

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: March 06, 2023

+ ARB.P. 95/2022

NEWTON ENGINEERING AND CHEMICALS LIMITED

..... Petitioner

Through: Mr. Akash Nagar, Adv. with  
Ms. Ruchi Bhargarh Nagar,  
Mr. Samarpit Chauhan &  
Ms. Akanksha Chauhan, Advs.

versus

UEM INDIA PRIVATE LIMITED

..... Respondent

Through: Mr. Kirti Uppal, Sr. Adv. with  
Mr. Debopriyo Maulik & Ms. Riya  
Gulati, Advs.

**CORAM:**

**HON'BLE MR. JUSTICE V. KAMESWAR RAO**

**J U D G M E N T**

**V. KAMESWAR RAO, J**

1. The present petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 ('Act of 1996'), seeking indulgence of this Court to appoint an Arbitrator for adjudication of disputes which have arisen between the parties herein. Specifically, the instant petition has been filed with the following prayers:-

*"In light of the facts and circumstances of the case, it is most humbly prayed that this Hon'ble Court may be pleased to:*

*a. Allow the present Petition.*

*b. Appoint an Arbitral Tribunal in the form of Sole Arbitrator, in accordance with Section 11 (4) and 11 (8) of the Arbitration and Conciliation Act, 1996 for reference and adjudication of the claims of the Petitioner as against*

*the Respondent; and*

*c. Pass any other orders this Hon'ble Court may deem fit."*

2. It is stated in the petition that the petitioner is a private limited company registered under the provisions of the Companies Act, 1956 and possesses extensive experience in the field of Project Management, Detailed Engineering, Manufacture and Erection of Equipment, Process Vessel, Tankages, Piping, Electrical and Instrumentation and other similar areas of work. It has its registered office at 864/B-4, G.I.D.C., Makarpura, Baroda-390010, Gujarat.

3. Whereas the respondent is also a private limited company which specializes in Turnkey services in the water and effluent collection, treatment and disposal and has requisite Manpower, construction equipments and capability in construction Management, Procurement and Detailed Engineering. It is also known as 'Toshiba Water Solutions Private Limited'.

4. It is stated that the petitioner had entered a Memorandum of Understanding ('MoU') dated June 19, 2014 with the respondent for the execution of the work under Tender No. UA5KC13001 ('Tender') granted by the Oil and Natural Gas Corporation ('ONGC') to the petitioner specifically for Modernization of ETP Plant at ONGC Uran Plant.

5. It is stated that as per Clause 3 of the MoU, both the parties had to cooperate in the execution of the Project in a manner that the respondent had to act like a technical collaborator and provide Design and Engineering Services, Supply Supervisory and Management Services, Supply of Critical Equipment for the Project and also to

make available to the petitioner its expertise and technical know-how in the field of execution of Water and Effluent Treatment projects. It is further stated that the bid of the petitioner was accepted by the ONGC and as a result, the afore-said MoU had come into force.

6. It is further stated that under Clauses 6 and 7 of the MoU, the respondent had the obligation to render the afore-mentioned services @2% of the contract value, excluding the operation and maintenance costs. The agreed payment had to be disbursed by the petitioner to the respondent in the following manner:

- a) 0.50% had to be paid immediately upon receipt of advance payment from the ONGC;
- b) Balance 1.50% had to be paid by way of three equal quarterly installments, whereas first quarter period had to start from the date of signing the contract.

7. It is stated that the said MoU also contains an Arbitration Clause stipulated as Clause 10, which renders any dispute arising out of the said MoU arbitrable by a panel of three arbitrators. Clause 10 of the MoU has been reproduced in the following manner:

***“10. Dispute Resolution***

*In case of dispute between the Parties, The Parties shall make all effort to resolve the dispute amicably. However, in case the Parties could not resolve the dispute amicably, the same can be referred for arbitration to an Arbitration Panel of 3 arbitrators as per provisions of the Arbitration and Conciliation Act, 1986. The seat of the Arbitration shall be located at Delhi. The language of the arbitration will be English.”*

8. It is further stated that as a result of the MoU coming into

force, the petitioner and the ONGC entered into a Contract, dated May 11, 2015, bearing no. MR/URAN/MM/LSTK/ETP/14/2013-14/UA5KC13001 ('Contract').

9. Subsequently, on June 09, 2015, the petitioner and the respondent executed a Letter of Intent vide Letter No. NECL/UEM/LOI/TCA/15 ('LOI') which was executed in reference to the MoU. The LOI was for the purpose of declaring the commencement of the operation of the project under the Tender no.UA5KC13001 and to specify the payment- value of the Project to the respondent.

10. As per the LOI, it was finalized that the respondent will be paid 2% of the contract value which was ₹82,32,46,625/-. Therefore, 2% of the above mentioned value i.e., ₹1,64,64,933/- had to be paid by the petitioner.

11. Thereafter, for the purpose of execution of the Project, the petitioner initiated discussions through several emails, phone calls and meetings were also held in the office of the respondent including one 'Management Review Meeting' ('MRM'), which was organized by the ONGC at its plant in Uran on November 29, 2016. It is stated that the respondent kept delaying the execution of the work as it failed to submit the proper documents for the execution of the Project. It is the case of the petitioner that though the respondent was not carrying out the execution of the Project but it was regularly asking the petitioner for the payment for the execution of the Project.

12. Thus, as a result of the delay on the part of the respondent to execute the Project, the ONGC issued a Notice bearing No. MR/

URAN/ MM/ LSTK/ ETP/ 14/ 2013-14/ UA5KC13001, dated May 09, 2017, wherein the petitioner was directed to complete certain tasks mentioned in that Notice within the period of 30 days in order to demonstrate improvement in the execution of the Project and also to prove its capability to execute the Project.

13. It is the case of the petitioner that despite making enough efforts, the respondent failed to execute the work as per the Contract. As a result, the ONGC terminated the Contract vide a Notice of Intimation of Termination of Contract ('Notice of Termination') dated June 15, 2017.

14. It is the case of the petitioner and so contended by Mr. Akash Nagar, learned counsel, appearing on behalf of the petitioner that the payment of ₹84,34,849/- has already been made to the respondent for the execution of the Project qua the Contract, dated May 11, 2015. It has been submitted that the respondent is liable to pay the said amount as well as the losses incurred by the petitioner and for which arbitration proceeding is sought to be initiated by the petitioner as per Clause 10 of the MoU.

15. It has been submitted that the petitioner had sent a Notice for Invocation of Arbitration dated July 04, 2019 ('Invocation Notice'), wherein it recommended a panel of three arbitrators to the respondent.

16. It is his case that the respondent had failed to reply to the Invocation Notice and thus, the petitioner was constrained to file a petition under Section 11 of the Act of 1996 on December 09, 2019 bearing ARB.P. 831/2019, before this Court.

17. It is stated that to the aforesaid petition, the respondent filed

the objections dated December 17, 2019 and challenged the maintainability of the same. It is the case of Mr. Nagar that the respondent in the objections filed to that petition had curtailed its scope of obligations under the MoU as being limited to ‘technical collaboration and bidding for the aforesaid work’. It is further his case that the respondent had failed to notice Clause 3 of the MoU, which clearly stipulates that the obligations of the respondent will have to remain in force throughout the subsistence of the work under the Contract. It is also his case that the respondent should be *estopped* from advancing such an argument since the respondent itself carried out communications with the petitioner in relation to the execution of the work and that fact is evident from the emails exchanged between both the parties.

18. It has also been pointed out by Mr. Nagar that when the matter was taken up in Arb.P. 831/2019, it was noted by this Court that there exist an agreement containing the arbitration clause governing the disputes between the parties herein. However, the Court directed the petitioner herein to issue a fresh Notice of Invocation to the respondent since the Court observed that the same was not in accordance with the provisions laid down under the MoU and thus the said petition was accordingly disposed of.

19. It is the case of Mr. Nagar that in conformity with the direction of this Court, the petitioner issued a fresh ‘Notice of Invocation’ dated April 20, 2020, reiterating clearly and specifically the detailed facts pertaining to the nature and object of the MoU, details of the Contract with ONGC, scope of work expected from the respondent and details

of payments already made to the respondent by the petitioner, the details of the disputes and finally the losses incurred by the petitioner. Moreover, the petitioner again suggested a panel of Arbitrators therein.

20. Whereas the respondent in the reply, dated May 04, 2020, filed to the said Notice of Invocation, denied the existence of any disputes between the petitioner and the respondent and thus did not give its consent to refer the disputes to arbitration.

21. Thereafter the petitioner responded to the reply sent by the respondent by sending a reminder Notice for invocation of arbitration dated May 15, 2020 and this time recommended the name of a single arbitrator instead of three. However, the respondent failed to respond to the same.

22. It has been submitted by Mr. Nagar that the petitioner has incurred heavy losses owing to the willful negligence of the respondent towards its obligations contemplated in the MoU.

23. He further submitted that in view of the legislative mandate contained under Section 11(6A) of the Act of 1996, the Court is now required to only examine the existence of arbitration agreement between the parties. He further submitted that in the instant case there is an explicit admission towards an existence of the arbitration agreement between the petitioner and the respondent by the respondent which can be seen from the order dated February 13, 2020, passed by this Court in the Arb. P. 831/2019.

24. Thus, aggrieved by the actions of the respondent, the petitioner is constrained to file the instant petition.

25. On the other hand in the reply filed by the respondent, it is its

primary case and so contended by Mr. Kirti Uppal, learned Senior Counsel appearing on behalf of the respondent that the MoU was only entered for the purposes of submitting bids towards the Tender floated by the ONGC and this is clear from the fact that the MoU contains a Clause which limits the liability of the respondent and also waives consequential damages causes to it.

26. He submitted that after the award of Contract to the petitioner by the ONGC, the petitioner time and again issued multiple letters of intent ('LOIs') / work orders, seeking services of the respondent qua the Project. However, such LOIs, were independently issued by the respondent and therefore should be construed as independent agreements or contracts, devoid of any arbitration clause.

27. It is his submission that since the disputes which the petitioner has sought to refer for arbitration are emanating from these LOIs and not from the MoU, the disputes cannot be referred to arbitration as there is no arbitration clause governing the same.

28. He submitted that mere perusal of the Notice dated July 04, 2019 issued by the petitioner would indicate that though the dispute was essentially the same, the narration qua the dispute has undergone a sea change in the Notice dated April 20, 2020. He further submitted that the petitioner is misstating the facts to mislead this Court and to substantiate the same, he has tabulated a comparison between the description of the dispute in Notice dated July 4, 2019 and April 20, 2020, in the following manner:

<b>Notice dated 04.07.2019</b>	<b>Notice dated 20.04.2020</b>
<i>As per the discussion held at</i>	<i>As per the discussion held at your</i>



<p><i>your office on 17th and 18<sup>th</sup> May, 2017 a payment of Rs. 36 Lakhs was demanded for initiation of the work and signing of MOU.</i></p> <p><i>Based on the demand made, my client made a payment of Rs. 9 Lakhs which was made vide cheque dated 18th May, 2017 and Rs. 20 Lakhs was paid on 23rd May, 2017 through RTGS. A Post Dated Cheque dated 23rd June, 2017 was issued to you noticee for Rs. 7 Lakh towards the balance payment. These payments were made with a bonafide belief that you will cooperate with my client in submission of drawings and sign the MOU as required by ONGC whose contract was to be executed.</i></p> <p><i>However, since you denied to sign the MOU and neither submitted any drawings as desired, my Client has been put to great troubles. The Subject contract was terminated vide letter dated May 09, 2017 on the specific ground that My Client has failed to resolve the dispute with technical Collaborator M/s. UEM India Private Limited. The same was communicated to your office by my Client and vide its email dated 21/06/2017, intimated you that they do not</i></p>	<p><i>office on 17th and 18<sup>th</sup> May, 2017 a payment of Rs. 36 Lakhs was demanded for start of the work as required by ONGC.</i></p> <p><i>Based on the demand made, a payment of Rs. 9 Lakhs was made vide cheque dated 18 May, 2017 and Rs. 20 Lakhs was paid on 23rd May, 2017 through RTGS. A Post Dated Cheque dated 23rd June, 2017 was issued to you for Rs. 7 Lakh towards the balance payment. These payments were made with a trust that you noticee will cooperate with my client in submission of drawings and other requirements of ONGO whose contract was to be executed.</i></p> <p><i>However, since you notice failed to act in lines of discussion held in meeting dated June 06, 2015, my Client has been put to great troubles. A termination notice for the subject contract was issued by ONGC vide letter dated May 09, 2017 on the specific ground that my Client has failed to resolve the dispute with its technical Collaborator M/s. UEM India Private Limited, i.e you noticee. The same was communicated to your office by my Client and vide its email dated 21/06/2017, intimating you that my client do not intend to make the balance payment to you in view of</i></p>
--	--

<i>intend to make the balance payment to you in view of such termination of the contract and hence requested you to restrain your office from depositing the said cheque number 000982 drawn on Bank of Baroda for Rs. 7 Lakh.</i>	<i>termination of the contract by ONGC vide its letter dated 15/06/2017 and hence requested you to restrain your office from depositing the said cheque number 000982 drawn on Bank of Baroda for Rs. 7 Lakh.</i>
--	---

29. He further submitted that from the perusal of the above table it is abundantly clear that the petitioner has cosmetically changed the narration of the description of the dispute in order to make it plausible that the dispute is covered under the MoU.

30. It is his submission that the perusal of the order dated February 13, 2020 passed by this Court in Arb.P. 831/2019 indicates that the petitioner had admitted that the description of the dispute in the Invocation Notice was not in terms of the MoU which contains the arbitration Clause. Therefore, as there has been no substantial change in the description of the dispute in the Notice of Invocation, the present dispute is not covered by Clause 10 of the MoU.

31. It is his primary submission that the genesis of the present dispute does not arise out of the MoU wherein the Dispute resolution Clause exists. However, the same pertains to one 'unsigned MoU' which was never executed between the parties. Thus, there does not exist any arbitration clause which covers the dispute that the petitioner intends to resolve by way of appointment of an arbitrator.

32. He submitted that the true reason for filing the instant petition and resorting to Clause 10 of the MoU is to avoid and procrastinate the proceedings initiated under Section 138 of the Negotiable Instruments

Act, 1881, by the respondent against the petitioner.

33. Whereas, in rejoinder submissions, Mr. Nagar had stated that the scope of the MoU was never limited to mere respondent providing technical collaboration and bidding for the work. It has been submitted that the respondent has wrongfully narrowed down its obligations under the MoU and is misleading this Court.

34. He reiterated and emphasized on the fact that under Clause 3 of the MoU, the respondent was to specifically participate in the Project under the said Tender as a technical collaborator and provide the following services: 'Design and Engineering Services, Project Supervisory and Management Services, Supply of Critical Equipment for the Project and also to make available to the petitioner its expertise and technical know-how in the field of execution of Water and Effluent Treatment Projects'. He further submitted that the role of the respondent under the MoU was not merely limited to submission of bids by the petitioner but it was well beyond the same i.e., until the completion of the work under the Contract awarded by the ONGC.

35. He submitted that the respondent should be *estopped* from holding such a ground, as it has accepted several payments in pursuance of the Project under the Tender and has also attended several meetings which were not only confined to the bidding process.

36. It is his submission that the LOIs sent by the petitioner to the respondent were never meant to be independent agreements/contracts. He submitted that each of the LOIs was well knit and interlinked with each other and also with the governing MoU. Moreover, the works envisaged under each LOIs, forms an important part of the Scope of

work envisaged under the MoU. It has been submitted that the absence of a dispute resolution Clause in the LOIs is irrelevant as each of such LOIs was governed by the MoU and the LOI dated June 09, 2015 clearly contains a reference towards the MoU.

37. He submitted that there has not been a change in the facts of Notice of Invocation dated April 20, 2020, with that of the Invocation Notice, dated July 04, 2019. It has been submitted that the only change in the facts of the said Notices is the correction of the typographical error of the word 'MoU' which was supposed to be typed as 'MOM' i.e., the Minutes of Meeting, dated June 06, 2015. It is his case that no such 'MoU' as stated under the facts narrated in Invocation Notice dated July 04, 2019 exists and it was rather the 'MoM', of the meeting held on June 06, 2015, between the representatives of the petitioner and the respondent. He submitted that even now, the fact remains that the 'MoU' covers each and every aspect of the present dispute under its Clause 10 as the Governing document. Moreover, it his submission that there does not exist any unsigned MoU as submitted by the respondent and the existence of the same has not been proved by the respondent by producing any iota of evidence.

38. Mr. Nagar has further submitted that in light of the termination Notice dated May 09, 2017 sent by the ONGC to the petitioner, the representatives of the petitioner and the respondent held multiple meetings and one of such meeting was held on May 17, 2017 and discussions of that meeting was summarized in the form of a MoM dated May 30, 2017.

39. He submitted that under the said MoM, the obligations of both

the petitioner and the respondent were summarized, as discussed and finalized in the meetings dated May 17, 2017 & May 18, 2017 and the said obligations were pertaining to the aspects of Engineering, Procurement, Payments to the respondent and the Success Fees.

40. It is his case that the aforesaid MoM was supposed to be executed between the parties in accordance with Clauses 15.8 and 17 of the notice of the termination dated May 09, 2017, wherein ONGC had required the petitioner and the respondent to resolve all the technical and commercial issues between them.

41. He further submitted that the said MoM was drafted mutually by the representatives of the petitioner as well as the respondent. Moreover, time and again respondent was requested by the petitioner to sign the said MoM, so that the same may be communicated to the ONGC to avoid the termination of the Contract. However, it is his case that the respondent never signed the said MoM and as a result, the ONGC terminated the Contract.

42. He submitted that the petitioner has been using the word MoU since the very inception. However, the same refers to the MoM, dated May 30, 2017. It his submission that this fact is clear from the e-mail dated May 31, 2017 sent by Mr. Amit Datarkar, representative of the petitioner wherein he had specifically referred to the contents of that MoM while stating that the respondent is expected to '*do detailed engineering*' and that the '*order for TTPRO is ready*'. It is his case that the same typographical error in referring to that MoM crept in the earlier Invocation Notice of July 04, 2019 under the heading dispute description. He submitted that what was sought to be written and ought

to be written in the said Invocation Notice was that “*Rs.36 lakhs were demanded for initiation of the work and signing of MoM*” instead of “*Rs.36 lakhs were demanded for initiation of the work and signing of MoU*”.

43. So, on the basis of afore-said submissions, he seeks indulgence of this Court to appoint an arbitrator for adjudication of the disputes which have arisen between the parties.

44. It has additionally been submitted by Mr. Uppal that the copy of the MoM dated May 30, 2017 has not been signed by the parties and the respondent denies the execution of the same. He submitted that it is a trite law that a contract only arises between the parties when they absolutely and unequivocally agree to the same. Since the parties to the said MoM have not executed the same, it cannot be said that it will have any binding effect upon the parties. He reiterated and emphasized that even the said MoM does not contain any arbitration Clause, therefore, the same should not be relied upon to refer the disputes for arbitration.

45. He submitted that the said MoM was only the subsequent contract wherein additional work was allocated to the respondent on fresh payment terms. He further submitted that in 2017, in a separate MoU, it was made clear, that a separate work order will be issued by the petitioner on the basis of a mutually agreed draft signed by both the parties. However, as of now, no agreement to that effect has been signed by the parties. So, it his submission that the reliance of the petitioner on the MoM of the year 2017 is completely misplaced. He submitted that the petitioner has particularly failed to show (i) how the

present description of the dispute is different and covered by the arbitration clause stipulated in the MoU and (ii) how the said MoM has given rise to the disputes between the parties.

46. He further submitted that the said MoM never finalized the obligations pertaining to the aspects of Engineering, Procurement, Payments made to the respondent and the Success Fees and it was only a proposal and the same had never been accepted by the respondent.

47. So on the basis above-mentioned submissions, Mr. Uppal, is seeking dismissal of the instant petition.

#### **ANALYSIS**

48. Having heard the learned counsels for the parties, the short issue which arises for consideration is whether the petitioner is entitled to the prayer made in the instant petition for appointment of an Arbitrator.

49. There is no dispute that present petition is a second round of litigation filed by the petitioner. The initial one being ARB.P. 831/2019 which was decided by this Court on February 13, 2020, whereby this Court had passed the following order:

*“Learned counsel for the respondent, at the outset, submits that while there is an Agreement between the parties which has an Arbitration Clause but the notice of invocation dated 04.07.2019 is not in terms of the Memorandum of Understanding which contains the Arbitration Clause.*

*Learned counsel for the petitioner fairly submits that fresh notice of invocation will be sent to the respondent in terms of the Arbitration Agreement calling upon the respondent to appoint an Arbitrator.*

*Learned counsel for the petitioner seeks leave to withdraw the petition with liberty to take re-course to appropriate remedies*

*available to the petitioner in law.*

*Petition is disposed of with the liberty aforesaid. Needless to state that petitioner is at liberty to approach the Court again for appointment of an Arbitrator, in accordance with law.”*

50. A perusal of the same would reveal that the afore-said petition was disposed of, as the notice invoking the arbitration, which resulted in the filing of the ARB.P. 831/2019, was not in conformity with the terms of the MoU dated June 19, 2014. Thus, liberty was granted to the petitioner to invoke Clause 10 as stipulated in the MoU, to file a fresh petition, if in eventuality the dispute arises and it is pursuant thereto that the instant petition has been filed.

51. The submission of the learned counsel for the petitioner is that the instant petition is primarily filed by invoking the provisions of the MoU wherein the parties had decided to enter into a relationship for executing the Project which was awarded to the petitioner by the ONGC. On the other hand, the only objection advanced by Mr.Uppal, learned Senior counsel for the respondent, was primarily that the dispute does not pertain to the MoU but several LoIs which have been issued subsequently by the petitioner to the respondent and the said LoIs do not contain any arbitration clause(s), which shall make the present petition maintainable.

52. He had also tried to justify his submission by drawing a comparison between the description of the disputes in Notices dated July 4, 2019 and April 20, 2020 to contend that the attempt is being made on behalf of the petitioner to misstate the facts by giving an impression that the disputes are relatable to MoU dated June 19, 2014



and not the LoIs, which were subsequently issued by the petitioner to the respondent.

53. At the outset, I may state that the Clause 10 of the MoU which I have already reproduced in paragraph 7, is a part of the MoU. In the order of this Court passed in the initial round of litigation, which I have already reproduced in paragraph 49, the Court had directed the petitioner to issue a fresh notice of invocation to the respondent as the Court was of the view that the Invocation Notice dated July 04, 2019 was not in accordance with the provisions laid down under the MoU.

54. Subsequently, the Notice of Invocation dated April 20, 2020 was sent by the petitioner to the respondent, wherein reference has been given to the Contract with ONGC and which reads as under:

*“The work order was for a project which was as per ONGC Tender No. UA5KC13001 for Modernization of ETP Plant at ONGC Uran Plant only (UEM as a technical Collaborator). ONGC awarded the contract for Modernization of ETP Plant at ONGC Uran Plant on 11.05.2015 of an amount of Rs. 111,04,76,499/- inclusive all taxes, duties and levies and the MOU was executed in furtherance of the same. The above-mentioned work was assigned by my Client to your Company, vide letter no. NECL/UEM/LOI/TCA/2015 dated June 09, 2015 as per the terms of the MOU as mentioned above, with the contract value of Rs. 1,64,64,933.00/- (Rupees One Crore Sixty four lakh sixty four thousand nine hundred thirty three only) for UEM to make available to NECL, expertise and technical know how in relation to carrying out work by NECL. Such expertise and technical know how to be made available by UEM to NECL included giving assistance, training and practical experience/expert supervision in accordance with good HSE practices to personnel employed by NECL, my client. The arrangement was to remain in full force during the term of the contract period with my Client.”*

55. In any case, the issue, whether the disputes which have arisen between the parties are in the terms of the MoU dated June 19, 2014 or in terms of the LoIs issued by the petitioner or related to both (as according to Mr. Nagar both the MoU and the LoIs are interrelated, as LoIs were issued in furtherance of the MoU), can be looked into by the Arbitrator as the Arbitrator can decide his own jurisdiction in terms of Section 16 of the Act of 1996. It is not a case that no arbitration Clause exists between the parties.

56. If the plea of Mr. Uppal that the disputes relate to the LoIs, which do not contain the arbitration clause is not substantiated then the dispute with regard to LoIs are necessarily to be decided through the process of arbitration. It can be a position that MoU and LoIs are two separate contracts, then also the arbitration Clause in MoU need to be given effect to whatever is its effect.

57. So, it will be apt here to put reliance on the judgment of the Supreme Court in the case of *Sanjiv Prakash v. Seema Kukreja and Ors.*, *MANU/SC/0238/2021*, wherein, the Court whilst delving into the aspect of limited jurisdiction of the Court under Section 11 of the Act of 1996, has in paragraph 9, held as under:-

*“9. Judged by the aforesaid tests, it is obvious that whether the MoU has been novated by the SHA dated 12.04.1996 requires a detailed consideration of the clauses of the two Agreements, together with the surrounding circumstances in which these Agreements were entered into, and a full consideration of the law on the subject. None of this can be done given the limited jurisdiction of a court under Section 11 of the 1996 Act. As has been held in paragraph 148 of Vidya Drolia (supra), detailed arguments on whether an agreement which contains an*

*arbitration clause has or has not been novated cannot possibly be decided in exercise of a limited prima facie review as to whether an arbitration agreement exists between the parties. Also, this case does not fall within the category of cases which ousts arbitration altogether, such as matters which are in rem proceedings or cases which, without doubt, concern minors, lunatics or other persons incompetent to contract. There is nothing vexatious or frivolous in the plea taken by the Appellant. On the contrary, a Section 11 court would refer the matter when contentions relating to non-arbitrability are plainly arguable, or when facts are contested. The court cannot, at this stage, enter into a mini trial or elaborate review of the facts and law which would usurp the jurisdiction of the arbitral tribunal.”.*

58. Accordingly, this petition is disposed of by appointing Justice R.K. Gauba, a former Judge of this Court as a learned Arbitrator, who shall adjudicate the disputes between the parties, both through claims and counter-claims, if any.

59. The fee of the learned Arbitrator shall be in terms of the Schedule IV of the Act of 1996. The learned Arbitrator shall also give his declaration in terms of Section 12 of the Act of 1996.

60. All the contentions of the parties, both on facts and in law are left open for consideration of the learned Arbitrator.

61. This order must not be construed as an opinion of this Court on the merits of the issues raised by the parties in this petition.

62. No costs.

**V. KAMESWAR RAO, J**

**MARCH 06, 2023**/aky/jg