
(2014) 02 MAD CK 0180
In the Madras High Court
Case No : Original Petition No. 330 of 2013

M/s. G.G. Hospital

APPELLANT

Vs

Larsen and Toubro Limited

RESPONDENT

Date of Decision : 04-02-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11 11(6) 16 7(4)(b) 9

Citation : (2014) 2 ARBLR 306 : (2014) 2 MLJ 644

Hon'ble Judges : R.K. Agrawal, C.J

Bench : Single Bench

Advocate : Nalini Chidambaram, for C. Uma, for the Appellant; R. Murari, for Preethi Mohan, for the Respondent

Judgement

R.K. Agrawal, C.J.—The petitioner, M/s. G.G. Hospital, has approached this Court by way of these original petitions u/s 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) seeking appointment of Thiru. Justice Doraisamy Raju as the Sole Arbitrator to adjudicate the disputes between the petitioner and the respondent arising under Clause 24 of the Consultancy Agreement dated 23.4.2008 entered into between the petitioner and the respondent (under O.P. No. 331 of 2013); and Clause 11 of the Tripartite Agreement dated 21.10.2009 entered into between the petitioner, the respondent and M/s. Ascent Engineers (under O.P. No. 330 of 2013). The factual matrix of the petitioner's case, as seen from the affidavits filed in the respective original petitions, is stated in a nutshell hereinbelow:-

The petitioner herein, with an intention to construct a hospital at Door No. 21, Thirumurthy Nagar Main Road, Nungambakkam, Chennai-34, entered into a Consultancy Service Agreement with the respondent herein on 23.4.2008, whereby the respondent was appointed as the Consultant for the Architecture and Engineering Services for the project and whereunder the terms and conditions of the contract were set out. The above agreement envisaged the appointment of a Project Manager by the petitioner as its authorized agent, who

was to liaison between the petitioner and the respondent. Clause 1 of the agreement stipulated that the professional services to be provided by the respondent related to the conceptual as well as detailed architectural design and detailed engineering design services of all elements, with all follow-up services necessary to interpret and implement the design intentions to achieve final completion of the work. Even though Clause 3 of the agreement excluded certain aspects from the scope of works of the respondent, it was agreed mutually between the parties that the respondent will provide necessary drawings and documentation required for getting approval from Government bodies and would ensure compliance with various codes, standards and legislation, as applicable. The respondent was to submit a programme to the petitioner comprising a comprehensive schedule of completion dates of the stages and services to be performed by them in respect of the project and the expected dates of approval required from the petitioner, strictly complying with the overall design programme. Under Clause 7 of the agreement, the respondent was obliged to assist the petitioner in obtaining Completion/Occupancy Certificate from the statutory authorities, wherever required. The petitioner was to pay a lumpsum of Rs. 64 Lakhs to the respondent towards the scope of work enumerated in Clause 2 of the agreement. On 2.6.2009, the petitioner was granted permission by the State Government under G.O. Ms. No. 84 to construct a hospital comprising two basement plus ground plus three floors. Thereupon, a tripartite agreement was entered on 21.10.2009 between the petitioner, the respondent and a third party engineering company by name, M/s. Ascent Engineers, for construction of hospital building for the petitioner at Door No. 21, Dr. Thirumurthy Nagar Main Road, Nungambakkam, Chennai-34. Under the said agreement, the third party viz. M/s. Ascent Engineers, were appointed as the Package Contractor, the respondent was appointed as the Project Management Consultant and the petitioner was referred to as the owner, and the construction of the hospital was to be in accordance with the terms and conditions as agreed to in the agreement. As per Clause 7 as stated above, the petitioner was to pay a sum of Rs. 22,37,95,725/- to M/s. Ascent Engineers for the civil works undertaken by them and a co-ordination fee at the rate of 7.5% of the aforesaid amount was to be paid to the respondent.

2. It is the case of the petitioner that in terms of the above, the construction works commenced on 21.10.2009 and the petitioner was also very prompt in making payments to the respondent as well as M/s. Ascent Engineers for the works done by them respectively. On 27.4.2012, the petitioner applied to the CMDA for issuance of the Completion Certificate, to which the CMDA replied on 31.5.2012 stating that the completed construction did not satisfy the norms as it was an unauthorised construction and deviation from the planning permission. The petitioner pointed out that the respondent had been appointed as the Consultant under the Consultancy Agreement dated 23.4.2008 and under the tripartite agreement too, the respondent was appointed as the Project Management Consultant and therefore, it was the duty of the respondent to

ensure that there is no deviation from the planning permission. As advised by the respondent, the petitioner re-submitted the application for Completion Certificate without rectifying the defects pointed out by the CMDA and yet again, the application came to be rejected. According to the petitioner, neither the respondent, nor M/s. Ascent Engineers, were inclined to rectify the deviations pointed out by the CMDA, even though the petitioner requested them to do so at the earliest, so as to enable the petitioner to obtain the Completion Certificate. On account of the inaction of the respondent and M/s. Ascent Engineers, there was considerable delay in the entire project, causing heavy financial loss to the petitioner. Ultimately, the petitioner personally undertook the responsibility of getting the Completion Certificate by engaging a third party contractor, incurring huge costs to the tune of Rs. 75 Lakhs for rectifying the deviations pointed out and succeeded in getting the Completion Certificate on 18.12.2012. Thus, the petitioner contended that the respondent as well as M/s. Ascent Engineers failed to discharge their respective obligations under the tripartite agreement, with the latter demanding payment for the works already done by them, thereby refusing to rectify the deviations. This, the petitioner pointed out, led to disputes between the petitioner on the one hand and the respondent as well as M/s. Ascent Engineers on the other. Accordingly, M/s. Ascent Engineers invoked the arbitration clause contained in the tripartite agreement dated 21.10.2009, which stipulated that either party shall choose their respective nominee arbitrators, who shall then choose the presiding arbitrator. However, by mutual consent, the parties agreed to appoint Thiru. Justice Doraiswamy Raju, a former Judge of the Supreme Court, and the arbitration process is currently in progress.

3. It is the case of the petitioner that on account of the non-adherence to the obligation cast upon them under the tripartite agreement, the respondent and M/s. Ascent Engineers have both become jointly and severally liable for the huge losses suffered by the petitioner due to the deviations in the construction undertaken by them and also in not rectifying the same as pointed out by the CMDA. In view thereof, the petitioner issued a notice on 7.4.2013 to the respondent, calling upon them to pay a total sum of Rs. 31 Crores as compensation. The respondent replied stating that the question of paying any amount to the petitioner does not arise at all. Since according to the petitioner, the respondent acted in breach of the contractual terms, there is an arbitrable dispute which needs to be resolved in terms of the agreement between the parties. It is stated that the Consultancy Service Agreement dated 23.4.2008 as well as the tripartite agreement dated 21.10.2009 provided for resolution of the disputes between the parties by arbitration. Clause 24 of the Consultancy Service Agreement reads thus:-

24. Arbitration

All claims, dispute, differences and other matters in question between the parties hereto arising out of or relating to this agreement or the breach thereof shall be settled as far as possibly amicably, failing which such claims, disputes,

differences or matters shall be referred to the arbitration and final decision in accordance with the Arbitration and Conciliation Act, 1996 and/or any statutory modifications thereof. The arbitration shall be conducted by a Sole Arbitrator to be mutually agreed and appointed by the parties thereto. The venue of arbitration proceedings shall be Chennai and the language used shall be English.

Clause 11 of the Tripartite Agreement reads thus:-

11. Arbitration

All unresolved disputes shall be resolved through the process of arbitration shall be conducted as per the Arbitration and Conciliation Act, 1996 and or any statutory medications thereof. L&T, Package Contractor and the owner shall choose their nominee arbitrators (Two nominees from each side). These nominated arbitrators shall then mutually choose the presiding arbitrator. The majority decision shall be binding on both the contractor and the owner. The award shall be a speaking award, giving reasons for allowance/rejection of the claims of the parties. The venue of arbitration shall be at Chennai." Thus, it is seen that the Consultancy Service Agreement under Clause 24 provides for arbitration of the disputes by a sole arbitrator, where the tripartite agreement under Clause 11 provides for arbitration by an arbitral tribunal comprising two arbitrators nominated by each of the party and the two arbitrators in turn appointing the presiding arbitrator. Since the petitioner and M/s. Ascent Engineers have arrived at a consensus and nominated Thiru. Justice Doraiswamy Raju, a former Judge of the Supreme Court, to resolve the disputes between them, the petitioner contended that it was in the fitness of things that the same arbitrator could be appointed to decide the disputes between the petitioner and the respondent also.

4. With a view to resolve the disputes in terms of the agreements entered into between the parties, the petitioner sent notices to the respondent on 10.4.2013 and 15.4.2013 invoking the aforesaid arbitration clauses and requested them to nominate, by mutual consent, Thiru. Justice Doraiswamy Raju, a former Judge of the Supreme Court as the sole arbitrator. The respondents, by ill advised reply notices dated 13.4.2013 and 19.4.2013, stated that they are not acceptable for appointment of a sole arbitrator and also stated that if the petitioner were to nominate their arbitrator, the respondent would also appoint their arbitrator. The respondent further stated that the reference of the disputes between the petitioner and M/s. Ascent Engineers to a sole arbitrator would be of no relevance to the present dispute between the petitioner and the respondent. In view of such an untenable stand taken by the respondent, the petitioner sent a notice dated 20.4.2013 to the respondent stating that it had no other option but to approach this Court u/s 11(6) of the Act for appointment of Thiru. Justice Doraiswamy Raju as the sole arbitrator to resolve the disputes between the parties.

5. According to the petitioner, a strict interpretation of Clause 11 of the tripartite

agreement relating to the arbitration clause leads to the conclusion that each of the parties should nominate two arbitrators and the four nominated arbitrators should nominate a presiding arbitrator, thus totalling five arbitrators. It is also seen that if a dispute arose between all three parties to the tripartite agreement, then the total number of arbitrators to be appointed would be seven. Therefore, in the interest of the parties, the petitioner thought it fit to nominate a single arbitrator, also keeping in mind the cost factor involved in the arbitration process and according to them, that is the reason why the petitioner and M/s. Ascent Engineers also agreed to have a sole arbitrator for resolving their disputes. The petitioner contended that the disputes between the petitioner and the respondent are inextricably interlinked with the disputes between the petitioner and M/s. Ascent Engineers and hence, the stand of the respondent that appointment of the arbitrator by M/s. Ascent Engineers will have no bearing to their dispute is only with a view to delay the arbitration proceedings. In this regard, petitioner draws reference to the stand taken by M/s. Ascent Engineers in Application No. 572 of 2013 and O.A. No. 61 of 2013 filed by them in the High Court as against the petitioner and the respondent, wherein they have stated that the presence of the respondent is very much essential in the application since it is only the respondent which had certified all the works carried out by them and raised the bills therefor from the petitioner. Even in the counter claim statement filed by the petitioner in the above proceedings initiated by M/s. Ascent Engineers, the petitioner has stated that M/s. Ascent Engineers and the respondent herein are jointly and severally liable to compensate the petitioner for the losses suffered by them. If the petitioner chose to file a claim against the respondent, then there would be a joint trial thereof along with the arbitration proceedings initiated by M/s. Ascent Engineers, since the disputes between all the three parties relate to the construction of the hospital for the petitioner.

6. The main allegation of the petitioner is that the respondent is guilty of deficiency of service under the Consultancy Service Agreement dated 23.4.2008, in that they failed to discharge their duties under the tripartite agreement dated 21.10.2009, leading to disputes between the parties. According to the petitioner, the two agreements cannot be disassociated and have to be read in consonance. If read in isolation, there would be a scenario where a sole arbitrator would have to be appointed in terms of the Consultancy Service Agreement and five arbitrators in terms of the tripartite agreement. Moreover, there is already an arbitration mechanism in place, in that an arbitrator has been appointed with reference to the same subject matter, but in respect of the disputes between the petitioner and M/s. Ascent Engineers. If the stand of the respondent were to be accepted, there would be a scenario where there will be three different arbitrators undertaking the arbitration process in reference to a single dispute between the petitioner, the respondent and M/s. Ascent Engineers. Therefore, a joint trial of the issue would be ideal in terms of convenience, time and cost factor, apart from avoiding multiplicity of proceedings. According to the petitioner, the attempt of the respondent is only intended to drag on the matter

endlessly, adding to the woes of the petitioner. Therefore, in view of the untenable and untenable stand taken by the respondent, the petitioner was constrained to move this Court u/s 11(6) of the Act for appointment of Thiru. Justice Doraiswamy Raju, a former Judge of the Supreme Court as the sole arbitrator for resolving the disputes between them and the respondent. The petitioner already sought the respondent's consent in this regard, but by failing/refusing to accept to the petitioner's offer, the respondent has forfeited their right to nominate an arbitrator from their side and therefore, the petitioner prays this Court to appoint Thiru. Justice Doraiswamy Raju, a former Judge of the Supreme Court as the sole arbitrator in this matter for resolving the disputes between the parties under the Consultancy Service Agreement dated 23.4.2008 as well as the Tripartite Agreement dated 21.10.2009.

7. The respondent has filed detailed counter statements refuting the allegations made by the petitioner in the original petitions. According to them, the original petitions filed u/s 11(6) of the Act are not even maintainable, since the Section mandates that only on the failure of either party to the agreement to nominate their arbitrator that the aggrieved party can approach the High Court for the relief. In this case, there has been no such failure on the part of the respondent to adhere to the terms of appointment procedure as prescribed in the tripartite agreement dated 21.10.2009. All that the respondent did was, not to agree with the petitioner's nomination of the sole arbitrator, who is adjudicating the disputes between the petitioner and M/s. Ascent Engineers, to be the sole arbitrator in the present case also. According to the respondent, it is the petitioner which is trying to deviate from the provisions of the Act, as also the procedure prescribed under the agreement entered into between the parties with regard to appointment of multiple arbitrators and hence, the petitions preferred by the petitioner are not sustainable and liable to be rejected in limine.

8. As regards the merits or otherwise of the grounds advanced by the petitioner in the original petitions, the respondent has denied that there was any mutual agreement between the parties outside the scope of the tripartite agreement or the consultancy service agreement and the respondent's scope was limited to what was agreed upon in the consultancy service agreement. As per Clause 7 of the consultancy service agreement, the respondent was only required to prepare completion reports and drawings for the project as required and to assist the petitioner in obtaining the completion/occupancy certificate from the statutory authorities concerned. The respondent denied the contention that the work commenced on 21.10.2009 as stated by the petitioner and states that the actual construction work commenced only on 1.2.2010, and that the petitioner was not prompt in making payments either to the respondent or to M/s. Ascent Engineers for the works done by them respectively. The respondent stoutly denied the contention that it was their duty to ensure there were no deviations from the planning permission. It is stated that though as per the Government Order dated 2.6.2009 permission was granted for construction of only three floors, the petitioner consciously entered into the agreement providing for construction of

four floors and also sought a separate cost estimate in respect of the fourth floor from the respondent, which they were duty bound to provide. So, according to the respondent, it was the conscious decision of the petitioner to go ahead with construction of the fourth floor and suddenly, when the Completion Certificate was refused by the C.M.D.A. on account of such deviation, petitioner is now shifting the blame on the respondent. All along during the construction activity, it was the petitioner which was taking all the conceptual and strategic decisions with regard to the construction and the respondent was only preparing drawings to suit the requirements of the petitioner, and the respondent is not responsible in any manner for rectification of the alleged defects. Even the decision to re-submit the application to the CMDA was that of the petitioner and therefore, the petitioner cannot now feign ignorance and wash its hands off the issue stating that it was done only on the advice of the respondent and putting the blame on the respondent is completely baseless and misleading. According to the respondent, the task of rectification of defects, if any, was that of M/s. Ascent Engineers, and the respondent was unaware that M/s. Ascent Engineers had demanded any payment from the petitioner for rectification of the alleged defects and therefore, it cannot be contended that the respondent had failed to discharge their obligations under the agreements and was jointly and severally liable along with M/s. Ascent for the losses allegedly suffered by the petitioner due to the construction in deviation of the planning permission.

9. Conceding the fact that there did emerge disputes between the petitioner and M/s. Ascent Engineers, the respondent has stated that in view of the differences that arose, the petitioner and M/s. Ascent Engineers subsequently agreed for resolving the same by appointing a mutually acceptable sole arbitrator. That, however, according to the respondent, was contrary to the terms of the tripartite agreement, which envisaged appointment of multiple arbitrators for settlement of the disputes between the parties to the agreement. At best, the respondent submits, the agreement between the petitioner and M/s. Ascent Engineers could be termed as an independent one, falling u/s 7(4)(b) of the Act, since it came to be arrived at much after the tripartite agreement was executed. At any rate, the proceedings before the learned arbitrator are still at the preliminary stage where the petitioner and M/s. Ascent Engineers have filed the pleadings and the matter has not yet reached the stage of arguments. It is pointed out that in those proceedings, no claim has been made as against the petitioner herein and the respondent has been arrayed merely as a formal party therein. It is further stated that the learned arbitrator has given liberty to the respondent to file an application u/s 16 of the Act seeking to hold that he has no jurisdiction over the respondent and accordingly dismiss the proceedings as against them by discharging them.

10. The respondent goes on to state that the petitioner is deliberately trying to confuse the consultancy service agreement, the tripartite agreement, and the issue of reference of the disputes between them and M/s. Ascent Engineers to a sole arbitrator, since the reference of the disputes between the petitioner and M/

s. Ascent Engineers arose out of an independent arbitration agreement entered into between the two of them subsequent to the disputes having arisen between them, for the purpose of resolving such disputes and the respondent herein is not a party to the subsequent agreement between the two. According to the respondent, the fact that the consultancy agreement requires a sole arbitrator is of no relevance to this aspect, since the consultancy agreement has no connection with the present disputes arising between the petitioner and M/s. Ascent Engineers, admittedly out of the tripartite agreement. Even according to the petitioner, though the arbitration clause in the tripartite agreement envisaged multiple arbitrators, the fact that the petitioner and M/s. Ascent Engineers chose to appoint a sole arbitrator keeping in mind the cost and other such factors only fortifies the respondent's contention that the two parties entered into an independent arbitration agreement, to which the respondent is not a party and hence, that arbitration process will never bind the respondent with regard to the present dispute. It is the case of the respondent that the petitioner cannot be allowed to invoke the jurisdiction of this Court by-passing the appointment procedure agreed to upon by the parties themselves in the agreements entered into between them.

11. The respondent seeks to reject the case of the petitioner that they had, by their notices dated 10.4.2013 and 15.4.2013, invoked the arbitration clauses in the consultancy service agreement as well as the tripartite agreement.

According to them, the notices did not separately invoke Clause 24 of the consultancy service agreement, but clubbed it with the tripartite agreement, nor was the respondent's consent sought for the appointment of Thiru. Justice Doraiswamy Raju, a former Judge of the Supreme Court as the sole arbitrator under the consultancy service agreement. All that the petitioner had stated in the notices was that since the learned Judge had come to be appointed as the sole arbitrator for resolving the disputes between the petitioner and M/s. Ascent Engineers, it was in the fitness of things that he may also be appointed to resolve their disputes with the respondent under the two agreements. Since the tripartite agreement in specific words had provided for multiple arbitrators, the respondent thought it fit to stick to the agreement, as according to them, the very notice issued by the petitioner was not a valid notice for invoking the arbitration agreement. According to the respondent, when the intention of the parties at the time of signing the agreement was to appoint 5 or 7 arbitrators, as the case may be, for resolving the disputes between them, they cannot be permitted to depart therefrom, and the quantum of the project cost, as projected by the petitioner, would pale into insignificance.

12. The respondent plainly denies the contention of the petitioner that they are trying to stall the arbitration proceedings between the petitioner and M/s. Ascent Engineers stating that they are not even concerned with these proceedings and have themselves sought the relief of discharge from the said proceedings. Even assuming without admitting the petitioner's case that the disputes between

them and M/s. Ascent Engineers were inextricably interlinked with their disputes with the respondent and hence, must be referred to the same sole arbitrator, then according to the respondent, nothing prevented the petitioner from invoking the arbitration clause in the tripartite agreement and getting their disputes with the respondent as well as M/s. Ascent Engineers referred to a tribunal duly constituted in terms of the arbitration clause of the tripartite agreement. This itself shows the mala fides of the petitioner in clandestinely entering into an independent agreement with M/s. Ascent Engineers for resolving their disputes through a sole arbitrator, knowing fully well that the respondent was in no way concerned with the disputes between the petitioner and M/s. Ascent Engineers. Having done so, it is not now open to the petitioner to take a stand that the disputes between all the three parties are interlinked and must be resolved through the same arbitrator, ignoring the specific arbitration clause contained not only in the tripartite agreement, but also in the consultancy service agreement, to which M/s. Ascent Engineers were not even a party.

13. It is the case of the respondent that the petitioner's reference to Application No. 572 of 2013 and O.A. No. 61 of 2013 filed by M/s. Ascent Engineers u/s 9 of the Act is completely irrelevant and does not advance the case of the petitioner in any manner. The respondent contends that the statement of M/s. Ascent Engineers therein that the respondent's presence in that Application was very much essential, since they had certified the works carried out by them for the petitioner and raised the bills cannot stand a minute's scrutiny as it was no way relevant to the prayer of the petitioner in the present petitions and cannot on its own be attributed to the petitioner's contention that the disputes between the three parties were interlinked and hence, should be tried together. The respondent denies the petitioner's contention that the stand of the respondent was untenable, and if the agreements entered into between the parties provide for constitution of three tribunals, the same could not be avoided, and on this premise, terming the present dispute as arising out of "the same issue of construction of a hospital" is an attempt to over-simplify the matter by the petitioner. Although the dispute between the petitioner and M/s. Ascent Engineers could generally and vaguely be characterized as arising out of the construction of the hospital, the respondent is no way concerned with such a dispute, nor has any relief been sought for against the respondent by either the petitioner or M/s. Ascent Engineers. The respondent denies the allegation that their intention is to make a mockery of the system by protracting the arbitration proceedings for taking recourse to a civil suit. It is alleged that it is the petitioner which is making a mockery of the system, first by entering into an independent agreement with M/s. Ascent Engineers to resolve their disputes through a sole arbitrator and thereafter using the same as a ruse to try and defeat the specific arbitration agreement arrived at with the respondent. The respondent has neither filed any civil suit in any court of law, nor is their intention to do so in future. The respondent contends that the ground taken by the petitioner that by failing to give its consent to the arbitrator to be appointed, the respondent has

forfeited their right to nominate their arbitrator does not arise, since the petitioner never called upon the respondent to act as per the appointment procedure prescribed in the arbitration agreements, nor did the respondent refused to so act, for them to forfeit their right, as alleged by the petitioner. The grounds raised by the petitioner themselves would go to show that there was no independent invocation of the arbitration agreement and the very basis of the present petitions is incorrect, since it rests on an alleged failure on the part of the respondent to act in terms of the tripartite agreement, which allegation is misplaced, and has also been pointed out by the respondent in their counter affidavit filed in O.P. No. 330 of 2013. Even assuming for the sake of argument that the respondent's right stood forfeited, the petitioner could not be permitted to make a prayer as sought for in the present petitions and at best, they can only seek appointment of arbitrators in consonance with the arbitration clause contained in the tripartite agreement.

14. In the reply affidavits filed on their behalf, the petitioner has strongly denied and refuted the stand taken by the respondent in their counter statements and the averments made therein, which are contrary to the stand taken by the petitioner in the original petitions.

15. I have heard Mrs. Nalini Chidambaram, learned senior counsel appearing on behalf of the petitioner and Mr. R. Murari, learned senior counsel appearing on behalf of the respondents.

16. Learned senior counsel for the petitioner submitted that the arbitration process is going on with reference to the disputes between the petitioner and M/s. Ascent Engineers, which is one of the parties to the tripartite agreement dated 21.10.2009 before Thiru. Justice Doraisamy Raju, a former Judge of the Supreme Court and it would be in the fitness of things that the dispute between the petitioner and the respondent herein be also referred to the same learned arbitrator, instead of constituting another arbitral tribunal. Learned counsel submitted that this Court, under the provisions of Section 11 of the Act has ample jurisdiction to go beyond the arbitrators mentioned in the arbitration clause and appoint another arbitrator in order to do complete justice between the parties. In support of her contentions, learned senior counsel has relied upon the following decisions:-

Indian Oil Corporation Ltd. and Others Vs. Raja Transport (P) Ltd., ;

Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, ;

Gas Authority of India Ltd. and Another Vs. Ketki Construction (I) Ltd. and Others, ; and

M/s. TVS Finance & Services Ltd. vs. M/s. Divya Enterprises & Others,

O.P. No. 830 of 2005 dated 28.7.2011.

17. Per contra, the learned senior counsel for the respondent submitted that the

provisions of Section 11(6) of the Act have to be strictly construed and in terms of the arbitration clause under the tripartite agreement, two arbitrators have to be appointed by each of the parties to the agreement, and the arbitrators so appointed have to appoint an Umpire. Thus, the arbitral tribunal consists of five arbitrators where the dispute is between the two parties to the Consultancy Service Agreement, whereas if the dispute is inter se between all the three parties to the Tripartite Agreement, viz. the petitioner and the respondent herein as well as M/s. Ascent Engineers, then the arbitral tribunal shall consist of seven arbitrators. According to the learned senior counsel, in the notices dated 10.4.2013 and 15.4.2013 sent by the petitioner invoking the arbitration clause, the petitioner sought for appointment of Thiru. Justice Doraisamy Raju, a former Judge of the Supreme Court as the sole arbitrator for resolving the entire dispute, which was rightly not agreed to upon by the respondent since it was not in terms of the arbitration clause contained in the agreement. Learned senior counsel, therefore, submitted that the present applications are not maintainable and are liable to be rejected. In support of his contentions, learned senior counsel has relied upon the following decisions:-

Indian Oil Corporation Ltd. and Others Vs. Raja Transport (P) Ltd., ; and

National Highways Authority of India and Another Vs. Bumihiway DDB Ltd. (JV) and Others, .

18. I have given my anxious and thoughtful consideration to the various pleas raised by the learned senior counsel appearing for the parties. The parties to the lis do not dispute the fact that there is an arbitration clause, viz. Clause 11 in the Tripartite Agreement dated 21.10.2009, which provides for appointing two arbitrators by each of the party to the agreement, and the arbitrators so appointed in turn to appoint one Umpire. The agreement in specific terms spells out that if the dispute is between the two parties, the arbitral tribunal shall consist of five arbitrators and if the dispute is between all the three parties to the agreement, then the arbitral tribunal shall consist of seven arbitrators. It is also open to the parties to the agreement to modify the arbitration clause, by mutual agreement.

19. It is apparent that the dispute between the petitioner and M/s. Ascent Engineers, which arose out of the tripartite agreement, had come to be referred to the learned arbitrator Thiru. Justice Doraisamy Raju, a former Judge of the Supreme Court, by mutual agreement. However, that cannot be insisted upon by the petitioner as a matter of right to be followed in respect of the present dispute which has arisen between the petitioner and the respondent herein as well. This, especially when the respondent is insisting upon appointment of arbitrators either in terms of Clause 11 of the tripartite agreement or appointment of one arbitrator by each of the parties to the dispute, with an Umpire to be appointed by such arbitrators. The plea of the respondent for appointing one arbitrator by each of the parties to the dispute has not been agreed upon by the petitioner. Thus, the petitioner has failed to strictly adhere to the terms of the tripartite

agreement providing for appointment of arbitrators in terms of Clause 11 thereof.

20. In the decision reported in the case of Indian Oil Corporation Ltd. and Others Vs. Raja Transport (P) Ltd., , which was relied upon by both sides, the Supreme Court has held that a party to an agreement cannot claim the benefit of arbitration under the arbitration clause, but ignore the appointment procedure relating to the named arbitrator contained in the arbitration clause. The observations of Supreme Court are relevant and are extracted below:-

14. No party can say he will be bound by only part of the agreement and not the other part, unless such other part is impossible of performance or is void being contrary to the provisions of the Act, and such part is severable from the remaining part of the agreement. The arbitration clause is a package which may provide for what disputes are arbitrable, at what stage the disputes are arbitrable, who should be the arbitrator, what should be the venue, what law would govern the parties etc. A party to an agreement cannot claim the benefit of arbitration under the arbitration clause, but ignore the appointment procedure relating to the named arbitrator contained in the arbitration clause.

48. In the light of the above discussion, the scope of Section 11 of the Act containing the scheme of appointment of arbitrators may be summarised thus:

(i) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an Arbitrator within 30 days from the receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief Justice or his designate will exercise power under Sub-section (4) of Section 11 of the Act.

(ii) Where the agreement provides for arbitration by a sole arbitrator and the parties have not agreed upon any appointment procedure, the Chief Justice or his designate will exercise power under Sub-section (5) of Section 11, if the parties fail to agree on the arbitration within thirty days from the receipt of a request by a party from the other party.

(iii) Where the arbitration agreement specifies the appointment procedure, then irrespective of whether the arbitration is by a sole arbitrator or by a three-member Tribunal, the Chief Justice or his designate will exercise power under Sub-section (6) of Section 11, if a party fails to act as required under the agreed procedure (or the parties or the two appointed arbitrators fail to reach an agreement expected of them under the agreed procedure or any person/institution fails to perform any function entrusted to him/it under that procedure).

(iv) While failure of the other party to act within 30 days will furnish a cause of action to the party seeking arbitration to approach the Chief Justice or his designate in cases falling under Sub-sections (4) & (5), such a time bound requirement is not found in Sub-section (6) of Section 11. The failure to act as

per the agreed procedure within the time limit prescribed by the arbitration agreement, or in the absence of any prescribed time limit, within a reasonable time, will enable the aggrieved party to file a petition u/s 11(6) of the Act.

(v) Where the appointment procedure has been agreed between the parties, but the cause of action for invoking the jurisdiction of the Chief Justice or his designate under Clauses (a), (b) or (c) of Sub-section (6) has not arisen, then the question of Chief Justice or his designate exercising power under Sub-section (6) does not arise. The condition precedent for approaching the Chief Justice or his designate for taking necessary measures under Sub-section (6) is that (i) a party failing to act as required under the agreed appointment procedure; or (ii) the parties (or the two appointed arbitrators), failing to reach an agreement expected of them under the agreed appointment procedure; or (iii) a person/institution who has been entrusted with any function under the agreed appointment procedure, failing to perform such function.

(vi) The Chief Justice or his designate while exercising power under Sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.

21. In *Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others*, , the Supreme Court had occasion to deal with a somewhat similar case where there were two separate agreements between the parties. The Supreme Court observed as follows:-

28. It is true that there are two agreements in each of the three appeals before us. One is the main agreement relating to construction of flats and the arbitration Clause 39 there is general and does not refer to any named arbitrator. It is also true that there is a separate arbitration Clause 5 in the Interior Design Agreement which gives the names of specific arbitrators. But it must be noticed that Clause 39 permits reference to arbitration not only of issues arising under the main agreement, but also those disputes or differences which are "connected" with disputes arising under the main agreement. The following words in the main agreement are important:

Otherwise as to any other method in any way connected with, arising out of or in relation to the subject matter of this agreement.

29. In other words, Clause 39 refers to the "subject matter" of the main agreement and also to "any other matters" and these "any other matters" if they are "connected" with or arise out of or are in relation to the subject matter of the main agreement, the disputes and differences concerning those "other matters"

can also be referred to arbitration under Clause 39 of the main agreement. In other words, parties intended arbitration in respect of the main disputes and connected disputes before one arbitral tribunal.

30. As to the meaning of the words "connected with, arising out of or in relation thereto", we may refer to *Renusagar Power Co. Ltd. Vs. General Electric Company and Another*, . It was held that these words are of the widest amplitude and content and include even questions as to the existence and effect (scope) of the arbitration agreement.

31. Question is whether the disputes and differences arising under the Interior Design Agreement are integrally "connected with" the disputes and differences arising from the main contract? In our view, they are. The main agreement refers to the payment of the last installment of Rs. 17 lakhs against "taking of possession" of the flats. Therefore the main agreements extended upto the time of taking of possession by the purchasers. Para 8 of the main agreement states that the fixtures, fittings and amenities to be provided by the Developers in the said building and the flat/unit are those that are set out in Annexure E annexed to the main agreement. Now annexure E refers not only to the building but to the type of doors, corridors, fixtures, the nature of the flooring, the bathroom tiles and fittings, the Kitchen, the W.C. and the nature of the Electric Wiring. When we come to the Interior Design Agreement, Annexure A itself refers to the element of designs, Interior finishes/fittings/services and deals with the Walls, Balcony, type of Main Door and Internal Doors, External Doors. It also deals with the type of staircase, the flooring (Italian marbles for Hall room, Bed rooms and passages), Toilet (Italian Marbles, Designed Basin Ceiling Valve plastering, Bath tub/Jacuzzi all hardware fining inclusively Germany range), Marble skirting, Lobby & Entrance (Italian Marble Flooring), Plumbing, Gas system, Electrical (Heavy Duty ISI quality concealed copper wiring) etc.

32. Thus it will be noticed that there are several items in Schedule E of the main agreement which overlap the items in Schedule A of the Interior Design Agreement. In view of the overlapping, in our opinion it has to be said that several items in the Schedule A of the Interior Design Agreement are in modification/substitution of the items in the Main Agreement. Therefore the coverage of the two agreements makes it clear that the execution of the Interior Design Agreement is "connected with" the execution of the main Agreement. It may also be noted that the date of the main agreement and the Interior Design Agreement is the same in each of the three cases and Clause 3 of the Interior Design Agreement states specifically that "the work of the said renovation, designing and installation shall commence from the execution thereof which means that the execution of the Interior Design agreement and the main agreement is to be simultaneous.

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34. If there is a situation where there are disputes and differences in connection

with the main agreement, and also disputes in regard to "other matters" "connected" with subject matter of the main agreement then in such a situation, in our view, we are governed by the general arbitration Clause 39 of the main agreement under which disputes under the main agreement and disputes connected therewith can be referred to the same arbitral tribunal. This Clause 39 no doubt does not refer to any named arbitrators. So far as Clause 5 of the Interior Decorator Agreement is concerned, it refers to disputes and differences arising from that agreement which can be referred to named arbitrators and said Clause 5, in our opinion, comes into play only in a situation where there are no disputes and differences in relation to the main agreement and the disputes and differences are solely confined to the Interior Design Agreement. That, in our view, is the true intention of parties and that is the only way by which the general arbitration provision in Clause 39 of the main agreement and the arbitration provision for named arbitrator contained in Clause 5 of the Interior Design Agreement can be harmonised or reconciled. Therefore, in a case like the present where the disputes and differences cover the main agreement as well as the Interior Design Agreement, -(that there are disputes arising under the main agreement and the Interior Design Agreement is not in dispute)-it is the general arbitration Clause 39 in the main agreement that governs because the questions arise also in regard to disputes relating to the overlapping items in the Schedule to the main agreement and the Interior Design Agreement, as detailed earlier. There cannot be conflicting awards in regard to items which, overlap in the two agreements. Such a situation was never contemplated by the parties. The intention of the parties when they incorporated Clause 39 in the main agreement and Clause 5 in the Interior Design agreement was that the former clause was to apply to situations when there were disputes arising under both agreements and the latter was to apply to a situation where there were no disputes or differences arising under the main contract but the disputes and differences were confined only to the Interior Design Agreement. A case containing two agreements with arbitration clauses arose before this Court in Agarwal Engineering Co. Vs. Technoimpex Hungarian Machine Industries Foreign Trade Co., . There were arbitration clauses in two contracts one for sale of two machines to the appellant and the other appointing the appellant as sales-representative. On the facts of the case, it was held that both the clauses operated separately and this conclusion was based on the specific clause in the sale contract that it was the "sole repository" of the sale transaction of the two machines. Krishna Iyer, J. held that if that were so, then there was no jurisdiction for travelling beyond the sale contract. The language of the other agreement appointing the appellant as sales representative was prospective and related to a sales agency and "later purchases", other than the purchases of these two machines. There was therefore no overlapping. The case before us and the above case exemplify contrary situations. In one case the disputes are connected and in the other they are distinct and not connected. Thus, in the present case, Clause 39 of the main agreement applies. Points 1 and 2 are decided accordingly in favour of the respondents.

22. In *Gas Authority of India Ltd. and Another Vs. Ketu Construction (I) Ltd. and Others*, the Supreme Court held that the terms of the arbitration agreement have to be construed in a broad common sense manner, and the whole object of the Act is to secure expeditious resolution of the disputes. In the unreported decision of this Court dated 28.7.2011 rendered in O.P. No. 830 of 2005 in *M/s. TVS Finance & Services Ltd. vs. M/s. Divya Enterprises & Others*, relied upon on behalf of the petitioner, this Court has not decided any issue except appointing an arbitrator in the matter.

23. In the decision reported in the case of *National Highways Authority of India and Another Vs. Bumihiway DDB Ltd. (JV) and Others*, which was heavily relied upon by the respondent, the Supreme Court has held that the Court has the jurisdiction to make appointment of an arbitrator only when the person including an institution fails to perform any function entrusted to it under the procedure of appointment provided for in the arbitration agreement. The relevant observations of the Supreme Court are extracted hereunder:-

30. It is pertinent to state that u/s 11(6) of the Act, the Court has jurisdiction to make the appointment only when the person including an institution, fails to perform any function entrusted to it under that procedure. In the present case, the relief claimed by the respondents by invoking Section 11(6) is wholly erroneous as prior to the order dated 1.7.2005, the respondents only sought a clarification from IRC and without making a reference to them, immediately filed the petition u/s 11(6) on the purported ground that the Indian Road Congress had failed to make the appointment within the stipulated time. Therefore, the reliance placed by the respondent on the judgment of this Court in the case of *Punj Lloyd Ltd. v. Petronet MHB Ltd. (2006) 2 SCC 638* is wholly erroneous and is not applicable to the facts of the present case.

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33. Reliance was placed on the case of *Yashwith Construction P. Ltd. v. Simplex Concrete Piles India Ltd. and Anr. (supra)* wherein this Court had reiterated the well settled law and held that there was no failure on the part of the concerned party as per arbitration agreement, to fulfil his obligation in terms of Section 11 of the Act so as to attract the jurisdiction of the Chief Justice u/s 11(6) of the Act for appointing a substitute arbitrator. Obviously, Section 11(6) of the Act has application only when a party had failed to act in terms of the arbitration agreement. In the light of the legal position, it was submitted that the impugned order is wholly erroneous and liable to be set aside.

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36. It was argued by Mr. Altaf Ahmed, learned senior counsel for the respondent, that there has been a judicial determination by the High Court in the impugned order which is based on the reasoning that hierarchically a judicial arbitrator must sit with another judge only. This reasoning, in our opinion, is de hors the sanction in the Contract. The appointment made by the High Court as per the

impugned order is against the express provisions of contract as held by this Court in the case of You One Engineering and Construction Co. Ltd. and Another Vs. National Highways Authority of India (NHAI), reaffirming that once the arbitration agreement clearly envisages the appointment of the Presiding Arbitrator by IRC, there is no qualification that the arbitrator has to be a different person depending on the nature of the dispute. If the parties have entered into such an agreement with open eyes, it is not open to ignore it and invoke exercise of powers in Section 11(6).

24. From the aforesaid decisions, it follows that the provisions of the arbitration clause contained in the agreement entered into between the parties have to be strictly adhered to by the parties and any party to the agreement, before approaching this Court u/s 11(6) of the Act, has first to invoke such arbitration clause by sending notice to the other party for appointment of an arbitrator in terms of the agreement, and after the expiry of the period of 30 days, if the other party does not appoint the arbitrator, only then a right accrues in favour the first party to approach this Court by filing the application u/s 11(6) of the Act seeking the relief of appointment of the arbitrator for deciding the disputes between them.

25. In the present case, we find that even though there is an arbitration clause in the tripartite agreement dated 21.10.2009, the petitioner had not asked for appointment of an arbitrator in terms of the said clause and instead, had asked the respondent to agree for the appointment of Thiru. Justice Doraisamy Raju, a former Judge of the Supreme Court as an arbitrator, since according to the petitioner, the learned arbitrator is already seized of an arbitration proceedings in respect of a dispute between the petitioner and M/s. Ascent Engineers. However, such a stand has been objected to by the respondent, in my view, rightly so. I, therefore, am of the considered opinion that this Court does not have the jurisdiction to appoint an arbitrator under the provisions of Section 11(6) of the Act, in the face of the specific terms of the tripartite agreement entered into between the petitioner and the respondent. Original Petition No. 330 of 2013 is, therefore, misconceived and is accordingly dismissed. As far as the Consultancy Service Agreement dated 23.4.2008 is concerned, I find that the notice dated 10.4.2013 issued by the petitioner invoking the arbitration clause was in respect of both the agreements, i.e. the Consultancy Service Agreement dated 23.4.2008 and the Tripartite Agreement dated 21.10.2009. It was a composite notice nominating Thiru. Justice Doraisamy Raju, a former Judge of the Supreme Court as the sole arbitrator for adjudicating the disputes between the parties in respect of both the agreements. I am of the opinion that this notice does not conform to the requisites of Section 11 of the Act and therefore, Original Petition No. 331 of 2013 also does not merit indulgence and is accordingly dismissed.