
(2016) 04 RAJ CK 0106

In the Rajasthan High Court

Case No : Arbitration Application No. 131 of 2014

M/s JIL-Aquafil (JV), 5th Floor

APPELLANT

Vs

Rajasthan Urban Infrastructure Development Project

RESPONDENT

Date of Decision : 22-04-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11

Citation : (2016) 4 WLC 474

Hon'ble Judges : Mr. Mohammad Rafiq, J.

Bench : Single Bench

Advocate : Shri Sunil Nath, Counsel, for the Applicant; Shri Rishabh Khandelwal, Counsel, for the Non-Applicant

Final Decision : Allowed

Judgement

Mr. Mohammad Rafiq, J. - Applicant M/s JIL-Aquafil (JV) has filed this application under Section 11 of the Arbitration and Conciliation Act, 1996, inter-alia with the prayer that an Arbitrator in terms of Clause 24.4 of the Contract be appointed for resolution of its dispute with the non-applicant, Rajasthan Urban Infrastructure Development Project.

2. Foundational facts essential for deciding the application are that applicant is a joint venture of M/s Jain Infra Projects Limited and M/s Aquafil Polymers Company Private Limited. Non-applicant Rajasthan Urban Infrastructure Development Project has been created by the Government of Rajasthan for development of infrastructure across the urban centers of the State of Rajasthan. Non-applicant on 28.01.2011 invited tenders to improve infrastructure facilities at Bundi. Applicant submitted its tender and was declared as a successful bidder to "Design, Construction, Supply, Erection, Testing, Commissioning and five years Operation & Maintenance of Sewage Treatment plant having a capacity of 8 MLD including all Civil, Electrical, Mechanical, Pumping and other allied works and Supply, Laying, Joining, Testing and Commissioning of Outfall Sewer, various Trunk sewers, collecting and lateral sewers along with all necessary manholes,

appurtenances, etc. at Bundi town", under Contract Package for the accepted contract amount of Rs.34,73,78,358/-. A letter of acceptance in favour of the applicant was issued by non-applicant on 21.07.2011. In terms thereof, the applicant, from time to time, submitted performance security in the form of four different bank guarantees, each for a sum of Rs.5,41,21,818/-. The non-applicant issued notice to applicant of work order dated 09.09.2011 and directed it to commence mobilisation of the work. According to said notice, date of commencement of the project was 18.08.2011 and date of completion was 17.02.2014. In terms of the tender document, contract agreement (work) and contract agreement (operation and maintenance), both dated 21.09.2011, were executed between the parties. As per Clause 14.1 of Part III of the conditions of contract, the contractor in preparing the bid, was required to rely on the site investigation report, supplemented by any information made available to the bidder. According to the applicant, in terms of sub-clause (dd) of Clause 1 of Section VII i.e. General Condition of Contract, Site Investigation Reports are those that were included in the bidding documents being factual and interpretative reports about the surface and subsurface conditions at the site. Case of applicant is that a clear report was given by non-applicant that entire site was in their possession and that they would be able to transfer possession of the site to applicant enabling them to proceed with the execution of work immediately. However, a "Handing over/Taking over of Sites" Note was also required to be prepared in terms of Clause 6.1.10.1 of the tender document, after physically visiting the sites detailing out any hindrances/encroachments, if any. Further, in terms of Clause 6.1.10.2 of the tender document, in case of such hindrances/encroachments, probable dates of removal of hindrances/encroachments were also required to be given by the Project Manager in the said Note, which was required to be jointly signed by the Project Manager as well as the Contractor.

3. Allegation of applicant is that non-applicant failed to provide possession of the required land and the Note of a "Handing over/Taking over of Sites" to them. Even then, non-applicant directed the applicant to proceed with the work with a representation that the project site is free from encroachment/hindrances. Applicant started preliminary works by setting up site office, proceeded for mobilisation of manpower, initiated the work for preparation of action plan, initiated the work regarding preparation and approval of equipment design and drawings etc. However, to utter shock and dismay of the applicant, it was found by them that the site is full of hindrances/encroachments and the basic mandatory obligation of providing hindrance free site has not been fulfilled by non-applicant. Some of the site area was either in possession of the Forest Department or encroached upon or occupied by certain khatedars/owners of the lands, and apparently applicant could never take possession thereof. Neither any survey was conducted nor due diligence was exercised by non-applicant before issuing above-mentioned tender for the proposed sewer project at Bundi and a false representation at the time agreement was given to the applicant. In the

circumstances, applicant claims to have raised demand before the non-applicants and consequently a contract review meeting was held on 04.01.2012 with the officials of non-applicant at Investment Project Implementation Unit (IPIU) at Bundi. Applicant faced problems and agitation from local farmers/khatedars and also opposition from the forest department. Some of the khatedars/owners of plot, obtained interim orders in respect of the site area against non-applicant. Applicant claims to have again requested the non-applicant by letter dated 10.04.2012 to take steps for clearance of hindrances. It then, by letter dated 16.04.2012, yet again brought to knowledge of non-applicant that forest staff stopped the work for want of permission/work order and also prepared the challan after taking pock lane (excavator) in their custody. Request was made to obtain clearance from forest department. Non-applicant did not address/rectify any of the aforesaid issues. They rather, by letter dated 19.06.2012, arbitrarily raised various issues regarding delay in project work. Applicant, by letter dated 16.07.2012, sent a detailed reply requesting to provide land clearance for STP and 1MLD pumping station to complete the project at the earliest. Thereafter, applicant, by letter dated 29.08.2012 followed by letter dated 24.09.2012, again requested to provide the site. According to applicant, it thereafter again that vide communication dated 10.10.2012, 11.10.2012, 20.10.2012 and 26.10.2012, repeatedly raised the issue of site clearance and other related issues.

4. As per applicant, even when it was willing to start and complete the project, non-applicant, to its utter shock and surprise, issued show cause notice dated 27.08.2013 for termination of contract. Said notice required applicant to show cause as to why contract should not be terminated as per Clause 56, Section VI of the General Condition of Contract and why the additional costs for completion of work to 50% of the value of the work not completed, should not be recovered. Applicant submitted a detailed reply to the show cause notice on 13.09.2013. Applicant, vide letter dated 13.09.2013 again raised several claims against non-applicant on account of breach of different contractual obligations by its various letters. Applicant therefore called upon the non-applicant to settle the dispute by way of amicable settlement. Non-applicant, without considering above letter/reply and without providing opportunity of personal hearing, arbitrarily terminated the contract by order dated 23.10.2013 by invoking provision of Clause 56.2(a) and 56.2(h) of Section VII of the General Condition of Contract. Copy of the said order was served upon applicant on 30.10.2013, whereby applicant was directed to pay damages to non-applicant in respect of alleged delay incurred to the tune of fifty percent of the value of incomplete work under the aforesaid contract agreement i.e. total sum of Rs.1617.89 lakhs. In the backdrop of the above events, the applicant, in order to resolve the matter through amicable settlement, met the Project Director on 06.02.2014 and explained at length various reasons which had hampered the progress of the project. A letter was also issued on 07.02.2014 vide which it was stated that as per the approved design calculations and available tender drawings for successful construction of all the units, minimum 77 bigha land was required. However, as

per letter issued by the Executive Engineer, only 44 bigha land was available for the above project but no official handing over of land has ever taken place. Further it was stated that certain part of the land was occupied by the forest department and also encroached upon by private persons and therefore, without the land, it was not possible for applicant to construct STP. Applicant requested non-applicant to reconstitute the contract with fresh time frame for STP/MPS and sewerage network. Even then, non-applicant did not withdraw the termination order. Applicant thus has not been permitted to continue with the work. Hence this application.

5. Shri Sunil Nath, learned counsel appearing for applicant, submitted that Clause 24.4 of Section VII of Particular Conditions of Contract, embodies the mechanism for the settlement of disputes between the parties, which provides that in case of a dispute or difference of any kind arising out of or in connection with the contract, the parties shall first try to resolve the same amicably by mutual consultation. If the parties fail to resolve the dispute or difference by such mutual consultation, either party may then serve upon the other party a notice of its intention to commence arbitration. Though the applicant approached the non-applicant several times for amicable settlement of the dispute, but non-applicant hurriedly and without referring the dispute for amicable settlement, terminated the contract and even afterwards has failed to settle the matter amicably. Therefore, there existed an arbitrable dispute. In view of the arbitration clause in the contract entered into between the parties, applicant sent a notice to non-applicant on 29.09.2014 of its intention to commence arbitration, to the Project Manager as well as the Superintending Engineer in accordance with aforesaid Clause 24.4 of Section VI of Particular Conditions of the Contract.

6. It is contended that in view of the said Clause, the arbitration has to be conducted in accordance with the Indian Arbitration and Conciliation Act, 1996 at Jaipur. As per the general arbitration procedure under the Act of 1996, each party is required to appoint an arbitrator and two appointed arbitrators shall then appoint the third arbitrator, who shall be the presiding arbitrator, and therefore, applicant appointed Shri Ratan Prakash, retired District Judge, as its arbitrator and obtained consent for the same. Further vide notice dated 29.09.2014, applicant also requested non-applicant to appoint their arbitrator and communicate the same. Non-applicant, however, did not entertain the aforesaid request. Even after lapse of more than 30 days, they failed to act upon the request and have not appointed their arbitrator till date. Learned counsel therefore submitted that non-applicants have failed to act in accordance with the agreed procedure for appointment of arbitrator and that it is clear that non-applicants are deliberately delaying the appointment of the arbitrator as provided in the contract. Now therefore they have fortified the right to appoint the arbitrator. A sole arbitrator be therefore appointed by this court.

7. It is argued that scope of Section 11 of the Act of 1996 is very limited, wherein the Chief Justice or his Designate has a very limited jurisdiction, which

has been amply interpreted by Supreme Court in Arasmeta Captive Power Company Private Limited and Another v. Lafarge India Private Limited ? (2013) 15 SCC 414. Reliance in this connection has also been placed on the judgment of the Supreme Court in Indowind Energy Limited v. Wescare (India) Limited and Another ? (2010) 5 SCC 306 and Indian Oil Corporation Limited v. SPS Engineering Limited ? (2011) 3 SCC 507. Since in the present case, neither existence of arbitration clause has been disputed nor any issue regarding jurisdiction has been raised, objection of the non-applicant that the dispute has to be first referred to the Project Manager as per clause 24 is liable to be overruled. The application for that reason cannot be said to be premature in the light of the events explained by the applicant in their application in detail. The requirement of the matter being referred to Project Manager stands sufficiently and substantially complied with because when termination notice was served, the applicant at that stage vide communication dated 13.09.2013 requested the Project Manager to adjudicate the dispute. Even then the Project Manager, vide order dated 23.10.2013 decided to terminate the contract, which shows that this requirement stood complied with. Further objection of the non-applicant that applicant never agreed for amicable settlement, is wholly unfounded. On the contrary, applicant, on its part, made every effort to arrive at an amicable settlement, which was never encouraged by non-applicant. The argument that notice for appointment of arbitrator dated 29.09.2014 was issued after delay of about 8 to 9 months, is also liable to be rejected because as per intention of Clause 24 of the contract agreement, applicant was first required to explore the possibility of amicable settlement and consumption of some time therein was quite natural. Besides, Clause 24.3 of the agreement clearly shows that this was not a mandatory requirement. Even if efforts of amicable settlement are not made or if made but fail, option of arbitration is not foreclosed. In fact, non-applicant did not reply to several communications sent by applicant in that behalf, thus frustrating all such endeavours. This clearly shows that they never intended to settle the dispute amicably.

8. Learned counsel alternatively submitted that even if prior requirement, as stated, for invoking arbitration clause is not complied with, the same cannot be a reason to deny reference of dispute to the arbitrator, because such precondition has to be taken only as directory and not mandatory. Reliance in this connection is placed on judgments of the Delhi High Court in Ravindra Kumar Verma v. BPTP Limited ? 2015 (147) DRJ 147 and Saraswati Construction Company v. East Delhi Cooperative Group Housing Society Limited ? 57 (1995) DLT 343.

9. It is argued that requirement of issue of notice within 28 days cannot be said to be mandatory and further it cannot be held that the applicant is debarred from applying for the appointment of arbitrator due to alleged non-compliance of such condition. Reliance in this connection placed by the non-applicants on judgment of the Supreme Court in P. Manohar Reddy and Bros. v. Maharashtra Krishna Valley Development Corporation and Others ? (2009) 2 SCC 494, is misconceived. That judgment relates to Sections 8 and 20 of the Arbitration Act,

1940, and ratio thereof cannot be applied to proceedings under Section 11 of the Act of 1996, where for the Chief Justice or his Designate has been conferred with limited jurisdiction by the legislation. Scope of Section 11 of the Act of 1996 cannot be equated with the scope of Section 8 under the old Act, which had much wider scope. Scope of Section 11 of the new Act has been interpreted by catena of decisions of the Supreme Court, which clearly shows that even the issue about limitation under law has been left for the arbitrator to decide and Chief Justice or his Designate would refrain himself from deciding such issue except in the cases where there is enormous delay. Moreover, the Supreme Court in *P. Manohar Reddy and Bros.*, *supra*, did not consider the amended provisions of Section 28(b) of the Contract Act, according to which any contract, which limits the time within which a party can enforce his right or which restricts any party from enforcing his rights, is void to that extent.

10. Shri Rishabh Khandelwal, learned counsel appearing for non-applicants, opposed the application and submitted that filing of present application seeking appointment of arbitrator, is premature and is liable to be dismissed on this ground alone. He, in this connection, made reference to Clause 24 of the agreement, according to which, the dispute, if any, shall in the first place, be necessarily referred in writing to the Project Manager, for his decision. Clause 24.2 clearly states that if the contractor, is dissatisfied with the decision of the Project Manager or if the Project Manager fails to communicate his decision on or before 28 days after the day on which he received the reference, then the Contractor, on or before the expiry of 28th day, may give notice to the other party, with copy to the Project Manager of its intention to commence arbitration for settlement of dispute. If no written notice to commence arbitration has been given within the expiry of 28 days after the receipt of decision of the Project Manager, the said decision would be binding on the employer and the contractor. As per Clause 24.4, a dispute can be referred to arbitration, only when the decision of the Project Manager, has not become final and binding. In other words, if decision of the Project Manager, as per the above clause, has indeed become final and binding, then as per the arbitration agreement, the dispute cannot be referred to arbitration.

11. Learned counsel argued that the applicant never approached the Project Manager as per Clause 24.1, referring all his disputes to the Project Manager, pursuant to the said clause. The applicant has not even gone for amicable settlement as per Clause 24.3. It has straightaway approached this Court for appointment of arbitrator under Section 11(4) of the Act of 1996, which request, as per law, is premature and contrary to agreement. It is settled proposition of law that appointment of arbitrator can happen only as per the procedure agreed or set out in the arbitration agreement under Section 11 of the Act of 1996. If the procedure has not been complied with, then this court cannot appoint an arbitrator. This court has to strictly adhere to the procedure set out in the agreement for appointment of arbitrator. Reliance in this connection is placed on the reply to show cause notice dated 13.09.2013 submitted by applicant, to

argue that the same constituted a reference to the Project Manager of the dispute, is wholly misconceived. It was only a reply to show cause notice dated 27.08.2013 and that for a reply to show cause notice, it cannot be said that the same amounts to a crystallized dispute having arisen between the parties, qua the agreement. Moreover, reply to show cause notice cannot amount to creation of a crystallized dispute as per Clause 24 of the agreement, which can be invoked only when a dispute of any kind arises between the parties. Mere giving show cause notice cannot and does not conclusively raise a dispute at that stage. Learned counsel, in support of his argument, relied on judgment of the Supreme Court in *Gorkha Securities Services v. Government (NCT of Delhi) and Others* ? (2014) 9 SCC 105. It is argued that dispute, if any, can be said to come into existence only when the termination notice dated 23.10.2013 was issued to applicant. Admittedly, no reference or any challenge to show cause notice was made before the Project Manager as per Clause 24.1 of the agreement. This is not even the pleaded case of the applicant. Applicant has not made any reference to Clause 24 of the agreement either in reply to show cause notice or in their letter dated 24.09.2012, which is the requirement. Thus, no dispute was ever referred to the Project Manager as per Clause 24.1 of the agreement. It contained a mere request to provide land for STP, SPS and tertiary plan. Thus, the contention of applicant that reference was made to Project Manager is factually incorrect. Since, this was mandatory precondition for invoking arbitration clause of the agreement, the application is therefore liable to be dismissed being premature. Reliance, in support of this argument, is placed on judgment dated 06.07.1999 of the Kerala High Court in *Nirman Sindia v. Indal Electromelts Limited*, and that of Andhra Pradesh High Court dated 26.02.1999 in *D. Raja Reddy v. Director General*.

12. Shri Rishabh Khandelwal, learned counsel for non-applicant, alternatively argued that even if it is assumed that averments made in the reply to show cause notice can be construed to be a reference of disputes to the Project Manager as per Clause 24.1 of the agreement, still as per Clause 24.2, the notice to commence arbitration was barred by limitation as the same was communicated much after expiry of 28 days from the date of alleged decision of the Project Manager, which, as per the applicant, was the termination notice dated 23.10.2013. Notice to commence arbitration was given only on 29.09.2014 and that was received on 08.10.2014, after expiry of 11 months from 23.10.2013, the date on which decision to terminate the contract was taken by the Project Manager. It is thus plain and simple that as per Clause 24.2 of the agreement, if the notice to commence arbitration is not given on or before the 28th day from the date of receipt of decision of the Project Manager, then thereafter, the arbitration clause cannot be invoked as that would amount to waiver of the arbitration clause. Thus, in the present case the notice being time barred, the application for appointment of arbitrator is liable to be rejected. It is not even the pleaded case of the applicant in the application or even in the notice for appointment of arbitrator that they have complied with Clause 24.1 of the

agreement or that they referred the dispute to the Project Manager, therefore, this argument cannot be considered in the scope of Section 11 of the Act of 1996. Even otherwise, this court, as designate of the Chief Justice, under Section 11 of the Act of 1996, cannot appoint arbitrator contrary to agreement. This court cannot travel beyond arbitration clause or procedure agreed upon as per Section 11 of the Act of 1996. Such a request is beyond jurisdiction being violative of Section 11(2) read with Section 11(6) of the Act of 1996. Lastly, learned counsel argued that Clause 24.1, 24.2 and 24.3 of the agreement cannot be said to be directory as they are mandatory. Reliance in this connection is placed on judgment of the Supreme Court in P. Manohar Reddy and Bros., supra, and in particular the discussion made in paras 31 to 33 of the judgment, and it is argued that the Supreme Court therein held that arbitration was barred and relegated the parties to remedy of civil suit. It is argued that arbitration clause aforesaid sets out mandatory procedure for appointment of arbitrator, which continues even after termination of agreement. The applicant has to therefore necessarily comply with said arbitration clause. It is therefore prayed that the application be dismissed.

13. I have bestowed my thoughtful consideration to rival submissions, perused the material on record and carefully studied the cited judgments.

14. Question that has to be primarily considered in this matter is whether the present application filed by applicants is premature inasmuch as the procedure for appointment of the arbitrator as contained in Clause 24 of the contract has not been followed by the applicant prior to filing of the present application. In order therefore to fully comprehend the contours of the issues involved, it would be apposite to reproduce Clause 24 of the Contract, which reads thus,

"24.1 Project Manager's Decision: If any dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of Works or after their completion, and before or after repudiation or other termination of the Contract, including any dispute as to:

- a) the meaning of the specifications, designs, drawings and instructions herein before mentioned,
- b) the quality of the workman ship or materials,
- c) any opinion, instruction, determination, certificate or valuation of the Project Manager, or
- d) any other question, claim, right matter or anything whatsoever in any way arising out of or relating to the contract, design, drawings, specifications, estimates, instructions, conditions, orders or the failure to execute the same,

The dispute shall, in the first place, be referred in writing to the Project Manager who has jurisdiction over the Works specified in the Contract, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause.

Not later than 28 (twenty eight) day after the day on which he received such reference the Project Manager shall give, written notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause.

Subject to the other forms of settlement hereinafter provided, the Project Manager's decision in respect of every dispute or difference so referred shall be final and binding upon the Contractor and the Employer. Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Project Manager until or unless the same shall be revised in an amicable settlement or as hereinafter provided.

24.2 Remedy when the Project Manager's Decision is Not Accepted: If either the Employer or the Contractor be dissatisfied with any decision of the Project Manager, or if the Project Manager fails to give notice of his decision on or before 28 (twenty eight) days after the day on which he received the reference, then either the Employer or the Contractor may, on or before the twenty eight day after the day on which he received the notice of such decision, or on or before the twenty eighth day after the day on which the said period of 28 days expired, as the case may be, give notice to the other party, with a copy to the Project Manager, of his intention to commence arbitration for settlement of the dispute.

If the project Manager has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no written notice to commence arbitration has been given by either the Employer or the Contractor on or before the twenty eight day after the day on which the parties received notice as to such decision from the Project Manager, the said decision shall become final and binding upon the Employer and the Contractor.

24.3 Amicable Settlement: Where notice of intention to commence arbitration has been given in accordance with Sub-Clause 24.3, arbitration shall not be commenced unless an attempt has first been made by the parties to settle the dispute amicably. Provided that, unless the parties otherwise agree, arbitration, may be commenced on or after the fifty-sixth day after the day on which the notice of intention to commence arbitration was given, whether or not any attempt at amicable settlement thereof has been made.

24.4 Arbitration: Any dispute in respect of which:

- a) the decision, if any, of the Project Manager has not become final and binding pursuant to Sub-Clause 24.3, and
- b) amicable settlement has not been reached within the period stated in Sub-Clause 24.5, shall be finally resolved by arbitration. The arbitration will take place in accordance with Indian Arbitration and Conciliation Act 1996 and the arbitration will take place at Jaipur. Arbitration may be commenced prior to or

after completion of the Works, provided that the obligations of the Employer, the Project Manager and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works.

24.5 Contractor to Execute Work Pending Settlement: Whether the dispute is referred to the Project Manager to Adjudicator, to amicable settlement, or to the law courts, as the case may be, the Contractor shall, unless the Contract has been repudiated or terminated, proceed to execute and complete the Works with all due diligence pending settlement of the said dispute or differences."

15. The sequence of events narrated with reference to averments of the application herein-above would indicate that soon after the contract agreement was executed on 21.09.2011, disputes cropped up between the parties and major part of the blame placed by the applicant at the door of non-applicant is that they failed to provide possession of the site for construction of STP and SPS and could not remove hindrance/encroachment therefrom. It is further alleged by the applicant that handing over/taking over site of the land was required to be done by preparing a Note as per Clause 6.1.10.1 of the tender document, which could not be done and if there was any hindrance/ encroachment, probable date of removal of hindrances/ encroachments was required to be given by the Project Manager in the said Note as per Clause 6.1.10.2, which both the parties have to sign. According to the applicant, the contract meeting dated 01.02.2012 failed to achieve any desired result. If land was not handed over to applicant, work of STP and SPS could not commence. Even though it was agreed in that meeting that time limit for entire amount would be considered after land of the complete site was handed over to the applicant in writing and zero date for time limit would start from the date on which full clearance of the site was given to the applicant. Applicant claims to have repeatedly requested the non-applicants to ensure handing over of the land and in this connection wrote a letters dated 13.01.2012, 16.01.2012, 10.04.2012, 16.04.2012, and requested for taking steps to remove hindrances/obstructions. In fact, by letter dated 16.04.2012, applicant again claims that it brought to the notice of non-applicant that forest department has stopped the work for want of permission/work order and also prepared the challan after taking pock lane (excavator) in their custody. Non-applicants, on their part, by letter dated 19.06.2012, raised various issues regarding delay in project work and directed applicant to take necessary action and otherwise they threatened to impose liquidated damages and initiate proceedings to rescind the contract. The applicant, by letter dated 16.07.2012, submitted detailed reply, requesting to provide land clearance for STP and 1MLD pumping station to complete the project at the earliest, which was followed by letters dated 29.08.2012 and 24.09.2012. On the other hand, non-applicants encashed the bank guarantee provided by the applicant of Rs.3.74 crore on 28.09.2012 and the applicant then approached the Civil Court but eventually the non-applicants agreed to restore the bank guarantee and did so on 07.11.2012 and 24.01.2013. Even thereafter, disputes between the parties persisted and applicant sent letters dated 10.10.2012, 11.10.2012, 20.10.2012 and 26.10.2012, raising the issue of

site clearance and other related works.

16. It was after these many developments that non-applicant served on applicant show cause notice dated 27.08.2013 for termination of contract. Said notice required applicant to show cause as to why contract would not be terminated as per Clause 56, Section VI of the General Condition of Contract and why the additional costs for completion of work to 50% of the value of the work, which remained incomplete to the extent of 50%, should not be recovered. It is at this stage that applicant submitted reply to show cause notice wherein it made reference to as many as 18 letters sent to non-applicants, which have been referred to above. Apart from replying to specific allegation, applicant therein requested that certain disputes arose out of said contract and need to be adjudicated and resolved. Relevant part thereof reads thus:-

"Certain disputes have emerged out of the said contract and need to be adjudicated and needs o be resolved as the site possession for the Part B to F is still pending. Hence, under the agreed contract, we wish to bring to your kind notice about the facts to once again review the status and resolve the same amicably."

17. In the said reply to notice, applicant also made reference to various other developments and stated that it submitted revised documents on 30.11.2012 after necessary changes, approval whereof was still pending and further that it has supplied more than 6 K.M.D.I. Pipe for which the laying permission was still awaited and that there was huge variation in levels during confirmatory counter survey, which is to the tune of 2.5 meter to 3.5 meter in some areas, which is still pending from IPIU-Bundi/DSC, and therefore, the work cannot start without approval of L-Sections. Applicant raised certain specific issues in the concluding portion of the reply and lastly submitted that it had given intimation for appointment of arbitrator as per Clause 23 of General Condition of Contract through their Advocate vide letter dated 24.09.2012, which is still un-replied from the department. Therein, they had also asked for compensation for the delay in providing the land and that the department has no contractual power to issue such show cause notice, and requested to withdraw the same and look into the matter and provide justice. All these facts noted extensively thus clearly show existence of dispute between the parties and the fact that such dispute is still live.

18. Coming now to the arbitration clause, clause 24.1 requires that dispute in the first place be referred to the Project Manager with copy to another party, such reference shall state that it is made pursuant to this Clause and not later than 28 day after the day on which he received such reference, the Project Manager shall give written notice of his decision to the Employer and the Contractor. Contents of the reply to show cause notice submitted by the applicant examined in juxtaposition with Clause 24 of the contract agreement would indicate that first requirement of submitting in writing to the Project Manager the dispute, if not completely, stands satisfied substantially. And even if reference to Clause 24 was

not made, reference in the reply to show cause notice was made to Clause 23 and it would be evident from the copy of the contract placed on record that Clause 23 stood deleted in its entirety therefore it may be a case of incorrect reference, nevertheless the dispute in substance was submitted to the Executive Engineer, who as per Clause 1.1(aa) of Section VIII, was the Project Manager. This reply was submitted on 13.09.2013 and the Project Manager, by detailed order, terminated the contract. Last sub-clause of Clause 24.1 provides that decision of the Project Manager in respect of every dispute or decision shall be binding on contractor and employer and unless the contract has already been repudiated or terminated, the contractor in every case shall continue to proceed to work with all diligence. In the present case, the Project Manager, having decided to terminate the contract, there was no question of contractor/applicant proceeding with the work. Then comes the last clause 24.2, which is regarding remedy of the aggrieved party when decision of the Project Manager is not acceptable to it. The said clause provides that if either the Employer or the Contractor is dissatisfied with any decision of the Project Manager or the Project Manager fails to give notice of his decision on or before 28 days after the day on which he received the reference, then either the Employer or the Contractor may, on or before the twenty eight days after the day on which he received the notice of such decision, or on or before the twenty eight days after the day on which said period of 28 days expired, as the case may be, give notice to the other party, with a copy to the Project Manager, of his intention to commence arbitration for settlement of the dispute. It may be noted at this stage that though the show cause-notice was served on the applicant on 27th of August, 2013 and reply thereto was submitted by the applicant to the non-applicant on 13.09.2013 but the Project Manager passed the order of termination of contract not within 28 days but on 23.10.2013. Even then, if we take note of the subsequent events, we find that the applicant still on 07.02.2014 wrote a letter of request to the Project Director, inviting his attention to the persisting disputes between the parties, stating that they were in dilemma whether possession of 77 bigha of land would ever be delivered as according to them, major part of this land was either occupied by the forest department or was encroached upon by the local farmers and that in absence of required land, the STP and SPS could not be constructed. On the available land of 44 bigha, they proposed to construct 8 MLD STP based on UASB followed by facultative pond similar to their Karauli town STP. In the last part of concluding para of letter, applicant made a request not to debar them from further upcoming project and give them opportunity for reinstitution of 8 MLD STP and Sewer newt work. All these facts thus evidently make it clear that the applicant/contractor in terms of Clause 24.3 of the agreement made efforts for amicable settlement of disputes. It is thereafter that applicant served a legal notice on non-applicants seeking appointment of arbitrator thereby intimating its intention to commence arbitration and conveyed nomination of Shri Ratan Prakash, retired District Judge, as its nominee arbitrator, with request to non-applicant to appoint their nominee arbitrator and communicate the same, failing which the applicant would have to proceed in

accordance with the law.

19. The order of termination of contract has to be in the facts of the case taken as decision of Project Manager in response to the demand raised by the applicant in its reply and that decision did not come about within 28 days, rather that decision came after 40 days on 23.10.2013. The decision being of termination of contract, the applicant contractor, as per conditions of Clause 24.1, was not required to proceed with remaining work but as per Clause 24.2, if the Contractor/Applicant was dissatisfied with the decision of the Project Manager, in either event, namely, if the Project Manager gives notice of the decision on or before 28 days after the date on which he received the reference or if he failed to do so, it was free to give notice to the employer of its intention to commence arbitration for settlement of disputes.

20. Argument of non-applicant/employer in the present case is that as per the sub-clause (2) of Clause 24, if the Contractor has failed to give written notice to commence arbitration on or before 28 days after the day on which he received notice as to such decision, the said decision becomes final and binding upon him, amounting to waiver of arbitration clause by the contractor. Then Clause 24.3 comes into play, which provides that where notice of intention to commence arbitration has been given in accordance with sub-clause 24.3, according to which the arbitration shall not commence unless an attempt has first been made by the parties to settle the dispute amicably. It provided that unless the parties otherwise agree, arbitration, may be commenced on or after fifty-sixth day, after the day on which the notice of intention to commence arbitration was given, whether or not any attempt at amicable settlement thereof has been made. Clause 24.3 thus makes it clear that requirement of making efforts to settle the disputes amicably, prior to commencement of arbitration is optional. Even if such efforts after notice of intention to commence arbitration are made and fail, remedy of arbitration is not lost. In fact, Clause 24.4 stipulates that if any dispute in respect of which decision of Project Manager has not become final and binding pursuant to sub-clause 24.3, and amicable settlement has not been reached within the period stated in sub-clause 24.5, dispute shall be finally resolved by the arbitration. It is on the basis of this clause that learned counsel for non-applicant would argue that since decision of the Project Manager has become final and binding pursuant to sub-clause 24.3, the remedy of arbitration would not be available and dispute cannot be referred to the arbitration. I am not persuaded to uphold this argument for reasons to be stated herein little later.

21. What is the scope of the Chief Justice or his Designate, while dealing with a request seeking appointment of arbitrator has been dealt with by the Supreme Court in umpteen number of judgments. Reference to some of such judgments would not be out of order at this juncture. The Supreme Court in Indowind Energy Limited, *supra*, while considering the question as to whether wider examination of issues by the Chief Justice or its designate, is envisaged, held that scope of examination of the agreement by the Chief Justice or his designate

under Section 11 (6) is to be strictly restricted to the question whether there is an arbitration agreement between the parties. His jurisdiction cannot extend to examining the agreement to ascertain the rights and obligations regarding performance of such contract between the parties. It was held that such examination cannot extend to examining the agreement to ascertain the rights between the parties to the contract. The Supreme Court in that case revisited its earlier judgment in *SBP & Co. v. Patel Engineering Ltd.* - (2005) 8 SCC 618 and also in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.* - (2009) 1 SCC 267, wherein it has been held that when an application is filed under Section 11, the Chief Justice or his designate is required to decide only two issues, i.e. whether the party making the application has approached the appropriate court and whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such agreement. Therefore, what is to be considered is only whether there is an arbitration agreement between the applicant and non-applicant. Any wider examination in such a summary proceeding will not be warranted. In *Indian Oil Corporation Limited v. SPS Engineering Limited*, supra, again the Supreme Court held that scope of Section 11 of the Act of 1996 does not permit examination of maintainability or tenability of a claim either on facts or on law, and should be left for decision of arbitrator. The question of res-judicata and limitation was raised in that case and it was held that the designate Judge has exceeded his limited jurisdiction under Section 11 while deciding the question of appointment of arbitrator and that he was not expected to go into merits of claim or examine maintainability or tenability of claims either on facts or law in an application under Section 11, except when it was an apparently dead claim, which is evidently and patently long time-barred and where there is no need of detailed consideration of evidence.

22. After revisiting number of its previous judgments on the subject, the Supreme Court in a recent judgment in *Arasmata Captive Power Company Private Limited*, supra, has succinctly clarified the law in this respect and held that while deciding application under Section 11 (6) of the Act, the Chief Justice or designate would not be justified in deciding whether a claim falls under excepted matter or not under the arbitration agreement. The decision as to such issues should be left to arbitrator as it is to be exclusively determined by the arbitrator. The Chief Justice or designate has to record satisfaction that there remains a live issue in between the parties and that prima facie the issue had not become dead by the lapse of time or that any party to the agreement has not slept over the issue beyond the time permitted by law to agitate those issues, but sometime it would be appropriate to leave the question regarding the live claim to be decided by the arbitrator. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. But it was further held that Chief Justice/designate in doing so would not embark upon an examination of the issue of arbitrability or appropriateness of adjudication by a private forum, once he finds that there was

an arbitration agreement between or amongst the parties, he would leave the issue of arbitrability for the decision of the arbitral tribunal. Even if the arbitrator wrongly held that the dispute is arbitrable, the aggrieved party will have the remedy to challenge the award under Section 34 of the Act of 1996.

23. Now coming to the argument of learned counsel for non-applicants that since the decision of the Project Manager has become final and because the applicant failed to give written notice to commence arbitration before expiry of 28 days after the date on which he received notice of decision of the Project Manager to terminate the contract or in other words, he has sent the notice of his intention to commence the arbitration proceedings with delay of almost nine months, the dispute could not be referred to arbitrator. Reference in this connection may be usefully made to judgment of Delhi High Court in *Saraswati Construction Company*, supra. In that case too, the employer contested application of the contractor for seeking appointment of arbitrator on the sole ground that he has not invoked the arbitration clause in accordance with the terms of the said clause and, therefore, the application was not maintainable. Argument was that arbitration clause contemplates that the applicant has to give notice in writing in which dispute has to be sought and such notice was to be given through the architect to the employer and this step has not been taken by the Contractor, thus the arbitration clause cannot be invoked by filing petition under Section 20 of the Act. The Delhi High Court relying on its earlier judgment in *Mis. Sikand Construction Co. v. State Bank of India* ? (1979) 1 Del 364, held that writing a letter to the architect is directory provision in the relevant arbitration clause and in the said case, despite no such letter being written by the party for invoking the arbitration clause in the manner contemplated in the arbitration clause, still the Court held that in view of the provisions of Section 20 of the Arbitration Act what the Court has to consider is whether the parties have entered into an arbitration agreement and if so, whether there is any sufficient ground for not referring the matter for arbitration and if it is proved that there is an agreement for arbitration, then the Court has to direct the filing of the arbitration agreement and appoint the arbitrator in accordance with the arbitration clause. In that case, the directions were given to the parties to appoint an arbitrator in consonance with the arbitration clause. Judgment in *Saraswati Construction Company* (supra), has been recently followed by Delhi High Court in *Ravindra Kumar Verma*, supra. In that case also, as per the agreed arbitration clause, there was a precondition of mutual discussion between the parties and the objection as to the prayer for reference to the arbitration by the employer was that since no mutual discussion took place, the arbitration clause could not be invoked by the contractor. The Delhi High Court relying on *Saraswati Construction Co.*, supra, held that prior requirement, as stated, for invoking arbitration, even if not complied with, the same cannot prevent reference of the dispute to the arbitration because such procedure of precondition has to be only taken as directory and not mandatory. If the arbitration clause was treated as mandatory, the same can result in serious and grave prejudice to the parties seeking to

invoke arbitration. However, the time consumed in conciliation proceedings before seeking invocation of arbitration clause, was not exempt for limitation. Existence of conciliation or mutual discussion should not be a bar in seeking to file proceedings in reference of matter to arbitration. The Delhi High Court in the decision of Ravindra Kumar Verma, in para 11 of the report, held as under:-

"11. Whereas the existence of conciliation or mutual discussion should not be a bar in seeking to file proceedings for reference of the matter to arbitration and which is necessary for preserving rights as envisaged by Section 77 of the Act, however, since in many contracts there is an effective need of conciliation etc in terms of the agreed procedure provided by the contract, the best course of action to be adopted is that existence of conciliation or mutual discussion procedure or similar other procedure though should not be held as a bar for dismissing of a petition which is filed under Sections 11 or 8 of the Act or for any legal proceeding required to be filed for preserving rights of the parties, however before formally starting effective arbitration proceedings parties should be directed to take up the agreed procedure for conciliation as provided in the agreed clause for mutual discussion/conciliation in a time bound reasonable period, and which if they fail the parties can thereafter be held entitled to proceed with the arbitration proceedings to determine their claims/rights etc."

24. Once it is held that provision in Clause 24.2 of the agreement to the effect that 24. upon failure of the contractor/employer to give notice to commence arbitration proceedings within 28 days after decision of the Project Manager is directory and not mandatory, it may perhaps be not necessary to go into any other question. Even then, the matter can be examined from another angle whether at all such condition would be valid and enforceable in view of the amended provision of Section 28 (b) of the Indian Contract Act read with Article 137 of the Limitation Act. Section 28, amended by the Indian Contract (Amendment) Act, 1996 (Act 1 of 1997) with effect from 08.01.1997, reads thus,

"28. Agreements in restraint of legal proceedings, void ? Every agreement,

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or,

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent."

25. A Division Bench of Delhi High Court in Chander Kant and Co. v. The Vice Chairman, DDA and Others, distinguishing number of earlier decisions wherein pre-amended Section 28 was relied on, held similar clause to be not valid in view of amended provisions of Section 28(b) of the Indian Contract Act. In Explore Computers Pvt. Ltd. v. Cals Ltd. and Anr. - 131 (2006) DLT 477, the Single Bench

of Delhi High Court, after following decision of the Supreme Court in National Insurance Co., Ltd. v. Sujir Ganesh Nayak and Co., - AIR 1997 SC 2049, held as under:-

"48. The effect of the amendment of Section 28 thus made it clear that any clause extinguishing the right of a party or discharging any party from the liability in respect of any contract on expiry of specific period so as to restrict the time period would be void.

53. On a conspectus of the aforesaid judgments, two aspects have to be noted. The first is that it is the terms of the bank guarantee which have to be given due weight and the second is the distinction which is sought to be carved out in National Insurance Company Ltd. Case between a clause curtailing the period of limitation being void under Section 28 of the Contract Act and a clause which provides for forfeiture or waiver of a right if no action is commenced within the period stipulated by the agreement. Insofar as the second aspect is concerned, it cannot be lost sight of that the judgment in National Insurance Company Ltd. Case was delivered on 23.3.1997 and thus related to the provisions of Section 28 as it stood prior to the amendment because that was the substantive law in force at the time when the cause of action had arisen. The amendment to Section 28 was made with effect from 8.1.1997 and it is not disputed that the cause of action in respect of the subject matter in the present suit arose after the amendment. Sub-clause (b) of the amended Section 28 deals with the clauses which extinguish the rights of any party thereto or discharge any party from any liability being void under the said section. Thus, the scope of Section 28 has been widened whereby clause (a) deals with the position prior to the amendment alone and clause (b) is in addition.

54. In view of the amended section coming into force, the distinction sought to be carved out earlier by the legal pronouncements would not hold good.

55. In my considered view it is not open for defendant no.2 to contend that if any suit or claim is not filed within one month of the expiry of the bank guarantee, the right of the plaintiff to institute any legal proceedings itself is extinguished. Such a plea would fly in the face of the amended Section 28 as defendant no.2 cannot be discharged from the liability nor can the rights of the plaintiff be extinguished by inclusion of the clause providing so. I am thus of the considered view that to the extent there is restriction on any suit or claim being filed by the plaintiff beyond a period of one month from the expiry of the bank guarantee, the said clause would not prohibit the plaintiff from instituting the suit as it would be barred by the provisions of the amended Section 28 of the Contract Act."

26. Upon doubts being raised as to correctness of the aforesaid Single Bench judgment, reference was made to Division Bench of Delhi High Court in Chander Kant and Co., supra in an application under Section 11(6) of the Act of 1996 for appointment of arbitrator to adjudicate the dispute between the parties. The

application was opposed by Delhi Development Authority mainly on the ground that it is barred by virtue of Clause 25 of the agreement, which required that on final bill being ready for payment, the arbitration clause should be invoked within 90 days thereafter and failure to make demand for arbitration within 90 days, would result in forfeiture or waiver of right. The Delhi Development Authority in that case relied on same judgment of the Supreme Court, which has been cited on behalf of the non-applicant before this court in the present matter i.e. the case of P. Manohar Reddy and Bros., supra, to argue that similar clause in that case was held to be valid and binding and therefore the decision to the contrary relying on Section 28(b) of the Indian Contract Act should be held to be not good law. The Division Bench held that the Supreme Court in P. Manohar Reddy, supra, had no occasion to consider the effect of the insertion of Clause (b) in Section 28 by Amending Act 1 of 1997. Observation of the Court in Para 9, 10 and 11 of the report, are worth quoting:

"9. We are in respectful agreement with the view taken by the learned Judge. In our opinion, in view of the amendment, the distinction which was drawn earlier has been obliterated and the clauses providing for extinction or discharge of the rights of the parties on the expiry of the specified period are also covered by inserting Clause (b) in Section 28 of the Contract Act.

10. The contention of the DDA's counsel that the decisions of this Court no longer hold good in view of the decision in P. Manohar Reddy's case is misconceived. That decision is clearly distinguishable on facts. In that case Clause 54 of the contract provided that if the contractor considers any work demanded of him outside the requirements of the contract, he shall promptly ask the Executive Engineer, in writing, for written instructions or decisions. Thereupon, the Executive Engineer shall give his written instructions or decision within a period of 30 days of such request. If the Executive Engineer fails to give his decision in writing within a period of 30 days after being requested, or if the contractor is dissatisfied with the instructions or decision of the Executive Engineer, the contractor may within 30 days after receiving the instructions or decision, appeal to the upward authority who shall afford an opportunity to the contractor to be heard and to offer evidence in support of his appeal. It was further provided that if the contractor is dissatisfied with this decision, the contractor within a period of 30 days from receipt of the decision shall indicate his intention to refer the dispute to arbitration as per Clause 55 failing which the said decision would be final and conclusive. Clause 55 of the contract provided that all the disputes or differences in respect of which the decision has not been final and conclusive as per Clause 54 shall be referred for arbitration to a sole arbitrator appointed in the manner prescribed by that clause. It is thus seen that Clause 54 of the contract did not seek to forfeit or extinguish the right of the contractor but it merely provided that failure to make a demand for arbitration within the specified time would make the decision final and conclusive and consequently such claim will not be referable to arbitration under Clause 55 of the contract. In other words, the claim would fall in excepted category. The

argument before the Supreme Court was that the limitation for raising a claim as envisaged under Clause 54 was not applicable to the case and in view of the fact that the claim was rejected only on 26.2.1992 by the appellate authority, the period of 30 days ought to have been counted therefrom and it was also argued that under Section 8 of the Arbitration Act, the court was concerned only with the question as to whether there was a triable issue. Repelling the argument, the Supreme Court held as follows:

"18. The arbitration clause, thus, could be invoked only in a case where the decision has not become final and conclusive as per Clause 54.

19. A plain reading of the aforementioned provisions clearly shows that Clause 54 does not envisage raising of a claim in respect of extra or additional work after the completion of contract. The jurisdiction of the civil court under Section 8 of the Act or under Section 20 thereof can be invoked if the disputes and differences arising between the parties was the one to which the arbitration agreement applied.

20. The contractual clause provides for a limitation for the purpose of raising a claim having regard to the provisions of Section 28 of the Contract Act. It is no doubt true that the period of limitation as prescribed under Article 137 of the Limitation Act would be applicable, but it is well settled that a clause providing for limitation so as to enable a party to lodge his claim with the other side is not invalid."

11. In P. Manohar Reddy's case the Supreme Court had no occasion to consider the effect of the insertion of Clause (b) in Section 28 by Amending Act 1 of 1997. The Court did refer to the judgments in Vulcan Insurance Co. Ltd. v. Maharaj Singh and Wild Life Institute of India, Dehradun v. Vijay Kumar Garg but it was obvious that the observations were made in the context of unamended Section 28 of the Contract Act. It is also seen from the judgment that the cause of action had arisen in that case on 29.10.1991 on which date the appellant's claim was rejected. It is thus clear that the Court considered the case in the light of the unamended provisions of Section 28 of the Contract Act."

27. In view of above discussion and analyse of facts and law, such condition of Clause 24 or any of its sub-clauses and any such construction thereof, which debars the reference of dispute for arbitration, would be void in view of Section 28(b) of the Contract Act. Present application therefore deserves to succeed and is accordingly allowed. Hon"ble Mr. Justice V.S. Dave (Retd.), Flat No. 102, C-22, Block-A, Trimurti Dave Apartment, Sawai Jai Singh Highway, Bani Park, Jaipur (Phone No.0141-2202643) is hereby appointed as an independent arbitrator to resolve the disputes between the parties. The cost of arbitration proceedings and the arbitration fees shall be as per the Manual of Procedure for Alternative Dispute Resolution, 2009, of this Court, as amended from time to time.

28. A copy of this order be sent to Hon"ble Mr. Justice V.S. Dave (Retd.), Flat No. 102, C-22, Block-A, Trimurti Dave Apartment, Sawai Jai Singh Highway, Bani

Park, Jaipur.