IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/PETN. UNDER ARBITRATION ACT NO. 24 of 2024

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C2R PROJECTS LLP

Versus

KINETIX SOLUTIONS PRIVATE LIMITED & ORS.

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Appearance:
MR.PARTH CONTRACTOR(7150) for the Petitioner(s) No. 1
for the Respondent(s) No. 1,2,3,4,5
SHRIJIT G PILLAI(7937) for the Respondent(s) No. 1,2,3,4,5

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CORAM:**HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL**

Date : 03/05/2024

ORAL ORDER

1. The instant petition has been filed with the prayer to appoint a co-arbitrator on behalf of the respondent in respect of the arbitration proceedings between the petitioner and the respondent.

2. Brief facts relevant to decide the controversy at hands are that the petitioner and Respondent No. 1 – Company are privity to a share purchase and Share Subscription Agreement (SPA) and Share Holders Agreement (SHA) dated 03.06.2015. Clause 11.10 of the Share Purchase Agreement pari materia to Clause 18.12 of the Share Holders Agreement governs dispute resolution and reads as under:

"11.10 Governing Law and Dispute Resolution

(a) If any dispute arises between the Investors on the one hand any or all of the Company, Promoter Group on the other hand during the subsistence of the Transaction Documents or thereafter, in connection with or arising out of the validity, interpretation, implementation or alleged breach of any provision of the Transaction Documents or regarding a question, including the question as to whether the termination of any of the Transaction Documents by any Party has been legitimate, the disputing Parties shall endeavour to settle such dispute amicably, and the same shall in the first instant be resolved through mediation by reputed lawyers, 1 (One) each appointed by the Investors and the Promoter Group. The attempt to bring about an amicable settlement is considered to have failed as soon as one of the disputing Parties, after reasonable attempts, which attempt shall continue for not less than 30 (Thirty) days, gives 15 (Fifteen) days' notice thereof to the other disputing Parties in writing.

b) In case of such failure, the dispute shall be referred to a sole arbitrator to be mutually appointed by the Promoters Group, the Company and the Investor within 5 (Five) days from the expiry of the said 15 (Fifteen) days' notice or in case of disagreement as to the appointment of the sole arbitrator, to 3 (Three)

arbitrators, the Investor nominating one arbitrator and the Promoter Group appointing the second arbitrator where the dispute is between the Investors and the Promoters and where the dispute is between the Investors on the one hand and the Promoters and the Company on the other hand, the second arbitrator shall be appointed jointly by the Promoters and the Company, who shall both be appointed within 15 (Fifteen) days from the expiry of the said 5 (Five) days' period. The third arbitrator shall be appointed by the 2 (Two) arbitrators so appointed within 15 (Fifteen) days of their appointment. The arbitration proceedings shall be governed by the (Indian) Arbitration and Conciliation Act, 1996.

(c) The place of arbitration shall be Ahmedabad, India.

(d) The proceedings of arbitration shall be in the English Language.

(e) The arbitrator's award shall be substantiated in writing. The arbitral tribunal shall also decide on the costs of the arbitration proceedings.

(f) The award shall be binding on the Parties subject to the applicable Laws in force and the award shall be enforceable in any competent court of law.

(g) The award shall be concluded within 120 (One Hundred and Twenty) days of the date of reference of the dispute to arbitration.

(h) This Agreement shall be governed and construed in

accordance with the Laws of India and subject to the provisions of arbitration as set out above, the courts at Ahmedabad, India will have exclusive jurisdiction.

(i) For avoidance of doubt it is clarified that nothing in this Clause 11.10 shall apply to disputes inter se between the Company and the Promoter Group."

(emphasis supplied)

3. On a dispute between the parties, a notice dated 21.09.2020 was sent by the petitioner invoking arbitration / dispute resolution clause as per the dispute resolution clause, nominating a mediator and calling upon the respondents to appoint their nominee mediator within 15 days, in order to proceed with the mediation in respect of the disputes arising out of the aforesaid agreement. The notice also stipulated that in case of failure of the parties to resolve the dispute through mediation, the petitioner would nominate his sole arbitrator for adjudicating the dispute between the parties, and, in case, the respondent are not agreeable to appointment of petitioner's nominee as the sole arbitrator, they would be called upon to appoint their co-arbitrator.

4. As the parties could not agree on the

question of appointment of arbitrator, the petitioner herein approached this Court in a petition under Section 11 of the Arbitration Act' 1996 seeking for appointment of the arbitrator. By order dated 04.03.2022, this Court had appointed a sole arbitrator for adjudication of the dispute between the parties. The Arbitral Tribunal, constituted by this Court, had entered upon the reference and the arbitral proceedings commenced on 31.03.2022.

5. It may be noted from the statement made in the petition that on 13.04.2022, the petitioner filed application under Section 17 of the Act, 1996 seeking ad-interim relief. The statement of objection was filed by the Respondent on 30.04.2022 and the pleadings between the parties were completed on 22.08.2022. The Arbitral Tribunal passed an Order dated 28.07.2022 partly allowing Section 17 application filed by the petitioner. The Order dated 28.07.2022 passed by the Arbitral Tribunal was assailed under Section 34 of the Arbitration Act before the Commercial Court, which is pending adjudication as on date. Another application under Section 16 of the Arbitration Act' 1996 has been filed by the petitioner challenging the

filing of counter claims by the Respondents. It is further stated that the said claims were filed with an intent to delay the proceedings. It is stated that the Arbitral Tribunal reserved its order on the application Under Section 16 vide Order dated 11.10.2022, but, no proceedings had been held thereafter. It is stated further that on account of lapse of statutory mandated time line to conclude the arbitration, vide Letter dated 01.11.2023, the petitioner approached the Arbitral Tribunal inviting its attention to the said fact. In response thereto, the Sole Arbitrator passed an order dated 06.11.2023, withdrawing from the arbitral proceedings, leaving it to the parties to take further steps in accordance with law.

6. Placing the Order dated 06.11.2023 passed by the Arbitral Tribunal, it was vehemently argued by the learned counsel for the petitioner that once the sole arbitrator appointed by this Court has withdrawn from the office, the provisions of Section 15 (2) of the Arbitration Act 1996 will come into play. The result is that the mandate of the arbitrator terminates and a substitute arbitrator is to be appointed in accordance with the rules that were applicable to the appointment

of arbitrator being replaced.

7. With the aid of the decisions of the Apex Court in case of **INDIAN OIL CORPORATION LIMITED AND OTHERS VS. RAJA TRANSPORT PRIVATE LIMITED** reported in **(2009) 8 SCC 520** and **YASHWITH CONSTRUCTIONS (P) LTD. VS. SIMPLEX CONCRETE PILES INDIA LTD. AND ANOTHER** reported in **(2006) 6 SCC 204,** it was vehemently argued that Section 15 (2) contemplates appointment of the substitute arbitrator or replacing the arbitrator by another, according to the rules that were applicable to the appointment of the original arbitrator. The term "rules" as in Section 15 (2), explained therein is such that it obviously refer to the provisions for appointment contained in the arbitration agreement or any rules of any institution under which the dispute was to be referred to the arbitrator. With the aid of the said decisions, it was vehemently argued that the substitute arbitrator can only be appointed in accordance with the arbitration agreement, providing for appointment of arbitrator originally which means that the appointment can only be made as per the provisions applicable to the appointment of the

arbitrator at the initial stage.

8. It was argued that the arbitration being a binding voluntary alternative dispute resolution process by private forum chosen by the parties binds the parties and no one party can say that he will be bound by only one part of the agreement and not the other part. A party to the contract cannot claim the benefit of arbitration under the arbitration clause, but ignore the appointment procedure relating to the named arbitrator contained in the arbitration clause. It was, thus, vehemently argued that as per the agreed arbitration clause, in case of disagreement as to the appointment of the sole arbitrator, an arbitration panel comprising of three arbitrators, one appointed by the petitioner, another by the respondent and the third by two arbitrators was the only option left to the parties.

9. In this case, however, as the petitioner has nominated one arbitrator and required the respondent to appoint co-arbitrator by notice, which was not responded by the petitioner, the respondent is now denuded of its power to appoint a co-arbitrator in the present petition. By considering Clause 11.10 (b) of the Share Purchase Agreement (pari materia Clause 18.12

of the Share Holders Agreement), the instant petition, thus, deserves to be allowed with the appointment of the co-arbitrator by this Court.

10. The learned counsel for the respondent, in rebuttal, would submit that it is a case where the mandate of the arbitrator already terminated in the month of October 2023, though there is a dispute between the parties as to the date when the arbitration proceedings commenced. Initially on 18.04.2022, both the parties had agreed for extention of tenure of the mandate of the arbitrator as it was the first meeting scheduled after completion of the pleadings and other formalities. The consent of the parties was noted in the Order dated 18.04.2022, itself. It is further placed before us from the Order dated 06.11.2023 passed by the Arbitrator that pleadings were completed only on 24.10.2022. However, the fact remains that the mandate of the arbitrator had already been expired in the month of October 2023. The result is that Section 29 (4) will come into operation, inasmuch as, there is only one option with the parties to seek extension of the period of mandate by moving a proper application under Section 29A (4), (5), (6), (7), (8) and (9) of the

Arbitration Act 1996. In any case, the provisions of Section 15 (2) are not attracted in the facts and circumstances of the instant case.

11. Taking note of the above, suffice it to record that the Order dated 06.11.2023 passed by the sole-arbitrator withdrawing from the office of the Arbitral Tribunal invoking Section 14 (1) (b) of the Arbitration and Conciliation Act, 1996 is of no conseqence, inasmuch as, the mandate of the arbitrator as per the time limit prescribed in Section 29 A (1) has already been terminated with the expiry of the period of twelve months from the date of completion of the pleadings under Sub-Section(4) of Section 23, as on 24.10.2023, as is clear from the contents of the Order dated 06.11.2023 passed by the arbitrator. The result is that as on 06.11.2023, the arbitrator was not holding the office of the Arbitral Tribunal. With the expiry of the mandate of the arbitrator as per the period provided in Sub-Section (1) of Section 29A, the only option with the parties was to seek extension of period as referred in Sub-Section (4) of Section 29A by moving an appropriate application before this Court.

12. In any case, by mere passing of the Order dated 06.11.2023, the present case cannot be treated as the case of termination of mandate of the arbitrator by withdrawal from his office under Section 14(1)(b) of the Act, for the simple reason that with the expiry of the mandate on 24.10.2023, the arbitrator was not holding the office on the date of passing of the said order and, as such, there is no question of application of Section 15 of the Act 1996, in the facts of the instant case.

13. We may further record that the petitioner herein itself sent letter dated 01.11.2023 intimating for termination of the mandate of the Arbitral Tribunal stating therein that since the award had not been passed within the statutory period of one year for completion of the proceedings, i.e. from 24.10.2022, the mandate of the Arbitral Tribunal stand terminated. The contention of the learned counsel for the petitioner in the present petition is, thus, contrary to the own stand of the petitioner in its communication dated 01.11.2023 sent to the arbitrator.

14. We may further record that upon perusal of the contents of the letter dated 01.11.2023, appended

at Page '263' of the Paperbook, it is clear that the statement therein is that under Section 29 A of the Act 1996 the final award in the instant proceedings ought to have been made within the period of 1 year from the date of completion of the pleadings, i.e. on or before 18.07.2023. Even upon a liberal consideration of the statutory principles under Section 23 (4) and Section 29 A of the Act, the last pleading before the Arbitral Tribunal was submitted on 24.10.2022 in the shape of rejoinder to the counter claim filed by the Respondent, however, a period of 12 months has also elapsed since then. The letter, further, states that it was written to convey that the mandate of the Arbitral Tribunal stood terminated due to the lapse of the statutory period of 12 months and the further unlikelihood and impossibility of the remaining proceedings being capable of being completed and the arbitration resulting in an award in the next 180 days. Given the complexity of the dispute and the next stage involved in the arbitration included, but not limited to determination of issues, the volume and extent of evidence required to be taken, cross-examination of witnesses, oral arguments, public address and

publishing the arbitral award etc, these stages cannot be completed in the one time extendable period of 180 days after the elapse of 12 months. In light of the circumstances, the petitioner claimant expressed its inability to provide consent to any proposed extension of time for the mandate of the Arbitral Tribunal and reserved its right to take the next steps for re-consideration of the Arbitral Tribunal in accordance with law with the object of securing its legal rights.

15. In light of the language of the letter dated 01.11.2023 sent by the petitioner itself addressed to the Arbitral Tribunal, it is evident that the petitioner was well aware of the fact that the mandate of the Arbitral Tribunal came to an end on 24.10.2023 and there was a requirement of either giving consent for extension as per Sub-Section (3) of Section 29 A or to take recourse to the remedy for fresh consideration of the Arbitral Tribunal.

16. In any case, as the parties have not reached at a consensus for extension of the mandate of the Arbitral Tribunal as per Sub-Section (3) of Section 29 A, another option before any of the parties was to move an application seeking intervention of this Court for

extension of time. No such application under Section 29 A has been moved by any of the parties to the arbitration proceedings. The instant petition moved by the petitioner cannot be treated as the petition invoking Section 15 (2) of the Arbitration Act 1996 for appointment of substitute arbitrator, on the premise of the Order dated 06.11.2023 passed by the arbitrator that he withdraws from his office by invoking Section 14 (1) (b) of the Act 1996.

17. As discussed above, it is not a case of withdrawal from the office by the Arbitrator, rather a case of termination of the mandate of the arbitrator by operation of law. The result is that the arguments of the learned counsel for the petitioner on the interpretation of Section 15 (2) of the Arbitration Act, 1996 for appointment of substitute co-arbitrator by invoking Clause 11.12 of the Agreement, are liable to be turned down.

18. Lastly, on the asking of the Court as to whether the petitioner would prefer to move an application under Section 29 A (4) of the Act, 1996 or is agreeable for appointment of arbitrator by this Court, the learned counsel for the petitioner insisted that only

a co-arbitrator can be appointed by this Court to constitute an arbitration panel by including the nominated arbitrator of the petitioner and the petitioner is not agreeable to any other proposition for the appointment of arbitrator.

19. In the result, this Court has no option but to dismiss the instant petition, inasmuch as, this case does not fall under Section 15 (2) of the Act 1996 and no substitute co-arbitrator can be appointed, as claimed by the petitioner. Accordingly, the instant petition is **DISMISSED** as such.

20. It is, however, clarified that the dismissal of the instant petition will not come into the way of the parties to take recourse to the remedy available in law.

(SUNITA AGARWAL, CJ)

SAHIL S. RANGER