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

Pronounced on: 04.03.2024

+ **ARB.P. 1342/2022**

GODAVARI PROJECTS (J.V) Petitioner
Through: Mr. Angad Sapra, Ms. Divi Khurana
Sapra and Ms. Saroj Lathi, Advs
versus

UNION OF INDIA Respondent
Through: Mr. Bhagwan Swaroop Shukla,
CGSC for UOI along with Mr.Sarvan
Kumar (GP).

**CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA**

JUDGMENT

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (the „A&C Act“) has been filed seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties.
2. The disputes between the parties have arisen in context of a tender process initiated by the respondent for “construction of dwelling units including allied services for officers & ORS at Mumbai (Army)”. The bid submitted by the petitioner was accepted by the respondent on 15.06.2016, and accordingly a Work Order dated 27.06.2016 was issued.
3. The applicable General Conditions of Contract contains an arbitration clause as under:

“60. Arbitration :-

All disputes, between the parties to the contract (other than those for which the decision of the DG MAP or any other person is by the contract expressed to be final and binding) shall, after written notice

by either party to the Contract to the other of them, be referred to the sole arbitration of serving officer having degree in Engineering or equivalent or having passed Final/Direct Final Examination of Sub Division II of Institution of Surveyors (India) recognised by the Govt. Of India to be appointed by the Engineer-in-chief, Army Headquarters, New Delhi or in his absence, the officer officiating as Engineer-in-Chief, Army headquarters, New Delhi whose decision shall be final, conclusive and binding. The Arbitration shall be governed by Arbitration and Conciliation Act, 1996.

Unless both parties agree in writing, such reference shall not take place until after the completion or alleged completion of the Works or termination or determination of the Contract under Condition Nos. 49 and 50 hereof.

Provided that in the event of abandonment of the works or cancellation of the Contract under Condition Nos. 46, 47 or 48 hereof, such reference shall not take place until alternative arrangements have been finalised by the Government to get the works completed by or through any other Contractor or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner milliate against the Government's right of recovery from the contractor as provided in condition 57 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place:

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of case and pleading in defense.

The Arbitrator may proceed with the arbitration, exparte, if either party, inspite of a notice from the Arbitrator, fails to take part in the proceedings.

The Arbitrator shall give his reasoned award in writing on all matters referred to him and shall indicate his findings, alongwith sums awarded, separately on each individual item of dispute.

The venue of arbitration shall be such place or places as may be fixed by the arbitrator in his discretion.

The award of the Arbitrator shall be final and binding on both the parties to the Contract”.

4. It is averred in the petition that the work, for reasons not attributable to petitioner, could not be completed within the stipulated time period and was terminated by the petitioner vide letter dated 14.09.2021. Thereafter, the petitioner has submitted its final bill, but the payment has not been released to the petitioner till date. It is further averred that the respondent vide letter dated 22.01.2022 has sought to illegally terminate/cancel the contract under Clause 48 of the GCC. Consequently, disputes have arisen between the parties and a notice invoking arbitration dated 15.04.2022 has been sent by the petitioner to the respondent.

5. Learned counsel for the respondent has submitted that the work was cancelled/terminated by the respondent vide letter dated 21.01.2022 since the petitioner was in violation of its contractual obligations. It is further contended that the balance work is to be completed at the risk & cost of the petitioner; reliance placed by the petitioner on the Government of India, Office Memorandum dated 19.02.2020, to terminate the contract is flawed and that the contract could not have been terminated by the petitioner. It is further submitted that the present petition is not maintainable due to insolvency proceedings being undertaken against one of the member constituents of the petitioner JV. Reliance in this regard has been placed on ***Indus Biotech (P) Ltd. v. Kotak India Venture (Offshore) Fund***¹. It is further submitted that the Clause 60 of GCC/arbitration clause provides as under:

"Provided that in the event of abandonment of the works or cancellation of the Contract under Conditions No. 46, 47 or 48 thereof, such reference shall not take place until alternative arrangements have been finalized by

¹ (2021) 6 SCC 436

the Government to get the works completed by or through any other Contractor or Contractors or Agency or Agencies.

It is submitted that appointment of arbitrator without the finalization of alternative arrangement will be contrary to the aforesaid stipulation. Although the said interpretation of the respondent found no favour with a Coordinate Bench of this court in judgment/order dated 24.02.2015 in Arb. P. 618/2014, the arbitral proceedings arising therefrom are stated to have been stayed by the Supreme Court vide order dated 26.11.2021 in Civil Appeal no. 1704/2016.

6. *Per contra*, learned counsel for the petitioner has submitted that the Office Memorandums issued by the Government of India dated 19.02.2020 and 13.05.2020, acknowledging the impact of corona virus and recognizing the restrictions and difficulties faced by the contracting parties, gave option to the parties to invoke Force Majeure Clause and also to terminate the contract without any financial repercussion on either side. It is further submitted that merely because one of the constituents of the petitioner JV is under insolvency cannot be a ground to oppose the present petition. It is submitted that a JV is a separate legal entity altogether. Reliance in this regard has been placed on *Gammon India Limited v. Commissioner of Customs, Mumbai*², *New Horizons Limited v. Union of India*³ and *Corpus Juris Secundum*. It is further submitted that in any case insolvency proceedings under the IBC prohibit proceedings “against” the corporate debtor and not “by” him. Reliance in this regard has been placed on *Power Grid Corporation of India Ltd vs. Jyoti Structures Ltd.*⁴, and *New Delhi*

² (2011) 12 SCC 499

³ (1995) 1 SCC 478

⁴ (2018) 246 DLT 485

*Municipal Council v. Minosha (India) Ltd.*⁵. It is further submitted that it has already been more than two years since termination of the contract and the respondent has not taken any steps for issuing a fresh tender in terms of Clause 60 of GCC. It is submitted that in any case, the said part of the Clause 60, which restricts the right of the petitioner to invoke arbitration till alternative arrangements are made by the Government to get the works completed, is hit by Sections 28 and 29 of the Indian Contract Act, 1872. Reliance in this regard has been placed on *MFAR Constructions Pvt. Ltd. v. Married Accommodation Project*⁶, *Ivrcl Limited v. Union of India*⁷, *Mohindra Bros v. Union of India*,⁸ and *Sai Enterprises vs Union of India*.⁹

7. I have heard the parties and perused the record. I find no merits in the objections raised by the respondent. The reasons are enumerated hereunder.

8. In terms of the settled legal position, the scope of inquiry in a petition under Section 11 of the A&C is limited to examination of the existence of an arbitration agreement.

9. Whether or not it was permissible for the petitioner to terminate the contract by relying upon the Office Memorandum issued by the Government of India, is necessarily required to be adjudicated in the arbitral proceedings.

10. Further, concept of a joint venture has been explained by the Supreme Court in *New Horizons (supra)*, wherein it has been observed that a JV “is a legal entity in the nature of a partnership”. Relevant extract of the said judgement is as under:

⁵ (2022) 8 SCC 384

⁶ 2012 SCC OnLine Del 5965

⁷ 2015 SCC OnLine Ker 13527

⁸ 2012 SCC OnLine J&K 370

⁹ Judgement/order dated 15.09.2017 passed in ARB-36/2017 by Punjab and Haryana High Court.

“24. The expression “joint venture” is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. (Black's Law Dictionary, 6th Edn., p. 839) According to Words and Phrases, Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p. 117, Vol. 23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, chemicals, electronic, atomic fields. (Black's Law Dictionary, 6th Edn., p. 342) Joint venture companies are now being increasingly formed in relation to projects requiring inflow of foreign capital or technical expertise in the fast developing countries in East Asia, viz., Japan, South Korea, Taiwan, China, etc. [See Jacques Buhart : Joint Ventures in East Asia — Legal Issues (1991).] There has been similar growth of joint ventures in our country wherein foreign companies join with Indian counterparts and contribute towards capital and technical know-how for the success of the venture. The High Court has taken note of this connotation of the expression “joint venture”. But the High Court has held that NHL is not a joint venture and that there is only a certain amount of equity participation by a foreign company in it. We are unable to agree with the said view of the High Court.”

11. Even assuming the petitioner JV is under insolvency, the same will not prevent it (corporate debtor) from filing an application under Section 11 of the A&C Act against another party, since the said proceedings are for the benefit of the corporate debtor. The Supreme court in **Minosha** (supra), has held as under:

“31. Under the IBC, by virtue of the order admitting the application, be it under Sections 7, 9 or 10, and imposing moratorium, proceedings as are contemplated in Section 14 would be tabooed. This undoubtedly does not include an application under Section 11(6) of the 1996 Act by the corporate debtor or for that matter, any other proceeding by the corporate debtor against another party. At least there is no express exclusion of the jurisdiction of the Court or authorities to entertain any such proceeding at the hands of the corporate debtor. However, we must not be oblivious to

the other provisions as well. Under Section 17, the management of the affairs of the corporate debtor is taken over by the interim resolution professional. The powers of the Board of Directors or the partners of the corporate debtor shall stand suspended and it would be exercised by the interim resolution professional... ”

12. Needless to say, it is a disputed fact whether the petitioner JV is under insolvency. Respondent will be at liberty to raise the issue of petitioner JV’s alleged incapacity to institute proceedings in the arbitration.

13. The reliance placed by the respondent on the proviso of Clause 60 of GCC to contend that since the contract has been cancelled by the respondent, there can be no reference to the arbitration till alternative agreements have been made by the Government to get the works completed by or through any other also without any merit. The Kerala High Court in *Ivrcl* (supra), has held that such conditions in an arbitration clause are treated only as an enabling provision which enables the department to raise their claims in respect of the loss caused as a result of rearrangement and they cannot be treated as a fetter on the right of the petitioner to seek remedies on account of alleged breach of contract. Relevant extract of the said judgement is as under:

“...Provided that in the event of abandonment of the Works or cancellation of the Contract under Condition Nos. 52, 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies....

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28. There seems to be considerable force in the above submission. It is true that going by Condition No. 70 of the General Conditions that rearrangement of work seems to be a condition for seeking a reference to arbitration. But as rightly pointed out by the learned Senior Counsel for the petitioner, it is only an enabling provision

which enables the department to raise their claims in respect of the loss caused as a result of rearrangement. That cannot be treated as a fetter on the right of the petitioner to seek remedies on breach of contract. It could not be said that cause of action for the petitioner arises only on rearrangement of the work by the department. One need not labour much on this aspect. In the decision reported in Delta Foundations and Constructions v. Kerala State Construction Corporation (2003 KHC 107) wherein an identical question was considered, it was held that going by Article 55 of the Limitation Act, the time begins to run from the date on which the contract is broken and not when the rearrangement is made...

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32. Coming to the present claims, while the petitioner would complaint of illegal termination, the department would put the blame on the petitioner. The definite stand of the department is that as per Condition No. 70, only after rearrangement of work, any one of the parties get a right to seek arbitration.

33. As already noticed, the above contention cannot be countenanced. At the risk of repetition, one may notice the period of limitation. As far as the petitioner is concerned, the time commences to run from the date of breach of contract. It also does not stand to reason to hold that cause of action will commence only on a particular act being done by the respondent. As already noticed, the said clause is intended for the benefit of the department and cannot be taken as a ground to postpone the remedies i.e., to seek reference by the contractor on breach of contract. If one is to accept the contention of the respondent, in case the department decides not to make rearrangement for the work, or delays the same deliberately either the claim of the contractor would become barred or it would never arise.

34. There is nothing in Condition No. 70 which is relied on by the department to show that they were bound to take steps for rearrangement of the work within a stipulated period. It is difficult to understand how the period of limitation against the petitioner could be postponed by an act depending on the whims and fancies of the department which is essential to assess the damage or loss sustained by the department as a consequence of the rearrangement of the work.

35. It is significant to notice that the entire claim made by the contractor and the claim that is expected to be raised by the department consequent on the act of the petitioner are distinct and different. May be that when the claim is referred to the Arbitration Tribunal, the department may not be able to prefer a counter claim.

Apart from the fact that such a contingency has already been referred to, it does not stand to reason also. Therefore, the department can have no grievance.”

14. Further, the petitioner’s contention is that it had already terminated the contract on 14.09.2021 and thereafter the cancellation of the contract by the respondent is a farce and an attempt to build up a defence. Further, it is pointed out that the period of the contract had also come to end before reference was sought. In this context, the Jammu and Kashmir and Ladakh High Court in **Mohindra Bros** (supra), has held as under:

“Perusal of Condition 70, read as whole, demonstrates its object that arbitration may not be permissible during the period of Contract unless there was agreement between the parties for reference to arbitration or in the event of abandonment of Works or cancellation thereof, until alternate arrangements were finalized by the Government to get the Work completed by or through any other Contractor or Agency. The completion of Contract referred to in the Condition means the period initially fixed for completion of Contract, of course, including the extended period thereto. After the expiry of the period of Contract or extension allowed therefor, the agreement of the parties and the Proviso appended to Condition 70 thereof may not have any application, in that, after the expiry of period of Contract or extended period thereof, resort to arbitration is permissible for referring the matter to arbitration. Abandonment, cancellation or completion of work by any other Contractor or Agency would also not operate as impediment for appointment of Arbitrator when the period of Contract had otherwise expired.”

15. The above observations in **Ivrcl** (supra) and **Mohindra Bros** (supra), are squarely applicable in the present case. Also, the respondent cannot be permitted to frustrate the arbitration agreement by failing to make the alternative arrangements for inordinately long period. Almost two years have expired since the date of cancellation of the contract and the alternative arrangements are apparently not yet in place. In this context, the Punjab and Haryana High Court in **Sai Enterprises** (supra), has held as under:

“2. The parties had admittedly entered into a contract clause 37 whereof contains an arbitration agreement. Clause 37 entitles the respondents to appoint a serving officer which is not permissible under the amended Act. The proviso states that in the event of abandonment of the supplies or cancellation of the contract under condition Nos. 26, 27 or 28 thereof, the reference shall not take place until alternative arrangements have been finalized by the government to get the supplies completed by or through any other contractor or contractors or agency or agencies.

3. The respondents contend that the petitioner abandoned the work on 17.11.2016.

4. I will presume that to be so. I will also presume that the respondents have not as yet made the alternative arrangements as contemplated in the proviso to clause 37 of the agreement. The respondents cannot frustrate an arbitration agreement by failing to make the alternative arrangements. It is now ten months since the alleged abandonment of the work.

5. Faced with this, it is contended that the cancellation was on 03.08.2017. The respondents can always make alternative arrangements. That would not affect the appointment of the arbitrator. In any event, to leave no scope for grievance, the arbitrator shall not enter upon the reference for a period of four weeks hereafter.”

16. The stipulation in the arbitration agreement in the present case, that a serving officer of the respondent shall act as the arbitrator, is an invalid stipulation which makes it incumbent on this Court to appoint an independent sole arbitrator to adjudicate the disputes between the parties, as mandated in *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*¹⁰

17. Accordingly, Mr. Justice (Retd.) Krishna Murari, Former Judge Supreme Court of India, (Mob No.-9415308516) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

18. The respondent shall be entitled to raise preliminary objections as regards jurisdiction/arbitrability, which shall be decided by the learned arbitrator, in accordance with law.

¹⁰ (2020) 20 SCC 760

19. 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.

20. 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.

21. The parties shall share the arbitrator's fee and arbitral costs, equally.

22. 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.

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

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

MARCH 04, 2024/hg

SACHIN DATTA, J.