

(2019) 01 DEL CK 0364

In the Delhi High Court

Case No : Arbitration Petition No. 810 Of 2016, Miscellaneous Application No. 15589 Of 2017

Salma Dam Joint Venture Through: Sjd Projects Pvt. Ltd

APPELLANT

Vs

Wapcos Limited

RESPONDENT

Date of Decision : 25-01-2019

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9, 11(6), 11(8), 12, 17
Indian Contract Act, 1872 — Section 28

Citation : (2019) 3 R.A.J. 467 : (2019) 257 DLT 366 : (2019) 8 AD(Delhi) 131 : (2019) 4 ArbLR 105

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Shreyas Jayasimha, Supriya Jain, Shweta Vaishisht, Arvind K. Nigam, Milanka Choudhury, Vineet Dvivedi, Naina Dubey, Sakshi Singh, Geeta Luthra, R.K. Sanghi, Satyendra Kumar, Ishan Sanghi, K. Prasanna

Final Decision : Disposed Off

Judgement

Rajiv Shakdher, J

Prefatory facts:

1. This is a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereafter referred to as "1996 Act").

2. The petitioner before me is a joint venture entity going by the name: Salma Dam Joint Venture (hereafter referred to as "J.V. entity"). The J.V. entity comprises a company by the name of SSJV Projects Private Limited (in short "SSPL") and another company by the name: M/s Angelique International Ltd. (in short "AIL"). The J.V. entity was formed pursuant to a Joint Venture Agreement dated 9.9.2005 (in short "JV Agreement") executed between SSPL and AIL.

2.1 It may be relevant to note at the very outset that AIL communicated to the respondent, WAPCOS Limited (hereafter referred to as "WAPCOS"), vide letter

dated 11.11.2016 that it had withdrawn the authority granted to SSPL under the JV Agreement to represent AIL. The reason that I have referred to this aspect at the very threshold is on account of the fact that WAPCOS has opposed the instant petition on two principal grounds; one of which relates to withdrawal of authority given to SSPL. As to what is the impact, if any, of the objections taken by WAPCOS will be dealt with by me in the later part of the judgment.

3. However, in order to adjudicate upon the present petition, to my mind, the following broad facts are required to be noticed.

3.1 It appears that in and about 1976, the work pertaining to construction of the Salma Dam, which is located in Afghanistan, was initiated. This work was abandoned due to unrest and civil war. Around November 2004, the Government of India picked up the threads of the job left undone.

3.2 For this purpose, the Government of India through Ministry of External Affairs (MEA) entered into an agreement dated 29.11.2004 with WAPCOS; which is a public sector enterprise working under the aegis of the Ministry of Water Resources, River Development and Ganga Rejuvenation.

3.3 Under the aforementioned agreement, WAPCOS was appointed as a specialized agency to provide financial, administrative and contract management services to MEA for taking forward the work of constructing the Salma Dam. The respondent was to be paid a commission for its efforts, while the funding for the construction of the dam was required to be provided by MEA. However, payments made by MEA to the J.V entity were required to be routed via WAPCOS.

3.4 It may be relevant to note that the agreement dated 29.11.2004, to which I have made a reference above, was followed by a Supplementary Agreement dated 5.2.2016.

3.5 The construction of the dam was divided into five main packages. Being cognizant of the nature of job entrusted to it, WAPCOS in and about 2005, took out a public tender. Against this tender, the J.V. entity preferred a bid vis-à-vis one of the packages, which is described as "Reconstruction, Rehabilitation and Completion of Salma Dam Project (3x14 MW), Afghanistan, Package III: Main Civil & Hydro Mechanical Works"(hereafter referred to as "subject project").

3.6 The J.V. entity was declared successful and awarded the subject project on 17.1.2006.

3.7 Consequent thereto, on 9.3.2006, a Contract Agreement (in short "C.A.") was executed between WAPCOS and the J.V. entity. The C.A. was, however, made effective from the date when the tender was first awarded to the petitioner i.e. 17.1.2006.

3.8 Under the terms of the C.A., the J.V. entity was given 38 months to execute the subject project.

3.9 It may be relevant to note that under Clause 3.2 of the JV Agreement, AIL

has authorized SSPL and/or its nominees to engage with WAPCOS, which, inter alia, included the right to raise any dispute, make any claim, withdraw/settle any claim, initiate legal action before any appropriate forum on behalf of itself as well as the J.V. entity. The clause specifically empowers SSPL to seek appointment of an arbitrator.

Clause 3.2 - AIL hereby authorises SSJV or its nominee (including any replacement to such nominee) to undertake all or any of the following activities on its behalf and on behalf of the Joint Venture as the Lead Partner:

- (a) sign the Tender, the Contract and all documents related or incidental thereto;
- (b) to undertake all correspondence with the Employer or with other parties as may be required for the purposes of the Project, the Tender or the Contract;
- (c) to attend meetings, represent and/ or negotiate before the Employer or with other parties as may be required for the purposes of the Project, the Tender or the Contract .
- (d) to incur liabilities on behalf of the Joint Venture and receive instructions from the Employer with regard to the Project, the Tender or the Contract;
- (e) in case the Project is awarded to the Joint Venture, to receive payments, make payments, sign all the client letters, correspond, represent, make claims and demands and take all the necessary actions towards execution of the Project and any and all aspects related or incidental thereto including, without limitation, to open, establish and operate the bank accounts in the name of the Joint Venture;
- (f) to raise any dispute, make any claim, withdraw/ settle any such claim, defend any action and for that purpose initiate legal action in the form of suits, claims, complaints, criminal complaints, writs, appeals or any other petitions or applications before any appropriate court, forum or tribunal for and on behalf of AIL or on behalf the Joint Venture and for the said purpose appoint arbitrators, sign and verify plaints, claim petitions, writ petitions, appeals, petitions, complaints, applications, affidavits, make statements, give evidence, swear on oath, compromise or withdraw the same, file replies, reply affidavits, written statements, rejoinders, undertake defence, appoint advocates for an on behalf of AIL or on behalf the Joint Venture insofar as the same pertains or relates to the Project, the Contract or the Tender, payments due there under or performance thereof.

3.10 To begin with, the total cost which was assigned to the subject project was a sum of Rs.253.84 Crores. In December 2008, though, based on a request of the J.V entity, the cost of the civil and hydro mechanical works was enhanced from Rs.253.84 Crores to Rs.470.40 Crores.

3.11 Furthermore, the tenure for completion of the subject project was also extended from time to time, given the adverse circumstances obtaining in

Afghanistan.

3.12 It appears that in 2009, the J.V. entity made a request to WAPCOS to revise the rates set out in the C.A. In particular, revision was sought, as it appears, by the J.V. entity with regard to eight major items of civil and hydro mechanical works. Evidently, the Government of India, based on a representation made by the J.V. entity, and after deliberating on the matter, agreed to the payment of additional cost in the sum of Rs.367.03 crores towards civil and hydro mechanical works. Accordingly, the contract price of the subject project qua civil and hydro mechanical works, which factored in escalation, was revised to 872.67 Crores.

3.13 This revision in the contract price, according to WAPCOS, occurred due to: revision of rates concerning eight (8) major items of civil works and hydro mechanical works; provision for escalation; variation in quantities; and substitution of river bed material etcetera.

3.14 It is the stand of WAPCOS that because the aforesaid revision in the contract price had been agreed by the Government of India an amendment to the original C.A. was brought about by the Amendment of Agreement dated 9.6.2015 (in short "AOA"), it resulted in finally and fully putting a quietus to all pending and future claims of the J.V. entity. In this behalf (both in the pleadings and the correspondences placed on record), WAPCOS seeks to rely on Clause 1.2 and 1.3 of the AOA.

3.15 It appears that despite the AOA having been executed between the J.V. entity and WAPCOS, certain claims were raised by the J.V. entity. These claims were placed, in the first instance, before the Engineer appointed to look at the claims under the C.A. Since the Engineer repelled the claims preferred by the J.V. entity, an appeal was preferred with the Technical Committee in terms of Clause 20.1 of the Conditions of Particular Application (COPA). In the first instance, five appeals were filed with regard to various claims (which are numbered as: Appeals No.1 to 5). The Technical Committee, however, vide its decision dated 28.10.2016 rejected all five appeals i.e. Appeals No.1 to 5.

4. In the interregnum, disputes arose between the partners of the J.V. entity i.e. AIL and SSPL. Consequent thereto, AIL approached this Court by way of a petition i.e. O.M.P.(I) (COMM.) 70/2016, filed under Section 9 of the 1996 Act, wherein both SSPL and WAPCOS were arrayed as parties.

4.1 By an order dated 5.9.2016 passed in the said petition, based on the consensus arrived at between AIL and SSPL, this Court directed WAPCOS to deposit the amount retained by it against the subject project in the name of the Registrar General. It was agreed by AIL and SSPL that the petition filed under Section 9 would be placed before the Arbitral Tribunal, which would treat the same as an application filed under Section 17 of the 1996 Act. An agreement was also arrived at to the effect that the Arbitral Tribunal would have the necessary authority to modify or vacate the order dated 5.9.2016.

4.2 After AIL had obtained the order dated 5.9.2016 from this Court in its Section 9 petition, it issued a letter dated 19.10.2016 to WAPCOS. Via this letter, AIL informed WAPCOS that as per Clause 4.2 of the C.A. its involvement in the arbitration process would be necessary as it was jointly and severally liable in respect of disputes, which may be resolved via the arbitration process that was sought to be triggered between WAPCOS and the J.V. entity. In other words, it was emphasized that AIL being one of the partners of the J.V. entity, its presence in the process of resolution of disputes was necessary. Thus, AIL, by this communication, called upon WAPCOS to furnish to it copies of every correspondence exchanged in relation to invocation of arbitration by the J.V. entity/SSPL and the reply, if any, sent by WAPCOS. It was also suggested that arbitration should not commence till AIL's consent in writing is obtained in the matter.

4.3 AIL followed the aforesaid communication with yet another letter dated 11.11.2016. In this letter, AIL informed WAPCOS that in view of the disputes having erupted between itself and its joint venture partner i.e. SSPL, its Board of Directors on 21.9.2016 had revoked with immediate effect the authority given to SSPL to undertake correspondence with WAPCOS and other parties and/or to, inter alia, raise any dispute, make any claim, withdraw/settle any such claim, initiate legal action before any appropriate forum on behalf of itself as well as the J.V. entity.

4.4 AIL went on to state in this communication that henceforth, WAPCOS should entertain only that communication, agreement or document, which is co-signed by it as anything short of it would not bind the J.V. entity. Furthermore, WAPCOS was called upon, in future, to dispatch a copy of every communication sent to the J.V. entity; failing which the same shall be deemed to be void and illegal. Furthermore, WAPCOS was requested by AIL not to release any further amount to the J.V. entity till a decision is reached in the arbitration proceedings pending between the joint venture partners as any such action would cause irreparable injury and wrongful losses to AIL.

4.5 Since, SSPL was aggrieved by the decision taken by the Technical Committee vis-à-vis Appeals No.1 to 5, it triggered the arbitration agreement, which is contained in Clause 20.6 of the COPA via letter dated 12.11.2016.

4.6 WAPCOS vide letter dated 5.12.2016, responded to this communication of SSPL. The stand taken by WAPCOS was that the triggering of Arbitration Agreement by SSPL was invalid on account of the fact that it did not have the authority to represent the J.V. entity, in view of AIL's revocation of the authority granted to SSPL. Furthermore, WAPCOS also took the stand that the invocation of the arbitration mechanism was premature as a fresh appeal i.e. Appeal No.6, had been preferred by the J.V. entity, which, in turn, was preferred in continuation of Appeals No.1 to 5.

4.7 The petitioner remained undeterred and moved the instant petition before

this Court. On 21.12.2016, this Court issued notice in the captioned petition. At the relevant time, AIL, which is presently arrayed as respondent No.1 to the instant petition, was not arrayed as a party by the J.V. entity, which was and remains the sole petitioner in the instant action.

4.8 The petition was taken up for final hearing on 15.3.2017 by my predecessor. The Court on that date, by a detailed order, allowed the petition and appointed a former Judge of the Supreme Court as an Arbitrator on behalf of WAPCOS, with a further direction that the presiding arbitrator would be appointed by the two arbitrators. In other words, the nominee arbitrator of the J.V. entity and the Court appointed arbitrator had to take a decision with regard to the appointment of the presiding arbitrator.

4.9 WAPCOS, being aggrieved by the order, preferred a Special Leave Petition (SLP), which was numbered as: SLP(C) No.26555/2017. The Supreme Court by an order dated 3.11.2017 impleaded AIL as a party in the SLP pending before it. The SLP was posted for further hearing on 11.12.2017. Furthermore, in the interregnum, via the very same order, the Supreme Court directed stay of further proceedings before the Arbitrator.

4.10 The Supreme Court took up the SLP for hearing on the returnable date. The Court after granting leave and upon hearing the counsel for the parties, set aside the order dated 15.3.2017 and remitted the matter for reconsideration to this Court. The aspect which seems to have engaged the attention of the Supreme Court was the argument advanced on behalf of AIL: that even though it was a constituent of the J.V. entity, it was not made a party before the High Court and that the Arbitrator could not have been appointed without hearing its say in the matter. This submission made on behalf of AIL found resonance in the submission advanced on behalf of WAPCOS. It was submitted on behalf of WAPCOS that one constituent of the J.V. entity without the consent of the other could not have appointed a nominee arbitrator on behalf of the J.V. entity. As was expected, the counsel for the J.V. entity refuted these submissions and emphasized the fact that under the JV Agreement, the J.V. entity had the authority to appoint an arbitrator. It is in this foreground, as indicated above, that the Supreme Court set aside the order and remitted the same for fresh consideration by this Court.

4.11 In the meanwhile, AIL had filed an application, being I.A. No.4139/2017 before this Court for recall of the order dated 15.3.2017. This application, however, was withdrawn by AIL on 3.1.2018 by preferring a fresh application (i.e. I.A. No.30/2018) in view of the order dated 11.12.2017 passed by the Supreme Court, to which I have made a reference above.

4.12 Besides this, AIL also filed two applications being I.A. No.15588/2017 and I.A. No.15589/2017. I.A. No.15588/2017 sought hearing and disposal of the instant petition in terms of the Supreme Court order dated 11.12.2017, while I.A. No.15589/2017 sought impleadment of AIL. In effect, both these

applications got allowed on 23.07.2018. AIL, which is arrayed as respondent No.2 in these proceedings was represented by counsel on that date as well as on other dates.

4.13 Importantly, counsel for respondent No.2 was heard, when, judgment in the matter was reserved on 27.9.2018. On that date, since an issue was raised that the original arbitration agreement had not been filed, a direction to that effect was issued qua the J.V. entity i.e. the petitioner in the present proceedings. Since, the J.V. entity did not possess the AOA and COPA, it moved an application in that behalf, being I.A. No. 14433, which was disposed of with a direction to the counsel for WAPCOS to have the same be placed on record.

Submissions of counsel

5. It is in the background of the aforesaid facts and circumstances that submissions on behalf of the petitioner were advanced by Mr. Shreyas Jayasimha, Advocate, while on behalf of WAPCOS, arguments were advanced by Mr. Arvind K. Nigam, Senior Advocate, instructed by Mr. Milanka Choudhury. AIL on its part was represented by Ms. Geeta Luthra, Senior Advocate, instructed by Mr. R.K. Sanghi, Advocate.

6. On behalf of the J.V. entity (i.e. the petitioner), broadly, the following submissions were made:

(i) The J.V. entity derives its power to institute the present petition from the JV Agreement. The JV Agreement, in turn, has been made part of the C.A. In this behalf, reference was made to Clause 3.7 of the C.A.

(ii) As per Clause 3.2 of the JV Agreement, AIL had authorized SSPL or its nominee to undertake all or any of the activities, which are referred to in Sub-clauses (a) to (f) of the very same clause. In particular, Clause 3.2 (f) of the JV Agreement vests authority in SSPL to raise claims in respect of disputes arising under the C.A. and to appoint an arbitrator for resolution of the disputes.

(iii) The stand of AIL that the Power of Attorney (POA) issued in favour of SSPL has been withdrawn, is untenable and has no legal sanctity in view of the provisions of Clause 3.3 of the JV Agreement. Clause 3.3 of the JV Agreement provides for issuance of a POA by AIL in favour of SSPL or its nominee only if a need arises in respect of matters referred to in Clause 3.2(a) to (f) of the JV Agreement. This is clearly apparent as Clause 3.3 of the JV Agreement uses the expression "may" as against "shall" meaning thereby, that AIL had undertaken to execute POA in favour of SSPL or its nominee, only if it was required for the purposes set out in Clause 3.2(a) to (f). Therefore, the provision made in Clause 3.3 of the JV Agreement for execution of POA by AIL was need based, and thus, ancillary to the power already conferred otherwise on the SSPL.

AIL undertakes to execute such powers of attorney as may be required in favour of SSJV or its nominee for the aforesaid purposes.

(iv) In any event, even if one were to accept the stand adopted on behalf of AIL that the POA executed in favour of SSPL had been withdrawn, the same would not impact the authority of SSPL to trigger the arbitration agreement as the arbitration agreement contained in Clause 20.6 of COPA, which, in turn, is a part of the C.A., would survive.

(v) Even otherwise, the authority given to SSPL under the JV Agreement cannot be withdrawn in view of the fact that the JV Agreement by itself is terminable only in situations adverted to in Clause 9 of the said agreement. Since none of the situations stipulated in Clause 9 have occurred, the JV Agreement continues to survive and therefore, the authority conferred on SSPL under Clause 3.2 of the very same agreement continues to subsist.

(vi) Furthermore, Clause 12.4 of the JV Agreement stipulates that notwithstanding inter se disputes between the joint venture partners, obligations stipulated therein shall continue to be discharged by parties to the agreement. Thus, notwithstanding the fact that inter se disputes between SSPL and AIL are the subject matter of a separate arbitration proceeding, the right of the J.V. entity to appoint an arbitrator and maintainability of proceedings cannot be questioned on this ground

(vii) The stand of WAPCOS that upon the execution of the AOA, no disputes survive for adjudication is untenable for the reason that the claims in respect of which arbitration is sought were lodged after the execution of the AOA.

(viii) In any event, in law, the AOA cannot be construed as creating an embargo with respect to all future claims as such a clause would be void ab initio in view of Section 28 of the Indian Contract Act, 1872 (in short "Contract Act"). In support of this submission, it was argued that post the execution of the AOA, Clause 20.6 of COPA was not deleted and hence continued to remain operative.

7. On behalf of WAPCOS, the principal objections taken were:

(i) That with the execution of the AOA, all pending and future claims stood satisfied. In this behalf, reliance was placed on Clauses 1.23 and 1.34 of the AOA. According to the learned counsel, both, the Engineer and the Technical Committee had rejected the claims lodged by the joint venture partner, inter alia, on this ground.

Clause 1.2- The balance pending claims of Contractor stands buried and it was agreed by the Contractor that, no claims will be raised by Contractor on any of the pending/ settled claims/ other claims resulting out of the correspondences made so far and there will be no arbitration for the settlement of claims. It is agreed that the Contractor shall not be paid any further amount on claim/ additional rate for new item of work settled or pending over and above the payments already released to the contractor.

Clause 1.3- In future, no claim of Contractor on any account shall be entertained. However, any claim arising out of force majeure shall be examined.

(ii) In view of the fact that one of the partners of the J.V. entity had decided to revoke the authority conferred on SSPL, the J.V. entity could not have appointed an arbitrator and maintain the instant petition. Reliance in this behalf was placed on *Krishan Kumar Vs. Knitting Industries & Others*, (1972) SCC OnLine 38.

(ii)(a) In this behalf, reliance was placed on AIL's letter dated 19.10.2016 and 11.11.2016 addressed by AIL to WAPCOS.

8. On behalf of AIL, it was stated that:

(i) Since a specific POA had been executed on 15.7.2005 by AIL in favour of SSPL and its nominee, Mr. Pradeep Mohan Mathur, who, at the relevant time was holding the post of General Manager in SSPL, with its withdrawal, the J.V. entity could neither have appointed an arbitrator nor instituted the instant petition.

(ii) Based on the POA, the bid was preferred by the J.V. entity, which led to the Letter of Award (LOA) dated 17.1.2006 being issued in favour of the J.V. entity. AIL, thereafter, entered into an agreement dated 25.1.2006 with SSPL. Based on this agreement, the scope of work which had to be performed by AIL was crystallized and in addition thereto, the value of the performance bank guarantee, which had to be furnished, has also been frozen. Consequently, AIL was required to furnish a bank guarantee both in INR and USD, which was equivalent, approximately, to 1/3rd of the total contract value. AIL, in fact, submitted a performance bank guarantee of a value of Rs.8,07,90,465/-.

(ii)(a) SSPL, on the other hand, furnished a bank guarantee in the sum of Rs.17,30,53,000/-. The fact that the agreement dated 24/25.1.2006, which was executed between AIL and SSPL, was made part of the C.A. emerges upon perusal of Clause 4.2 of the said Agreement. Clause 4.2 of the said Agreement makes SSPL and AIL jointly and severally liable in the "process of settlement of disputes" in the arbitration proceedings envisaged between WAPCOS and the J.V. entity.

(iii) Pursuant to the 24/25.1.2006 agreement, SSPL and AIL had entered into an addendum on 29.3.2006, whereby, it was agreed, given the hostilities in Afghanistan that AIL's share in the joint venture would be enhanced while that of SSPL would get reduced. Though, this addendum remained on the file of AIL and SSPL, it was dispatched to WAPCOS under the cover of letter dated 6.3.2009. The payments received from WAPCOS against the C.A. were deposited in the bank accounts maintained in Afghanistan and in India by the J.V. entity and on account of the situation obtaining on ground, when, revision of rates was announced by the Government of India, AIL could not take benefit of the same. The bank account(s) maintained both in USD and INR were controlled by the J.V. entity, which in turn was controlled by SSPL. Over a period of time, SSPL has neither given access to the accounts maintained in the name of the J.V. entity nor given an account of monies illegally withdrawn from the J.V. entity's accounts in which otherwise AIL had a substantial share. In sum, SSPL has failed to render accounts for period spanning between 9.9.2005 and the date of closure

of the bank accounts opened for the purpose of execution of the subject project.

(iv) The financial position of SSPL is weak as is discernible on a perusal of the balance sheet ending on 31.3.2015. Against net worth of Rs.15.05 crores, SSPL has long term borrowings of Rs.344 crores. SSPL has recorded a net loss of Rs.14.13 crores. The Notes to Accounts show that SSPL is in litigation with various banks, sundry creditors etcetera. The Notes to Accounts also show that SSPL at present has not acknowledged debts of banks and creditors equivalent to Rs.2495.85 crores, which if taken into account, would further worsen SSPL's financials, even if one were to take into account the claims against the creditors and contracts made by SSPL to the tune of Rs.710.84 crores. Furthermore, the ROC's record shows that there are charges worth Rs.595 crores registered against the assets of SSPL.

(v) SSPL is embroiled in litigation with various banks including IDBI Limited and Canara Bank. There are four recovery cases instituted in the Debt Recovery Tribunal. Out of the four cases, three cases have been instituted by Canara Bank, while one by IDBI Limited.

(vi) Pursuant to AIL's Board of Directors taking a decision on 29.1.2016 to withdraw authority given to SSPL, the POA dated 15.7.2005 has been revoked. The decision taken in this behalf has not only been communicated to SSPL, but also the banks of the J.V. entity and WAPCOS. Reference in this behalf was made to the letters dated 19.10.2016 and 11.11.2016, which were also relied upon by WAPCOS. SSPL has made false averments in paragraph 10 of its petition that the POA dated 15.07.2005 was in force and formed part of the C.A. SSPL, deliberately, failed to mention that the said POA had been withdrawn by AIL. SSPL has not approached this Court with clean hands and has proceeded to appoint a technical person as an Arbitrator without consulting AIL. Reliance in this behalf was place on *Dhananjay Sharma v State of Haryana* (1995) 3 SCC 757.

(vii) SSPL has, as indicated above, failed to disclose that pursuant to agreement dated 24/25.01.2006 and an addendum dated 29.03.2006 was executed between them. The projection by SSPL that it is entitled to 95% of the share under the subject project, while the balance 5% would fall to the share of AIL is not correct, as AIL not only furnished the bank guarantee(s) of value equivalent to 1/3rd of the contract price but also executed work in the same ratio. In other words, the emphasis was that AIL had executed 33% of the total work envisaged under the subject contract.

(viii) The appointment of Mr. Kabindra Prasad Mohanty by SSPL was illegal as he has neither made the necessary disclosures as required by law in connection with his proposed appointment.

(ix) The appointment of an Arbitrator can only be made with the consent of AIL in consonance with provisions of Clause 4.2 of the C.A. As a matter of fact, Mr. Mohanty has not as yet accepted the offer of appointment made to him.

Reasons

9. I have heard the counsel for the parties and perused the record.

10. According to me, what emerges from the record is that in order to bid for the subject contract, SSPL and AIL entered into a Joint Venture Agreement. Thereafter, a techno-commercial bid followed by a price bid was preferred against the tender floated by WAPCOS.

10.1 The J.V. entity was declared as a successful bidder leading to the issuance of an LOA in its favour. The LOA was followed with the execution of the C.A. and AOA.

10.2 The record also shows that initially, the time frame for execution of subject project was pegged at 38 months, commencing from 17.01.2006, at a point in time when the LOA was issued. Thereafter, time for execution was, concededly, extended by WAPCOS. This led to a demand for revision of rates for major civil works" items and hydro mechanical works. Given the hostilities in the region, the request of the J.V. entity was accepted. Accordingly, the value of the civil works and hydro mechanical works was revised to Rs.872.67 crores.

10.3 Uptil this point, there is a broad agreement with regard to what transpired between the parties.

10.4 It is when the J.V. entity preferred some additional claims that the disputes arose between the J.V. entity and WAPCOS. The stand taken by WAPCOS before me is that with the execution of the AOA on 09.06.2005, all pending claims and future claims stood settled. For this purpose, reliance was placed on Clauses 1.2 and 1.3 of the AOA.

10.5 What is, however, not disputed is that as a matter of fact, the J.V. entity had lodged its claim with the Engineer appointed under the C.A. and upon the Engineer repelling its claim, five appeals were lodged with the Technical Committee which rejected the same by way of a common order dated 28.10.2016. A perusal of the order of the Technical Committee would show that the claims lodged by the J.V. entity have been examined on merits and also from the perspective of the plea raised before it with regard to their admissibility in view of the provisions of Clauses 1.2 and 1.3 of the AOA.

10.6 Therefore, if, as contended on behalf of WAPCOS, Clauses 1.2 and 1.3 of the AOA barred the J.V. entity from pressing any pending or future claims, then, to my mind, there was no need for the Technical Committee to deliberate upon the claims on merits. It is the stand of the J.V. entity that all the claims lodged by it with WAPCOS pertain to a period post the execution of the AOA.

10.7 The record shows that the AOA was executed on 09.06.2005, while the subject project was inaugurated post its completion only in 2016. Furthermore, it is the case of the J.V. entity that the AOA provided for revision of rates for eight major items concerning civil works and hydro mechanical works. Therefore, if at

all, the bar would apply to claims, which were referable to pre-existing claims, or claims pertaining to revision of rates relatable to eight major items of civil works and hydro mechanical works or those claims which overlapped with these claims. That being said, as to whether the position taken by the J.V. entity is correct or not is a matter which can only be examined by the Arbitral Tribunal once the matter is tried as based on mere pleas and counter pleas, this aspect cannot be decided in a Section 11 petition. Particularly, given the facts obtaining in this case, it is not possible to come to a definitive conclusion that there was accord and satisfaction upon the execution of the AOA.

10.8 Therefore, the ground taken on behalf of WAPCOS that no claim could be lodged post execution of the AOA is untenable and hence cannot be accepted. There is, to my mind, much merit in the submission advanced on behalf of the J.V. entity that the AOA cannot impede adjudication of all future claims whether or not they have their genesis in the AOA. If that was the intent, as correctly argued on behalf of the J.V. entity, the AOA should have done away with Clause 20.6 of COPA, which contains the arbitration agreement.

11. The other ground of challenge, which is common to WAPCOS and AIL is that the J.V. entity can neither nominate an Arbitrator nor institute the instant petition via SSPL. The argument is predicated on the purported withdrawal of the authority given by AIL to SSPL or its nominee via the POA dated 15.07.2005. In this context, it is important to bear in mind the following facts and circumstances.

11.1 The tender in respect of the subject project was floated in 2005. AIL, it appears, on 15.07.2005, executed a POA in favour of SSPL and its nominee, Mr. Pradeep Mohan Mathur, to act on its behalf based on which they applied to WAPCOS for pre-qualification to submit a bid as a joint venture.

11.2 Accordingly, techno-commercial bid and price bid were submitted on 12.09.2005 and 25.10.2005 respectively pursuant to the execution of the joint venture agreement which, as noticed hereinabove, was executed on 09.09.2005. It is based on the aforesaid bids which were submitted via the J.V. entity that led to an LOA being issued on 17.01.2006. The LOA was issued in favour of the J.V. entity, which therefore, resulted in the execution of the C.A. on 09.03.2006.

11.3 Thus, what is clear is that the POA of 15.07.2005 had served its purpose, once the joint venture agreement was executed on 09.09.2005. This is so as the power required by SSPL to act on behalf of AIL was captured in Clause 3.2 of the JV Agreement. Concededly, AIL authorized SSPL or its nominee to undertake various activities both on its behalf as well as on behalf of the J.V. entity, in its capacity as the lead partner qua aspects captured in Sub-clause (a) to (f) of Clause 3.2.

11.4 Pertinently, Sub clause (f) of Clause 3.2 confers upon SSPL, inter alia, the power to raise any dispute, make any claim, withdraw/settle any claim, initiate legal action before any appropriate forum on behalf of itself as well as the J.V. entity. Clearly, once such power was granted under Clause 3.2 of the JV

Agreement, there was no further need for execution of a separate POA. However, as a measure of abundant caution, in Clause 3.3 of the JV Agreement, it is provided that AIL, if required, "may" execute a POA in favour of SSPL or its nominee for the purposes set out in Sub clause (a) to (f) of Clause 3.2-which, to my mind, at worst was a surplusage and at best an insurance against the need to adapt to an unanticipated situation.

11.5 Therefore, the revocation of POA dated 15.07.2005, in my opinion, cannot impact or dilute what is provided in the JV Agreement. It is no one's case that the JV Agreement stands terminated.

11.6 Furthermore, Clause 4.2 of the C.A. makes it clear that the JV Agreement, which was executed, as indicated above, on 09.09.2005 was to be treated as a part of the C.A. and that both AIL and SSPL, as provided in the said clause, were to be jointly and severally liable in the "process of settlement of disputes in arbitration between WAPCOS and the Salma Dam Joint Venture". Clause 4.2 reads as under:

"Clause 4.2 It is also agreed that the Salma Dam Joint Venture agreement dated 9th September 2005 shall be treated as part of this agreement and both the parties to the said joint venture namely M/s SSJV Projects Private Limited and M/s Angelique International Limited shall also be jointly and severally liable in the process of settlement of disputes in arbitration between WAPCOS and Salma Dam Joint Venture"

(emphasis is mine)

11.7 This Clause read with Clause 3.2 of the JV Agreement, to which, I have made a reference above, would show that the J.V. entity through SSPL could trigger the arbitration agreement obtaining between itself and WAPCOS. The fact that SSPL is the lead partner of the J.V. entity emerges upon perusal of not only Clause 3.2 but also Clause 4.1 of the JV Agreement. The latter clause clearly states that SSPL would have a share of 95% in the J.V. entity while the remaining 5% will remain with AIL.

11.8 The arguments advanced by AIL that it had entered into an agreement dated 24/25.01.2006 with SSPL, which was made part of Clause 4.2 of the C.A. can in no way emasculate SSPL's power to act on behalf of the J.V. entity. The position, in this behalf, would not change even if one were to give credence to the other submissions advanced on behalf of AIL that an addendum dated 29.03.2006 to the agreement dated 24/25.01.2006 was also executed between AIL and SSPL, which, inter alia, recognized the need to increase the share of AIL in the joint venture. These are arguments on merits and therefore, to my mind, cannot impact the authority of SSPL conferred on it by the JV Agreement to act on behalf of the J.V. entity. It is no one's case that Clause 20.6 of COPA does not provide for adjudication of disputes via an arbitral mechanism set forth therein. Since, SSPL, under Clause 4.2 of the C.A. read with Clause 3.2 of the JV Agreement is authorized to initiate the arbitration process, I see no reason as to

how that power could have been taken away by AIL, merely, by revoking the POA, which preceded the execution of the JV Agreement.

11.9 As noted above, during the course of narration of facts, except for these two aspects, all other submissions, advanced on behalf of AIL pertain to the merits of the disputes. While one can have no difficulty with the submission advanced on behalf of AIL that, it is, if not a necessary party, certainly a proper party to the dispute, AIL cannot be permitted to derail the arbitration process commenced by the J.V. entity via SSPL. Steps, if any, in this behalf can be taken by AIL by moving the Arbitral Tribunal. However, if the argument advanced on behalf of AIL that SSPL cannot initiate arbitration process on behalf of the J.V. entity is accepted, it would result in a situation whereby, figuratively speaking, the tail would wag the dog.

12. Thus, for the foregoing reasons, I am of the view that the disputes between the J.V. entity and WAPCOS should be adjudicated by an Arbitral Tribunal. The next question which arises is: should the Court appoint an Arbitrator only for WAPCOS as was done in the first round of litigation, in view of the fact that the J.V. entity has already appointed its nominee Arbitrator. In this context, it needs to be noticed that on behalf of AIL, it was emphasized that the J.V. entity's nominee Arbitrator, Mr. Kabindra Prasad Mohanty, had neither filed his declaration nor accepted his appointment. Clearly, the two joint venture partners i.e. SSPL and AIL, are at odds with each other as regards who should be their nominee arbitrator.

12.1 The power available to the Court to appoint an Arbitrator when situations as set out in Section 11 (6) arise, is predicated on the appointee fulfilling the following criteria prescribed under Section 11 (8):

(i) Firstly, he should possess qualifications, if any, prescribed under the agreement obtaining between the parties

(ii) Secondly, his disclosure should not throw up aspects referred to in Section 12 read with the attendant Schedules

(iii) Lastly, "other considerations" which could impact the appointee's independence and impartiality require examination.

12.2 The Courts ordinarily would (and I am conscious of this fact) adhere to the arbitration procedure provided in the agreement obtaining between the parties. That being said, Courts have in certain circumstances appointed an Arbitrator de hors the arbitration agreement only to secure a neutral and independent Arbitral Tribunal. The attempt is to exclude "justifiable apprehension of bias" (See: Voestalpine Schienen GmbH Vs. Delhi Metro Rail Corporation Ltd., (2017) 4 SCC 655). Also see the following cases where the Supreme Court has expounded on the power of the Court to appoint an Arbitrator de hors the agreement obtaining between the parties. (Aravali Power Company Pvt. Ltd. Vs. Era Infra Engineering Ltd., (2017) 15 SCC 32; Indian Oil Corporation Limited and

Others Vs. Raja Transport Private Limited, (2009) 8 SCC 520; Union of India (UOI) Vs. U.P. State Bridge Corporation Ltd., (2015) 25 SCC 52; North Eastern Railway Vs. Tripple Engineering Works, (2014) 9 SCC 288; Denel (Proprietary Limited) Vs. Govt. of India, Ministry of Defence, (2012) 2 SCC 759 and Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Limited, (2008) 10 SCC 240.

12.3 Having said so, I must confess that the scope in this regard is narrow as it rails against the concept of party autonomy and, therefore, has to be applied with great care and caution.

12.4 Coming back to the instant case, there is undoubtedly a deep mistrust between the partners of the J.V. entity. AIL will always carry the impression, however misplaced it may be, that SSPL's nominee, Mr. Mohanty, will act against its interest. On the other hand, WAPCOS failed to appoint its nominee Arbitrator which led to the instant petition being filed. Therefore, given the circumstances arising in this case, I am inclined to appoint a sole Arbitrator in the matter. The relief sought in the petition is moulded to that extent. In my opinion, it will not only hasten the process of adjudication, but would also, possibly, bring down the costs of arbitration to a large extent

13. Accordingly, Hon"ble Mr. Justice Vikramajit Sen (Cell No.9818000290), former Judge, Supreme Court of India, is appointed as an Arbitrator in the matter. Being a court appointee even in the previous round, none of parties could possibly have any objection to his appointment.

14. The learned Arbitrator will be paid his fee as per the provisions of Fourth Schedule appended to the 1996 Act. Before entering upon reference, the learned Arbitrator will file a declaration as required under Section 12 and other attendant provisions of the 1996 Act. Needless to say, any observation made hereinabove will not impact the merits of the case.

15. The captioned arbitration petition and the impleadment application are disposed of in the aforesaid terms.