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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ARB.P. 107/2024**

M/S ARYAVRAT TOLLWAYS PVT. LTD. (ATPL)

.....Petitioner

Through: Mr Anukul Raj, Ms Nikita Raj, Mr Tushar Bhalla
and Mr Pratik Sharma, Advs.

versus

**MADHYA PRADESH ROAD DEVELOPMENT
CORPN. LTD. (MPRDC) & ANR.**

.....Respondents

Through: Mr Saurabh Mishra, Sr. Adv. with Mr Karthik
Sundar, Mr Kushagra Singh, Mr Aalok Kumar, Mr
Swastik Singh and Mr Hitesh Gupta, Advs. for R-
1/MPRDC.

Mr Sanjeev Sagar, Standing Counsel for SBI with
Ms Nazia Parveen, Ms Sonam Saini, Ms Preeti
Saxena, Ms Sunidhi, Ms Payal Kurichh, Mr Akash
Yadav, Ms Deepti Chauhan and Mr Varun Dixit,
Advs. for R-2/SBI.

**CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH**

ORDER
22.07.2024

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1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator to adjudicate the disputes between the parties arising out of the Tripartite Agreement dated 22.05.2014 executed between the petitioner, respondent No.1 and respondent No.2. The arbitration clause is Clause 9 of the Tripartite Agreement and it reads as under:



“9 DISPUTE RESOLUTION

9.1 Any dispute, difference or claim arising out of or in connection with this Agreement which is not resolved amicably within [15] days of communication thereof shall be decided finally by reference to arbitration to a Board of three Arbitrators comprising of one nominee of the Party which is the Claimant in such dispute, one nominee of the Empowered Institution and the third to be appointed in accordance with the Rules of Arbitration of the International Centre of Alternative Dispute Resolution, New Delhi (the “Rules”). Such arbitration shall be held in accordance with the said Rules and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996.

9.2 The Arbitrators shall issue a reasoned award and such award shall be final and binding on the Parties. The venue of arbitration shall be Delhi and the language of arbitration shall be English.”

2. A perusal of the Tripartite Agreement shows that the State Bank of India (SBI) represents the Lead Institution.
3. Since there were disputes between the parties, the petitioner invoked arbitration under this clause *vide* Legal Notice dated 19.12.2023 and thereafter filed the present petition.
4. Mr Mishra, learned senior counsel appears for the respondent No.1 and objects to the maintainability of the petition. He states that the Umbrella Agreement between the parties, i.e. executed between the petitioner and respondent no. 1, is the Concession Agreement dated 05.11.2012 and that it is a ‘*Works Contract*’. It is stated that as per the State Legislation being the



Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983, a Statutory Tribunal under the Act will govern the establishment of a tribunal to arbitrate the disputes between the parties in a ‘*Works Contract*’ to which the state government or a PSU is a party. He states that the same has duly been approved by the Hon’ble Supreme Court in ***MPRDC v. LG Chaudhary (2018) 10 SCC 826***.

5. Mr Mishra, learned senior counsel for the respondent No.1 further states that even assuming the best case of the petitioner that there is a dispute between the Concession Agreement and the Tripartite Agreement, the main agreement is the Concession Agreement and in case of any inconsistency, it will be the Concession Agreement which will be relevant. For substantiating that proposition, he relies on the judgment passed by a Coordinate Bench of this Court in ARB.P. 1317/2022 titled ‘***Amit Guglani & Anr. v. L and T Housing Finance Ltd.***’ decided on 22.08.2023 and more particularly paras 27 and 28 which reads as under:

27. Having come to a conclusion that the two agreements are inseparable and the dispute raised in the present petition can be only resolved by reading the covenants of both the agreements, the next question that falls for consideration is which of the two Arbitration Clauses can be invoked. It is an undisputed fact that the Tripartite Agreement contains an Arbitration Clause 27 where the venue of Arbitration is New Delhi while the Loan Agreement contains Arbitration Clause 12.3 which gives exclusive jurisdiction to the Courts at Kolkata.

*28. A similar question arose before the Supreme Court in ***Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan and Others, (1999) 5****



SCC 651, where the Supreme Court was deciding whether disputes and differences arising under the Interior Design Agreement were integrally connected with those arising under the main agreement pertaining to sale of flats. Having come to a finding that the disputes arising under the main agreement were connected with the disputes arising from the Interior Design Agreement, the Supreme Court held that the Arbitration Clause in the main agreement would govern the parties. Relevant paragraph is as follows:-

“30. If there is a situation where there are disputes and differences in connection with the main agreement and also disputes in regard to “other matters” “connected” with the subject-matter of the main agreement then in such a situation, in our view, we are governed by the general arbitration clause 39 of the main agreement under which disputes under the main agreement and disputes connected therewith can be referred to the same arbitral tribunal. This clause 39 no doubt does not refer to any named arbitrators. So far as clause 5 of the Interior Design Agreement is concerned, it refers to disputes and differences arising from that agreement which can be referred to named arbitrators and the said clause 5, in our opinion, comes into play only in a situation where there are no disputes and differences in relation to the main agreement and the disputes and differences are solely confined to the Interior Design Agreement. That, in our view, is the true intention of the parties and that is the only way by which the general arbitration provision in clause 39 of the main agreement and the



*arbitration provision for a named arbitrator contained in clause 5 of the Interior Design Agreement can be harmonised or reconciled. Therefore, in a case like the present where the disputes and differences cover the main agreement as well as the Interior Design Agreement, — (that there are disputes arising under the main agreement and the Interior Design Agreement is not in dispute) — it is the general arbitration clause 39 in the main agreement that governs because the questions arise also in regard to disputes relating to the overlapping items in the schedule to the main agreement and the Interior Design Agreement, as detailed earlier. There cannot be conflicting awards in regard to items which overlap in the two agreements. Such a situation was never contemplated by the parties. The intention of the parties when they incorporated clause 39 in the main agreement and clause 5 in the Interior Design Agreement was that the former clause was to apply to situations when there were disputes arising under both agreements and the latter was to apply to a situation where there were no disputes or differences arising under the main contract but the disputes and differences were confined only to the Interior Design Agreement. A case containing two agreements with arbitration clauses arose before this Court in **Agarwal Engg. Co. v. Technoimpex Hungarian Machine Industries Foreign Trade Co. [(1977) 4 SCC 367 : AIR 1977 SC 2122]** There were arbitration clauses in two contracts, one for sale of two machines to the appellant and the other*



appointing the appellant as sales representative. On the facts of the case, it was held that both the clauses operated separately and this conclusion was based on the specific clause in the sale contract that it was the “sole repository” of the sale transaction of the two machines. Krishna Iyer, J. held that if that were so, then there was no jurisdiction for travelling beyond the sale contract. The language of the other agreement appointing the appellant as sales representative was prospective and related to a sales agency and “later purchases”, other than the purchases of these two machines. There was therefore no overlapping. The case before us and the above case exemplify contrary situations. In one case the disputes are connected and in the other they are distinct and not connected. Thus, in the present case, clause 39 of the main agreement applies. Points 1 and 2 are decided accordingly in favour of the respondents.””

6. Mr Mishra, learned senior counsel relies on Clause 1.4 of the Concession Agreement to state that the Concession Agreement contemplates that if there is any other subsequent or supplementary agreement, it will be the Concession Agreement which will be considered as the Master Agreement. He states that Clause 25.2.5 contemplates entering into a further contract for viability gap funding and Tripartite Agreement is a viability gap funding arrangement. Hence, the same would be covered under Clause 1.4 of the Concession Agreement.

7. Lastly, he states that the petitioner invoked conciliation proceedings under the Concession Agreement on 11.08.2023 and raised 19 claims. Subsequently, the petitioner again raised the same very 19 claims in the



letter invoking arbitration on 19.12.2023 and this shows that the claims of the petitioner are under the Concession Agreement.

8. I have heard the learned counsel for the parties and perused the material on record.

9. Clause 1.4 of the Concession Agreement reads as under:-

“ 1.4 Priority of agreements, clauses and schedules

1.4.1 This Agreement, and all other agreements and documents forming part of or referred to in this agreement are to be taken as mutually explanatory and, unless otherwise expressly provided elsewhere in this Agreement, the priority of this Agreement and other documents and agreements forming part hereof or referred to herein shall, in the event of any conflict between them, be in the following order:

(A) this Agreement; and

(b) all other agreements and documents forming part hereof or referred to herein;

i.e. the Agreement at (a) above shall prevail over the agreements and documents at (b) above. . . .

1.4.2 Subject to provisions of Clause 1.4.1, in case of ambiguities or discrepancies within this Agreement, the following shall apply:

(a) between two or more Clauses of this Agreement, the provisions of a specific Clause relevant to the issue under consideration shall prevail over those in other Clauses;

(b) between the Clauses of this Agreement and the Schedules, the Clauses shall prevail and between Schedules and Annexes, the Schedules shall prevail;



- (c) between any two Schedules, the Schedule relevant to the issue shall prevail;*
- (d) between the written description on the Drawings and the Specifications and Standards, the latter shall prevail;*
- (e) between the dimension scaled from the Drawing and its specific written dimension, the latter shall prevail; and*
- (f) between any value written in numerals and that in words, the latter shall prevail.”*

10. A perusal of the above clause shows that the argument raised by the learned senior counsel for the respondent with respect to the Concession Agreement prevailing over all subsequent or supplementary agreements is without merit since the above clause only gives preference to the Concession Agreement over *“all other agreements and documents forming part of or referred to in the Concession Agreement.”*

11. The same is not true for Tripartite Agreement, especially since Clause 1.4 of the the Tripartite Agreement categorically states as under:

“1.4 Priority of Agreements

In the event of any conflict between this Agreement and

(i) the Concession Agreement; or

(ii) any of the Project Agreements,

the provision of this Agreement shall prevail”

12. In view of the above, it is clear that the parties, consensually, have given primacy to the Tripartite Agreement over the Concession Agreement. The primacy of the Concession Agreement is only with regard to other



agreements and documents forming part of or referred to in the Concession Agreement. The Tripartite Agreement is not forming part of or referred to in the Concession Agreement. On the other hand, the tripartite agreement categorically and in clear terms gives primacy to Tripartite Agreement in case of a conflict between the provisions *vis-a-vis* the Concession Agreement.

13. Once the parties have agreed themselves that in case of a conflict between the Tripartite Agreement and the Concession Agreement, it will be the Tripartite Agreement which will prevail, the argument raised by the respondents to the contrary no longer stands.

14. Since I have already rendered a finding that it is the Tripartite Agreement under which the petitioner has raised disputes and is seeking redressal of those disputes through arbitration, the question of Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 being applicable to the facts of the present case, does not arise.

15. The petitioner has raised its disputes under the Tripartite Agreement. At the stage of deciding a petition under section 11 of Arbitration and Conciliation, the Court is only required to see through the eye of the needle test. Admittedly, there is an arbitration clause for adjudicating the disputes arisen between the parties, being clause 9 of the Tripartite Agreement.

16. For the said reasons, the petition is allowed. Since the parties are still having disputes between them, the following directions are issued:-

- i) Mr. Justice Vipin Sanghi (Retd. Chief Justice of Uttarakhand High Court) (Mob. No. 9871300037) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.
- ii) The arbitration will be held under the aegis of the Delhi



International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi (hereinafter, referred to as the ‘DIAC’). The remuneration of the learned Arbitrator shall be in terms of the Fourth Schedule of the Arbitration & Conciliation Act, 1996.

- iii) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
- iv) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims/counter-claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
- v) The parties shall approach the learned Arbitrator within two weeks from today.

17. Mr. Mishra, learned senior counsel states that the disputes relatable to the Tripartite Agreement alone will be referred to the Arbitrator. Mr Raj, learned counsel for the petitioner has no objection to the same.

18. The petition is allowed and disposed of in the aforesaid terms.

19. This Court has not expressed any opinion on maintainability of any of the claims under the Tripartite Agreement.

JASMEET SINGH, J

JULY 22, 2024

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[Click here to check corrigendum, if any](#)