



2024:DHC:8368



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

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Date of Decision : 28.10.2024+ **ARB.P. 966/2024****PALGHAR ROAD PROJECT PRIVATE LIMITED**PetitionerThrough: Mr. Aayush Agarwala, Mr. Parag
Chaturvedi, Advocates.

versus

THE STATE OF MAHARASHTRARespondentThrough: Mr. Aravindh.S., Mr. Gulshan Jahan,
Mr. Aadithya Aravindh, Mr. Mushlin
Ansari, Advocates.**CORAM:****HON'BLE MR. JUSTICE SACHIN DATTA****SACHIN DATTA, J. (Oral)**

1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter '*the A&C Act*') seeks constitution of an Arbitral Tribunal to adjudicate the disputes between the parties. The disputes between the parties have arisen in the context of a concession agreement dated 08.08.2018 (hereafter '*the concession agreement*') in connection with a road construction project.

2. The arbitration clause contained in the concession agreement is as under-

"38.1 Dispute resolution

38.1.1 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 38.2.

38.1.2 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.

38.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Independent Engineer to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Engineer or without the intervention of the Independent Engineer, 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 Concessionaire for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) 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) days 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 38.1.1 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 38.3.

38.3 Arbitration

38.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 38.2 shall be finally decided by reference to arbitration by an arbitral tribunal constituted in accordance with Clause 38.3.2. Such arbitration shall be held in accordance with the Rules of Society for Affordable Redressal of Disputes ("SAROD"), New Delhi (the "Rules"), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996. The place of such arbitration shall be the [Delhi] and the language of arbitration proceedings shall be English.

38.3.2 There shall be an arbitral tribunal comprising three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.



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38.3.3 The arbitral tribunal shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 38 shall be final and binding on the Parties as from the date it is made, and the Concessionaire and the Authority agree and undertake to carry out such Award without delay.

38.3.4 The Concessionaire and the Authority agree that an Award may be enforced against the Concessionaire and/or the Authority, as the case may be, and their respective assets wherever situated.

38.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

38.4 Adjudication by a tribunal

In the event of constitution of a statutory tribunal or other forum with powers to adjudicate upon disputes between the Concessionaire and the Authority, all Disputes arising after such constitution shall, instead of reference to arbitration under Clause 38.3, be adjudicated upon by such tribunal or other forum in accordance with Applicable Laws and all references to Dispute Resolution Procedure shall be construed accordingly."

3. Under the said concession agreement, the construction of the project was scheduled to be completed within 24 months and the petitioner was entitled to payment of the bid project cost of Rs.198.20 Crores excluding GST upon completion of the construction. Pursuant to Clause 23.4 of the concession agreement, the construction under the agreement was divided into 5 milestones. The structure of the agreement is such that 60% of the bid project cost was payable upon completion of the five milestones and 40% of the remaining bid project cost was payable as twenty biannual instalments. It is the amount of GST allegedly not paid by the respondent, along with the payments towards the bid project cost upon completion of different milestones, which lies at the centre of the disputes between the parties.

4. The petitioner sent a letter dated 28.05.2020 to the Executive



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Engineer of the respondent, calling upon the respondent to pay the amount towards GST not included within the amounts paid towards completion of the first two milestones under the agreement. However, the petitioner did not receive any response to the said letter.

5. Thereafter, a number of letters were sent by the petitioner to the respondent on 22.02.2021, 21.08.2021 and 08.04.2024 calling upon the respondent to release the amount of GST on the payments released upon completion of construction as per the milestones under the agreement.

6. Upon receiving no response to the aforesaid letters, the petitioner sent an invocation notice dated 21.05.2024 under section 21 of the A&C Act invoking arbitration under clause 38.3 of the concession agreement.

7. The petitioner *vide* the said invocation notice mentioned that its attempts, at amicably resolving the disputes between the parties, have not been successful as the respondent failed to reply to the various letters sent by the petitioner and that in any case, the pre-arbitration conciliation mechanism under clause 38.2 of the concession agreement was not mandatory. In the said invocation notice, the petitioner also suggested a name of a person to be appointed as a sole arbitrator instead of a three-member tribunal. It was further stated on behalf of the petitioner that it does not consent to having the arbitration proceedings being held in accordance with the SAROD Rules as envisaged in clause 38.3.2 of the concession agreement.

8. While the notice invoking arbitration remained unreplied, on 10.06.2024, the respondent replied to the petitioner's earlier letter dated 08.04.2024 and refuted the claims for payment of GST on the milestone payments of the bid project cost, as demanded by the petitioner in its earlier



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communication dated 08.04.2024.

9. The petitioner thereafter, *vide* its communication dated 25.06.2024, responded to the respondent's reply dated 10.06.2024 and refuted that any such payment of GST had been made by the respondent as part of the milestone payments under the concession agreement, and called upon the respondent to act upon the invocation notice dated 21.05.2024. As no further communications were received from the respondent and since an arbitral tribunal could not be appointed by mutual consent of the parties, the present petition has been filed.

10. Learned counsel for the petitioner is right in contending that it cannot be compelled to become a member of Society for Affordable Redressal of Disputes (SAROD), which is a mandatory pre-requisite for conduct of arbitration as per the Rules of SAROD. It has been held in ***Rani Constructions Pvt. Ltd. v. Union of India***, 2024:DHC:2321, as under :-

“15. In the present case, the petitioner is willing to pay the applicable fee/ charges to SAROD for the purpose of functions to be discharged by SAROD in terms of the arbitration agreement between the parties, however, it is not willing to take primary membership of SAROD.

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 pre-requisite 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.

17. Since SAROD rules cannot be applied to conduct of the arbitration between the parties in the present case for the aforesaid reason, and since the parties have not arrived at an agreement for constitution of three-member arbitral tribunal as proposed by the petitioner in notice dated 15.02.2023, it is incumbent on this Court to appoint a sole arbitrator to adjudicate the disputes between the parties.”

11. Another aspect which has been highlighted by the learned counsel for the respondent is that Clause 38.2 of the concession agreement provides for a pre-arbitration conciliation mechanism. The petitioner has rightly mentioned in its invocation notice that the same does not preclude invocation of arbitration. It has been held by this Court in a catena of judgments that a contractual prescription requiring parties to participate in pre-arbitration mediation or conciliation, prior to invocation of arbitration, is directory and not mandatory.

12. In the case of ***Oasis Projects Ltd. v. National Highway & Infrastructure Development Corporation Limited*** 2023 SCC OnLine Del 645, it was held as under:-

“12. The primary issue to be decided in the present petition is, therefore, as to whether it was mandatory for the petitioner to resort to the Conciliation process by the Committee before invoking arbitration. Though Article 26.2 clearly states that before resorting to arbitration, the parties agree to explore Conciliation by the Committee, in my opinion, the same cannot be held to be mandatory in nature. It needs no emphasis that Conciliation as a Dispute Resolution Mechanism must be encouraged and should be one of the first endeavours of the parties when a dispute arises between them. However, having said that, Conciliation expresses a broad notion of a voluntary process, controlled by the parties and conducted with the assistance of a neutral third person or persons. It can be terminated by the parties at any time as per their free will. Therefore, while interpreting Article 26.2, the basic concept of Conciliation would have to be kept in mind.”



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(emphasis supplied)

13. In **Kunwar Narayan v. Ozone Overseas Pvt. Ltd.** 2021: DHC: 496, it was held as under:-

“5. Ms. Pahwa, learned Counsel for the respondents submitted that her only objection, to the petition, was that the petitioner has not exhausted the avenue of amicable resolution, contemplated by Clause 12 of the Share Buyback Agreement. I am not inclined to agree with this submission. The recital of facts, as set out in the petition, indicate that efforts at trying to resolve the disputes, amicably were made, but did not succeed. Even otherwise, the Supreme Court in *Demarara Distilleries Pvt. Ltd. v. Demerara Distilleries Ltd.* and this Court, in its judgment in *Ravindra Kumar Verma v. BPTP Ltd.*, opined that relegation of the parties to the avenue of amicable resolution, when the Court is moved under Section 11(6) of the 1996 Act, would be unjustified, where such relegation would merely be in the nature of an empty formality. The arbitration clause in the present case does not envisage any formal regimen or protocol for amicable resolution, such as issuance of a notice in that regard and completion of any stipulated time period thereafter, before which arbitral proceedings could be invoked. In the absence of any such stipulation, I am of the opinion, following the law laid down in *Demarara Distilleries Pvt. Ltd.* and *Ravindra Kumar Verma v. BPTP Ltd.* nothing worthwhile would be achieved, by relegating the parties to explore any avenue of amicable resolution. Besides, the appointment of an arbitrator by this Court would not act as an impediment in the parties resolving their disputes amicably, should it be possible at any point of time.”

14. While placing reliance on the aforementioned judgments, this Court in **Ranjit Construction Company v. Gujarat State Road & Building Department and Others**, 2023 SCC OnLine Del 3905, rejected the contention of one of the parties that, before resorting to arbitration, it was mandatory for the parties to exhaust the prescribed pre-arbitral conciliation mechanism.

15. Also, in a very recent case, **Jhajharia Nirman Ltd. v. South Western Railways** 2024:DHC:7801, this Court has reiterated that clauses in



arbitration agreements requiring parties to engage in pre-arbitral dispute resolution processes, such as amicable settlement or conciliation, are directory in nature and not mandatory.

16. In view of the above, the pre-arbitration conciliation clause contained in Clause 38.2 of the concession agreement cannot be construed as a mandatory requirement and it does not, therefore, operate as a bar to the initiation of the arbitral proceedings.

17. It is also noticed that in these proceedings, there is no impediment to this court in appointing a sole arbitrator to adjudicate the disputes between the parties. A Co-ordinate bench of this court in *M/s Twenty Four-Secure Services Pvt. Ltd. v. M/s. Competent Automobiles Company Limited* 2024:DHC:4601 has held as under:-

“22. In Union of India (UOI) vs. Singh Builders Syndicate (2009) 4 SCC 523, the High Court rejected the contention on behalf of the Government that the Court was not vested with any powers to appoint a Sole Arbitrator in distinction to the Arbitration Agreement which provided for the Tribunal of three members. The Apex Court upheld the order of this Court appointing a Sole Arbitrator by observing that the appointment of the Sole Arbitrator was valid.

23. In view of the submissions made as well as Clause 7 of the Services Agreement dated 16.08.2021 which provides for arbitration and the petitioner has raised the arbitrable disputes and without prejudice to the rights and contentions of the parties, the present petition is allowed....”

18. The said decision has also been followed by this Court in *Jhajharia Nirman Ltd. v. South Western Railways* (supra) as well.

19. In the present case, the existence of the arbitration clause is apparent from the perusal of Clause 38.3 of the concession agreement. In view of the judgments of the Supreme Court in *Interplay between Arbitration*



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Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re, 2023 SCC OnLine SC 1666, and in SBI General Insurance Co. Ltd. v. Krish Spinning, 2024 INSC 532, it is incumbent on this Court to appoint an independent Sole Arbitrator to adjudicate the disputes between the parties.

20. Accordingly, Mr. Justice (Retd.) Vineet Saran, Former Judge, Supreme Court of India (Mobile No.: +91 7897420209) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

21. It is made clear that the respondent shall be entitled to raise appropriate objections as regards jurisdiction/arbitrability, if any, before the learned Sole Arbitrator which shall be duly considered and decided by the learned Arbitrator on merits.

22. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under section 12 of the A&C Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.

23. The learned Sole Arbitrator shall be entitled to fees in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

24. Although the seat of arbitration is Delhi, it shall be open to the learned sole arbitrator to have Mumbai as the venue of arbitration for certain sittings, if a request in this regard is made by either of the parties.

25. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.



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26. Needless to say, nothing in this order shall be construed as an expression of this court on the merits of the case.

27. The present petition stands disposed of in the above terms.

SACHIN DATTA, J

OCTOBER 28, 2024/dn