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

+ **ARB.P. 1185/2023**

**M/S SONA BUILDER - M/S BHARAT SPUN PIPE AND
CONSTRUCTION COMPANY (JV) Petitioner**

Through: Mr. Ankit Totuka and Mr. Ranjeet K.
Ranjan, Mr. A. Karthik and Ms.
Gunjan Rathore, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA Respondent

Through: Mr. Santosh Kumar, Standing
Counsel with Mr. Kushagra Aman
and Mr. Adithya R., Advocates.

+ **O.M.P.(I) (COMM.) 332/2023**

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CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ORDER

15.01.2024

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By way of the present petition under section 11(6) of the Arbitration & Conciliation Act, 1996 ('A&C Act'), the petitioner seeks appointment of an arbitrator to adjudicate upon the disputes that are stated to have arisen with the respondent from Engineering, Procurement and Construction Agreement dated 04.12.2020 ('EPC Agreement').



2. Mr. Ankit Totuka, learned counsel for the petitioner has drawn the attention of this court to Article 26.3 of the EPC Agreement, which comprises the arbitration agreement between the parties; and contemplates reference of disputes between them to arbitration in accordance with the A&C Act; without however specifying the seat of arbitration.
3. It is however pointed-out that there is a general jurisdiction clause stipulated in Article 27.1 of the agreement, to the effect that courts at Delhi shall have exclusive jurisdiction over disputes arising from the agreement.
4. As per the record, the petitioner invoked arbitration *vide* notice dated 22.08.2023; to which the respondent sent reply dated 31.08.2023, whereupon the disputes were referred to pre-arbitration conciliation proceedings under the aegis of the Conciliation Committee of Independent Experts, which conciliation reference was however rejected by the petitioner *vide* letter dated 11.09.2023.
5. Thereupon, the respondent and the petitioner sent to each other letters dated 04.10.2023 and 25.10.2023 respectively, proposing certain names for appointment of a Sole Arbitrator.
6. Though formal notice has not been issued on this petition, the respondent had entered appearance on 08.11.2023.
7. Pursuant to what was recorded in last order dated 12.01.2024, Mr. Santosh Kumar, learned Standing Counsel appearing for the respondent/National Highways Authority of India ('NHAI') submits that he has now persuaded the NHAI to pay arbitrator's fee and costs on the consolidated sum of the claims and counter-claims in



accordance with Fourth Schedule to the A&C Act instead of the fixed/per-day fee as otherwise contemplated in the arbitration agreement.

8. However, Mr. Kumar submits that since the claims are likely to be around Rs.80 crores, when added with the counter-claims, the total sum in dispute would likely be more than Rs.100 crores; and for disputes in excess of Rs. 100 crore NHAI normally requires appointment of an Arbitral Tribunal comprising 03 members.
9. However, from a perusal of the arbitration clause contained in Article 26.3 of the EPC Agreement, it is seen that there is no stipulation for appointment of an Arbitral Tribunal of 03 members in that provision.¹
10. In view thereof, in the opinion of this court, as provided in section 10(2) read with section 2(1)(d) of the A&C Act,² the matter requires to be referred to a sole arbitrator.
11. Upon a conspectus of the foregoing, this court is satisfied that there is a valid and subsisting arbitration agreement between the parties, with territorial jurisdiction vesting in the courts of law at New Delhi; and also that the petitioners have invoked arbitration *vide* notice dated

¹ 26.3 Arbitration

(i) Any dispute which remains unresolved between the parties through the mechanisms available/ prescribed in the Agreement, **irrespective of any claim value**, which has not been agreed upon/reached settlement by the parties, **will be referred to the Arbitral Tribunal as per the Arbitration and Conciliation Act.**

² 2. Definitions.—(1)

(a)-(c)

(d) “arbitral tribunal” means a sole arbitrator or a panel of arbitrators;

* * * * *

10. Number of arbitrators.—(1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) **Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.**



22.08.2023; and *ex-facie* none of the disputes sought to be raised appear to be non-arbitrable.

12. In the above circumstances, learned counsel for the parties also jointly submit that the present petition under section 11 of the A&C Act be disposed-of, by the court appointing a sole arbitrator.
13. Accordingly, the present petition is allowed; and by consent of the parties, **Hon'ble Dr. Justice S. Muralidhar**, former Chief Justice of the Orissa High Court (Cellphone No. : +91 9872727986) is appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the parties.
14. The learned Sole Arbitrator may proceed with the arbitral proceedings subject to furnishing 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.
15. The learned Sole Arbitrator shall be entitled to fee 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.
16. Parties shall share the arbitrator's fee and arbitral costs, equally.
17. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Sole Arbitrator on merits, in accordance with law.
18. Parties are directed to approach the learned Sole Arbitrator appointed within 10 days.
19. A copy of this order be communicated by the Registry to the learned Sole Arbitrator.



20. The petition stands disposed of in the above terms.
21. Other pending applications, if any, also stand disposed of.

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22. Mr. Totuka, learned counsel appearing for the petitioner presses for interim relief in terms of the prayers made in the petition. The prayers recite as under :

“(a) Pass an order in favour of the Petitioner restraining the Respondent from disqualifying the Petitioner in any future tenders ;

“(b) Without prejudice to the above, alternatively pass an order in favour of the Petitioner and directing the Respondent that the termination of Contract Agreement dated 04.12.2020 shall not operate as a bar for the Petitioner from participating in any future tenders to be floated by the Respondent, till the matter is sub-judice before the Dispute Resolution Board;

“(c) Pass ad-interim ex-parte orders in terms of prayers (a) & (b);

“(d) Award the cost of proceedings in favour of the Petitioner.

“(e) Pass any other or further order or direction as this Hon’ble Court may deem necessary and proper in the facts and circumstances of the instant case.”

23. It is noticed that prayer (a) seeks a *blanket order* in favour of the petitioner, restraining the respondent from disqualifying it in *any future tenders*. By the very nature of the relief sought, such an order cannot be passed.
24. Furthermore, a perusal of prayer (b) shows that the petitioner has not impugned the termination of the EPC Agreement, but instead, the



petitioner again seeks a blanket order that such termination “..... shall not operate as a bar for the Petitioner from participating in any future tenders to be floated by the Respondent”. The petitioner also gives no specifics of any tender that may have been floated by the respondent in which the petitioner may be interested; nor even anything to show that the termination of the EPC Agreement would, in and of itself, bar the petitioner from participating in future tenders to be floated by the respondent.

25. In any case, without expressing any opinion on the merits of the relief prayed for under section 9, a brief reference may be made to the recent decision of the Supreme Court in *Arcelormittal Nippon Steel (India) Ltd. vs. Essar Bulk Terminal Ltd.*³, in which the Supreme Court has held as under :

“62. Sub-section (3) of Section 9 has two limbs. The first limb prohibits an application under sub-section (1) from being entertained once an Arbitral Tribunal has been constituted. The second limb carves out an exception to that prohibition, if the Court finds that circumstances exist, which may not render the remedy provided under Section 17 efficacious.

“63. To discourage the filing of applications for interim measures in courts under Section 9(1) of the Arbitration Act, Section 17 has also been amended to clothe the Arbitral Tribunal with the same powers to grant interim measures, as the Court under Section 9(1). The 2015 Amendment also introduces a deeming fiction, whereby an order passed by the Arbitral Tribunal under Section 17 is deemed to be an order of court for all purposes and is enforceable as an order of court.

“64. With the law as it stands today, the Arbitral Tribunal has the same power to grant interim relief as the Court and the remedy under Section 17 is as efficacious as the remedy under

³ (2022) 1 SCC 712



Section 9(1). *There is, therefore, no reason why the Court should continue to take up applications for interim relief, once the Arbitral Tribunal is constituted and is in seisin of the dispute between the parties, unless there is some impediment in approaching the Arbitral Tribunal, or the interim relief sought cannot expeditiously be obtained from the Arbitral Tribunal.*

(emphasis supplied)

It has thus been clearly held that the powers of the Arbitral Tribunal under section 17 of the A&C Act are co-extensive with those of this court under section 9 of the A&C Act. This court therefore does not deem it appropriate to pass any orders on this petition or to retain the matter with itself.

26. In view thereof, the present petition is disposed-of, directing the petitioner to place the present petition before learned Sole Arbitrator appointed in Arb. P. No. 1185/2023 above, as an application under section 17 of the A&C Act, to be decided in accordance with law; without however expressing any opinion on the merits of the matter.
27. Let the petitioner approach the learned Sole Arbitrator within 10 days for the above purpose.
28. All rights and contentions of the parties in relation to the present petition are kept open, to be decided by the learned Sole Arbitrator on merits, in accordance with law
29. The petition stands disposed-of in the above terms.
30. Pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

JANUARY 15, 2024/uj