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

+ **ARB.P. 782/2024**

M/S GARG SONS ESTATE PROMOTERS PVT LTD

.....Petitioner

Through: Mr Aditya Dhawan, Mr Kiran Dhawan and Mr
Sidhant Thakur, Advs.

versus

**NATIONAL HIGHWAYS AND INFRASTRUCTURE
DEVELOPMENT CORPORATION**

.....Respondent

Through: Mr Brijesh Kumar Tamber, Mr Vinay Singh Bist
and Ms Arani Mukherjee, Advs.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

23.08.2024

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1. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator for adjudication of disputes between the parties.
2. The facts are that on 14.09.2018, the respondent invited bids pertaining to "Rehabilitation of Km 181.00 to Km 206.00 section in Andaman Trunk Road of NH-4 to Intermediate lane with hard shoulder in the Union Territory of Andaman & Nicobar Islands (Total Length 25.00 km) on EPC Mode". The petitioner was issued the Letter of Award on 22.10.2018. As per the petitioner, the petitioner completed the contract in March, 2021 but in the process incurred huge financial losses on account of lapses and default on part of the respondent.
3. The petitioner invoked arbitration *vide* legal notice dated 28.03.2024



and thereafter has filed the present petition.

4. The arbitration clause is Clause 26.3.1 of the contract-agreement and reads as under:

“26.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26.2, shall be finally finally settled by arbitration in accordance with the rules of arbitration of the SOCIETY FOR AFFORDABLE REDRESSAL OF DISPUTES (SAROD).”

5. Mr Tamber, learned counsel for the respondent has handed over a copy of the reply dated 29.07.2024, wherein it has been stated that as per the dispute resolution mechanism, the parties have to approach Society for Affordable Redressal of Disputes (hereinafter referred to as “SAROD”) for the arbitration of their disputes. He has also relied upon the judgment of the Hon’ble Supreme Court in ***Standard Corrosion Controls (P) Ltd. v. Sarku Engg. Services SDN BHD***, (2009) 1 SCC 303 and more particularly paras 8, 10, 12, 14 and 15 which read as under:

“8. The respondent replied by e-mail dated 16-10-2007 and stated that in Article X of the arbitration it was mentioned that in case of any dispute or difference between the parties regarding the contract, the matter should be settled, as far as possible, by mutual consultation and consent, failing which by arbitration to be held at Mumbai, applying the Arbitration Rules of the International Chamber of Commerce (hereinafter referred to as “the ICC”).

Article X states as follows:

Article X—Arbitration

Any dispute or difference in view regarding this CONTRACT shall be settled, insofar as is possible, by mutual consultation and consent, failing which by arbitration to be



held at Mumbai, India applying the Arbitration Rules of the International Chamber of Commerce by a single arbitrator.”

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10. As per the Rules of Arbitration of ICC, the party who wishes to have recourse to arbitration under the said Rules is required to request for arbitration to the ICC Secretariat. The respondent submitted that the applicant has not followed that procedure for appointment of an arbitrator because it has not submitted any request to the ICC Secretariat. Instead, the applicant has rushed to this Court without following the procedure mentioned in Article X of the arbitration agreement.

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12. There is no dispute that the applicant had, with open eyes, signed the contract dated 21-2-2006, which contains Article X, quoted above.

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*14. As already stated above, the parties had agreed that any dispute between them shall be settled as far as possible by mutual consultation and consent, failing which by arbitration to be held at Mumbai applying the Arbitration Rules of the ICC. In my opinion, the applicant has to apply to the Secretariat of the ICC, as mentioned in the Arbitration Rules of the ICC, and it cannot approach this Court for appointment of an arbitrator. No doubt, the arbitration will have to be held at Mumbai, but the entire procedure of appointment of the arbitrator has to be in accordance with the Arbitration Rules of the ICC, which requires that first a request has to be made to the Secretariat of the ICC. Admittedly, the applicant has not approached the ICC Secretariat. Hence, in my opinion, the application filed by the applicant herein, is not maintainable at all. This Court in a series of decisions has held that such an application/petition without approaching the authority nominated and agreed upon by the parties is not maintainable vide *Iron & Steel Co. Ltd. v. Tiwari Road Lines* [(2007) 5 SCC 703] , *Rite Approach Group Ltd. v. Rosoboronexport* [(2006) 1 SCC 206] , etc.*

15. The scheme of the Act is that under Section 11(2), the parties are free to agree on a procedure for appointing an arbitrator subject to the provisions of Section 11(6). A petition under Section



11(5) of the Act would not lie if there is any agreement between the parties providing for the procedure for appointment of an arbitrator. In the present case there is Article X of the agreement (quoted above).”

6. Mr Tamber states that in view of the said judgment, it was incumbent upon the petitioner to take membership of SAROD and thereafter refer the disputes to arbitration under SAROD. He further states that the petition is premature and the petitioner should have first taken membership of SAROD and thereafter referred the disputes to SAROD.

7. Para 16 of ***Rani Constructions Pvt. Ltd. vs. Union of India*** in ARB.P. 1011/2023 decided on 22.03.2024 passed by a Coordinate Bench of this Court reads as under:

“16. I find merit in the contention of the petitioner that an arbitration agreement under which the parties agree on conducting arbitration as per rules of a particular arbitral institution, cannot be construed as subsuming within it, an additional obligation to become member/s of that arbitral institution. Becoming a member of an arbitral institution, which is a society registered under the Societies Registration Act, 1860, carries with it additional obligation/s which has nothing to do with the agreement between the parties to arbitrate. Such an obligation cannot be insisted as a prerequisite for taking recourse to arbitration. In the present case, insistence on the part of the SAROD that the parties must take membership of SAROD as a pre-condition for taking necessary steps to constitute an arbitral tribunal as per its rules, impinges on the validity of the appointment procedure; amounts to failure to perform the function entrusted to the concerned institute under the procedure agreed to by the parties, and consequently attracts Section 11(6)(c) of the A&C Act, 1996 and making it incumbent on this Court to take requisite steps to constitute the arbitral tribunal.”

8. The learned Single Judge has, in my view, correctly held that the



arbitration agreement mandating conducting arbitration as per rules of a particular arbitral institution (SAROD here) cannot be construed as encompassing an additional obligation to become a member of that arbitral institution. Becoming member of another arbitral institution is a separate obligation altogether and has nothing to do with the agreement between the parties to arbitrate. To obligate a party to an agreement to become a member of another organization to take recourse to arbitration is not a part of the agreement herein.

9. Learned counsel for the petitioner states that the petitioner is willing to pay the charges/applicable fee for the arbitration proceedings to SAROD but is not agreeable to becoming a member of SAROD.

10. The judgment of the Hon'ble Supreme Court is distinguishable for this reason alone, as in the judgment of the Hon'ble Supreme Court it was the arbitration proceedings which had to be conducted as per the ICC Arbitration Rules. There was no requirement of any of the party to become a member of the organization conducting the arbitration proceedings.

11. Further, the view of ***Rani Consturction Pvt. Ltd.*** (supra) has been reiterated by this Court in the order dated 09.08.2024 passed in ARB.P. 843/2024 titled "***M/s. Simplex Infrastructures Ltd. v. National Highways And Infrastructure Development Corporation Ltd.***".

12. 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 and 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.
13. The petition is disposed of in the aforesaid terms.

AUGUST 23, 2024

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JASMEET SINGH, J