



\$~44

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

+ **W.P.(C) 17245/2024 & CAV 610/2024, CM APPL. 73368/2024, CM APPL. 73369/2024**

PUBLIC WORKS DEPARTMENT

.....Petitioner

Through: Mr. Mahesh Jethmalani, Senior Advocate with Mr. Annirudh Sharma, Ms. Mugdha Pande, Ms. Navya Nanda, Mr. Ajay Awasthi and Mr. Vaibhav Theladi, Advocates.

versus

LARSEN AND TOURBO LIMITED

.....Respondent

Through: Mr. Dayan Krishnan, Senior Advocate with briefing counsel.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

% **13.12.2024**

1. The Petitioner, Public Works Department of Government of NCT of Delhi, has filed the present petition, assailing order dated 18th October, 2024, passed by the Arbitral Tribunal, dismissing the Petitioner's application under Section 16 of the Arbitration and Conciliation Act, 1996.¹

2. The Petitioner is presently in arbitration before a sole arbitrator, appointed by this Court in ARB.P. 440/2023 through judgment dated 04th July, 2023,² which reads as follows:

1. This petition is filed under Section 11 of Arbitration and Conciliation Act, 1996 for appointment of a sole arbitrator to resolve the

¹ "the Act"

² M/s Larsen & Turbo Limited v. Public Works Department; NCN: 2023:DHC:4351



disputes and differences arising between the parties in relation to the Contract Agreement dated 08.11.2017.

2. *The learned counsel for petitioner has referred to Article 23 viz. Dispute Resolution clause in the Contract Agreement dated 08.11.2017. The learned counsel for respondent also agrees to the appointment of a sole arbitrator to arbitrate the disputes between the parties.*

3. *Accordingly, Ms. Justice Mukta Gupta (Retd.) is hereby appointed as a sole arbitrator to arbitrate the disputes between the parties. The rights and contentions of the parties are left open.*

4. *In view of above, the petition stands disposed of. Pending application, if any, also stands disposed of. A copy of this order be communicated to the sole arbitrator. Order dasti.”*

3. The Petitioner filed an application under Section 16 of the Act before the Arbitration Tribunal, seeking a declaration that the Arbitral Tribunal has no jurisdiction to conduct the arbitration proceedings. The Petitioner alleged that this Court, in exercise of its jurisdiction under Section 11(6) of the Act, had failed to consider Article 23.1 of the Contract dated 18th November, 2017 executed between parties, which demonstrates that the Arbitration Agreement between the parties is not unconditional, but a qualified one.

4. The Arbitral Tribunal, after considering the contentions of both sides and analysing Article 23 of the Contract along with relevant case law, concluded that an Arbitration Agreement exists between the parties. The observations of the Tribunal read as follows:

“9. *The decision of the Delhi High Court in TK Engineering (supra) has been followed by other coordinate benches in ARSS Infrastructure (supra), Ram Kirpal Singh (supra) and SK Engineering (supra), while dealing with the similar clauses. It has been consistently held that just because the procedure for appointment of an arbitrator has been rendered invalid or unenforceable by reason of the amendment to the A&C Act, by insertion of Section 12(5) and by the subsequent decisions of the Supreme Court in TRF Ltd. (supra) and Perkins Eastman (supra), would not imply that the entire arbitration clause is rendered invalid or void. It was held that the procedure for appointment of an arbitrator is clearly distinct and separable from the agreement to refer disputes to arbitration, even if these are contained in the*



same arbitration clause. Hence, the part of the clause which has become inoperable will be severed from the remaining clause and parties will be referred to arbitration. Paragraph 22 of the decision in *S.K. Engineering (supra)* reads as under:

“22. As such, there is no merit in the contention raised by learned counsel for the respondent that the present disputes cannot be referred to arbitration at all. The arbitration clause insofar as it stipulates that only the respondent can act or appoint an arbitrator must be severed from rest of the arbitration clause in view of the judgment of the Supreme Court in TRF Ltd. (supra) and Perkins (supra). The later part of the arbitration clause, that if for any reason the person appointed by the respondent cannot act as arbitrator the matter is not to be referred to arbitration at all, must also be severed, as the same is also a part of the same stipulation, which is in utter contravention of TRF Ltd. (supra) and Perkins (supra).”

10. In *SK Engineering (supra)* the coordinate bench of the High Court also noted that the decision in *Vindhya Vasini Constitution (supra)* did not consider the legal position laid in the prior decisions of the court in *Ram Kirpal Singh (supra)*, *TK Engineering (supra)*, *ARSS Infrastructure (supra)*, *NIIT Technologies (supra)*, *Satish Builders (supra)*, *Sam (India) Buildwell (supra)* and full bench of this court in *Ved Prakash Mithal (supra)* and the judgment of the Supreme Court in *Indian Oil Corporation (supra)* and *Nandyal (supra)*. As such, the same must be read to be confined to the peculiar facts and circumstances and in the context of the submissions advanced in that case.
11. It may be noted that in *Vindhya Vasini (supra)* the Ld. Single Judge relied upon the decision in *Newton Engineering and Chemicals Limited Vs. Indian Corporation Limited (2013) 4 SCC 44* which judgement was rendered prior to the amendment of Section 12 of the Act.
12. There is no dispute that an arbitration agreement has to be written and duly signed by the parties. Even in the present case Article 23 of the contract which provides for Dispute Resolution, notes arbitration as the mode of dispute resolution. Merely because the appointment of the arbitrator can be by the officers of the Respondent, does not take Article 23 out of the character which provides for resolution of disputes through arbitration. As noted above, in a number of decisions rendered by the Delhi High Court, such a clause in the agreement, restricting the appointment of an arbitrator by particular officer has been held to be severable and the remaining portion of the clause enforceable.
13. Ld. Senior Counsel for the Respondent has vehemently contended that once there is an inherent lack of jurisdiction with the Arbitral



Tribunal, the said issue can be raised at any stage as the same goes to the root of the matter. Relying upon the decision in Kerala State Electricity Board (supra) it is contended that unlike other forum of alternate dispute resolution provided under Section 89 CPC where oral consent is sufficient, an agreement to arbitrate has to be in writing, hence in the absence of a written agreement or a written consent, there can be no arbitration.

14. *Even this objection of Ld. Senior Counsel for the Respondent is liable to be dismissed because Section 16 (2) and (3) mandate that an objection as to jurisdiction of the Tribunal is to be taken at the earliest, and not later than submission of statement of Defence. In the present case, the evidence is underway. The objection is belated and liable to be dismissed on this ground itself. The Respondent was always aware of the stipulation under the Arbitration Agreement, and was aware of the Claims raised by the Claimant at the time of filing its Statement of Defence.*
15. *In Union of India Vs. Pam Development Pvt. Ltd. (supra), Supreme Court dealing with the term of the agreement that no person other than a gazetted railway officer, should act as an arbitrator umpire and if for any reason, that is not possible, the matter is not to be referred to arbitration at all and on an application filed by the claimant, a former Judge was appointed as the arbitrator by the court held that the objection with regard to the competence jurisdiction of the Arbitral Tribunal having not been taken in the statement of defence, will be deemed to be waived in view of sub-section 4 of Section 16 of the Act.*
16. *For the reasons noted above, the application filed by the Respondent under Section 16 of the Act is dismissed.*
17. *The proceedings are now fixed on 14.12.2024 at 11:00 AM to 5:00 PM for cross examination of CWI. The venue along with secretarial assistance for the recording of the evidence will be booked by the claimant."*

5. Accordingly, the Petitioner's application under Section 16 of the Act stands dismissed. Aggrieved, the Petitioner challenges the aforementioned order passed by the Tribunal through the present petition.

6. At the outset, Mr. Dayan Krishnan, Senior Counsel for the Respondent, objects to the maintainability of the petition. On this issue, Mr. Mahesh Jethmalani, Senior Counsel for Petitioner, submits that there are jurisdictional issues, which can be considered by this Court. Mr. Jethmalani



firstly emphasises that this Court, while exercising jurisdiction under Section 11(6) of the Act, ought to have examined the issue of existence of an arbitration agreement between the parties. He submits that as per the jurisprudence on this issue, the Court, at a pre-referral stage under Section 11(6) of the Act, is required to conduct an enquiry about the existence and validity of the Arbitration Agreement. Mr. Jethmalani contends that the said procedure was not followed in the present case, and the appointment of Arbitral Tribunal was made, solely based on the counsel representing the Petitioner (respondent counsel in ARB.P. 440/2023) agreeing to arbitration, as evidenced from Paragraph No. 2 of the judgment dated 04th July, 2023. He points out that, in fact, the counsel had no instructions to agree to the appointment of the sole arbitrator, and such instructions were neither provided in writing nor orally. Therefore, the concession made by the counsel cannot bind the Petitioner, particularly when, as per the wording of the dispute resolution clause, the Arbitration Agreement had become unenforceable due to non-compliance with the stipulated procedure for appointment of the arbitrator.

7. Mr. Jethmalani further submits that the Dispute Resolution clause of the Contract should be interpreted in terms of the judgement of this Court in ***Vindhya Vasini Construction Co. v. BHEL.***³

8. Contrarily, Mr. Dayan Krishnan emphasizes on the question of maintainability of the present petition. As regards the Arbitration Agreement between the parties, Mr. Krishnan highlights that in the subsequent decision of ***SK Engineering and Construction Company India v. Bharat Heavy***

³ 2023 SCC OnLine Del 2768.



Electricals Ltd.,⁴ this Court considered a similar arbitration clause, and after examining the judgment in **Vindhya Vasini** and other judgments on this issue, determined that the agreement, as outlined in the arbitration clause, would be binding on the parties, and accordingly, proceeded to appoint an arbitrator in the said case.

9. The Court has considered the aforementioned contentions. The question of this Court's jurisdiction under Article 226 & 227 of the Constitution of India has been considered by the Supreme Court in **Bhaven Construction v. Executive Engineer, Sardar Sarovar**,⁵ where it has been emphasised that the jurisdiction under the aforementioned articles of the Constitution should be exercised only in exceptional circumstances. Despite the broad and pervasive ambit of Article 227, the Supreme Court opined that the High Court should ordinarily refrain from using its inherent powers to interfere with arbitral process, unless exceptional circumstances are demonstrated. It must also be noted that in **Bhaven Construction**, the controversy before the Court pertained to an order passed under Section 16 of the Act. On this issue, the Supreme Court, emphasizing on the framework of the Act, observed that Section 16 of the Act mandates that the issue of jurisdiction be examined by the Arbitral Tribunal, before it is examined by the Court under Section 34 of the Act.

10. The aforesaid view has also been expressed by this Court in several decisions including **C.S Construction Company Private Limited and Another v. Excelling Geo and Engineering Consultant and Others**;⁶

⁴ Arb. P. No. 737/2023 decided on 01.12.2023.

⁵ (2022) 1 Supreme Court Cases 75.

⁶ 2024:DHC:5644.



***Emerald Industries v. Tata Aldesa JV;*⁷ *M/s Lisraj Overseas Private Limited v. M/s Maa Sheetla Ventures Limited;*⁸ *Home and Soul Private Limited v. T.V. Today Network Limited;*⁹ and *Surender Kumar Singhal and Ors. V. Arun Kumar Bhalotia and Ors.*¹⁰**

11. In light of the aforementioned decisions, upon examining the issue in the instant case, the pertinent and undisputed fact that emerges is: the Arbitral Tribunal was constituted pursuant to an order passed under Section 11(6) of the Act, which order has not been challenged by the Petitioner and, therefore, is clearly binding on the Arbitral Tribunal. At the stage of reference, the Court also took into consideration Article 23, *i.e.*, the dispute resolution clause of the Contract. Therefore, the appointment of the sole arbitrator was not merely based on the statement given by the counsel representing the Petitioner, but in consideration of the aforementioned Arbitration Agreement between the parties.

12. Furthermore, as already explained above, a writ petition under Articles 226 and 227 of the Constitution can only be entertained against the orders of an Arbitral Tribunal in exceptional circumstances, or when bad faith or perversity is established. In the opinion of the Court, the Petitioner's contention that their counsel did not have the instructions to agree for arbitration, does not constitute an exceptional circumstance sufficient to challenge the order passed under Section 16 of the Act. As regards the observations made in the impugned order, it is noted: (i) the Arbitral Tribunal, relying on the decisions of this Court, applied the doctrine of

⁷ W.P.(C) 12110/2024, decided on 02nd September, 2024.

⁸ W.P.(C) 10515/2024, decided on 31st July, 2024.

⁹ 2024 SCC Online Del 7252.

¹⁰ MANU/DE/0561/2021.



severability, concluding that the restriction regarding the appointment of the arbitrator by a particular officer was severable, thereby rendering the remaining portion of the dispute resolution clause enforceable; (ii) the Tribunal observed that any objection as to the jurisdiction of the Tribunal had to be raised at the earliest, and could not be raised later than the submission of the Statement of Defence, emphasising that the present case was already at the evidence stage; (iii) the Tribunal further opined that since the objection concerning the competence and jurisdiction of the Tribunal was not raised in the Statement of Defence, it would be deemed waived as per Section 16(4) of the Act. Therefore, in the opinion of the Court, the view taken by the Arbitral Tribunal under Section 16 cannot be considered unreasonable or perverse so as to justify the exercise of jurisdiction by this Court under Article 226 of the Constitution.

13. On this issue, it must also be noted that the interpretation of the dispute resolution clause sought to be advanced by the Petitioner, even if considered plausible, must be weighed against the framework of the Act as well as the contrary views taken by this Court in judgements such as ***SK Engineering and Construction Company India***, where the decision of ***Vindhya Vasini*** has been specifically discussed and differentiated. It is also pertinent to note that the proceedings before the Arbitral Tribunal are at an advanced stage, two of the Claimant's witnesses have already been examined and discharged, and the examination of the third witness is currently underway.

14. Moreover, given that the impugned order has already been passed, the Petitioner's remedy, as per the framework of the Act, would now be to assail the final award, if permissible. In view of the above, the Court finds no



ground to entertain the present petition.

15. Accordingly, the petition is dismissed, along with pending application.

SANJEEV NARULA, J

DECEMBER 13, 2024
d.negi