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

RESERVED ON – 08.01.2024

% ***PRONOUNCED ON –15.03.2024***

\+ ARB.P. 373/2023, I.A. 6403/2023

M/S APEX BUILDSYS LIMITED ..... Petitioner

Through: Mr. Suhail Sehgal, Mr. Rakesh Kumar, Mr. Chandan, Advs.

versus

IRCON INTERNATIONAL LIMITED ..... Respondent

Through: Mr. Chandan Kumar, Ms. Kirti Atri, Advs.

CORAM:
HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA,J :

A.BRIEF FACTS

1. The present petition is filed under Section 11 of the Arbitration and Conciliation Act, 1996, seeking the appointment of a sole arbitrator to adjudicate the disputes *inter-se* having been arisen between the parties out of the Letter of Acceptance dated 29.11.2011 read with the General Conditions of Contract.
2. In brief, the case of the petitioner is that the respondent floated a Tender for Work of Construction of Wheel Shop, Bogie Shop, Paint

Shop, Garnet Blasting Shop, Machine Shop, Transport Shop & Sheil Store of RCF Rae Barali including Architectural & Structural Design, Fabrication, Supply and Erection of Pre- engineered steel buildings at Lalganj, Raebareli, Uttar Pradesh. Accordingly, the petitioner had invited quotation/expression of interest from shortlisted and eligible contractors/ firms for the said purpose.

3. It has been submitted that the respondent vide letter of Award dated 29.11.2011 selected the petitioner for the above-said work. Thereafter the parties entered into a formal agreement on 29.11.2011. It has been submitted that to complete the work within the stipulated time frame, the petitioner mobilized the site with tools, machinery, manpower and material. However, the petitioner faced various hindrances in smooth execution of the work, which were not within the control of the petitioner. It has been submitted that the disputes and differences arose and therefore the Petitioner filed an Arbitration Petition under Section 11 of the A&C Act vide Arb. P. No. 5/2018 before this Court. The Respondent alleged that it did not receive the notice issued on behalf of the Petitioner in terms of Clause 73.1 of the Agreement. The coordinate bench of this court upon considering the facts of the case, vide order dated 31.05.2018, disposed of the said arbitration petition with the direction to the Respondent to consider the contents of that petition filed under Section 11 of A&C Act as notice under Clause 73.1 of the Contract and to act expeditiously.

4. In pursuance of the order dated 31.05.2018, the conciliation proceedings were initiated. The sole conciliator i.e.Chief Manager, CCP vide order dated 17.12.2020 inter alia held that the despite the

attempt to settle the issue and avoid future litigation etc., the respondent has not agreed with the advise of the conciliator and thus, the Conciliation was declared to be failed. Pursuant to this, the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (ACT) was filed for referring the disputes for adjudication through arbitration.

5. The respondent has filed a short counter affidavit wherein the respondent has taken the plea that the present petition has been filed under Section 11 of the Act and not under Section 11 (6) of the Act which shows that the petitioner had not invoked the arbitration clause and there is no default on the part of the respondent in doing the needful under the Act. It has further been submitted that the conciliation failed on 17.12.2020, however, the petitioner issued the notice regarding the appointment of independent sole arbitrator only on 20.04.2021 It has been submitted that clause 73.2 specifically provides that no dispute or differences shall be referred to arbitration after expiry of 60 days from the date of notification of the failure of conciliation. It has been submitted that Section 11(2) of the Act provides that parties are free to agree on a procedure for appointing the arbitrator. Learned counsel submits that thus the petitioner has failed to follow the procedure as set out in the agreement. It has further been submitted that order of the Supreme Court in Suo Moto writ petition 3/2020, did not protect limitation from invoking the arbitration clause to which the parties have agreed. It was also submitted that the Apex Court in ***New Delhi Municipal Council V.***

Minosha India Ltd.[1] protects the limitation only for "suit and application by the corporate debtor" and it did not protect the limitation for invoking arbitration clause to which the parties had agreed wherein it has been stipulated that no dispute or differences shall be referred to the arbitration after expiry of 60 days from the date of notification of the failure of the conciliation.

6. It is further submitted that even the purported notice dated 20.04.2021 cannot be deemed to be a notice invoking the arbitration. It was submitted that the notice is a complete violation of clause 73.4 (A) (ii) of GCC.

7. Learned counsel submits that the Section 11 (6) of the Act confers jurisdiction upon the Court to take appropriate measures only if the parties fail to act as required under the procedure agreed upon under Section 11(2) of the Act. It has further been submitted that contractually mandated provisions are required to be followed. It is further submitted that if the petitioner has not adhered to the procedure, then whole arbitration clause should be not acted upon.

8. The petitioner has also filed an affidavit of competent officer of the petitioner's company. In the affidavit, it was stated that the conciliation proceedings between the petitioner and the respondent got over in the month of December 2020 and the matter could not be settled/reconciled between the parties. It has been submitted that therefore due to an unprecedented situation caused due to the second wave of Covid-19 and that parallelly the petitioner company was undergoing a liquidation process under IBC 2016 in terms of order

[1] 2022 8 SCC 384

dated 09.01.2020 passed by the NCLT, New Delhi. It has further been submitted that there was no effective working, functioning and operation of the petitioner company during that period. In the affidavit, it was deposed that after the Covid-19 wave slowed down, the office of the liquidator resumed, and minimum employees were allowed to work physically. The documents pertaining to the present matter were quite old, voluminous and were scattered in the other offices of the petitioner and it was very difficult to arrange and segregate those documents by the petitioner because of a limited number of staff and employees.

9. It has been submitted that due to liquidation process in progress, the concerned officials of the petitioner company left the organization including one of the concerned officials namely Gaurav Mishra who had the personal knowledge of the project and location of the files and documents thereof, as he was supervising the same. It has been submitted that Mr. Gaurav Mishra resigned from the petitioner company in September 2021. It has been submitted that on account of all of the above, the delay in filing the present petition occurred. Accordingly, the prayer was made to condone the delay.

B. SUBMISIONS OF THE PETITIONER

10. Learned counsel for the petitioner has submitted that clause 72.2.2 provides that the appointment is to be made by the Managing Director of the Respondent under Clause 73.4(a) (1) and 73.4(a)(2). It has been submitted that the said process has now clearly been held to be invalid, illegal, and void ab-initio and takes away from the party's autonomy to appoint its own Arbitrator. It is submitted that therefore,

the petitioner was not obligated to follow the process as required under clause 72.2.2. It has been submitted that the Coordinate Bench of this Court in ***Taleda Square (P) Ltd. v. Rail Land Development Authority***[2] has clearly held that the Clause relating to appointment from the panel the arbitrators proposed by the Railway is not at all valid. The view has been followed by this Court in ***Sri Ganesh Engineering Works v. Northern Railway and Ors.***[3]

11. Learned counsel submits that since the process provided for appointment of the Arbitrator in the GCC is not valid or applicable; hence, once the said process itself has been read down by the Coordinate Benches, there cannot be any insistence by the Respondent that the Petitioner ought to have followed the process of sending intimation to the Managing Director to provide for the panel of Arbitrators as under Clause 73.2 of the Agreement.

12. Learned counsel submits that the plea taken by the respondent regarding the delay if at all, in invoking the arbitration is not tenable as there was no requirement to follow the process under which the time limit was given as the Managing Director cannot provide for the panel of arbitrators. Learned counsel submits that even otherwise, this issue has been considered by this Court and vide order dated 21.07.2023, this Court recorded it's prima facie satisfaction with the explanation given by the petitioner in the affidavit for the delay caused in filing the present petition. This order has since not been challenged, has now attained finality.

[2] 2023 SCC OnLine Del 6321
[3] MANU/DE/7981/2023.

13. Learned counsel further submitted that even otherwise the petitioner was going through liquidation in NCLT, New Delhi pursuant to the order dated 09.01.2020 and therefore the petitioner is excluded from the application of limitation Act as envisaged under Section 60(6) of IBC, 2016. Learned counsel further submitted that in respect of notice of invocation under Section 21 of the Act, the petitioner has submitted its demand/letters dated 02.03.2017 and 24.07.2017. It has further been submitted that the conciliation proceedings also took place and thereafter further demand/legal notice dated 21.04.2021 was served.

14. Learned counsel submits that intention of the legislature behind Section 21 of the Act is only to inform the other parties about the dispute between the parties and intention of one of the parties to invoke the arbitration clause. It has further been submitted without prejudice to contentions taken by the petitioner, all such aspects of alleged delay, want of notice under Section 21 of the Act or alleged non-compliance of contractual terms are mixed questions of law and fact which are to be agitated and adjudicated by the arbitrator.

C. SUBMISSIONS OF RESPONDENT

15. Mr. Chandan Kumar, learned counsel for the respondent has submitted that as per clause 73.2 of the GCC, the petitioner was required to follow the procedure as set out in the same. Learned counsel submits that since the procedure has not been followed by the petitioner, the present petition is not maintainable. Learned counsel submits that it has been specifically provided in clause 73.2.2 of the GCC, the contractor was required to refer the matter to the Managing Director in writing within 60 days from the date of failure of amicable

settlement of such dispute/differences for the settlement. Learned counsel submits that Clause 73.2.2. further provides that no dispute or differences shall be referred to arbitration after expiry of 60 days from the date of notification of the failure of conciliation. Learned counsel submits that in the present case, the conciliation failed on 17.12.2020 whereas the purported notice under Section 21 of the Act was sent on 20.04.2021 and present petition was filed on 01.02.2023, therefore, the petitioner has failed to follow the procedure. Learned counsel further submitted that the Arbitration and Conciliation Act, 1996 specifically provides Section 43 and that the petitioner could have moved under Section 43(3) for seeking extension of time/condoning of delay.

16. Learned counsel further submitted that order of the Supreme Court in Suo Moto writ petition 3/2020 will not come to the rescue of the petitioner as there was no protection for invoking the arbitration clause for which the parties have agreed. It has further been stated that the judgment of the Supreme Court in ***New Delhi Municipal Council V. Minosha India Ltd.*** *(supra)* will also not come to the rescue to the petitioner in view of the specific clause as contained in 73.2.2. Learned counsel further submitted that purported notice dated 20.04.2021 under Section 21 is in violation of Clause 73.4(a)(ii). Learned counsel further submitted that Clause 73.4(a)(ii) provides that in case where the total value of all claims/counter claims exceeds Rs.2 Crores, the arbitral tribunal shall consist of the panel of three officers not below the GM level. The clause further provides that the employer i.e. the respondent herein will send panel of more than three

names to the contractor i.e. the petitioner within 60 days from the day when a written and valid demand for arbitration is received by the employer i.e. the respondent.

17. Learned counsel submits that no such notice was sent by the petitioner. Learned counsel further submits that the parties are obligated to follow the contractually mandated provisions and the plea of the petitioner that while the clause providing for arbitration is acceptable yet the procedure set out therein is incorrect. Learned counsel has also relied upon the ***Amit Guglani and Another v. L and T Housing Finanace Ltd***.[4]

D. ANALYSIS AND FINDINGS

18. The plea of the respondent opposing the present petition is primarily threefold. Firstly, that present petition could not have been filed and the matter cannot be referred to the arbitration as Clause 73.2 of the GCC specifically provides that no dispute or differences shall be referred to the arbitration after expiry of 60 days from the date of notification of the failure of the conciliation. Second major objection is that the purported notice dated 20.04.2021 cannot be taken as notice under Section 21 of the Act. The third submission is since the petitioner has failed to follow the procedure, whole arbitration clause should not be acted upon and the petitioner may file a suit instead.

[4] 2023 SCC OnLine Del 5206

19. The jurisdiction of conducting an enquiry at the time of making reference is very well settled in ***DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd.***,[5] wherein it was *inter alia* held as under:

> *21. The jurisdiction of this Court under Section 11 is primarily to find out whether there exists a written agreement between the parties for resolution of disputes through arbitration and whether the aggrieved party has made out a prima facie arbitrable case. The limited jurisdiction, however, does not denude this Court of its judicial function to look beyond the bare existence of an arbitration clause to cut the deadwood. A three-Judge Bench in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, paras 236, 237, 244.3, 244.4, 244.5, 244.5.1-244.5.3 : (2021) 1 SCC (Civ) 549] , has eloquently clarified that this Court, with a view to prevent wastage of public and private resources, may conduct "prima facie review" at the stage of reference to weed out any frivolous or vexatious claims.*
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> *22. In this context, the Court, speaking through Sanjiv Khanna, J. held that : (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, paras 236, 237, 244.3, 244.4, 244.5, 244.5.1-244.5.3 : (2021) 1 SCC (Civ) 549] , SCC p. 121, para 154)*
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> *"154. ... 154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.*
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> *154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i),*

[5] (2021) 16 SCC 743

(ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

23. N.V. Ramana, J. (as his Lordship then was) in his supplementary opinion further crystallised the position as follows : (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, paras 236, 237, 244.3, 244.4, 244.5, 244.5.1-244.5.3 : (2021) 1 SCC (Civ) 549] , SCC p. 162, para 244)
"244. Before we part, the conclusions reached, with respect to Question 1, are:

244.1. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

244.2. Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.

244.3. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case

may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. "when in doubt, do refer".

244.5. The scope of the court to examine the prima facie validity of an arbitration agreement includes only:

244.5.1. Whether the arbitration agreement was in writing? Or

244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?

244.5.4. On rare occasions, whether the subject-matter of dispute is arbitrable?"

20. Before proceeding further, it is also necessary to advert to the relevant arbitration clause of the GCC;

73.2. Conciliation/Arbitration

73.2.1 It is a term of this contract that Conciliation/ Arbitration cf disputes shall not be commenced unless an attempt has first been made by the parties to settle such disputes, within 120 days of submission of monthly statement 'of such claim, through mutual settlement.

73.2.2. In the event of failure to resolve any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Employer of any Certificate to which the contractor may claim to be entitled to. Through mutual settlement, the Contractor may refer such

matters to the Managing Director in writing within 60 days from the date of failure of amicable settlement of such disputes or differences for settlement through Conciliation. If the efforts to resolve all or any of the disputes through Conciliation faits, the Contractor may refer to the Managing Director of the Employer for settlement of such disputes or differences through Arbitration. No disputes or differences shall be referred to Arbitration after expiry of 60 days from the date of notification of the failure of Conciliation."

"73.4(a)(ii)Arbitration Tribunal:

In cases where the total value of all claims/counter-claims exceeds Rs.2.00 Crore, the Arbitral Tribunal shall consist of a panel of three Officers not below GM level. For this purpose, the Employer will send a panel of more than 3 names to the contractor, within 60 days from the day when a written and valid demand for arbitration is received by the Employer. Contractor will be asked to suggest to the Managing Director at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by the Employer. The Managing Director shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. The Managing Director shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts Department. An officer of AGM rank of the Accounts Department shall be considered of equal status to-the GM of the other departments of IRCON for the purpose of appointment of arbitrator."

21. Thus, the bare perusal of clause 73.4 (a) (ii) makes it clear that petitioner is required to choose two names out of the panel of three members sent by Managing Director of the respondent. It further

provides that Managing Director out of the two names shall appoint at least appoint one out of the two and will also appoint the balance two arbitrators, duly indicating the presiding arbitrator. Thus, the respondent has been vested with the power of appointing 2/3rd of the panel including the presiding arbitrator. Thus, at the outset, the procedure provided is violative of "counter-balancing".

22. In ***Taleda Square (P) Ltd*** (supra) the coordinate Bench of this Court, while dealing with an identical clause inter alia held as under;

> *"4. Before dealing with the rival submissions of the parties, it would be apposite to note the relevant arbitration clause as contained in the lease agreement dated 31.03.2015. The same reads as under:*
>
> *"23.5 PROCEDURE FOR ARBITRATION*
>
> *23.5.1 In the event of any dispute between the parties hereto in the construction or operation of this Agreement, or the respective rights and liabilities of the parties on any matter in question, dispute on any account or as to the withholding by RLDA of any certificate to which the Lessee may claim to be entitled to, or if the RLDA fails to take a decision within the time specified in this regard and in any such case, but except in any of the Excepted Matters referred to in Article 23.4 of these conditions, the Lessee, after the time specified in this regard of its presenting its final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration. * * * **
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> *
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> *23.5.10 In cases not covered by article 23.5.9 above, the Arbitral Tribunal shall consist of three retired officers of a Railway public sector undertaking (not below GM level) and/or retired Gazetted officers of the Railway (not below S.A. grade). For this purpose, a list of more than 3 names drawn from the*

panel of Arbitrators maintained by RLDA or otherwise will be sent to the Lessee 'within 60 days from the date when the written and valid demand for arbitration is received by the Vice Chairman of the RLDA. The Lessee will be asked to suggest at least 2 names out of the list for appointment as Lessee's nominee within 30 days from the date of dispatch of the letter to the Lessee. The Vice Chairman of RLDA shall appoint at least one out of them as the Lessee's nominee and will, also simultaneously appoint the balance number of arbitrators from the panel of Arbitrators maintained by RLDA or otherwise, duly indicating the presiding arbitrator from among the 3 arbitrators so appointed. Vice Chairman shall complete this exercise of appointing the arbitral tribunal within 30 days from the receipt of the names of the Lessee's nominee.

5. From a perusal of the aforesaid, what emerges is that the methodology as prescribed under clause 23.5.10 of the agreement while entitling the claimant/petitioner to select one of the arbitrators from the panel of five offered by the respondent also empowers the respondents to nominate the other two arbitrators. Having given my thoughtful consideration to the rival submission of the parties, I find that the respondent's plea that the petitioner should be compelled to select its nominee arbitrator from the five member panel provided by the respondent cannot be accepted. Not only has such an approach been disapproved by the Apex Court in Voestalpine Schienen Gmbh (supra) but has also been categorically dealt with by a Coordinate Bench in Margo Networks Pvt. Ltd. (supra), wherein the Court while dealing with a similar clause pertaining to the railway board had, after examining various decisions of the Apex Court including the decisions in Voestalpine Schienen Gmbh (supra) and Central Organisation for Railway Electrification (supra), come to a conclusion that the panel of arbitrators being offered by the respondent therein, which was a ten member panel in the said case, was clearly restrictive and, therefore, proceeded to appoint the nominee arbitrators for both the petitioner and the respondent."

23.In ***Margo Networks Pvt Ltd & Anr. Vs. Railtel Corporation of India Ltd***.[6], this Court has also inter alia held as under:

> *"25. Thus, it was held by the Supreme Court in Voestalpine (supra) that:*
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> *i. Affording a panel of five names to the petitioner from which the petitioner was required to nominate its nominee arbitrator, was restrictive in nature; the same created room for suspicion that DMRC may have picked up its own favourite;*
>
> *ii. Choice should be given to the concerned party to nominate any person from the entire panel of arbitrators;*
>
> *iii. The two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator;*
>
> *iv. The panel ought not to be restricted/limited to retired engineers and/or retired employees but should be broad based and apart from serving or retired employees of government departments and public sector undertakings, the panel should include lawyers, judges, engineers of prominence from the private sector etc.*
>
> *26. CORE does not in any manner overrule Voestalpine (supra) or narrow down the scope thereof, although it does not deal specifically with the issue as to whether the panel afforded by the Railways in that case was in conformance with the principles laid down in Voestalpine (supra).*
>
> *28. In the present case, the respondent has shared a panel of ten arbitrators with the petitioner, all being ex-employees of the Railways/RailTel. Apart from the ex-employees of the railways, no other person has been included in the panel. Such a panel is*

[6] 2023 SCC OnLine Del 3906

clearly restrictive and is manifestly not "broadbased" and therefore, impinges upon the validity of the appointment procedure prescribed in clause 3.37 of the RFP.

35. Thus, in an appointment procedure involving appointment from a panel made by one of the contracting parties, it is mandatory for the panel to be sufficiently broad based, in conformity with the principle laid down in Voestalpine (supra), failing which, it would be incumbent on the Court, while exercising jurisdiction under Section 11, to constitute an independent and impartial Arbitral Tribunal as mandated in TRF (supra) and Perkins (supra). The judgment of the Supreme Court in CORE does not alter the position in this regard.

36. In the facts of the present case, applying the principles laid down in Voestalpine (supra) and in view of the aforesaid judgments of this Court, including in L&T Hydrocarbon Engineering Limited (supra), it is evident that the panel offered by the respondent to the petitioner in the present case is restrictive and not broadbased. The same adversely impinges upon the validity of the appointment procedure contained in clause 3.37 (supra), and necessitates that an independent Arbitral Tribunal be constituted by this Court"

7. In the light of the aforesaid, once the Coordinate Bench has dealt with an identical clause, I do not see any reasons as to why I should not adopt the same course of action. Even otherwise, I fail to appreciate as to how this position, where not only does the respondent have the power to unilaterally appoint two out of the three arbitrators and compels the petitioner to choose one of the panel of five arbitrators can be said to be meeting the test of "counter balancing" as laid down in Voestalpine Schienen Gmbh (supra) and Perkins (supra). The very fact that the petitioner was given an option to choose from a list of five persons in itself shows that the panel being offered by the respondent was not even sufficiently broad-based."

24. Thus in view of the consistent law laid down by the Hon'ble Supreme Court and the Co-ordinate Bench of this Court, the relevant clause fails to pass the acid test of "neutrality" "Counter-balancing" and "broad-based".

25. I consider that as far as the delay in filing of the petition is concerned that has duly been considered by this Court and vide order dated 21.07.2023 and the Court recorded its prima facie satisfaction after considering ***New Delhi Municipal Council*** (Supra). There is also substance in the contention of the petitioner that limitation is always a mixed question of law and fact and should be left to be adjudicated by the learned Arbitrator. In ***M/s. Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited*** [7] it was inter alia held as under:

> *"7.13. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator. Sub-section (1) of Section 16 provides that the Arbitral Tribunal may rule on its own jurisdiction, "including any objections" with respect to the existence or validity of the arbitration agreement. Section 16 is as an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator."*
>
> ....

[7] (2020) 2 SCC 455

"9.11. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator. ……..

9.12. In the present case, the issue of limitation was raised by the Respondent – Company to oppose the appointment of the arbitrator under Section 11 before the High Court.

Limitation is a mixed question of fact and law. In ITW Signode India Ltd. v. Collector of Central Excise a three judge bench of this Court held that the question of limitation involves a question of jurisdiction. The findings on the issue of limitation would be a jurisdictional issue. Such a jurisdictional issue is to be determined having regard to the facts and the law.

Reliance is also placed on the judgment of this Court in NTPC v. Siemens Atkein Gesell Schaft, wherein it was held that the arbitral tribunal would deal with limitation under Section 16 of the 1996 Act. If the tribunal finds that the claim is a dead one, or that the claim was barred by limitation, the adjudication of these issues would be on the merits of the claim. Under sub-section (5) of Section 16, the tribunal has the obligation to decide the plea; and if it rejects the plea, the arbitral proceedings would continue, and the tribunal would make the award. Under sub-section (6) a party aggrieved by such an arbitral award may challenge the award under Section 34……"

26. Thus, in view of the discussion made herein above this Court is of the considered opinion that the contention regarding delay in invoking the arbitration can be agitated before the learned arbitrator.

27. In regard to objection as to the non-service of under Section 21 of the Act, I consider that this plea is also liable to be rejected. Section 21 of the Act provides as under;

"21. Commencement of arbitral proceedings. —Unless otherwise agreed by the parties, the arbitral proceedings in respect of a

particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

28. Bare perusal of the provision demonstrates that it only indicates that in absence of any agreement between the parties to the contract, the arbitral proceedings in respect of the particular dispute commences on the date on which a request for dispute to be referred to the arbitration is received by the respondent. Thus, the basic intention of legislature behind is that before initiating the arbitration, the other party should be notified. The intention of the legislature also seems to be that there may be a possibility that the other party may settle the dispute amicably and there would be no need of going to arbitration. In the present case, it is a matter of the record that earlier the petition under Section 11 of the Act was filed by the petitioner which was disposed of with the following order dated 31.05.2018:

> *"Learned counsel for the petitioner submits that the petitioner has misplaced the proof of notices allegedly delivered to the respondent in terms of the Arbitration Agreement. As the respondent has denied the receipt of any of these notices, learned counsel for the petitioner submits that this petition itself may be considered as a notice in terms of Clause 73.1 of the Agreement. It is ordered accordingly. The respondent shall consider the contents of the petition as notice under Clause 73.1 and act on the same expeditiously.*
>
> *The petition is disposed of in the above terms, with no order as to cost.*
>
> *Dasti under the signature of the Court Master."*

29. It is also a matter of the record that thereafter the conciliation proceedings took place which culminated on 17.12.2020. Thus, it

cannot be said that the respondent were not aware about the dispute between the parties or that the petitioner wanted to initiate the arbitration proceedings.

30. Even otherwise, the Court must take a pragmatic and not a hyper-technical view, the notice dated 20.04.2021 unambiguously makes the intention of the petitioner clear for invoking the arbitration. The plea of the respondent is that if the petitioner has not followed the procedure, then the whole arbitration clause becomes redundant cannot be accepted. It is no longer *res integra* that if the procedure set out in the agreement, is in violation of the settled law as laid down in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd.***[8]**,** the whole arbitration clause cannot be held to be void. Such violative procedures have been held to be severable from the rest of the agreement. I consider that in view of this, none of the contention of the respondent is accepted, hence, rejected.

31. The claim amount is Rs.21,34,32,295/- along with interest @18% p.a.

32. In the circumstances, the matter be referred to the arbitral tribunal with the following directions:

    a. In view of the above, this Court considers it apposite to allow the present petition. Arbitration has duly been invoked and therefore Mr. Justice Swatanter Kumar, Former Judge, Supreme Court Mobile No.9560413636 is appointed as the sole Arbitrator to adjudicate the disputes between the parties with respect to the Agreements. The arbitration is to be conducted under the aegis of DIAC.

[8] (2020) 20 SCC 760

b. Both parties shall be entitled to raise preliminary objections as regards jurisdiction/arbitrability before the learned arbitrator, which shall be decided by the learned arbitrator, in accordance with law.

c. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing the requisite disclosures as required under Section 12 of the Arbitration and Conciliation Act, 1996 to the parties.

d. The learned Sole Arbitrator shall be entitled to a fee in accordance with the Fourth Schedule to the Arbitration and Conciliation Act, 1996; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator

e. The Parties shall share the fee of the learned sole Arbitrator and arbitral costs, equally.

f. 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 their merits, in accordance with law.

33. Needless to say, nothing in this order shall be tantamount to an expression of this court on the merits of the case.

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

DINESH KUMAR SHARMA, J

MARCH 15, 2024
Pallavi