



2025:DHC:4046



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

Reserved on: 12 August 2024

Pronounced on: 20 May 2025

+ ARB.P. 432/2024 & I.A. No. 35382/2024

TATA PROJECTS - KALINDEE (JV) & ORS.Petitioners

Through: Mr. Rajiv Nayar, Sr. Advocate
with Mr. Naveen Chawla, Advocate

versus

RAIL VIKAS NIGAM LIMITEDRespondent

Through: Mr. Udit Seth and Mr. Roshan
Roy, Advocate

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT

20.05.2025

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1. This is a petition under Section 11(6)¹ of the Arbitration and Conciliation Act, 1996², for reference of the disputes, stated to have arisen between the petitioners on the one hand and the respondent on the other, to arbitration.

¹ 11. **Appointment of arbitrators-**

(6) Where, under an appointment procedure agreed upon by the parties,—
(a) a party fails to act as required under that procedure; or
(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,
[the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

² “the 1996 Act” hereinafter



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Rival Pleadings

Case of the Petitioners

2. The petitioners set up the following case, to support the prayer for reference of the disputes to arbitration:

(i) Petitioner 1, Tata Projects-Kalindee (JV)³ is an unincorporated joint venture between Petitioner 2 Tata Projects Ltd.⁴ and Petitioner 3 Kalindee Rail Nirman (Engineers) Ltd.⁵ TPL is the lead partner of the JV.

(ii) The respondent Rail Vikas Nigam Limited⁶ is a 100% owned Public Sector Undertaking of the Ministry of Railways.

(iii) On 27 July 2016, RVNL floated a tender for carrying out railway electrification works in North-East India. The JV participated and submitted its bid on 3 October 2016. It was declared the most successful bidder and was awarded the contract on 27 January 2017. The contract included railway electrification of a section of the Alipurduar Division of the North-East Frontier Railway. The project was of 36 months' duration from the date of commencement. The date of commencement was reckoned as the date of receipt of the letter of acceptance (31 January 2017) and an added 42 days, which

³ "the JV" hereinafter

⁴ "TPL" hereinafter

⁵ "KRNEL" hereinafter

⁶ "RVNL" hereinafter



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worked out to 14 March 2017.

(iv) On 23 May 2017, a formal Contract Agreement⁷ was executed between the JV and RVNL. As per the General Conditions of Contract⁸ contained in the CA, the contract was to be completed by 14 March 2020, i.e. three years from the date of commencement. The relevant clauses of the GCC are reproduced thus:

“20. Claims, Disputes and Arbitration

20.2 Amicable Settlement: In case any dispute between the Engineer and the Contractor for which claim has already been made by the contractor, remains unresolved, the Contractor shall, then, give notice of dissatisfaction and intention to commence arbitration to the Employer duly specifying the subject of the dispute or difference as also the amount of claim item wise. The Parties shall make attempts to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, demand for arbitration may be made by the contractor after ninety days from the day on which a notice of dissatisfaction and intention to commence arbitration was given, even if no attempt at amicable settlement has been made.

20.3 Arbitration: Any dispute, in respect of which amicable settlement has not been reached, arising between the Employer and the Domestic or Foreign Contractor related to any matter arising out of or connected with this contract, then the contractor, after 90 days but within 150 days from the day on which a notice of dissatisfaction and intention to commence arbitration was given under GCC 20.2, shall be entitled to demand in writing that the dispute or difference be referred to arbitration.

Only such dispute(s) or difference(s) in respect of which

⁷ “CA” hereinafter

⁸ “GCC” hereinafter



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the demand had been made for amicable settlement under GCC 20.2 but could not be settled together with counter claims or set off, given by the Employer, shall be referred to arbitration and other matters shall not be included in the reference.

The Arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by Chairman and Managing Director, Rail Vikas Nigam Limited, New Delhi (CMD/RVNL).

The disputes so referred to arbitration shall be settled in accordance with the Indian Arbitration & Conciliation Act, 1996 and any statutory modification or re-enactment thereof.

Further, it is agreed between the parties as under:

20.3.1 Number of Arbitrators: The arbitral tribunal shall consist of:

- (i) Sole Arbitrator in cases where the total value of all claims in question added together does not exceed ₹ 50 Lakhs.
- (ii) 3 (Three) arbitrators in all other cases.

20.3.2 Procedure for Appointment of Arbitrators: The arbitrators shall be appointed as per following procedure:

- (i) In case of Sole Arbitrator: CMD/RVNL shall appoint any working officer of RVNL not below the rank of AGM within 60 days from the day when a written and valid demand for arbitration is received by CMD/RVNL.
- (ii) In case of 3 Arbitrators:
 - (a) Within 60 days from the day when a written and valid demand for arbitration is received by CMD/RVNL, the Employer will forward a panel of 3 names to the contractor. The contractor will then give his consent for any one name out of the panel to be appointed as one of the Arbitrators within 30 days of dispatch of the request by the Employer.



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(b) Employer will decide the second Arbitrator, CMD/RVNL shall appoint the two Arbitrators, including the name of one Arbitrator for whom consent was given by the contractor, within 30 days from the receipt of the consent for one name of the Arbitrator from the contractor. In case the contractor fails to give his consent within 30 days of dispatch of the request of the Employer then CMD/RVNL shall nominate both the Arbitrators from the panel.

(c) The third Arbitrator shall be chosen by the two Arbitrators so appointed by the parties and shall act as Presiding Arbitrator. In case of failure of the two Arbitrators appointed by the parties to reach upon consensus within a period of 30 days from the appointment of the Arbitrators subsequently appointed, then, upon the request of either or both parties, the presiding Arbitrator shall be appointed by the Chairman and Managing Director, Rall Vikas Nigam Limited, New Delhi,

(iii) If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the CMD/RVNL fails to act without undue delay, the CMD/RVNL shall appoint new arbitrator/arbitrators to act in his/their place except in case of new Presiding Arbitrator who shall be chosen following the same procedure as mentioned in para (ii)(c) above. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator(s).

20.3.3 Qualification and Experience of Arbitrators: The arbitrators to be appointed shall have minimum qualification and experience as under:

In case of Sole Arbitrator;

Arbitrator shall be a working officer of RVNL (not below



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the rank of AGM)

In case of 3 Arbitrators;

Arbitrators shall be retired officers (retired not below the HAG level in Railways or Director/CMD/MD in a Schedule 'A' PSU, age not exceeding 70 years and in reasonably good mental and physical fitness) of Engineering Services of Indian Railways or Indian Railway Accounts Service having experience in Contract Management of construction contracts.

No person other than the persons appointed as per above procedure and having above qualification and experience shall act as Arbitrator.”

(v) According to the petitioners, execution of the project was delayed owing to causes attributable to RVNL and beyond the reach of the petitioners. Ultimately, the contract could be completed only after a delay of 1341 days, which, according to the petitioners, is attributable to RVNL.

(vi) *Vide* letter dated 11 March 2023, addressed by the JV to RVNL, a claim of ₹ 71,48,19,223/- was raised by the JV towards additional expenses incurred under various heads of the CA and RVNL was called upon to release the said payment. RVNL, *vide* response dated 5 April 2023, repudiated the claim of JV. Thus, it is contended, disputes arose between the parties.

(vii) A further letter of demand was raised by the JV on RVNL on 26 April 2023. This letter again required RVNL to approve the claims submitted earlier by letter dated 11 March 2023. The claims of the JV were once again repudiated by RVNL by letter dated 16 May 2023.



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(viii) On 2 June 2023, the JV issued a notice to RVNL under Clause 20.2 of the GCC. The letter reiterated the various claims of the JV against RVNL and alleged the repudiation of the said claims by RVNL to be illegal and without application of mind. The letter, therefore, claimed to have been issued under Clause 20.2 and also purported to be a notice intending reference of the disputes between the parties to arbitration. Paras 1 and 7 of the said letter merit reproduction, thus:

“1. We are writing to you under clause 20.2 of the contract notifying the contractor's dissatisfaction and intention to commence arbitration on the following long contractual issues:-

- i) Claim towards Damages due to Prolongation of Contract.
- ii) Price adjustment claim.
- iii) Claim of compensation for price adjustment on account of increase in basic wages of labour under adjustment for changes in legislation.
- iv) Release/ Refund of Various Withheld Amounts/ Recoveries made from the payments due to the Contractor.
- v) Claim on account of difference in rates of the pile foundation.
- vi) Claim of interest on delayed payments

7. Accordingly, the present claim is being made before RVNL under Clause 20.2 of the Terms of the Contract. Under Clause 20.2, the determination has to be made within a period of 90 days.”



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(ix) *Vide* letter dated 1 September 2023, addressed to the JV, RVNL once again repudiated all the claims of the JV. On the other hand, alleged RVNL, the delay in completion of the contract was entirely attributable to the JV. The response did not, however, address the issue of reference of the disputes to arbitration, suggested in the letter dated 2 June 2023.

(x) On 9 October 2023, RVNL wrote to the JV, raising a demand of ₹ 2,12,04,921.35. In the event of failure, on the part of the JV, to deposit the said amount, RVNL threatened to encash the performance bank guarantees submitted by the JV.

(xi) On 10 October 2023, a formal notice under Section 21⁹ of the 1996 Act was issued by the JV, through Counsel, to RVNL. The letter once again reiterated the claims of the JV against RVNL and concluded, in paras 7 to 14, thus:

“7. Accordingly, as per the dispute resolution process stated in clause 20.2 of the GCC, the JV vide its letter dated 2.6.2023 issued notice of dissatisfaction and requested for commencement of arbitration. In the said notice the JV reiterated its claims on the following contractual issues:

- i) Claim towards Damages due to Prolongation of Contract.
- ii) Price adjustment claim.
- iii) Claim of compensation for price adjustment on account of increase in basic wages of labour under adjustment for changes in legislation.

⁹ 21. **Commencement of arbitral proceedings.** – Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.



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- iv) Release/ Refund of Various Withheld Amounts/ Recoveries made from the payments due to the Contractor.
- v) Claim on account of difference in rates of the pile foundation.
- vi) Claim of interest on delayed payments

8. RVNL, vide its response dated 01.9.2023, to the above letter of the JV, again rejected all the claims of the JV, leaving no options for the JV but to invoke clause 20.3 of the GCC requesting for reference of the dispute to Arbitration.

9. It is stated that as per clause 20.3.2 of the GCC, RVNL has retained the right to appoint the panel of Arbitrators. Perusal of clauses 20.3.2 (ii) a to c of the GCC clearly shows that power for appointment of the arbitrators is vested with RVNL and the appointment of the arbitrator has to be from the panel of RVNL. Relevant clauses of GCC are reproduced as under:

Clause 20.3.2(ii)(a) states as follows:

“Within 60 days from the day when a written and valid demand for arbitration is received by CMD.RVNL, the Employer will forward a panel of 3 names to the contractor. The contractor will then give his consent for any one name out of the panel to be appointed as one of the Arbitrators within 30 days of dispatch of the request by the Employer.”

Clause 20.3.2(ii)(b) reads as follows:

“Employer will decide the second arbitrator, CME/RVNL shall appoint the two arbitrators, including the name of one Arbitrator for whom consent was given by the contractor, within 30 days from the receipt of the consent for one name of the Arbitrator from the contractor. In case the contractor fails to give his consent within 30 days of dispatch of the request of the Employer then CMD/RVNL shall nominate both the Arbitrators from the panel.”

Clause 20.3.2(iii)(c)



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“The third Arbitrator shall be chosen by the two Arbitrators so appointed by the parties and shall act as Presiding Arbitrator. In case of failure of the two Arbitrators appointed by the parties to reach upon consensus within a period of 30 days from the appointment of the Arbitrators subsequently appointed, then upon the request of either or both parties, the Presiding Arbitrator shall be appointment by the Chairman and Managing Director, Rail Vikas Nigam Limited, New Delhi.”

10. Further clause 20.3.3 of the GCC states qualifications of the Arbitrators as follows:

“Arbitrators shall be retired officers (retired not below the HAG level in Railways or Director/CMDIMD in a schedule "A" PSU age not exceeding 70 years and in reasonably good mental and physical fitness) of Engineering Services of Indian Railways or Indian Railway Accounts Service having experience in Contract Management of construction contracts. No person other than the persons appointed as per above procedure and having above qualification and experience shall act as Arbitrator.

11. It is stated that your above procedure as per clause 20.3 of the GCC is against the amended Arbitration and Conciliation Act, 1996, that has been in effect from 23.10.2015, as per which the arbitrators to be nominated to the arbitral tribunal must not fall under any of the categories mentioned in Schedule V read with Explanation 1 to Section 12 (1) and Schedule VII read with Section 12 (5). Accordingly, a person who is an officer of the Railway or in any manner be connected or associated with the Railway is ineligible to be appointed as an arbitrator in the present dispute. Accordingly, the provision of the Contract in so far as it provides for appointment of retired Railway officers to be arbitrator is invalid. The Parties will thus have to proceed as per the Arbitration and Conciliation Act, 1996.

12. Accordingly, the JV appoints Justice (Retd) G.S. Sistani, former judge of the Delhi High Court as its nominee Arbitrator. RVNL may appoint its nominee arbitrator in line with the provisions of the amended Arbitration and Conciliation Act, 1996 within 30days from the receipt of this notice. You may note that the Arbitrator



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to be appointed by RVNL cannot be part of the prohibited category as per the provisions of the Act. Thereafter, the two arbitrators so appointed will appoint the Presiding Arbitrator to form the arbitration tribunal.

13. In case you fail to appoint arbitrator on your behalf within 30 days of the receipt of this letter, JV would be constrained to approach the Hon'ble Court to seek appointment of arbitrator on your behalf.

14. JV is reserving its right to raise any further or additional claims before the Tribunal, apart from the claims stated in para 6 above, that it may have arising from the present Contract. The present notice is issued without prejudice to such other & further claims.”

(xii) On 16 October 2023, RVNL wrote to the JV granting extension of time up to 15 November 2023 for submission of the final bill by the JV. The claims of the JV against RVNL, as raised in the communications already cited *supra*, were once again repudiated.

3. It is in these circumstances that the petitioners have instituted the present petition before this Court under Section 11(6) of the 1996 Act, asserting that, by failing to respond to Section 21 notice dated 10 October 2023 *supra* issued by the JV, RVNL had forfeited its right to appoint its arbitrator and that, therefore, the mantle fell on this Court to appoint the arbitrator on behalf of RVNL. Accordingly, the petition exhorts the Court to appoint a nominee arbitrator for RVNL.

Reply by the respondent

4. The Respondent, in its counter-affidavit, has advanced the following submissions:



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(i) TPL and KRNEL have no privity of contract with the Respondent, and there is no arbitration agreement between them. As such, TPL and KRNEL cannot maintain the present petition.

(ii) Clause 20.2 of the GCC, which requires an attempt at amicable settlement of the dispute before invocation of arbitration, has not been exhausted. It was not open to the JV to invoke arbitration without exhausting Clause 20.2. For this reason, too, the present petition is not maintainable.

(iii) The invocation of arbitration was also contrary to the terms of the CA. The CA did not empower either party to nominate its arbitrator and call on the other party to do likewise. The notice invoking arbitration had merely to invoke arbitration, and could not suggest the name of an arbitrator.

(iv) The arbitrator suggested by the JV in its Section 21 notice did not possess the requisite qualifications envisaged in Clause 20.3.3 of the GCC.

For these reasons, the counter-affidavit filed by the Respondent prays that the present petition be dismissed.

Rejoinder by the petitioners

5. In rejoinder, the petitioners contend that RVNL, having failed



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to appoint an arbitrator in response to the Section 21 notice issued by the petitioner, had forfeited its right to do so, and the task of appointing an arbitrator now fell on this Court. Reliance has been placed, for this purpose, on the judgments of the Supreme Court in *Bharat Sanchar Nigam Ltd v Motorola India (P) Ltd*¹⁰, *Datar Switchgear v Tata Finance Ltd*¹¹ and *Deep Trading Co. v Indian Oil Corporation*¹². Insofar as the contention of absence of any privity of contract between RVNL and TPL or KRNEL is concerned, it is contended that the JV is an unincorporated joint-venture of TPL and KRNEL and that they had jointly bid in response to the invitation for tender issued by RVNL. Effectively, therefore, it is submitted that all petitioners are aggrieved and are entitled to maintain a joint petition.

6. It is further submitted that there has been no breach, by the petitioners, in following the pre-arbitral procedure envisaged in the CA. Once the Engineer of RVNL had rejected the claims put forth by the JV, the JV issued letter dated 2 June 2023 under Clause 20.2 of the GCC, notifying the intention to commence arbitration. The claims were once again repudiated by RVNL vide letter dated 5 April 2023 and, later, 1 September 2023. This left the JV with no option but to issue a notice invoking arbitration under Clause 20.3 of the GCC.

7. The petitioners further contended that the provision for constitution of the arbitral tribunal, as envisaged in Clause 20.3.2 of the GCC is contrary to the provisions of the 1996 Act which does not

¹⁰ (2009) 2 SCC 337

¹¹ (2000) 8 SCC 151

¹² (2013) 4 SCC 35



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permit selection of an arbitrator by one party out of the panel provided by the other, for which purpose the petitioners rely on *Voestalpoine Schienen GmbH v DMRC*¹³, *HRD Corporation v GAIL (India) Ltd*¹⁴ and *Bharat Broadband Network Ltd v United Telecoms Limited*¹⁵. It was for this reason that the JV suggested the name of an arbitrator in the Section 21 notice issued to RVNL. RVNL having failed to respond to the notice and nominate its own arbitrator, its right to do so stood forfeited.

Rival Submissions

8. We have heard Mr. Rajiv Nayar, learned Senior Counsel for the petitioner and Mr. Udit Seth for RVNL, at length.

9. Mr. Nayar submits that, once the notice dated 2 June 2023 addressed by the JV to RVNL was met with a repudiation, no further pre-arbitral protocol remained to be exhausted. The invocation of arbitration by the JV was, therefore, entirely in terms of Section 21 of the 1996 Act and Clause 20.3 of the GCC. He also pointed out that, even after the said notice of invocation of arbitration, no panel of arbitrators was suggested by RVNL.

10. Mr. Seth, responding to Mr. Nayar's submissions, essentially reiterated the contentions advanced in the counter-affidavit filed by way of response to the petition. He submitted that the Section 21

¹³ (2017) 4 SCC 665

¹⁴ (2018) 12 SCC 471

¹⁵ (2019) 5 SCC 755



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notice dated 10 October 2023, issued by the JV was invalid, as it suggested the name of the arbitrator of the JV. He submits that the GCC did not authorise either party to name its arbitrator and that, even if Clause 20.3.3 were to be treated as invalid, the JV could only have issued an unconditional notice to RVNL, manifesting its intent to commence arbitration and, if RVNL did not respond thereto, had to approach this Court. He relies on

- (i) para 14 of the judgment of the Supreme Court in *Northern Railway Administration v Patel Engineering Co. Ltd*¹⁶,
- (ii) para 13 of the judgment of the Supreme Court in *Larsen & Toubro Ltd v Mumbai Metropolitan Region Development Authority*¹⁷, and
- (iii) paras 2, 8 and 10 of the judgment of the High Court of Bombay in *Larsen & Toubro Ltd v Mumbai Metropolitan Region Development Authority*¹⁸ and
- (iv) paras 52, 98 and 109 of the judgment of the High Court of Bombay in *Maharashtra State Electricity Distribution Co. Ltd v Godrej & Boyce Manufacturing Co. Ltd*¹⁹.

11. Mr. Seth further submits that the pre-arbitral protocol envisaged by Clause 20.2 of the GCC has not been exhausted by the JV before issuing the Section 21 notice and that, therefore, the petition is not competent. He relies on judgment of this Court in *Sushil Kumar*

¹⁶ (2008) 10 SCC 240

¹⁷ (2019) 2 SCC 271

¹⁸ 2016 SCC OnLine Bom 13348

¹⁹ 2019 SCC OnLine Bom 3920



*Bhardwaj v UOI*²⁰. The petitioners, he submits, have not even pleaded that compliance with Clause 20.2 would be an exercise in futility. To a query from the Court, Mr. Seth acknowledges that, prior to the Section 21 notice, the JV had addressed the notice of demand dated 26 April 2023 to RVNL, which RVNL repudiated in its reply dated 1 September 2023.

12. Arguing in rejoinder, Mr. Nayar submits that Clause 20.3.2 of the GCC required RVNL, in response to the Section 21 notice of the JV, to suggest a panel of arbitrators. RVNL having defaulted in doing so, Mr. Nayar submits that the clause requiring the arbitration to be by three-member panel, stood worked out and the exclusive jurisdiction now vests in this Court to appoint the arbitrator. He relies, for this purpose, on the judgment of the Supreme Court in *UOI v Besco Ltd.*²¹

13. In surrejoinder, Mr. Seth draws my attention to Section 11(8) of the 1996 Act, which also finds mention in *Besco*. He submits that, in *Besco*, there was no clause similar to Clause 20.3.3 of the GCC in the present case.

Analysis

Scope of Section 11(6)

14. The scope of jurisdiction of a Section 11(6) Court stands authoritatively delineated in the following paragraphs from the

²⁰ 2009 SCC OnLine Del 4355

²¹ (2017) 14 SCC 187



judgment of the Supreme Court in *SBI General Insurance Co. Ltd v Krish Spinning*²², which also takes into consideration 11(6-A):

“110. The scope of examination under Section 11(6-A) is confined to the existence of an arbitration agreement on the basis of Section 7. The examination of validity of the arbitration agreement is also limited to the requirement of formal validity such as the requirement that the agreement should be in writing.

111. The use of the term ‘examination’ under Section 11(6-A) as distinguished from the use of the term ‘rule’ under Section 16 implies that the scope of enquiry under section 11(6-A) is limited to a *prima facie* scrutiny of the existence of the arbitration agreement, and does not include a contested or laborious enquiry, which is left for the arbitral tribunal to ‘rule’ under Section 16. The *prima facie* view on existence of the arbitration agreement taken by the referral court does not bind either the arbitral tribunal or the court enforcing the arbitral award.

112. The aforesaid approach serves a two-fold purpose - firstly, it allows the referral court to weed out non-existent arbitration agreements, and secondly, it protects the jurisdictional competence of the arbitral tribunal to rule on the issue of existence of the arbitration agreement in depth.

113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in *In Re : Interplay*²³ that the High Court and the Supreme Court at the stage of appointment of arbitrator shall examine the existence of a *prima facie* arbitration agreement and not any other issues. The relevant observations are extracted hereinbelow:

“209. The above extract indicates that *the Supreme Court or High Court at the stage of the appointment of an arbitrator shall “examine the existence of a *prima facie* arbitration agreement and not other issues”.* These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings. Accordingly, the “other issues” also include examination and impounding of an unstamped

²² 2024 SCC OnLine SC 1754

²³ *In Re. Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act 1899*, (2024) 6 SCC 1



instrument by the referral court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument under the Stamp Act is not a timebound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators. [...]”

(Emphasis supplied)

114. In view of the observations made by this Court in *In Re. Interplay* (supra), it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in *Vidya Drolia*²⁴ and adopted in *NTPC v SPML*²⁵ that the jurisdiction of the referral court when dealing with the issue of “accord and satisfaction” under Section 11 extends to weeding out *ex-facie* non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in *In Re: Interplay* (supra).

118. Tests like the “eye of the needle” and “ex-facie meritless”, although try to minimise the extent of judicial interference, yet they require the referral court to examine contested facts and appreciate prima facie evidence (however limited the scope of enquiry may be) and thus are not in conformity with the principles of modern arbitration which place arbitral autonomy and judicial non-interference on the highest pedestal.

119. Appointment of an arbitral tribunal at the stage of Section 11 petition also does not mean that the referral courts forego any scope of judicial review of the adjudication done by the arbitral tribunal. The Act, 1996 clearly vests the national courts with the power of subsequent review by which the award passed by an arbitrator may be subjected to challenge by any of the parties to the arbitration.

120. The principle of subsequent judicial review has been enshrined in the US doctrine of “Second Look”. In a leading U.S. Supreme Court judgment of *PacifiCare Health Systems, Inc. v Book*²⁶, it was held that the question of non-arbitrability should be considered in the first instance by the arbitral tribunal. The Court observed that, “*since we do not know how the arbitrator*

²⁴ *Vidya Drolia v Durga Trading Corpn*, (2021) 2 SCC 1

²⁵ *NTPC v SPML Infra Ltd*, (2023) 9 SCC 385

²⁶ 538, U.S. 401 (U.S. S. Ct. 2003)



will construe the remedial limitations, the question ... whether they render the parties' agreements unenforceable is better left for initial arbitral consideration". This doctrine has also been affirmed by judgments of the U.S. lower courts in cases of *Dillon v BMO Harris Bank, NA*²⁷ and *Escobar v Celebration Cruise Operator, Inc.*²⁸ wherein it was reasoned that the issues of U.S. statutory law and arbitrability should be submitted first to arbitration, with the possibility of subsequent judicial review in recognition and enforcement proceedings.

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

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

124. Section 11 also envisages a time-bound and expeditious disposal of the application for appointment of arbitrator. One of the reasons for this is also the fact that unlike Section 8, once an application under Section 11 is filed, arbitration cannot commence until the arbitral tribunal is constituted by the referral court. This Court, on various occasions, has given directions to the High Courts for expeditious disposal of pending Section 11 applications.

²⁷ 856 F.3d 330, 333 (4th Cir. 2017)

²⁸ 805 F.3d 1279, 1288-89 (11th Cir. 2015)



It has also directed the litigating parties to refrain from filing bulky pleadings in matters pertaining to Section 11. Seen thus, if the referral courts go into the details of issues pertaining to “accord and satisfaction” and the like, then it would become rather difficult to achieve the objective of expediency and simplification of pleadings.

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

133. Thus, we clarify that while determining the issue of limitation in exercise of the powers under Section 11(6) of the Act, 1996, the referral court should limit its enquiry to examining whether Section 11(6) application has been filed within the period of limitation of three years or not. The date of commencement of limitation period for this purpose shall have to be construed as per the decision in *Arif Azim*²⁹. As a natural corollary, it is further clarified that the referral courts, at the stage of deciding an application for appointment of arbitrator, must not conduct an intricate evidentiary enquiry into the question whether the claims raised by the applicant are time barred and should leave that question for determination by the arbitrator. Such an approach gives true meaning to the legislative intention underlying Section 11(6-A) of the Act, and also to the view taken in *In Re: Interplay* (supra).

15. The Supreme Court has, therefore, held, in unequivocal terms, that the referral court under Section 11(6) is to examine only whether an arbitration agreement exists between the parties, “*and nothing else*”. The only other aspect which the Court has to see is whether the Section 11(6) petition has been filed within three years of the Section

²⁹ *Arif Azim Co. Ltd v Aptech Ltd*, (2024) 5 SCC 313



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21 notice.

16. *SBI General Insurance* continues to govern, having been followed numerous times thereafter, the most recent of the decisions that cite it being *Office For Alternative Architecture v Ircon Infrastructure & Services Ltd*³⁰, others being *Ajay Madhusudan Patel v Jyotindra S. Patel*³¹, *Central Warehousing Corporation v Sidhartha Tiles & Sanitary Pvt Ltd*³², *Goqii Technologies Pvt Ltd v Sokrati Technologies Pvt Ltd*³³ and *Aslam Ismail Khan Deshmukh v Asap Fluids Pvt Ltd*³⁴.

17. In the present case, there is a contract between the JV and the respondent, in the form of the CA. The CA does envisage resolution of disputes to arbitration. The Section 11(6) petition has been filed within three years of the Section 21 notice issued by the JV to RVNL. Thus, the factors noted in *SBI General Insurance* as relevant to be noted at the Section 11(6) stage all tilt towards reference of the disputes to arbitration.

Issues which survive

18. The following issues, however, survive for consideration:

- (i) Has the petitioner exhausted the pre-arbitral protocol envisaged in the GCC?

³⁰ 2025 SCC OnLine SC 1098

³¹ (2025) 2 SCC 147

³² AIR 2024 SC 5645

³³ (2025) 2 SCC 192

³⁴ (2025) 1 SCC 502



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(ii) Is the Section 21 notice issued by the JV valid, or is it defective?

(iii) What is the nature of the referral exercise that the Court would undertake in the present case? More specifically, is the Court to adopt the respondent's arbitrator, as the petition seeks, or the petitioner's arbitrator, or both arbitrators, or a sole arbitrator?

(iv) Whom would the Court refer to arbitration; more specifically, can the Court refer TPL and KNERL to arbitration?

19. The nature of the order that the Court would pass would depend on these issues; ergo, they have to be decided.

Re. Issue (i) – Whether the petitioner has exhausted the pre-arbitral protocol

20. Mr. Seth sought to contend that the present petition is not maintainable as the petitioner has not exhausted the pre-arbitral protocol of attempting an amicable settlement, envisaged in Clause 20.2 of the GCC.

21. The objection is plainly unsustainable. Clause 20.2 does not require the claimant to make an overture to the opposite party towards attempting an amicable settlement. Once the contractor, i.e. the JV,



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gives a notice of dissatisfaction and intention to commence arbitration, the JV's responsibility, under Clause 20.2, stands discharged. The Clause does not even require the contractor to suggest, in the notice, any attempt at an amicable resolution. He has only to "give notice of dissatisfaction and intention to commence arbitration to the Employer duly specifying the subject of the dispute or difference as also the amount of claim item wise". This was faithfully done by the JV on 2 June 2023. The JV was required to do no more. It was not required to hold out any olive branch to RVNL. The *parties* had to make attempts to settle the dispute amicably. The responsibility for this cannot be legally laid on the shoulders of the JV alone. Inasmuch as the GCC did not specifically require either party to initiate the attempt at an amicable settlement, the parties were only required to wait for a month and, if no amicable settlement was arrived at within that period, were entitled to initiate the arbitral process. Mr. Seth is not, therefore, correct in his submission that the JV was remiss in complying with Clause 20.2 of the GCC.

22. Besides, Clause 20.2 goes on to specifically ordain that, a demand for arbitration may be made by the contractor after 90 days from the date of issuance of the notice of dissatisfaction and intention to commence arbitration was given, even if no attempt at amicable settlement was made. Reckoned from 2 June 2023, the Section 21 notice was issued by the JV to RVNL after the expiry of the said three month waiting period, on 10 October 2023. Even by this reckoning, the Section 21 notice was competent.



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23. The objection, of Mr. Seth, regarding failure, on the JV's part, to satisfy the pre-arbitral protocol envisaged in Clause 20.2 of the GCC is, therefore, rejected.

Re. Issue (ii) – Validity of Section 21 notice

24. Mr. Seth sought to contend that the Section 21 notice issued by the JV on 10 October 2023 was illegal, as it suggested the name of an arbitrator. The submission is that the GCC did not permit the contractor to appoint its own arbitrator and that, even if Clause 20.3.2 of the GCC were to be treated as incapable of enforcement, as it conferred, on RVNL, the unilateral right to suggest a panel of arbitrators, and compelled the JV to choose an arbitrator from the said panel, the JV would, nonetheless, had to issue a plain notice of arbitration, evincing its intention to commence arbitration and, if RVNL were not to respond to the notice, move this Court under Section 11(6) of the 1996 Act. In other words, the JV could not, in its Section 21 notice, have named its arbitrator.

25. I am not inclined to accept the submission.

26. The Constitution Bench of the Supreme Court as, in para 169(d) of judgment in *Central Organisation for Railway Electrification v ECI SPIC SMO MCML (JV)*³⁵, held:

“d. In the appointment of a three-member panel, mandating the other party to select its arbitrator from a curated panel of potential arbitrators is against the principle of equal treatment of parties. In

³⁵ 2024 SCC OnLine SC 3219



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this situation, there is no effective counterbalance costs parties do not participate equally in the process of appointing arbitrators. The process of appointing arbitrators in *CORE*³⁶ is unequal and prejudiced in favour of the Railways.”

Thus, Clause 20.3.2(ii)(a) of the GCC is unworkable, as it requires the JV to select an arbitrator from a curated panel of arbitrators suggested by RVNL. This inequity is augmented by the fact that Clause 20.3.2(ii)(b) retains, with RVNL, the right to select the second arbitrator. The position that results is that, while the JV would have to select its arbitrator out of a curated panel of arbitrators provided by RVNL, RVNL’s arbitrator would also be of its own choice. This would result in completely skewing the impartiality and integrity of the arbitral process.

27. There can, therefore, be no manner of doubt that Clause 20.3.2(ii)(a), which required the JV to select its arbitrator from a curated panel of three arbitrators to be provided by RVNL, is unworkable in law.

28. Even so, Clause 20.3.1(ii) provides that, where the total value of claims is in excess of ₹ 50 lakhs, the arbitral tribunal is to consist of three arbitrators. This provision, having been executed *ad idem* between the parties, and not being in infraction of any law, is binding. Inasmuch as the total claims of the JV against RVNL – and, indeed, the claims of RVNL against the JV – were in excess of ₹ 50 lakhs, the arbitration has to be by a panel of three arbitrators. Of course, this would be subject to the parties, by consent, modifying the clause and

³⁶ *Central Organisation for Railway Electrification v ECI SPIC SMO MCML (JV)*, (2020) 14 SCC 712



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agreeing for arbitration by a sole arbitrator. However, no such agreement was voiced before me in the proceedings.

29. The arbitration has, therefore, to be by a panel of three arbitrators. Classically, in the case of arbitration by a 3-member arbitral tribunal, the claimant has the choice of one member, the opposite party/respondent has the choice of the second, and the two members thus chosen by the parties nominate the third, presiding arbitrator. In the case of any hiccup at any stage, i.e., where either of the parties fails to appoint its arbitrator within the available time, or where the two arbitrators appointed by the parties are unable to agree on a presiding arbitrator, the mantle falls on the Court under Section 11(6) of the 1996 Act, to select the arbitrator. In the present case, the submission of the petitioner is that they have selected their arbitrator, but that, as RVNL has not done so within the available period of 30 days, this Court is required to appoint the arbitrator for RVNL.

30. Mr. Seth submits that, however, the JV could not have appointed its arbitrator and that, in doing so, the Section 21 notice issued by the JV on 10 October 2023, stood vitiated.

31. In the first place, even if it were to be assumed that the JV could not have appointed its arbitrator, the mere fact that the JV suggested the name of an arbitrator in case Section 21 notice, would not vitiate the notice in its entirety. Section 21 does not prohibit either party from suggesting the name of its arbitrator. Indeed, there is a judgment of a Division Bench of this Court in *Shriram Transport*



*Finance Co Ltd v Narender Singh*³⁷, which holds that a Section 21 notice must suggest the name of an arbitrator. Irrespective of whether that is, or is not, the correct legal position, the mere fact that the Section 21 notice suggested the name of the JV's arbitrator, would not render the notice invalid or ineffective. At the highest, if the terms of the contract did not authorise the JV to suggest the name of its arbitrator, RVNL could have ignored the suggestion.

32. In the present case, however, I am of the opinion that the JV has not materially erred in suggesting the name of its arbitrator. As already noted, Clause 20.3.1(ii) of the GCC requires the arbitration to be by a 3-member arbitral tribunal. Clause 20.3.2(ii) also recognises this position. While doing so, however, Clause 20.3.2(ii)(a) requires the JV to choose its arbitrator from a curated panel of three arbitrators to be suggested by RVNL. This Clause, as I have already noted, is unworkable in law, especially in view of the judgment of the Constitution Bench in *Central Organisation for Railway Electrification*.

33. For the same reason, the stipulation, in Clause 20.3.3, of the arbitrators having to be retired officers of Engineering Services of the Indian Railways, which is obviously intended to cater to the envisaged protocol in Clause 20.3.2 of RVNL suggesting a curated panel of three arbitrators to the JV, would also be inapplicable. Needless to say, such a stipulation cannot, in any case, apply to the Court, once the procedure for constitution of the three member arbitral tribunal, as

³⁷ 2022 SCC Online Del 3412



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envisaged in the GCC, has failed, and it is for the Court to appoint the arbitrator under Section 11(6).

34. The sequitur is that, while the arbitral tribunal is required to be of three members, the JV cannot be compelled to choose its arbitrator from the curated panel of three arbitrators suggested by RVNL. The only consequence can, therefore, be that the JV is entitled to appoint an arbitrator of its own choice.

35. In, therefore, appointing its arbitrator, I am of the opinion that the Section 21 notice dated 10 October 2023, issued by the JV, does not suffer from any error of law.

36. The objection of Mr. Seth, to that effect is, therefore, also rejected.

Re. Issue (iii) - Exercise that this Court is to undertake

37. Once Issue (ii) stands thus answered, the answer to Issue (iii) becomes obvious. The Section 21 notice issued by the JV to RVNL on 10 October 2023 is valid, as is also the appointment of the learned Arbitrator whose name figures in the said notice. RVNL was, therefore, required to appoint its arbitrator within 30 days of the appointment of the arbitrator by the JV. It has failed to do so. By operation of Section 11(6) of the 1996 Act, therefore, this Court has to appoint the arbitrator for RVNL. The arbitrator named in the Section 21 notice dated 10 October 2023 issued by the JV to RVNL, and the



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arbitrator appointed by this Court on behalf of RVNL, by the present judgment, would then have to appoint a third, presiding arbitrator.

38. Issue (iii) stands thus answered.

Re. Issue (iv) - Parties to the arbitration

39. It is now settled, by the judgments of the Supreme Court in *Cox and Kings Ltd v Sap India Pvt Ltd*³⁸ and *ASF Buildtech Pvt Ltd v Shapoorji Pallonji & Co. Pvt Ltd*³⁹, that the arbitral tribunal retains the power and authority to add or delete parties to the arbitral proceedings. Even if, therefore, this Court refers the disputes between specified parties to arbitration, it would always be open to either party to apply for including other parties in the arbitral proceedings, and the arbitral tribunal would be within its authority in taking a decision on the said application, one way or the other.

40. In the present case, the CA is clearly between the JV and RVNL. TPL and KRNEL are not parties to the CA. Clause 20.3 of the GCC envisages disputes between RVNL and *the contractor* being referred to arbitration. The opening recitals in the CA identify the JV as the contractor. All communications with RVNL have been by the JV. The Section 21 notice dated 10 October 2023 is also addressed by the JV.

41. In view of this contractual position, I am inclined to refer, to

³⁸ (2024) 4 SCC 1

³⁹ 2025 SCC OnLine SC 1016



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arbitration, the disputes between the JV and RVNL. For the present, therefore, the JV and RVNL alone would be parties to the arbitral proceedings.

42. This would not, however, preclude either party from moving an appropriate application before the learned arbitral tribunal to include other parties in the arbitration. Were any such application to be moved, the learned arbitral tribunal, needless to say, would decide the application on its own merits.

Conclusion

43. In view of the aforesaid observations and conclusions this Court appoints Hon'ble Ms. Justice Rekha Palli, (Tel. 9810012120), a learned retired judge of this court, as the arbitrator on behalf of RVNL.

44. The learned Arbitrator would furnish the requisite disclosure under Section 12 of the 1996 Act, within a week of entering on reference.

45. The fees of the learned Arbitrator would be decided in consultation with the parties. Ordinarily, the learned Arbitrator would be entitled to the same fees as would be settled in respect of the learned Arbitrator appointed by the JV.

46. All questions of fact and law are kept open for being agitated



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before the learned arbitral tribunal.

47. The petition stands allowed in the aforesaid terms with no orders as to costs.

C. HARI SHANKAR, J.

May 20, 2025/ar

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