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

Judgment reserved on: 16.01.2024

Judgment pronounced on: 03.04.2024

+ **ARB.P. 1073/2022, I.As. 4276/2023, 4286/2023, 5075/2023**

GANNON DUNKERLEY AND COMPANY LIMITED

..... Petitioner

Through: Mr. Arjun Syal, Mr. Bhargav Thali,
Mr. Shreyan Das, Ms. Manjira Dasgupta, Advs.

versus

**UNION OF INDIA MINISTRY OF ROAD TRANSPORT AND
HIGHWAYS**

..... Respondent

Through: Ms. Reema Khorana, Mr. Vikash
Kumar, Ms. Sonu, Advs.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **JASMEET SINGH, J**

1. This is a petition under section 11 of the Arbitration and Conciliation Act, 1996 ('the Act') seeking appointment of an Arbitrator for adjudication of disputes between the parties.
2. The brief facts encapsulating the present case are that the petitioner is a company engaged in the business of infrastructure development and construction of public sector projects, including roads and bridges. The respondent is the Ministry of Transport and Highways.



3. The respondent authority has been entrusted with the development, maintenance and management of National Highway NH-37, including the section from Kilometer 534.800 to Kilometer 561.700 (length of 26.9 km)
4. The respondent on 07.08.2015 invited bids through Request for Proposal (RFP) for “Four Lanning of NH 37 from Demow (Km 534.800) to end of Moran By-pass (Km 561.700) of NH 37 in the State of Assam under SARDP-NE, Phase-A, on Engineering, Procurement and Construction basis (EPC basis), *hereinafter called the project.*
5. The petitioner was successful in the bid and a Letter of Acceptance (LoA) dated 14.01.2016 was issued in its favor. The parties entered into an Agreement dated 09.02.2016 and by a letter dated 14.05.2016, the ‘Appointed date’ of commencement for work was declared to be 16.05.2016. However, the ‘Appointed Date’ was postponed to 17.08.2016 by way of supplementary agreement dated 23.02.2017.
6. The respondent on account of delay, issued several notices of intention to terminate dated 28.07.2017, 09.10.2018 and 09.07.2019. The same are stated to be replied to by the petitioner.
7. It is averred by the petitioner that the work on the site was disrupted frequently due to agitations by local people and general strikes.
8. In the month of December of 2019, the petitioner was constrained to suspend work at the project site due to protests which resulted in suspension of work for 74 days.
9. Further, due to the imposition of a nationwide lockdown due to the COVID-19 pandemic, the petitioner was constrained to invoke Force Majeure in terms of clause 21 of the Agreement through its letter dated 20.03.2020 which resulted in heavy disruption to the pace of the work.



10. In the month of 2020, a joint verification was conducted by the parties, pursuant to which the respondent was requested to clear all identified obstructions and provide the petitioner with encumbrance-free land so as to complete the project.

11. The respondent authority issued a show-cause notice dated 17.03.2021 seeking reasons for delay in the project. The same was replied to by the petitioner stating that in spite of adverse ground situations, the petitioner has achieved 68.50% progress with completion of 32.278 Km of DBM (Dense Bituminous Macadam) on 23.03.2021.

12. The Petitioner vide letter dated 11.06.2021 sought an extension of nearly 900 days to complete the project by 31.07.2021. However, an extension of time was given only till 24.04.2021. Thereafter, the Respondent issued a cure default notice dated 25.07.2021, granting 60 day's time to complete the project.

13. It is submitted that by the petitioner that despite the non-expiration of the 60 day period, the respondent authority served a notice terminating the contract of the petitioner. However, the petitioner continued to work on the project and the same was undisputed by the respondent. The petitioner sought a second interim extension of time ("second EOT") till 31.12.2021 on the ground of the second wave of COVID-19 pandemic. The respondent authorities in the Review Meeting held on 13.12.2021 granted the petitioner time till 31.05.2022 and the balance work be completed by 30.06.2022.

14. During the pendency of works, the respondent issued another notice dated 08.04.2022 threatening termination on account of failure on the petitioner in the execution of the works. In reply dated 11.04.2022, the petitioner stated that majority of the project has been done and only 16% of



the project remained to be completed. The same was stated to be completed by 30.06.2022.

15. The Respondent authority issued a letter dated 27.04.2022 declaring the petitioner as a non-performer. The petitioner challenged the said notice by filing writ petition before the Gauhati High Court, being WP(C) 2969/2022.

16. The respondent authority also issued a letter dated 11.05.2022 calling upon the petitioner to submit a detailed work program for completion of balance work. The petitioner responded to the same on 14.05.2022 stating that the balance work will be completed by 31.08.2022.

17. The petitioner further by way of letter dated 25.05.2022 informed the respondent authority that due to unseasonable and continuous rainfall, the petitioner will be unable to complete the project in the stipulated time.

18. The respondent authority issued letter dated 30.05.2022 terminating the contract with immediate effect on the ground of petitioner's default under clause 23.1.2 of the Agreement. The Respondent by way of its letter dated 31.05.2022 to the bank, sought to encash the bank guarantee for a sum of Rs. 38, 24,21,000/-

19. The petitioner, being aggrieved from termination notice, filed a writ petition bearing No. 3689/2022 before the Gauhati High Court challenging the termination notice and seeking a stay on the effect of the said termination notice. The substantial prayer reads as under:-

“(A) a Writ in the nature of certiorari in setting aside and quash the impugned termination dated 30/05/2022 issued by the Executive Director NHIDCL and all consequential actions taken thereunder.



(B) a Writ in the nature of Mandamus should not be issued directing the Respondents to rescind, recall or forbear from giving effect to the impugned termination dated 30/05/2022 (Annexure-16) and to allow the petitioner to continue with the allotted work.

.....

AND

(i) During pendency of this case the impugned termination dated 30/05/2022 (Annexure-16) issued by the Respondent No. 3, may graciously be pleased to stay.

(ii) Directing the respondent authority not to encash the bank guarantee Rs 9,70, 76,100/-, Rs 6,47,17,400/- and Rs 22,06,27,500/- in total Rs 38,24,21,000/- (Rupees Thirty Eight Crore Twenty Four Lakhs Twenty one Thousand Only), or not to take any action in terms of impugned termination dated 30/05/2022.

(iii) And allow the petitioner to continue with work within the physical and reasonable period of time.

iv) Direct the respondents not to take any coercive action against the petitioner.”

20. By way of order dated 02.06.2022, the Gauhati High Court stayed the termination notice and directed the respondent to not encash the bank guarantee. However, the same was vacated by the court on 30.06.2022. The operative portion reads as under:-

“Having considered the facts and circumstances of the case, I am not inclined to extend the interim order dated 02.06.2022. The same is accordingly vacated. The respondents may go ahead and finalise the tender, if so advised. However, notwithstanding this order, it would still be open to the respondents to consider the request for extension of time made by the writ petitioner, if so advised. It is further directed that no coercive action shall be initiated against the writ petitioner until the returnable date.”



21. Thereafter, the petitioner invoked conciliation in terms of clause 26.1 and clause 26.2 of the agreement by way of letter dated 22.07.2022. Since, the respondent failed to reply to the same, the petitioner invoked arbitration in terms of clause 26.3 by way of letter dated 30.07.2022 and raised claims for over Rs. 124 crores.

22. The respondent vide reply dated 31.08.2022 denied all the claims of the petitioner and refused the appointment of an arbitrator.

23. Hence, the present petition.

24. The respondent at the outset submits that all the issues pertaining to the hindrance of the work was duly considered and extensions were granted time and time again.

25. The respondent objects to the present petition on the ground that by invoking jurisdiction of the Gauhati High Court through filing of WP(C) 3689/2022 and WP(C) 2969/22, the petitioner's right to invoke arbitration has been forfeited/waived off. It is a settled principle of law that once parties have consented and allowed civil proceedings to continue, they cannot subsequently invoke arbitration clause and make alive the dead arbitration clause.

26. It is stated by the respondent that it was the discretion/liberty of the Respondent to take recourse under section 8 of the Arbitration and Conciliation Act, 1996 before the Gauhati High Court. However the respondent also chose to submit to the jurisdiction of the Gauhati High Court and hence the petitioner's right to arbitration stands already abandoned.

27. In addition, the respondent has also disputed averments of the petitioner on merit.



28. Further, the respondent denies that there is any dispute between the parties since no such dispute has ever been notified in terms of clause 26.1.1 by the petitioner, which is *sin qua non* for the initiation of any further proceedings, including appointment of arbitrator. Clause 26 of the Agreement reads as under:-

“26.1 Dispute Resolution

26.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 26.2.

26.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

26.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Authority's Engineer, or such other person as the Parties may mutually agree upon (the "Conciliator") to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the conciliator or without the intervention of the Conciliator, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Contractor for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) business days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) business day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms



of settlement within 30 (thirty) days of the notice in writing referred to in Clause 26.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 26.3

26.3 Adjudication by Regulatory Authority, Tribunal or Commission

In the event of constitution of a statutory regulatory authority, tribunal or commission, as the case may be, with powers to adjudicate upon disputes between the Contractor and the Authority, all Disputes arising after such constitution shall, instead of reference to arbitration under Clause 26.3, be adjudicated upon by such regulatory authority, tribunal or commission in accordance with the Applicable Law and all references to Dispute Resolution Procedure shall be construed accordingly. For the avoidance of doubt, the Parties hereto agree that the adjudication hereunder shall not be final and binding until an appeal against such adjudication has been decided by an appellate tribunal or court of competent jurisdiction, as the case may be, or no such appeal has been preferred within the time specified in the Applicable Law.”

29. The court on 19.01.2023 observed that one of the issues which arise for consideration of this court is whether present petition under section 11 for reference of the dispute to arbitration would lie when a writ petition questioning the validity of termination action taken by respondent authority is pending before the Gauhati High Court and granted time to the petitioner to take instructions in this regard.

30. Thereafter, the petitioner filed an I.A. No. 311/2023 in WP(C) 3689/2022 seeking withdrawal of the writ petition pending before the Gauhati High Court. Paras 4 to 7 of the application read as under:-

“4. That it is evident from the above, that the Petitioner has substantial monetary claims which arise as a consequence of the



wrongful termination of the Subject Agreement dated 09.02.2016 by the Respondents. Furthermore, it is also evident that the issue of validity of the termination (which is also a subject matter of the present Writ Petition) is being challenged by the Respondents. Furthermore, it is also evident from the above, that the Petitioner has invoked the arbitration procedure stipulated under the Subject Agreement dated 09.02.2016 to seek adjudication of the aforementioned claims.

5. In this regard it is submitted that the petitioner's claims for damages, which arise out of contractual breaches by the Respondent cannot be granted to the Petitioner by this Hon'ble Court in the instant Writ Petition, and the appropriate remedy for the same is reference of the disputes to Arbitration. Furthermore, it is also trite that the adjudication of the Petitioner's claims will also be dependent on adjudication of the validity of the termination, and should the same remain pending here, it would lead to bifurcation of the causes of action leading up to the arbitration proceedings.

6. In these circumstances the petitioner most humbly prays that in light of the Petitioner having initiated steps to avail its remedy under Clause 26.3 of the Subject Agreement dated 09.02.2016, by seeking reference of all issues to an Arbitral Tribunal, it be permitted to withdraw the instant Writ Petition without prejudice to its rights and liberties to raise all issues (including issues arising for adjudication herein) before the Arbitral Tribunal that may be constituted pursuant to the petitioner's section 11 petition pending before the Hon'ble Delhi High Court.

7. The petitioner further prays until the petitioner herein is able to avail its alternate efficacious remedy under section 9 as well as section 17 of the Arbitration and Conciliation Act, 1996, (for seeking interim protection against the invocation of its Bank Guarantees by the Respondent) this Hon'ble Court be pleased to continue the interim orders granted in favour of the Petitioner vide inter a/lia the Orders dated 02.06.2022, 30.06.2022 and 01.08.2022 by restraining the Respondents from invoking the petitioner's Bank Guarantees until the Arbitral Tribunal is seized of the petitioner's



application under section 9 as well as section 17 of the Arbitration and Conciliation Act, 1996 in this regard.”

31. The court closed the matter on 13.02.2023 with the following observations:-

“6. The interlocutory application, I.A.[Civil] no. 311/2023, has been preferred by the petitioner as the applicant seeking the following reliefs :-

[i] Pass an order allowing the applicant to withdraw the instant writ petition, W.P.[C] no. 3689 of 2022 in terms of the instant application with liberty to the parties to raise all issues before the concerned Arbitral Tribunal;

[ii] Extend the interim protection granted to the Petitioner by way of the orders dated 02.06.2022, 30.06.2022 and 01.08.2022 by directing the respondents to maintain status quo with regard to the petitioner’s Bank Guarantees until such time that the Arbitral Tribunal is seized of the petitioner’s Application under Section 9 as well as Section 17 of the Arbitration and Conciliation Act, 1996; and

[iii] Pass such order and any further orders as this Hon’ble Court may deem fit and proper in the facts and circumstances of the present case.

.....

9. It is submitted by Mr. Mazumdar, learned Senior Counsel for the applicant petitioner- applicant that the petitioner-applicant, at the time of execution of the Contract-Agreement, had submitted following 3 [three] bank guarantees and the details of the bank guarantees, as on date, are as under :-

S. No.	Name of Contractor	Name of Project	Type of BG	BG No	Amount (Rs.)	Valid upto	Claim period upto
1	M/s GDCL	Demow to End Moran Bypass	Performance	0607016 BG10000 09	22,06,27,500	24.08.2022	24.08.2023



2			Mobilization Advance	0607017 BG10000 40	6,47,17,400	07.06.2022	07.06.2023
3				1908IGFIN00 0719 [1908IFGIN0 00719 As per BGMS]	9,70,76,100	27.03.2023	27.03.2023

9.1. Mr. Mazumdar has submitted that it is on the apprehension that the afore-mentioned bank guarantees might be encashed by the respondent NHIDCL authorities before consideration of the application either under Section 9 of the Arbitration and Conciliation Act, 1996 or under Section 17 of the Arbitration and Conciliation Act, 1996, the interlocutory application has been filed seeking the above relief, while seeking withdrawal of the writ petition. Mr. Mazumdar has submitted that this Court has already observed in its order dated 30.06.2022 that no coercive action shall be taken against the petitioner until the returnable date and the said interim had been extended by the subsequent order dated 01.08.2022 until further order.

10. Mr. Saikia, learned Senior Counsel for the respondent-opposite party nos. 1, 2, 3 & 4 in the NHIDCL, has submitted, on instruction, that the petitioner applicant has to take the requisite steps for extension of the period of the 3 [three] bank guarantees by sufficient period. He has further submitted, on instruction, that the respondent NHIDCL authorities can provide the petitioner applicant a period of 2 [two] months with the assurance that within the said period of 2 [two] months, the respondent NHIDCL authorities shall not take any coercive steps like invocation of the afore-mentioned 3 [three] bank guarantees, etc. and such interim order will cease to have any effect after expiry of a period of 2 [two] months from today. He has, thus, submitted that both the writ petition and the interlocutory application can be disposed of with such observations.



11. Mr. Mazumdar, learned Senior Counsel for the petitioner-applicant has submitted that the petitioner-applicant is agreeable to such an arrangement.

12. Having found that the parties have reached a consensus in the aforesaid manner, the Court is of the view that the writ petition as well as the interlocutory application can be closed with the observations indicated. They are accordingly closed, extending the interim protection granted to the petitioner applicant by providing that the respondent NHIDCL authorities shall not take any coercive action against the –petitioner-applicant pursuant to the termination of the Contract-Agreement for a period of 2 [two] months from today [13.02.2023], subject to the condition that the period of the 3 [three] bank guarantee shall be extended for a time period by the petitioner, in the manner sought for by the respondent NHIDCL authorities. It is further observed that the interim protection will cease to have any effect after expiry of 2 [two] months from today [13.02.2023].”

32. The petitioner states that it is in the process of withdrawing the other writ petition bearing no. 2969/2022 pending before the Gauhati High Court.

33. The petitioner further states that the petitioner filed OMP(I)COMM 384/2022 under section 9 of the Arbitration and Conciliation Act, 1996 in this Court which was disposed of vide order 28.04.2023 and therein the respondent never raised objection to the arbitration clause and submitted to the jurisdiction of this court.

34. It is stated by the petitioner that the petitioner filed a second petition under section 9 of the Arbitration and Conciliation Act bearing no. 103/2023 wherein once again the respondent did not raise the objection of abandonment of arbitration clause. Even at the stage of FAO (OS)(COMM) 68/2023 before the Division Bench of this court, the respondent failed to raise any objection with respect to above proposition.



35. The petitioner relies on the judgment of this court in *SK Construction Company v. Telecommunication Consultant India Limited*, Arb. P. 1206/2022, to state that in a similar matter this court allowed petition under section 11 for appointment of an arbitrator even though the petitioner had already approached High Court of Madhya Pradesh at Jabalpur. The operative portion reads as under:-

“1. On 28.10.2022, when these petitions were first listed before this Court, the learned counsel for the respondent had submitted that the present petitions would not be maintainable as the petitioner has already approached the High Court of Madhya Pradesh at Jabalpur for substantive relief by filing Writ Petitions and has already obtained relief from the said Court. The petitioner was, therefore, directed to file on record the Writ Petitions that had been filed by the petitioner before the High Court of Madhya Pradesh. The same have been filed.

...

8. I have perused the contents of the above-mentioned reply of the respondent. In my prima facie opinion, the same cannot be read as an admission of the petitioner to a full and final settlement of its claims under the Arbitration Agreement and/or waiver of the right to seek arbitration. At that stage, the petitioner was contending that deduction of Liquidated Damages from the Running Bill of the petitioner by the respondent was illegal and that the Final Bill cleared by the respondent must be paid by the respondent.

9. In view of the above, at least prima facie, it cannot be said that there was a full and final settlement of all disputes between the parties, thereby leading to exhaustion of the Arbitration Agreement between the parties. I may emphasize herein that, at this stage, this Court is not to conclude one way or the other that the above acts of the petitioner would amount to exhaustion of the Arbitration Agreement or as an estoppel against invoking the Arbitration



Agreement. As held by the Supreme Court in inter alia Vijay Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 and Sanjiv Prakash v. Seema Kukreja, (2021) 9 SCC 732, the objections of the respondent cannot possibly be decided in exercise of a limited prima facie review as to whether an arbitration agreement exists between the parties. The questions raised by the respondent are necessarily to be left to be determined by the Arbitrator.”

36. The petitioner further states that it is settled law that whether the claims of the petitioner would be barred by the principles of res-judicata or estoppel are not matters to be considered by this court while exercising jurisdiction under section 11 of the Arbitration and Conciliation Act, 1996. Reliance is placed on *Prasvnath Developers Limited and Anr. v Rail Land Development Authority*, Arb. P. No. 724/2018 dated 31.10.2018. The operative portion reads as under:-

*“ 11. The question whether the claim of the petitioner would be barred by the principles of res judicata or estoppel or by Order II Rule 2 of the CPC are not matters to be considered by this Court while exercising its jurisdiction under Section 11 of the Act. (Indian Oil Corporation Ltd. vs. SPS Engineering Ltd. (2011) 3 SCC 507)).
12. The legislature by amending the Act by way of the Arbitration and Conciliation (Amendment Act) 2015 and the insertion of Section 11(6A) of the Act has also restricted the scrutiny of the Court at the stage of adjudicating an application under Section 11 of the Act only to the existence of the Arbitration Agreement.”*

37. The respondent refutes the above and states that once the court has adjudicated the matter, then there is no possibility of enforcing an arbitration agreement. Reliance is placed on judgment of the Hon'ble Supreme Court in



F.C.I. v. Yadav Engineer & Contractor, (1982) 2 SCC 499. The operative portion reads as under:-

“ Abandonment of a right to seek resolution of dispute as provided in the arbitration agreement must be clearly manifested by the step taken by such party. Once such unequivocal intention is declared or abandonment of the right to claim the benefit of the agreement becomes manifest from the conduct, such party would then not be entitled to enforce the arbitration agreement because there is thus a breach of the agreement by both the parties disentitling both to claim any benefit of the arbitration agreement. Section 34 provides that a party dragged to the court as defendant by another party who is a party to the arbitration agreement must ask for stay of the proceedings before filing the written statement or before taking any other step in the proceedings. That party must simultaneously show its readiness and willingness to do all things necessary to the proper conduct of the arbitration. The legislature by making it mandatory on the party seeking benefit of the arbitration agreement to apply for stay of the proceedings before filing the written statement or before taking any other steps in the proceedings unmistakably pointed out that filing of the written statement discloses such conduct on the part of the party as would unquestionably show that the party has abandoned its rights under the arbitration agreement and has disclosed an unequivocal intention to accept the forum of the court for resolution of the dispute by waiving its right to get the dispute resolved by a forum contemplated by the arbitration agreement. When the party files written statement to the suit it discloses its defence, enters into a contest and invites the court to adjudicate upon the dispute. Once the court is invited to adjudicate upon the dispute there is no question of then enforcing an arbitration agreement by forcing the parties to resort to the forum of their choice as set out in the arbitration agreement. This flows from the well-settled principle that the court would normally hold the parties to the bargain [see



Ramji Dayawala & Sons (P) Ltd. v. Invest Import [(1981) 1 SCC 80 : (1981) 1 SCR 899] J.”

38. Reliance is further placed on *Raj and Associate vs VSNL*, 2004 113 DLT 318, the operative portion reads as under:-

“ 9. In my view once the Plaintiff opts to file a suit it is no longer open to him to pray to the Court that the parties be referred to arbitration. The present case is not one where the Plaintiff can be heard to plead ignorance of the existence of the arbitration clause. Furthermore, counsel for the Plaintiff had made an oral request that such a referral should take place but this submission does not fall within the purview of Section 8 which specifically envisages that a request of this nature should be contained in a written application. I am fortified in this view by the pronouncement in Garden Finance Limited v. Prakash Inds. Ltd. and another, AIR 2002 Bombay 8. It has been contended by counsel for Defendant No. 2 that this Court is duty bound to refer the parties to arbitration no sooner it is made aware of the existence of an arbitration clause. I cannot accede to this argument in view of the following pronouncements in Sukanya Holdings (P) Limited v. Jayesh H. Pandya and another, (2003) 5 SCC 531:

“For interpretation of Section 8, Section 5 would have no bearing because it only contemplates that in the matters governed by Part I of the Act, the judicial authority shall not intervene except where so provided in the Act. Except Section 8, there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the Arbitral Tribunal, if :(1) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that the Arbitration Act does not oust the jurisdiction of the



civil court to decide the dispute in a case where parties to the arbitration agreement do not take appropriate steps as contemplated under sub-sections (1) and (2) of Section 8 of the Act”.”

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

40. From the facts noted above, the sole issue which arises for the consideration of this court is that whether upon filing of earlier writ petitions, has the arbitration clause been waived of/abandoned.

41. The petitioner approached the Gauhati High Court on two occasions for challenging the action of the respondent in terms of the contract between the parties. The respondent had participated in these proceedings and did not raise the plea of an arbitration clause existing between the parties by filing of an application under section 8 of the Arbitration and Conciliation Act, 1996 before the Gauhati High Court and thereby contends that the respondent had agreed to the abandonment of the arbitration proceedings.

42. Nonetheless, the petitioner has withdrawn the petition bearing no. WP(C) 3689/2022 before the Gauhati High Court seeking liberty to pursue arbitral proceedings before this court and is stated to be in process of withdrawing the other pending petition as well. The application, i.e. IA No. 311 of 2023, seeking withdrawal of the writ petition, more particularly in paras 4 to 7, clearly shows that there is no abandonment of the arbitration clause as the petitioner sought to withdraw the writ petition to agitate its claims before the arbitral tribunal. The court in terms of the application disposed of the writ petition and the respondent assented to the arrangement so given in the order dated 13.02.2023. Further, in the writ petition filed



before the Gauhati High Court there is no adjudication of disputes raised by the petitioner. The respondent at the stage of withdrawal of the said writ petition did not raise any issue with respect to abandonment/waiving of right to invocation of arbitration by the petitioner. Hence, *prima-facie*, there is no abandonment/waiver of the arbitration clause. In this view to deny the petitioner proceedings under the Arbitration and Conciliation Act, 1996 would be to render the petitioner remediless.

43. Even otherwise, the scope and power of the court to examine the merits of the dispute under section 11 of the Act has been substantially restricted since the 2015 amendment and therefore, in view of section 11(6-A) of the Act, the courts have to *confine* their enquiry only to the existence of an arbitration agreement. Reliance is placed upon the judgement of the Hon'ble Supreme Court in *Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd.*, (2020) 2 SCC 455, the operative portion of which reads as under:-

“7.10. In view of the legislative mandate contained in Section 11(6-A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the kompetenz-kompetenz principle.

7.11. The doctrine of “kompetenz-kompetenz”, also referred to as “compétence-compétence”, or “compétence de la recognized”, implies that the Arbitral Tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimise judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties. The doctrine of kompetenz-kompetenz is, however, subject



to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified. If an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement. Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".

7.12. The legislative intent underlying the 1996 Act is party autonomy and minimal judicial intervention in the arbitral process. Under this regime, once the arbitrator is appointed, or the tribunal is constituted, all issues and objections are to be decided by the Arbitral Tribunal."

44. Following the above judgment, this court in Arb. P. 710/2019 titled *Parsynath Developers Limited and Anr. v Rail Land Development Authority* dated 19.05.2020 held that any objections to jurisdiction including but not limited to bar under Order II Rule 2, estoppel, res-judicata, etc. touch upon the merits of the claims and hence can be decided only by the Tribunal. The operative portion reads as under:-

"37. At this stage, it is also important to note that in Arbitration Petition 724/2018 between the same parties, the Respondent had raised similar objections to the disputes being referred to



Arbitration such as bar under Order II Rule 2 CPC, waiver, estoppel etc. The Co-ordinate Bench of this Court had observed that the Arbitration Agreement had been invoked by the Petitioners and its existence was not in question. The issues of res judicata or estoppel or claims being barred under the principles of Order II Rule 2 CPC touch upon the merits of the claim and can be decided only by the Tribunal. The Court also held that an Arbitration Agreement can be invoked any number of times as held by the Supreme Court in Dolphin Drilling Ltd. vs. Oil and Natural Gas Corporation Ltd. [(2010) 3 SCC 267]. Relevant part of the judgment dated 31.10.2018 is as under :-

“10. In my opinion, the existence of the Arbitration Agreement itself is not in dispute. The dispute is whether the claim now sought to be raised by the Petitioner would be barred by the principles of Order II Rule 2 of the CPC and/or principles of res judicata and/or estoppel. It cannot be denied that an Arbitration Agreement can be invoked a number of times and does not cease to exist only with the invocation for the first time. The Supreme Court in Dolphin Drilling Ltd. vs. Oil and Natural Gas Corporation Ltd. (2010) 3 SCC 267, has held as under:

"8. The plea of the Respondent is based on the words "all disputes" occurring in Para 28.3 of the agreement. Mr. Aggrawal submitted that those two words must be understood to mean "all disputes under the agreement" that might arise between the parties throughout the period of its subsistence. However, he had no answer as to what would happen to such disputes that might arise in the earlier period of the contract and get barred by limitation till the time comes to refer "all disputes" at the conclusion of the contract. The words "all disputes" in Clause 28.3 of the agreement can only mean "all disputes" that might be in existence when the arbitration



clause is invoked and one of the parties to the agreement gives the arbitration notice to the other. In its present form Clause 28 of the agreement cannot be said to be a onetime measure and it cannot be held that once the arbitration clause is invoked the remedy of arbitration is no longer available in regard to other disputes that might arise in future. "

11. The question whether the claim of the Petitioner would be barred by the principles of res judicata or estoppel or by Order II Rule 2 of the CPC are not matters to be considered by this Court while exercising its jurisdiction under Section 11 of the Act. (Indian Oil Corporation Ltd. vs. SPS Engineering Ltd. (2011) 3 SCC 507).

12. The legislature by amending the Act by way of the Arbitration and Conciliation (Amendment Act) 2015 and the insertion of Section 11 (6A) of the Act has also restricted the scrutiny of the Court at the stage of adjudicating an application under Section 11 of the Act only to the existence of the Arbitration Agreement. "

45. Further, this court in Aditya Birla Finance Limited v. Shri Jagannath Memorial Education Trust and Ors, Arb. P. 251/2023 dated 01.12.2023 has held that this court has limited scope under section 11 of the Act. The operative portion reads as under:-

"12. Having noted the aforesaid, this Court opines that an extensive scrutiny of the nature of claims of the parties presented before the Civil Court would exceed the limited purview of this Court under Section 11 of the Arbitration Act. Nonetheless, the substantive disputes presented by the Petitioner, and their potential monetary claims, arise out of the agreements between the parties and clearly fall within the scope of the arbitration clause. It would thus be



apposite that the question of arbitrability of the disputes be determined by the Arbitral Tribunal in exercise of its power under the principle of kompetenz-kompetenz, which includes the mandate to entertain jurisdictional objections as well.

13. The principle of party autonomy, a cornerstone of arbitration law, also bolsters the Petitioner's prayer for initiating arbitral proceedings. The parties should be able to resolve their disputes in the forum they have contractually agreed upon, provided that the nature of the disputes falls within the scope of the arbitration agreement. The fact that the Respondent has initiated a civil suit with seemingly distinct claims should not negate the Petitioner's contractual right to arbitrate its own claims and denying the Petitioner this avenue of redressal would undermine the essence of the contractual agreement between the parties. It is also worth noting the fact that the potential claims brought forth by the Petitioner appear to be predominantly grounded in financial transactions, for which arbitration is an efficient forum for dispute resolution."

46. Therefore, the Arbitral Tribunal under section 16 of the Act has the power to determine its own jurisdiction, i.e the principle of kompetenz-kompetenz, and therefore the contention of the respondents regarding the maintainability of the arbitral proceedings can be raised before the learned arbitrator.

47. For the said reasons, the petition is allowed with the following directions:

- i. 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 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.
48. The observations made shall have no bearing on the adjudication of the arbitral proceedings.

JASMEET SINGH, J

APRIL 3, 2024 /DJ

Click here to check corrigendum, if any