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

+ **ARB.P. 1992/2024 & I.A. 47878/2024**

M/S DESIGN ASSOCIATES INC., A PARTNERSHIP FIRM

.....Petitioner

Through: Mr. Arjun Mukherjee and Mr. Sanchit
Sherawat, Advs.

versus

HINUDSTAN PREFAB LIMITED

.....Respondent

Through: Mr. Varun Nischal, Ms. Saira Tagra,
Advocates with Mr. Mukesh Kumar,
Legal Incharge

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

ORDER

11.03.2025

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1. The Petitioner has approached this Court under Section 11(6) of the Arbitration & Conciliation Act for appointment of an arbitrator to adjudicate upon the disputes which have arisen between the parties.
2. Material on record indicates that the Petitioner and the Respondent entered into an agreement dated 18.02.2013 whereunder the Petitioner was to provide architectural planning, designing and detailing of construction of Q Complex at Deoghar, Jharkhand for the Department of Tourism Jharkhand. The said agreement contains an arbitration clause.
3. It is stated that since disputes arose between the parties under the contract, the Petitioner has issued a notice under Section 21 of the Arbitration & Conciliation Act to the Respondent on 17.09.2024. Under the



said notice, it was the stand of the Petitioner that it has completed 70% of the work under the agreement and that since disputes have arisen between the Respondent and its contractor, the construction of the project has come to a complete standstill. The said notice also states that the Petitioner is willing to carry out the remaining obligations but for the outstanding amounts payable under the contract.

4. The Petitioner also states that because of the delay in payment of the outstanding amount, the Petitioner has already written a letter dated 04.01.2024 to the Respondent seeking closure of the agreement dated 18.02.2013 between the Petitioner and the Respondent and seeking release of the performance bank guarantee.

5. It is stated that since the Respondent failed to provide its consent for appointment of an Arbitrator, the Petitioner has approached this Court for appointment of an Arbitrator.

6. Notice was issued on 11.12.2024. It is stated by the learned Counsel for the Respondent that the claim for the outstanding amounts is barred by limitation for the reason that the last of the payments was made on 16.02.2017 and amounts are due and payable from 2017 and invocation of arbitration in 2024 is for a dead claim. It is also stated that after issuing notice under Section 21 of the Arbitration & Conciliation Act, the Petitioner has extended the bank guarantee, meaning thereby, there is no dispute between the parties.

7. It is also stated by learned Counsel for the Respondent that there is no amount due and payable by the Respondent, which is disputed by the learned Counsel for the Petitioner.

8. This Court is of the opinion that there are disputes that are pending



between the parties in view of the fact that the notice invoking arbitration does indicate that the Petitioner has already issued a notice for closure of the contract and the Respondent did not close the contract and also that the bank guarantees are alive.

9. This petition is only a petition under Section 11 of the Arbitration & Conciliation Act. It is now well settled that the referral courts do not ordinarily go into the issue whether there are disputes pending between the parties or not. The Apex Court in SBI General Insurance Co. Ltd v. Krish Spinning, (2024) SCC OnLine SC 1754, has observed as under:-

“122. Once an arbitration agreement exists between parties, then the option of approaching the civil court becomes unavailable to them. In such a scenario, if the parties seek to raise a dispute, they necessarily have to do so before the arbitral tribunal. The arbitral tribunal, in turn, can only be constituted as per the procedure agreed upon between the parties. However, if there is a failure of the agreed upon procedure, then the duty of appointing the arbitral tribunal falls upon the referral court under Section 11 of the Act, 1996. If the referral court, at this stage, goes beyond the scope of enquiry as provided under the section and examines the issue of “accord and satisfaction”, then it would amount to usurpation of the power which the parties had intended to be exercisable by the arbitral tribunal alone and not by the national courts. Such a scenario would impeach arbitral autonomy and would not fit well with the scheme of the Act, 1996.

123. The power available to the referral courts has to be construed in the light of the fact that no right to appeal is available against any order passed by the referral court under Section 11 for either appointing or refusing to appoint an arbitrator. Thus, by delving into the domain of the arbitral tribunal at the nascent stage of Section 11, the referral courts also run the risk of leaving the claimant in a situation wherein it does not have any forum to approach for the adjudication of



its claims, if it Section 11 application is rejected.

124. Section 11 also envisages a time-bound and expeditious disposal of the application for appointment of arbitrator. One of the reasons for this is also the fact that unlike Section 8, once an application under Section 11 is filed, arbitration cannot commence until the arbitral tribunal is constituted by the referral court. This Court, on various occasions, has given directions to the High Courts for expeditious disposal of pending Section 11 applications. It has also directed the litigating parties to refrain from filing bulky pleadings in matters pertaining to Section 11. Seen thus, if the referral courts go into the details of issues pertaining to “accord and satisfaction” and the like, then it would become rather difficult to achieve the objective of expediency and simplification of pleadings.

125. We are also of the view that ex-facie frivolity and dishonesty in litigation is an aspect which the arbitral tribunal is equally, if not more, capable to decide upon the appreciation of the evidence adduced by the parties. We say so because the arbitral tribunal has the benefit of going through all the relevant evidence and pleadings in much more detail than the referral court. If the referral court is able to see the frivolity in the litigation on the basis of bare minimum pleadings, then it would be incorrect to doubt that the arbitral tribunal would not be able to arrive at the same inference, most likely in the first few hearings itself, with the benefit of extensive pleadings and evidentiary material.”

10. It is well settled that referral courts should normally follow the policy of ‘*when in doubt, refer*’, as laid down by the Apex Court in Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1. In view of the fact that disputes have arisen between the parties, this Court is inclined to appoint an Arbitrator to adjudicate upon the disputes between the parties.

11. It is made clear that the observations made in this order are limited to



the appointment of the arbitrator. It is open for the Respondent to file an application under Section 16 of the Arbitration & Conciliation Act before the learned Arbitrator and raise contentions regarding the existence of disputes on the basis of the conduct of the Petitioner. The question of limitation is also left open for the Arbitrator to take a decision as to whether the claim made by the Petitioner is barred by limitation or not.

12. It is also stated by the learned Counsel for the Respondent that no amount is due and payable to the Petitioner which is disputed by the Petitioner.

13. The contention of the Respondent regarding the question of arbitrability of disputes is left open to be decided by the learned Arbitrator.

14. Accordingly, Ms. Sangeeta Bharti, (Mob: 9811112863) is appointed as the Sole Arbitrator to adjudicate upon the disputes between the parties.

15. The arbitration would take place under the aegis of the Delhi International Arbitration Centre (DIAC) and would abide by its rules and regulations. The learned Arbitrator shall be entitled to fees as per the Schedule of Fees maintained by the DIAC.

16. The learned Arbitrator is also requested to file the requisite disclosure under Section 12(2) of the Arbitration & Conciliation Act within a week of entering on reference.

17. 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.

18. Needless to say, nothing in this order shall be construed as an expression of this Court on the merits of the contentions of the parties.

19. The present petition stands disposed of in the above terms along with



pending application(s), if any.

MARCH 11, 2025
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SUBRAMONIUM PRASAD, J