**** THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY***

+ ARBITRATION APPLICATION No.68 of 2019

% 09.06.2020

Indu Eastern Province Projects Private Ltd.,
represented by its Director

.. Applicant

And

$ Telangana Housing Board (Formerly Andhra Pradesh Housing Board), represented by its Vice Chairman and Housing Commissioner.

.. Respondent

! Counsel for the applicant : Sri Vivek Jain

Counsel for respondent : Special Government Pleader.

< Gist :

> Head Note :

? Citations:

1. 2019 SCC Online TS 1658
2. (2018)15 SCC 678
3. (2014)6 SCC 677
4. (2013)1 SCC 641
5. 2019(10) SCALE 619
6. 2019 SCC Online NCLAT 526
7. (2016)10 SCC 386
8. (2019)8 SCC 714
9. (2004)10 SCC 504
10. (2006)13 SCC 240

DATE OF JUDGMENT PRONOUNCED : 09.06.2020

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

1. Whether Reporters of Local Newspapers may be allowed to see the Judgments ? : Yes / No

2. Whether the copies of judgment may be marked to Law Reporters/Journals : Yes / No

3. Whether Their Lordship wish to see the fair copy of the Judgment ? : Yes / No

THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

Arbitration Application No.68 of 2019

O R D E R

The applicant is M/s Indu Eastern Province Projects Private Ltd., represented by its director, and the respondent is the Telangana Housing Board (for short 'THB') (Formerly Andhra Pradesh Housing Board), represented by its Vice Chairman and Housing Commissioner.

2. The present application is filed under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') read with the Scheme for Appointment of Arbitrators 1996, as framed by the Telangana High Court, Hyderabad, seeking to appoint an Arbitrator on behalf of the respondent under Clause 20.2 of the Development Agreement – cum – GPA, who would in turn, appoint the Presiding Arbitrator, along with the Arbitrator nominated by the applicant, to resolve the disputes between the applicant and the respondent, arising out of the agreement dated 22.03.2006, and to pass an award in accordance with law.

3. The case of the applicant, as stated in the arbitration application is that, the respondent – THB, called for tenders for development of a residential and commercial project over an extent of land admeasuring Acs.50.00, belonging to THB, situated in Sy.No.22(P) of Bandlalguda, 117 and 127/1 of Tattiannaram, Rangareddy District. In the said tender process, M/s Indu Projects Ltd., participated, and became the successful bidder, and the respondent - THB entered into a development agreement with the said successful bidder on 22.03.2006. With the prior knowledge and consent of the respondent - THB, and as per the terms of the agreement dated

22.03.2006, M/s Indu Projects Ltd., assigned the contract to the applicant, which is formed as a Special Purpose vehicle, for execution of the contract, and the respondent – THB, executed a General Power of Attorney ('GPA'), dated 26.02.2008 vide registered document No.23/2008 in favour of the applicant.

4. As per the terms of GPA dated 26.02.2008, the applicant was required to take up work pertaining to designing and planning, financing, marketing, development of necessary infrastructure, provision of necessary services, operation and maintenance of infrastructure, administration and management of the project among other obligations, in conformity with detailed project report (DPR), development control rules etc.

5. The case of the applicant is that it is required to provide a detailed report consisting of development plan, architectural plans, financial structure and marketing strategy, and the respondent –THB was required to review and approve DPR within 30 days and communicate its acceptance, and unless some modifications are suggested, the applicant is required to undertake development works, apart from submitting a bank guarantee. The applicant in terms of the contract, submitted bank guarantees, which were returned over a period of time by the respondent, upon payment of the corresponding installments towards land cost.

6. It is stated that under the agreement, the project was required to be completed originally by 25.08.2010, but, subsequently under supplementary agreement dated 02.12.2009, it was extended till 30.06.2011.

7. In the application, the applicant has referred to various clauses under the agreement dated 22.03.2006, where-under the obligations of the parties under the contract and the revenue share of the THB was mentioned. It is further stated that the applicant has complied with its obligation, and could complete the project to an extent of 80%, but, as the respondent – THB failed to resolve the following issues, it could not complete the project, even within the extended period:

(i) Resolution as regards shortfall of the land to a tune of Acs.2.15 which has directly affected the villas, commercial land apartments;

(ii) Failure to give clarity in regard to changes in the plan on account of the requirement for construction of houses for Economically Weaker Sections (EWS) in terms of G.O.Ms.No.526 dated 31.07.2008, which became a stumbling block for approvals from GHMC;

(iii) Delay in handing over the land of Geological Survey of India,

(iv) Delay in shifting of urban forestry;

(v) Delay in approval of plans before submission to sanctioning authority;

(vi) Failure to give credit for the excess amount of Rs.58.84 lakhs incurred by the applicant for removal of urban forestry;

(vii) Delay in change of land use;

(viii) Failure to adjust a sum of Rs.1.39 crores paid in excess for deficit land on ground and;

(ix) Non execution of registered sale deeds in favour of purchasers, etc.

8. The further averments in the arbitration application disclose that the respondent - THB issued notice dated 21.04.2015, stating that the applicant has committed events of default under Clause 17 of the development agreement, and required the applicant to provide point wise clarifications on each of the issues involved, and to show cause why the action should not be taken against the applicant for termination of the development agreement and for revoking the GPA. The case of the applicant is that, it submitted a detailed reply on 26.05.2015, answering the issued raised in the said notice, but without resolving the issues raised by the applicant, which are noted above, the respondent – THB, issued final show

cause notice vide No.686/BGuda/AE/PC/2015 dated 08.06.2016 reiterating the very same allegations, which were made in the earlier show cause notice dated 21.04.2015, alleging that the applicant has committed the events of default as per Clause 17.1.1(ii), (iii) and (v) of the Development agreement, and asking the applicant to show cause why the THB shall not proceed to terminate the development agreement, revoke the power of attorney and resume the un-utilized land of Acs.9.233, earmarked for apartments and commercial area, within fifteen days from the date of receipt of the notice, with a default clause.

9. It is stated that under Clause 20.1 of the agreement, dispute resolution mechanism is agreed, but the respondent without taking recourse to the said mechanism, issued the final show cause notice and the same is contrary to the terms of the contract. Therefore, challenging the said show cause notice dated 08.06.2016, the applicant filed W.P.No.22032 of 2016, and this court by interim order dated 27.07.2016, granted *status quo*, and subsequently based on the submissions of both the counsel and also taking into consideration that Government vide G.O.Ms.No.1061 General Administration (Cabinet) Department, dated 16.05.2016, constituted a Cabinet Sub-Committee to resolve the issues involved in the project in question, and also in other joint Venture Projects of the Housing Board, disposed of the writ petition vide order dated 20.09.2016, giving liberty to the applicant to make a comprehensive representation to the Committee to resolve the issue, and the said committee was to take appropriate decision, and this court further directed both the parties to maintain *status quo* for a period of four weeks from the date of the said order.

10. The case of the applicant is that as per the directions of this court, it made representations on 26.07.2016 and 23.09.2016 with regard to its proposals, and it was asked to attend the meeting of the Cabinet Sub-Committee on 11.11.2016. The further case of the applicant is that though it has been making efforts to resolve the differences as per the directions of this court in W.P.No.22032 of 2016, and to complete the smaller parts of the project, which remained undeveloped, the respondent eventually issued proceedings bearing Lr.No.150/B.Guda/AE/PC/2006-1 dated 28.02.2019 terminating the development agreement and directing the applicant to handover the unused / un-development land to an extent of Acs.8.008 in the project to the respondent. The respondent also issued Lr.No.150/B.guda/AE/PC/2006-2 dated 28.02.2019 stating that the Government has approved for proceeding with the project under 'one time settlement' subject to certain conditions in respect of land in Acs.41.992.

11. Challenging the above said proceedings, the applicant herein filed C.O.P.Nos.18 and 19 of 2019 on the file of XXIV Additional Chief Judge cum Commercial Court, City Civil Court at Hyderabad, under Section 9 of the Arbitration and Conciliation Act, 1996, for interim relief, pending resolution of disputes by way of arbitration, and the trial court, by separate interim orders dated 11.03.2019, granted interim injunction till 25.03.2019, while ordering notice, and the said orders were extended from time to time, and they are stated to be in force as on today.

12. In spite of the best efforts of the applicant to hold negotiations for an amicable solution, as nothing has been forthcoming from the respondent, except coercive action, which is contrary to the contract, and detrimental to

its interest, the applicant issued notice dated 18.03.2019, invoking the arbitration under Clause 20.2, and nominating Sri Justice K.C.Bhanu, retired Judge of the erstwhile High Court of Andhra Pradesh, as an Arbitrator on its behalf, and calling upon the respondent to nominate an arbitrator on their behalf, who would then jointly chose the Presiding Arbitrator. The respondent vide its reply dated 16.04.2019 contended that Arbitrator cannot be appointed between the parties and made certain allegations against the applicant and failed to nominate Arbitrator on its behalf.

13. In view of the above facts and circumstances, as the respondent failed to nominate an arbitrator on its behalf, the applicant filed the present application seeking to nominate an Arbitrator on behalf of the respondent under Clause 20.2 of the Development Agreement dated 22.03.2016.

14. The Secretary, Telangana, Housing Board, filed counter affidavit on behalf of the respondent.

15. In the counter affidavit it is stated that M/s Indu Projects Limited, which is the lead consortium member of M/s Indu Embassy Consortium, is the developer company of the project in question. Certain lenders / banks have approached the National Company Law Tribunal, Hyderabad Bench, Hyderabad in CP (IB)No.373/7/HDB/2018, under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short 'the IBC') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016, and the said Tribunal, vide order dated 25.02.2019, admitted the application filed by the lenders, and initiated Corporate Insolvency Resolution Process (CIRP), and appointed an Interim Resolution Professional (IRP) on 05.03.2019 and the management of the affairs of the developer company

i.e., M/s Indu Projects Limited, has been taken over by the Interim Resolution Professional. Therefore, it is stated that when Developer Company of the Joint Venture Project is under moratorium, the arbitration application, if any, has to be filed by the said IRP. Hence the present application seeking to nominate an arbitrator on behalf of the respondent is not maintainable.

16. That pursuant to the agreement between M/s Indu Projects Limited and the respondent dated 22.03.2016, the applicant is the Special Purpose Vehicle, formed by the said consortium for the purpose of the project, and a power of attorney was signed on 26.02.2008, and as per the development agreement, the development company i.e., the applicant, has to complete the project within a period of 30 months from the date of singing of the power of attorney i.e., the applicant has to complete the project by 25.08.2010, and as per the clauses 17 of the agreement, if the developer commits any material breach of the terms of the agreement, the respondent is entitled to terminate the agreement and revoke the power of attorney. The applicant could not complete the project by the stipulated date i.e., 25.08.2010 and, however, based on the request of the applicant, time was extended for completion of the project till 30.06.2011, subject to certain conditions, and a supplementary agreement was entered on 02.12.2009. The case of the respondent is that in the said supplementary agreement, the applicant, has agreed to complete the project within the extended time and that it will not seek for further extension, and under clause No.4 of the supplementary agreement, the applicant has categorically accepted that there is no fault on the part of the respondent for the delay, and in view of

the said condition, the applicant cannot now attribute the delay to the respondent.

17. It is further stated that the applicant could not complete the project even by the extended time, and vide letters dated 5.10.2012 and 19.11.2012 the applicant once again sought for extension of time. By that time, as the Vigilance and Enforcement Department had started enquires into the joint venture projects of the respondent with regard to certain allegations, and CBI had also started investigation in the project, as part of its investigation in the disproportionate assets/money laundering cases; the respondent in its meeting held on 12.12.2012, resolved to refer the request of the applicant to the Government, and accordingly vide letter dated 4.1.2013, the request of the applicant was referred to the Government. However, as the applicant committed default in completing the project and in complying with its obligations under the contract, and also sought for further extension for the second time, and as the investigations by Enforcement Directorate and CBI are pending, the respondent has taken a decision not to undertake any further registration in favour of the purchasers, and issued Circular No.100/AE/PC/2010 dated 07.02.2012, directing all the Executive Engineers to stop registrations, and several purchasers have filed W.P.Nos.34550 and 38372 of 2012, 11590, 13059, 13212 and 13014 of 2014 and 14271 and 14072 of 2014. This court initially passed interim orders directing the respondent to register the flats in favour of the purchasers. Subsequently, on filing of the vacate petitions, bringing to the notice of this court, the defaults committed by the applicant, this court by order dated 29.12.2014, directed the respondent and the applicant to hold

negotiations, and to come up with a solution for redressing the grievance of the purchasers, as they are not at default, while at the same time, safeguarding the interest of the Housing Board. Accordingly, negotiations were held and the respondent intimated the applicant the conditions to be satisfied for resuming the registrations, subject to the approval of the Government. But the applicant did not come forward to comply with the conditions stipulated by the respondent, and sought for concessions, for which the respondent has not agreed, and the same was reported to the Government. On reporting of these facts, this court vide order dated 29.12.2014, directing the Government to take decision on the proposals sent by the Housing Board within a period of three weeks, and accordingly, the respondent has sent proposals.

18. That pendency of the proposals sent to the Government will not come in the way of the respondent to take action for the events of default committed by the applicant. As the applicant has committed defaults under clauses 17.1 of the agreement, the respondent issued show cause notice dated 08.06.2016, informing the applicant the defaults committed by it, and to show cause why the respondent shall not terminate the development agreement, revoke the power of attorney and resume the unutilized land to an extent of Acs.9.233. The applicant has submitted its reply on 30.06.2016, and while the same was under consideration, the applicant has filed W.P.No.22032 of 2016, and this court initially passed interim orders of *status quo*.

19. It is further stated that the Government of Telananga issued G.O.Ms.No.1061, General Administration (Cabinet), Department dated

16.05.2016, constituting a Cabinet Sub-Committee, for making recommendations on the issues pertaining to the Housing Board Projects, including the project in question, and for granting extension of time. When the same was brought to the notice of this court, and that the applicant also informed this court that it had submitted letter dated 26.07.2016 requesting the Government to provide opportunity to represent before the said Cabinet Sub-Committee, this court, vide order dated 20.09.2016 in W.P.No.22032 of 2016, gave liberty to the applicant to make a comprehensive representation and respondent was directed to maintain *status quo* for period of four weeks.

20. The said Cabinet Sub-Committee made its recommendations and the same were accepted by the Government vide Letter No.758/HB & OP. A1/2019-1 dated 07.02.2019. In pursuance of the same, the respondent issued two letters to the applicant. In Lr. No.150/B.guda/AE/PC/2006-2 dated 28.02.2019, the applicant was informed that in respect of the Acs.41.992 under the project, the Government have approved for proceeding with the project under 'one time settlement scheme' subject to certain conditions, and with regard to balance of Acs.8.008, the Government decided to revoke the power of attorney and to resume the said land. For resumption of land to the said extent of Acs.8.008, the respondent issued Lr.No.150/B.guda/AE/PC/2006-1 dated 28.02.2019. Accordingly, public notice was issued in news papers on 03.03.2019. Against the said letters, applicant filed C.O.P.Nos.18 and 19 of 2019, and the trial court granted orders of *status quo*.

21. It is stated that the applicant has not agreed to comply with the conditions recommended by the Cabinet Sub-Committee for resumption of

the project and for entering into the supplementary agreement and for resumption of registrations, and on the other hand, challenged the said proceedings. As the applicant has committed defaults under Clause 17.1 of the agreement, and also not complied with the conditions recommended by the Cabinet Sub-Committee, it is not entitled for invocation of the arbitration clause. To the notice dated 18.03.2019 issued by the applicant invoking arbitration clause, the respondent issued reply dated 16.04.2019 denying the same. Therefore, it is stated that there are no merits in the arbitration application, and the same may accordingly be dismissed.

22. Learned counsel appearing for the applicant reiterating the above averments made in the arbitration application, further submits that there is no dispute that M/s Indu Projects Ltd., is the successful bidder and it has entered into an agreement with the respondent on 22.03.2006, and the applicant herein is formed as a special purpose vehicle for execution of the project, and the respondent executed a GPA dated 26.02.2008 in favour of the applicant for the said purpose. Therefore, it cannot be said that there is no privity of contract between the applicant and the respondent. As the respondent committed defaults in complying with its obligations under the agreement dated 22.03.2006, the applicant could not complete the project within the time granted, and for the defaults committed by the respondent, the applicant cannot be mulcted with liability. As the dispute arose under the agreement and the same could not be settled through negotiations, the applicant issued notice dated 18.03.2019 invoking arbitration clause, and as the respondent failed to nominate arbitrator on its behalf, the applicant is constrained to file the present application.

23. Learned counsel would further submit that as per the agreement, the project was required to be completed by 25.08.2010 and the period was extended till 30.06.2011 and a supplementary agreement was executed in that regard. Learned counsel referring to the alleged defaults committed by the respondent, which are extracted above, submits that because of the said defaults, the applicant could not complete the project even within the extended period, and though it has been trying to resolve the issue by negations, the respondent is not coming forward for resolving the issue, and on the other hand, has taken coercive steps for termination of the contract. Therefore, for resolution of the disputes arising out of the contract, the present arbitration application is filed. With these submissions, learned counsel for the applicant, seeks to nominate an Arbitrator on behalf of the respondent.

24. On the other hand, learned Special Government Pleader attached to the office of the Advocate General initially raised the objection with regard to maintainability of the application. He submits that the respondent has entered into agreement with M/s Indu Projects Limited, which is the lead member of M/s Indu Embassy Consortium and the present applicant is formed as a special purpose vehicle to execute the project. The lenders of M/s Indu Project Ltd., have initiated Corporate Insolvency Resolution Process (CIRP), and the NCLT while admitting the proceedings, appointed an Interim Resolution Professional and in view of the same, the management of the affairs of the Developer Company i.e., M/s Indu Project Ltd., has been taken over by the Interim Resolution Professional. Therefore, he submits that when the developer of the joint venture project is under moratorium, if any application for arbitration has to be filed, the same has to be filed only by the

Interim Resolution Professional, and the not by the applicant, which is the subsidiary of the developer / Corporate Debtor. Therefore, the arbitration application is not maintainable.

25. He further submits that the agreement was entered into between M/s Indu Projects Limited, and the respondent has not entered into the agreement with the applicant and the arbitration clause is contained in the agreement entered into with M/s Indu Projects Limited dated 22.03.2006, and the applicant cannot invoke the said arbitration clause.

26. Learned Special Government Pleader submits that the events of default under clause 17.1.1(vi) and (vii), refer to lenders of the developer company enforcing or initiating measures to enforce any security over any of the assets of the developer company and initiating liquidation and other proceedings. In the present case, as already stated, the lenders of the developer company have initiated Corporate Insolvency Resolution Process and Interim Resolution Professional has also been appointed by NCLT. He submits that initiation of such proceedings against the developer company, itself, would constitute an event of default under clause 17.1.1(vi) and (vii), and such default cannot be resolved by an arbitrator, and under clause 17.1.3, the respondent is entitled to immediately terminate the agreement.

27. Learned counsel further submits that under sub-clause (viii) of clause 17.1.1 of the development agreement, if, as a result of any act or omission of the developer company, a governmental authority, expropriates, confiscates, seizes, nationalizes, or compulsorily acquires any of the assets of the Developer Company, or the shares of the Developer Company owned by

the developer; such acts would constitute default, and under Clause 17.1.3, the respondent is entitled to immediately terminate the agreement. Learned counsel submits that in the present case, based on the investigation conducted by the Enforcement Directorate under the Prevention of Money Laundering Act, 2002, vide Provisional Attachment Order No.01/2018 dated 03.01.2018, it has attached the unutilized land in the project, on the ground that the same are proceeds of crime, and involved in the offence of money laundering. In view of the same, the respondent is entitled to terminate the contract under Clause 17.1.3.

28. Learned counsel submits that the above events of default committed by the applicant under clause 17.1 (vi), (vii) and (viii), are not the issues that can be resolved by arbitration, therefore, the applicant cannot be permitted to invoke the arbitration clause under Clause 20.2 of the agreement dated 22.03.2006.

29. Learned Special Government Pleader further submits that the applicant could not complete the project within the time initially granted by the respondent, and subsequently, on the request of the applicant, time was extended up to 30.06.2011 and a supplementary agreement was entered into, and as per the clause 4 of the said agreement, the applicant has categorically admitted that there is no fault on the part of the respondent for the delay. Learned counsel submits that having admitted that there is no fault on the part of the respondent, the applicant, without completing the project even by the extended date, cannot attribute the delay to the respondent, and hence cannot invoke the arbitration clause.

30. Learned Special Government Pleader would further submit that to look into the joint venture projects of the respondent, including the project in question, Government constituted a Cabinet Sub-Committee and the said Committee, after giving opportunity to the applicant, and also considering the directions of this court in W.P.No.22032 of 2016, for resolving the issue, made recommendations, as 'one time measure' for extension of time and for proceeding with the project, subject to certain conditions, and the same have been approved by the Government. The applicant having submitted to the jurisdiction of the said Cabinet Sub-Committee, cannot invoke the arbitration clause, and the arbitrator will not be in a position to decide the correctness or otherwise of the recommendations of the said Cabinet Sub-Committee, which have been approved by the Government. With these submissions, learned Special Government sought for dismissal of the application.

31. In reply to the above submissions, learned counsel for the applicant submits that in the proceedings initiated by the lending institutions before the National Law Tribunal Hyderabad Bench, Hyderabad in CP(IB).No.372/7/HDB/2018 dated 25.02.2019, the Tribunal, while admitting the petition and appointing the interim resolution professional, has passed certain directions and the said directions does not prohibit the initiation of the arbitration proceedings and hence, it cannot be said that the application filed by the applicant, which is the subsidiary of M/s Indu Projects Ltd. – corporate debtor, is not maintainable. In support of this contention, learned counsel relied on the judgment of the learned single Judge of this court, in

TECPRO SYSTEMS LTD. v. TELANGANA STATE POWER GENERATION COMPANY LTD.[1]

32. Learned counsel for the applicant submits that the applicant herein is engaged by M/s Indu Projects Ltd., for execution of the project with the consent of the respondent – THB vide letter dated 07.11.2006, and the respondent has also executed a GPA dated 26.02.2008 in favour of the applicant and all through, the respondent has been making correspondence with the applicant and it has also issued show cause notices dated 21.04.2015 and 08.06.2016 to the applicant and the applicant also filed explanations to the said show cause notice, and the applicant also filed W.P.No.22032 of 2016 against the show cause notice dated 08.06.2016, further, the applicant made negotiations with the respondent for resolution of the dispute and also made representations to the Cabinet Sub Committee. He submits that as the disputes raised by the applicant remained unresolved in spite of negotiations and the respondent has taken coercive steps for termination of the agreement, and as the agreement provides for arbitration clause, the applicant, in view of the above facts and circumstances, and as the disputes arose out of the agreement dated 22.03.2006, is entitled to invoke the arbitration clause for resolution of the dispute, though it is not a party to the agreement. In support of this submission, learned counsel for the applicant, relied on the judgment of a learned single Judge of this court, referred to one supra.

33. Learned counsel submits that because of the defaults committed by the respondent in discharging its obligation under the agreement,

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[1] 2019 SCC Online TS 1658

applicant could not complete the project within time. He submits that the respondent cannot be permitted to take advantage of its own default, and contend that arbitration clause cannot be invoked.

34. With regard to event of default under Clause 17.1.1.(viii), learned counsel submits that the said event would show that when the Government Authority expropriates, confiscates, seizes, nationalizes, or compulsorily acquires any of the assets of the developer company, then the respondent can terminate the agreement under Clause 17.1.3. The contention of the learned counsel for the applicant is that, such events of defaults would arise only after conclusion of proceedings and when there is eventual confiscation, seizure etc., of the assets of the developer company. In the present case, the attachment of the subject property is only a provisional attachment and there is no conclusion of trial and the issues are pending. Hence the said allegations, does not constitute events of default under Clause 17.1.1.(viii).

35. Learned counsel further submits that the enquiries by the Enforcement Directorate and the CBI with regard to awarding of the contract, i.e., with regard to allegations of the fraud, cannot nullify the effect of arbitration agreement between the parties, and arbitration clause need not be avoided and the parties have to be referred to arbitration for resolving the disputes arising out of the agreement. In support of this contention, learned counsel relied on the judgment of the Apex Court in ***AMEET LALCHAND SHAH v. RISHABH ENTERPRISES***[2]. Relying on the judgment of the Apex Court in ***SWISS TIMING LTD. v. COMMONWEALTH GAMES 2010***

[2] (2018) 15 SCC 678

ORGANIZING COMMITTEE[3] learned counsel further submits that registration of criminal case in relation to agreement concerned on grounds of fraud, corruption and collusion against certain members of both parties, is not an absolute bar to refer disputes to arbitration.

36. In view of above facts and circumstances, learned counsel for the applicant submits that as the disputes arose between the parties under the agreement and as there is arbitration clause in the agreement, this court may nominate an arbitrator on behalf of the respondent, as it refused to nominate an arbitrator on its behalf. Learned counsel further submits that under Section 16 of the Act, the respondent can raise all the contentions before the Arbitral Tribunal, and the said Tribunal can decide the same in accordance with law. With these submissions, learned counsel sought to refer the disputes arising out of the agreement dated 22.03.206, to arbitration.

37. Having regard to the facts and circumstances of the case and the submissions of the learned counsel, the issues that arise for my consideration are:

1. Whether the applicant – company, which is not a signatory to the development agreement, can invoke the arbitration clause in the agreement, for resolution of its dispute arising out of the said development agreement dated 22.03.2006?

2. Whether the proceedings before the NCLT under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against the corporate debtor, and in the light of

[3] (2014)6 SCC 677

appointment of an Interim Resolution Professional by the Tribunal, whether the applicant, which is engaged by the Corporate Debtor for execution of the project, is barred from invoking the arbitration clause, and for maintaining the arbitration application before this court under Section 11(5) and (6) of the Act?

3. Whether the events of default pointed out by the respondent under sub-clauses (vi), (vii) and (viii) of Clause 17.1.1 under the agreement dated 22.03.2006, can be referred to arbitration?

3(a) Whether registration of criminal case and allegations of fraud in the process of awarding contract, is a bar for referring the disputes arising out of the agreement, to arbitration?

4. The applicant having submitted to the jurisdiction of the Cabinet Sub Committee for extension of time, and the Government having accepted the recommendations of the said committee, and granting extension of time as a 'one time measure', subject to certain conditions'; whether the applicant can go back and dispute the decision of the Government, and seek to invoke the arbitration clause in the agreement dated 22.03.2006?

5. To what relief, the applicant is entitled to?

38. **Issue No.1**: The facts which are not in dispute are that in the tender notification issued by the respondent – THB for development of residential and commercial project in the subject land, M/s Indu Projects Ltd., is the successful bidder, and the Housing Board entered into development agreement dated 22.03.2006 with the said firm, and the applicant herein is formed as a special purpose vehicle for execution of the project and the respondent - Housing Board also GPA dated 26.02.2008 in

favour of the applicant vide registered document No.23/2008 for execution of the project. In the said G.P.A., at clauses B and C it is stated as under:

> "B. Indu Projects Limited in their letter dated 19.10.2006 have sought approval of APHB for assigning the development agreement dated 22.03.2006 in favour of the Special Purpose Vehicle (SPV), Indu Eastern Province Projects Private Limited, for execution of the above project. The APHB in their Letter No.150/B.GUDA/AE/PC/05 dated 07.11.2006 has agreed for the same.
>
> C. The APHB is desirous of granting necessary powers and authority to Indu Eastern Province Projects Private Limited, hereinafter being referred to as the "Developer Company", inter alia, for the purpose of effective and speedy execution of the scheme as per the terms of the said Agreement."

In these circumstances, it cannot be held that there is no privity of contract between the applicant and the respondent – Housing Board. In the principal agreement dated 22.03.2006, clause 20.02 provides for arbitration, and the same is extracted as under for ready reference:

> **"20.2. Arbitration**:
> In the event of a dispute arising out of or in connection with this agreement not being resolved in accordance with the provisions of Section 20.01 above either party shall be entitled to, by notice in writing (Arbitration Notice) to the other party, refer such dispute for final resolution by binding arbitration in accordance with the Arbitration and Conciliation Act, 1996."

39. Reading of the above clause makes it clear that in the event of dispute arising out of or in connection with this agreement, not being resolved through negotiations, then either party to the agreement, shall be entitled to seek for reference of dispute to arbitration by issuing prior notice in that regard. The applicant company, though is not a signatory to the agreement, is engaged to execute the project under the agreement, and as disputes arose under the said agreement, which could not be resolved through negotiations, it had issued arbitration notice, and as the respondent has not consented for arbitration, filed the present application.

40. The objection of the counsel for the respondent is that as the applicant is not a signatory to the development agreement, it cannot invoke the arbitration clause in the development agreement. To resolve this issue,

the law laid down by Apex Court in similar facts and circumstances, is required to be taken into consideration. In ***CHLORO CONTROLS INDIA PRIVATE LIMITED vs. SEVERN TRENT WATER PURIFICATION INC.***[4] the Apex Court, considering a dispute pertaining to an international arbitration, where there are various agreements, which constitute composite transactions and where a non-signatory, or third party to the arbitration agreement sought reference of the dispute relatable to principle agreement, to arbitration; it held that court can refer dispute to arbitration existing between signatory or non-signatory parties, if all ancillary agreements between them are relatable to principal agreement. The relevant portion of the judgment is as under:

> 71. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the "group of companies doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliaties or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. (Russell on Arbitration (23rd Edn.)]
>
> 72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with the group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.
>
> 73.. . . The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the needs of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.
>
> ...
>
> 76. The court will have to examine such pleas with greater caution and by definite reference to the language of the contract and intention of the parties. In the case of composite transactions and multiple agreements, it may again be possible to invoke such principle in accepting the pleas of non-signatory parties for reference to arbitration. Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically intermingled or interdependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performance, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. The principal of "composite performance" would have to be gathered from the conjoint reading of the principal and supplementary

[4] (2013)1 SCC 641

> agreements on the one hand and the explicit intention of the parties and the attendant circumstances on the other."

41. In ***AMEET LALCHAND SHAH v. RISHAB ENTERPRISES*** (2 supra), the Apex Court considering similar facts arising out of a domestic arbitration, and relying on the above judgment of the Apex Court in *Chloro Controls* case (supra), held as under:

> "25. . . . This is a case where several parties are involved in a single commercial project (Solar Plant at Dongiri) executed through several agreements/contracts. In such a case, all the parties can be covered by the arbitration clause in the main agreement i.e., Equipment Lease Agreement (14-3-2012)."

42. In another judgment, the Apex Court in ***MAHANAGAR NIGAM LTD. V. CANARA BANK***[5] considering the dispute pertaining to domestic arbitration, held that a non-signatory can be bound by an arbitration agreement on the basis of the 'Group of Companies' doctrine, where the conduct of the parties evidences a clear intention to bind both the signatory as well as the non-signatory parties. The Apex Court further held that courts and tribunals have invoked this doctrine to join a non-signatory member of the group, if they are satisfied that the non-signatory company was by reference to the common intention of the parties, a necessary party to the contract. The Apex Court explained that this doctrine was invoked where an arbitration agreement is entered into by one of the companies in the group, and the non-signatory affiliate, or sister, or parent concern, is held to be bound by the arbitration agreement if the facts and circumstances of the case demonstrate that it was the mutual intention of all parties to bind both the signatories and the non-signatory affiliates in the group.

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[5] 2019 (10) SCALE 619

43. A learned single Judge of this court in ***TECPRO SYSTEMS LIMITED v. TELANGANA STATE POWER GENERATION COMPANY LIMITED*** (1 supra), while considering the facts in the said judgment, which disclose that that a consortium of companies entered into agreement with the respondent – Corporation therein for execution of certain works, and one of the companies of consortium, wanted to invoke arbitration clause in the agreement for resolution of its dispute. The respondent therein has taken an objection that only parties to the arbitration agreement can invoke arbitration clause in the agreement, and non-signatures to it, are not entitled, to invoke it. The learned single Judge, while not accepting the said objection, and relying on the above judgments of the Apex Court, held that the consortium agreement and the arbitration clause that is in it, bind all the consortium members; and in such a contract it is necessary to ensure that even though the lead members of the consortium might alone be party to an arbitration agreement, with the other party, all the consortium members are bound by the arbitration agreement and the arbitrator's award.

44. In view of the facts and circumstances of the case on hand, and the judgments of the Apex Court and the learned single Judge of this court, referred to one supra, the objection raised by the counsel for the respondent that the applicant being not a party to the contract, or rather not a signatory to the development agreement, cannot be permitted to invoke the arbitration clause, cannot be sustained, and the issue is answered in favour of the applicant.

45. **Issue No.2**: Under the second issue, the objection of the learned counsel for the respondent is with regard to maintainability of the arbitration

application at the instance of the applicant, since in the insolvency proceedings initiated by the financial creditor, the Tribunal has appointed an Interim Resolution Professional, and if at all any arbitration application has be filed, it has to be filed by the said professional.

46. First of all, proceedings under IBC have not been initiated against the applicant. Secondly, the NCLT vide order dated 25.02.2019 in CP(IB)No.372/7/HDB/2018, while ordering for commencement of corporate insolvency resolution process, passed the following order:

> "16. This Adjudicating Authority order the commencement of the Corporate Insolvency Resolution Process which shall ordinarily get completed within 180 days, reckoning from the day this order is passed. Further, I declare the moratorium which shall have effect from the date of this order till the completion of corporate insolvency resolution process for the purposes referred to in Section 14 of the I and B Code, 2016. I order to prohibit all of the following namely;
>
> a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
>
> b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
>
> c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
>
> d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor"

The NCLT, vide the above order, prohibited initiation of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of any assets by the corporate debtor; any action for foreclose, recovery or enforce any security interest created by the corporate debtor on its properties under the Act 54 of 2002; and recovery of property, which is in possession of the corporate debtor.

47. The above order of the NCLT does not prohibit initiation of arbitration proceedings by the corporate debtor or its subsidiaries for resolving their dispute against the third parties. Moreover in the present case, NCLT order is not against applicant – company, which is a separate corporate entity having an independent existence.

48. In the decision reported in ***ASHOK B.JIWRAJKA, DIRECTOROF ALOK INFRASTRUCTURE LTD. Vs. AXIS BANK LTD.***[6], the facts disclose that separate Corporate Insolvency Resolution Processes have been initiated both against the holding company, and its subsidiary company. The subsidiary company i.e., the appellant therein, sought to contend that unless the Corporate Insolvency Resolution Process is decided under Section 31 of IBC in the case of holding company, insolvency resolution process should not continue against the subsidiary company. The Tribunal has not accepted the said contention, and held that *"2. . . . However, such submission cannot be accepted as a separate Corporate Insolvency Resolution Process has been initiated against another Corporate Debtor, which is* ***separate*** *from the Corporate Insolvency Resolution Process initiated against 'Alok Infrastructure Ltd.', of which the appellant is the Director."* As the writ petitioner herein is a subsidiary of the M/s Indu Projects Ltd., it is a separate corporate entity, having an independent existence. Therefore, the insolvency proceedings initiated against the holding company – M/s Indu Projects Ltd., will have no bearing on the applicant, or in other words, initiation of insolvency resolution process and the appointment of interim resolution professional, does not prohibit the applicant herein from invoking the arbitration clause in the development agreement dated 22.03.2006 for resolution of disputes arising

[6] 2019 SCC Online NCLAT 526

under the said agreement, and from filing the arbitration application on the file of this court under Section 11 of the Act.

49. In the judgment of the learned single Judge of this court in Tecpro Systems Limited v. Telangana State Power Generation Company Limited (1 supra), relied on by the learned counsel for the applicant, the facts disclose that proceedings were initiated against the corporate debtor therein before the NCLT, and the Tribunal appointed the interim resolution professional, and the said professional without the consent of committee of creditors, authorized the corporate debtor to initiate arbitration proceedings. In those circumstances, the respondent has taken an objection stating that as the committee of creditors have not given consent as required under Section 28 of IBC, the arbitration application is not maintainable. Learned single Judge considering the facts and circumstances of the case and Section 28 of the IBC, held that proceedings of the NCLT, is not a bar for the applicant therein from invoking the arbitration clause. The relevant portion of the order is as under:

> "26. Under this point the question to be considered is 'whether the proceedings of the NCLT taken against the applicant operate as a bar for invoking the arbitration clause and for maintaining this Arbitration Application?'
>
> 27. It is the contention of the respondent that the IRP, without taking consent of Committee of Creditors, had given authorization for filing of this Application by the applicant and therefore, this application is not maintainable.
>
> 28. Applicant however, contended that such consent of Committee of Creditors is not required for the purpose of filing a suit or filing an application in a court of law. Reliance is placed on Section 28 of the IBC and it is contended that though consent of Committee of Creditors for initiating certain actions as mentioned in the said provision is required, the said provision does not require obtaining of such consent for filing of arbitration application.
>
> **29. Section 28 of the Code states**:
>
> . . .
>
> 30. A reading of the above provision does not indicate that consent of the Committee of Creditors is required by the IRP to

give authorization to another person for filing of an Arbitration Application under Section 11 of the Act. Clause 28(1)(h) of the IBC does not apply as the Resolution Professional has not delegated his duties of 'resolution' to the applicant. No other provision of the Code is brought to the notice of this court by the respondent in support of its submission that such consent of creditors is required for filing of an Arbitration Application under Section 11 of the Act.

31. In the absence of any such requirement prescribed by the Code, it is not open to the respondent to oppose this application on the ground that the authorization given by the IRP to the representative of the applicant to file this application is not valid, and that his application should be dismissed on the said ground.

32. Moreover, the order of the National Company Law Tribunal, Principal Bench, New Delhi passed on 07-08-2017 only prohibits initiation of suites or continuation of proceedings suit or proceedings against the Corporate Debtor (the applicant) including execution of any judgment, decree or order in any Court of law, Tribunal, Arbitration Panel or other Authority (Clause 15(a) of the said order). It does not prohibit initiation of proceedings by the *Corporate Debtor (applicant)* against third parties like the respondent for amounts due to it from the respondent.

33. Any recoveries of amounts from respondent would benefit all the creditors of the applicant in the proceedings under the code and no reasonable creditor would oppose steps initiated for recovery of amounts if due to the applicant, through the process of arbitration.

34. The order dt. 15-05-2009 of the NCLT in C.A.No.503(PB)/2019 in C.P.No.(IB)-197(PB)/2017 passed on an application filed by IRP under Section 30(6) of the Code r/w Regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulations, 2016, approving the resolution plan submitted by one of the creditors of the applicant by name M/s. Kridhan Infrastructures Private Limited, makes it binding on the creditors of the applicant as well.

35. Therefore, this point is answered in favour of the applicant and against the respondent and I hold that the proceedings of the NCLT do not bar the applicant from invoking the arbitration clause."

50. For the foregoing reasons, issue No.2 is answered in favour of the applicant and the objection of the respondent with regard to maintainability of the arbitration application, cannot be sustained.

51. **Issue No.3**: Under the third issue, the contention of the counsel for the respondent is that the initiation of insolvency proceedings on the file of NCLT by the financial creditors against the developer company, itself, is an event of default under Clause 17.1.1 (vi) and (vii) of the agreement and, similarly the attachment of part of the subject property by the Enforcement is also an event of default under Clause 17.1.1 (viii), and under Clause 17.1.3 of the agreement, for the said events of defaults, the

respondent is entitled to terminate the agreement and further, these are not the issues that can be resolved by the arbitrator.

52. Learned counsel for the applicant submits that several disputes arose between the parties and because of the delay and defaults on the part of the respondent in discharging its obligations, the applicant was unable to discharge its part of reciprocal obligations. The learned counsel for the applicant has referred to the incidents of default, which are extracted above and because of the said defaults in discharging the obligations on the part of the respondent, the applicant had to indulge in unwarranted litigation and cost overheads. Learned counsel submits that the developer company is contesting the litigation and the respondent cannot take advantage of its own defaults and terminate the agreement and this arbitrary.

53. In my considered view, this aspect has to be considered by the arbitrator during the process of adjudication and based on the same, a finding with regard to events of default under clause 17.1.1(vi) and (vii) has to be recorded.

54. The other event of default is attachment of part of subject property, by the enforcement directorate. The relevant averments made in the counter affidavit at paragraphs 7 and 15 are to the following effect:

> "I respectfully submit that by that time, the Vigilance and Enforcement Department had started enquiries into the Joint Venture Projects of the APHB including this project with regard to all aspects such as improper evaluation of bids and selection of ineligible developers and non-fixation of minimum reserve price, delay in commencement of LIG, delay in completion of project and also whether the rates at which the developers are selling the units to purchasers are being correctly reported and correct revenue share is being paid to APHC etc. Further, the CBI had also started an investigation into this project as part of its investigations in the disproportionate assets/money laundering cases against Sri Y.S.Jagan Mohan Reddy, s/o of ex-Chief Minister Sri Y.S.Rajasheker Reddy. . . . . It is pertinent to mention here that based on the investigation conducted by the Enforcement Directorate under the Prevention of Money Laundering Act, 2002, it had attached, vide Provisional Attachment Order No.01/2018,

> dated 03.01.2018, the unutilized land in the project, on the ground that the same are proceeds of crime and involved in the offence of Money Laundering."

The above averments made in the counter affidavit disclose that they are only allegations and the attachment sought to be relied on the counsel for the respondent is only a provisional attachment, and as per the contention of the learned counsel for the applicant, the same are pending investigation, and the issue has not attained finality.

55. **Issue 3(a) Fraud and criminal case:** In the judgment relied on by the learned counsel for the applicant in Swiss Timing Ltd. (3 supra), the facts disclose that on the basis of registration of criminal case by CBI against Chairman of respondent - Common Wealth games Organizing Committee and some officials of petitioner, respondent sought to invoke non-liability clause in Clauses 29 and 34 of the agreement that empowered respondent to terminate the contract in case of corrupt, fraudulent, collusive or coercive practices in connection with agreement. It was contended that since the allegations could not be properly gone in by arbitrator, decision of criminal proceedings should be awaited instead of constitution of Arbitral Tribunal. The Apex Court, while not accepting the above contention, held that it is mandatory for the courts to refer disputes to arbitration, if agreement between parties provide for reference to arbitration. Thus, registering of criminal case as to execution of said contract, is not an absolute bar to refer disputes to arbitration. The Apex Court further held that there is no inherent risk of prejudice to any party in permitting arbitration to proceed simultaneously with criminal proceedings, since findings recorded by Arbitral Tribunal are not binding in criminal proceedings. In an eventuality where ultimately award is rendered by Arbitral Tribunal and criminal proceedings

result in conviction, rendering underlying contract void as provided for in the contract, necessary plea can be taken on the basis of such conviction to resist execution/enforcement of award. The Apex Court further held that if the matter is not referred to arbitration and criminal proceedings result in acquittal leaving no ground for claiming that underlying contract is void or voidable, it would result in undesirable delay in arbitration. The relevant excerpts of the judgment are as under:

> 24. Keeping in view the aforesaid observations made by this Court in *Today Homes case {(2014)5 SCC 68}*, I see no reason to accept the submission made by the learned counsel for the respondents that since a criminal case has been registered against the Chairman of the Organizing Committee and some other officials of the petitioner, this Court would have no jurisdiction to make a reference to arbitration.
>
> . . .
>
> 28. To shut out arbitration at the initial stage would destroy the very purpose for which the parties had entered into arbitration. Furthermore, there is no inherent risk of prejudice to any of the parties in permitting arbitration to proceed simultaneously to the criminal proceedings. In an eventuality where ultimately an award is rendered by the Arbitral Tribunal, and the criminal proceedings result in conviction rendering the underlying contract *void*, necessary plea can be taken on the basis of the conviction to resist the *execution/enforcement* of the award. Conversely, if the matter is not referred to arbitration and the criminal proceedings result in an acquittal and thus leaving little or no ground for claiming that the underlying contract is *void* or *voidable*, it would have the wholly undesirable result of delaying the arbitration.
>
> 29. In the present case, it is pleaded that the manner in which the contract was made between the petitioner and the respondent was investigated by CBI. As a part of the investigation, CBI had seized all the original documents and the records from the office of the respondent. After investigation, the criminal case CC.No.22 of 2011 has been registered, as noticed earlier. It is claimed that in the event of the Chairman of the Organizing Committee and the other officials who manipulated the grant of contract in favour of the petitioner are found guilty in the criminal trial, no amount would be payable to the petitioner. Therefore, it would be appropriate to await the decision of the criminal proceedings before the Arbitral Tribunal is constituted to go into the alleged disputes between the parties. I am unable to accept the aforesaid submission made by the learned counsel for the respondents, for the reasons stated in the previous paragraphs. The balance of convenience is tilted more in favour of permitting the arbitration proceedings to continue rather than to bring the same to a grinding halt.

56. In ***AMEET LALCHAND SHAH vs. RISHAB ENTERPRISES*** (2 supra), relying on its earlier judgment in ***A.AYYASAMY v. A.PARAMASIVAM***[7], the Apex Court held that mere allegations of fraud is

[7] (2016) 10 SCC 386

not a ground to nullify the effect of arbitration agreement between the parties and also that the duty of the court is to impart to the commercial understanding, reflected in the terms of the agreement, a sense of business efficacy, held, it is only where serious questions of fraud are involved, the arbitration can be refused. The relevant portion is as under:

> "34. Under the Act, an arbitration agreement means an agreement which is enforceable in law and the jurisdiction of the arbitrator is on the basis of an arbitration clause contained in the arbitration agreement. However, in a case where the parties alleged that the arbitration agreement is vitiated on account of fraud, the Court may refuse to refer the parties to arbitration. In Ayyasamy case {(2016)10 SCC 386}, this court held that mere allegations of fraud is not a ground to nullify the effect of arbitration between the parties and arbitration cause need not be avoided and parties can be relegated to arbitration where merely simple allegations of fraud touched upon internal affairs of the parties is levelled. A.K.Sikri, J. observed that it is only in those cases where the court finds that there are serious allegations of fraud which make a virtual case of criminal offence and where there are complicated allegations of fraud then it becomes necessary that such complex issues can be decided only by the civil court on the appreciation of evidence that needs to be produced.

57. In view of the above judgment of the Apex Court, and having regard to the facts and circumstances of the case, the contention based on the clause 17.1.1(viii) cannot be sustained, and issue No.3(a) is answered accordingly.

58. **Issue No.4:** With regard to this issue, the contention of the learned Special Government Pleader is that a Cabinet Sub-Committee was constituted and it considered the request of the applicant for extension of time and after giving ample opportunity to both the parties, made recommendations for extension of time for proceeding with the project, subject to certain conditions and the said recommendations were accepted by the Government and, therefore, the applicant having submitted to the jurisdiction of the said committee, cannot retreat, and moreover, the arbitrator cannot decide the correctness or otherwise of the recommendations of the Cabinet Sub-Committee and hence, the arbitration application is not maintainable. It is to be seen that the arbitration clause in

the agreement provides for amicable settlement of the issue and this process can at best be treated as step towards amicable settlement.

59. The grievance of the applicant is that as the respondent – THB, failed to discharge its obligation under the agreement dated 22.03.2006, and also failed to resolve the issues raised by it, it could not complete the project. The issues raised by the applicant are extracted while narrating the facts, and hence they are not being reproduced. The case of the applicant is that the respondent – THB, issued notice dated 21.04.2015 seeking certain clarifications and to show cause why action shall not be taken for termination of the development agreement. To the said show cause notice, the applicant has submitted a detailed reply dated 26.05.2015. The grievance of the petitioner is that without resolving the issues raised by the applicant, the respondent issued a show cause notice dated 08.06.2016 for termination of the contract. As the respondent, without resorting to the dispute resolution mechanism agreed to between the parties under Clause 20.1 of the agreement, issued the final show cause notice for termination, the applicant filed W.P.No.22032 of 2016 challenging the said final show cause notice. The respondent – THB, filed counter affidavit in the said writ petition and it has also pointed out the defaults committed by the applicant and hence as per the terms of the agreement, the applicant was issued with final show cause notice for termination of the contract. The defaults, which are stated to be have been committed by the applicant, have also been extracted above while noting the averments made in the counter affidavit.

60. Considering the above facts and circumstances, this court disposed of W.P.No.22032 of 2016 by order dated 20.09.2016. Reading of

the said order shows that, as the respondent – THB, resorted to termination of contract by issuing show cause notice dated 08.06.2016 without following the dispute resolution protocol in terms of Clause 20 of the Agreement dated 22.03.2006, the applicant herein filed the writ petition and this court, considering the representation of both the counsel, and also taking into consideration that the Government constituted the Committee under G.O.Ms.No.1061 dated 16.05.2016, gave liberty to the applicant to make representation, and this court expected that the said committee would take appropriate decision.

61. The grievance of the applicant is that the said committee has not resolved the issues raised by it, but however, extended the time subject to certain conditions, and the Government has accepted the said recommendations vide proceedings dated 07.02.2019 vide Lr.No.758/HB& OP.A1/2019-1 dated 07.02.2019. The case of the applicant is that the conditions imposed in the said recommendations are in penal nature and hence not agreeable to it, and seeks to resolve the dispute by invoking the arbitration clause.

62. In view of the above circumstances, as already observed, the constitution of the Cabinet Sub Committee, and the participation of the applicant by making representations, and the recommendations of the said committee, and acceptance by the Government, have to be taken as the process during the course of negotiations provided under dispute resolution mechanism under Clause 20 of the agreement. Since the applicant is disputing the said recommendations and contends that its grievances have not been resolved, that aspect of the matter has to be considered by Arbitral

Tribunal. By virtue of Amendment Act No.3 of 2016, sub-section 6-A has been added to Section 11 of the Act, and it came into force with effect from 23.10.2015. As per the said provision, the issue that is required to be examined in an arbitration application is with regard to existence of an arbitration agreement and nothing more and nothing less. Considering Section 11(6-A), the Apex Court in the Apex Court in ***MAYAVATI TRADING (P) LTD. v. PRADYUAT DEB BURMAN***[8] held that after insertion of Section 11(6-A) by way of 2015 Amendment Act with effect from 23.10.2015, the court has to confine its examination to the existence of arbitration agreement alone, and nothing more or nothing less, and leave all other preliminary issues to be decided by the arbitrator. As such, merits of the claims raised by both the parties, cannot be considered in this application, and the same can be raised before arbitrator.

63. Further, the respondent – THB, is also claiming that the land should be returned by the applicant and in view of the same, and in the interest of both the parties and also in the interest of justice, it is better that the dispute be resolved at the earliest by referring the dispute to arbitration, which is the quicker remedy compared to the regular civil suit, as already litigation is going on for several years.

64. As per Clause 20 of the agreement, if the dispute has not been settled through negotiations, either party has to serve written notice on the other party, and then the remaining provisions of clause 20 with regard to arbitration, shall apply.

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[8] (2019) 8 SCC 714

65. As the dispute raised by the applicant, which arose under the development agreement dated 22.03.2006 remained unresolved, it issued notice dated 18.03.2019, invoking arbitration clause under Clause 20.2 of the agreement and as the respondent – THB, refused to appoint an arbitrator on its behalf, and issued reply notice dated 16.04.2019, the present arbitration application is filed and having regard to the facts and circumstances of the case, I am of the considered view that the dispute deserves to be referred for arbitration. Issue No.4 is answered accordingly in favour of the applicant.

66. The Apex Court in the decisions reported in ***UNION OF INDIA v. M.P. GUPTA***[9], ***UNION OF INDIA v. V.S.ENGG. (P) LTD***[10] and ***UNION OF INDIA v. SINGH BUILPRADEEP VINOD CONSTRUTION CO.***[11], held that whenever the agreement specifically provides for appointment of named arbitrators, the appoint of arbitrator should be in terms of the contract. In the present case, under the arbitration clause No.20.2 of the agreement, both the parties have agreed to appoint one arbitrator each and the said two arbitrators, shall appoint a third arbitrator, who shall serve as the Presiding Arbitrator. Therefore, the appointment of arbitrators shall be in terms of the agreement.

67. For the foregoing reasons, the arbitration application is allowed.

68. Sri Justice K.C.Bhanu, Former Judge of erstwhile High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh, is nominated as Arbitrator on behalf of the applicant. Sri Justice G.V.Seethapathy, Former Judge of erstwhile High Court of Andhra Pradesh, is nominated as Arbitrator on behalf of the respondent.

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[9] (2004)10 SCC 504
[10] (2006) 13 SCC 240
[11] (2009)4 SCC 523

69. The above said Arbitrators, shall follow the procedure prescribed under Clause 20.2.2 for nomination of third arbitrator, who shall served as Presiding Arbitrator. The Arbitrators, so nominated, shall pass an award in accordance with law.

70. The learned Arbitrators are entitled to fees as per the rates specified in the Fourth Schedule to the Act of 1996, inserted by Act 3 of 2016 with effect from 23-10-2015, which shall be borne by both parties in equal shares.

71. Interlocutory applications pending, if any, shall stand closed. No order as to costs.

72. Before parting with the case it is made clear that all the issues are left open to both the parties to agitate before the Arbitrators, and the Arbitrators shall pass award on merits and in accordance with law, uninfluenced by finding or observation, if any, made in this order.

A.RAJASHEKER REDDY,J

DATE:09—06—2020

Note:

1. L.R. copy to be marked.
2. **Office to mark a copy of this order to:**

(i) Justice K.C.Bhanu,
Former Judge of erstwhile High Court of Judicature at
Hyderabad for the State of Telangana and the
State of Andhra Pradesh,
R/o Village No.43, Adity Royal Palms,
Gated Community,
Road opposite to 7 Tombs Gate,
Shaikpet, Hyderabad – 8.

(ii) Sri Justice G.V.Seethapathy,
Former Judge of erstwhile High Court of A.P..
R/o D.No.5-8-30/34, Govardhanpuri Gardens,
Yapral, Secunderabad – 87.

B/O
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