

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Reserved on: January 07, 2022*

Pronounced on: January 17, 2022

+ ARB.P. 820/2021

PANIPAT JALANDHAR NH 1 TOLLWAY PRIVATE
LIMITED FORMERLY KNOWN AS M S SOMA ISOLUX NH 1
TOLLWAY PVT LTD. Petitioner

Through: Ms. Meenakshi Arora Senior
Advocate with Mr. Omar Ahmad,
Mr. Arun Siwach, Mr. Ishan Gaur,
Mr. Vikram Shah, Ms. Simran
Khorana & Mr. Tuhin Dey,
Advocates

Versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Respondent

Through: Mr. Parag P. Tripathi, Senior
Advocate with Ms. Madhu Sweta,
Mr. Srinivasan Ramaswamy &
Ms. Shivangi Khanna, Advocates

**CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT**

JUDGMENT

1. The present petition under the provisions of Section 11(6) of the Arbitration and Conciliation Act, 1996 has been filed by the petitioner seeking appointment of the respondent's Arbitrator upon its failure to appoint the same, for adjudication of disputes with regard to Concession Agreement dated 9th May, 2008. In addition, prayer is also made to declare that the purported appointment of Justice (Retd.) G.P. Mathur, former

Judge, Supreme Court by the respondent is *non est* and bad in the eyes of law.

2. The petitioner- Panipat Jalandhar NH-1 Tollway Private Limited had entered into a Concession Agreement dated 9th May, 2008 with respondent - National Highway Authority of India (NHAI) for Six-Laning of Panipat-Jalandhar Section of NH-1 from Km 96.00 to Km 387.10 (length of 291.10 Km) in the State of Haryana and Punjab to be executed on Built-Operate-Transfer (Toll) basis on Design- Build-Finance- Operate (DBFO) pattern under NHDP Phase-V. The duration of the Concession Agreement was 15 years commencing from 11th May, 2009 till 11th May, 2024.

3. According to petitioner, subsequent to entering into the Concession Agreement, petitioner started the work, however, certain disputes arose between the parties and those disputes pertaining to the year 2013 are pending before an independent arbitral tribunal.

4. Petitioner has claimed that out of the 291.1 km, the work on 269 km was completed when respondent took a decision to delink 22.1 km out of the total length, for the delay and failure on the part of respondent to hand over the stretch and consequently, due to this delinking, petitioner suffered severe loss to the tune of more than INR 2,000 crores. Accordingly, petitioner sent a Notice of Dispute dated 25th October, 2019 to the respondent. Since the parties failed to resolve the disputes, petitioner invoked arbitration under clause 44.3 of the Concession Agreement and issued a notice dated 7th February, 2020 calling upon the respondent to confer a set of Arbitrators. However, on 4th December, 2020 respondent suspended the Concession Agreement, (against which petitioner preferred

a petition under Section 9 of Arbitration and Conciliation Act, 1996 [OMP (I) (COMM) 421/2020].

5. According to petitioner, the disputes with regard to suspension and termination of aforesaid Concession Agreement are pending adjudication before the second arbitral tribunal comprising of Justice (Retd.) M.K. Sharma, Presiding Arbitrator, Justice (Retd.) A.K. Sikri as petitioner's nominee Arbitrator and Justice (Retd.) G.P. Mathur as respondent's nominee.

6. During the course of hearing, Ms. Meenakshi Arora, learned senior counsel appearing on behalf of petitioner submitted that upon respondent's failure to appoint its nominee Arbitrator, petitioner had preferred a petition under Section 11(6) of the Act, however, vide order dated 4th May, 2021 this Court appointed Justice (Retd.) G.P. Mathur as nominated arbitrator on behalf of the respondent proposed by respondent itself. Further submitted that the said appointment was subject to furnishing of consent by Justice (Retd.) G.P. Mathur and necessary disclosure under Section 12(5) of the Act. Accordingly, a declaration was given on 25th May, 2021 by Justice (Retd.) G.P. Mathur that he has been appointed arbitrator in three other matters by respondent- NHAI in last three years.

7. Further, since parties failed to resolve their differences as highlighted in the Dispute Notice, petitioner issued notice dated 4th June, 2021 to the respondent invoking arbitration and appointed Mr. V.K. Tyagi as its nominee arbitrator and called upon the respondent to appoint its nominee arbitrator within 30 days. It was contended on behalf of petitioner that invocation of arbitration vide notice dated 4th June, 2021 pertains to disputes which are distinct separate and independent of disputes

arbitrated by the first and second arbitral tribunal. However, vide its communication dated 17th June 2021, respondent requested to consolidate the second and third arbitration and also vide letter dated 2nd July, 2021 requested Justice (Retd.) G.P. Mathur to consent to act as respondent's nominee in proposed third arbitration. The aforesaid was objected by the petitioner vide its letter dated 06th July, 2021 explaining how three arbitrations are different from each other and so, cannot be consolidated and also that Justice (Retd.) G.P. Mathur has already been appointed as respondent's Arbitrator in four matters, including the second arbitration between the parties and all arbitrators have to comply with the requirements of Fifth and Seventh Schedule of the Arbitration Act. However, instead of appointing an alternative arbitrator, respondent vide its communication dated 25th July, 2021 reiterated its appointment of Justice (Retd.) G.P. Mathur and again requested to refer the disputes to the second arbitral tribunal, which was again refused by petitioner vide its letter dated 30th July, 2021 and requested the respondent to nominate its arbitrator. Once again, respondent reiterated its stand vide communication dated 5th August, 2021 and petitioner vide its communication dated 13th August, 2021 rejected the same.

8. Learned senior counsel for the petitioner drew attention of this Court to Paras-9 to 11 of the order dated 4th May, 2021 passed by a Coordinate Bench of this Court in ARB.P. 411/2021 to controvert the claim of respondent in its communication dated 5th August, 2021 that petitioner had consented to the nomination of Justice (Retd.) G.P. Mathur. Further attention of this Court was again drawn to the twin pre-conditions to the appointment of Justice (Retd.) G.P. Mathur. Learned senior counsel

emphasized that by filing petition under Section 11 of the Act, respondent had in fact forfeited its right to appoint an Arbitrator in view of Hon'ble Supreme Court's decision in *Datar Switch gears Ltd. Vs. Tata Finance Ltd.*, (2000) 8 SCC 151.

9. Learned senior counsel next submitted that declaration dated 25th May, 2021 by Justice (Retd.) G.P. Mathur shows that his appointment was in contravention of Entry No. 22 of the Fifth Schedule of the Arbitration Act. Even the subsequent declaration dated 5th August, 2021 was not in accordance with Sixth Schedule and the provisions of the Arbitration Act. Learned counsel submitted that arbitrator's disclosure under the Sixth Schedule has to be crystal clear in all aspects to which Section 12 and the Schedules of the Arbitration Act entails and the declaration by Justice (Retd.) G.P. Mathur vide subsequent declaration dated 5th August, 2021 was bereft of all material particulars as required under the Arbitration Act, as the same does not provide information of the total ongoing arbitrations and as to whether other three arbitrations wherein he was appointed as Arbitrator by respondent-NHAI were pending or not. Also, Justice (Retd.) G.P. Mathur considers his appointment in the present matter as an appointment by the Court and not by the respondent and such an interpretation is in contravention of Entry No. 22 of the Fifth Schedule.

10. Learned senior counsel for petitioner also drew attention of this Court to Hon'ble Supreme Court's decision in *HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Ltd* (2018) 12 SCC 471 to submit that unless the proposed arbitrator discloses in writing his involvement in terms of Items 1 to 34 of the Fifth Schedule, "*such disclosure would be lacking*", and in which case, the parties would be put

at a disadvantage as such information is often within the personal knowledge of the arbitrator "only".

11. According to learned senior counsel for petitioner, appointment of Justice (Retd.) G.P. Mathur, as Arbitrator who is disqualified in terms of the Fifth Schedule of the Arbitration, is non-est and bad in law.

12. Learned senior counsel emphatically submitted that the disputes raised in proposed third and second arbitration are completely different and independent even though they arise out of the same Concession Agreement and if these disputes are consolidated then it would result in delaying the outcome of second arbitration, as pleadings therein are now complete. It was submitted that respondent has failed to appoint its nominee Arbitrator within 30 days of invoking arbitration and also after multiple opportunities, and petitioner has raised justifiable doubts to the independence and impartiality of Justice (Retd.) G.P. Mathur, therefore, this Court may appoint Arbitrator for adjudication of disputes between the parties.

13. To the contrary, Mr.Parag P. Tripathi, learned senior counsel for the respondent-NHAI submitted that the present petition is not only ill-conceived and motivated but also filed with *mala fide* intention to create confusion.

14. Learned senior counsel for respondent submitted that the present petition under the provisions of Section 11(6) deserves to be rejected as it has been filed on the false pretext that respondent had failed to appoint its nominee arbitrator within 30 days. On 4th June, 2021 petitioner had issued the notice invoking arbitration and nominating Mr.V.K. Tyagi, as its nominee arbitrator. In reply to the same, vide letter dated 17.06.2021,

requested the petitioner to refer the disputes to the existing Arbitral Tribunal comprising of Mr. Justice (Retd.) Dr. Mukundakam Sharma, Presiding Arbitrator, Mr. Justice (Retd.) A.K Sikri, Co-Arbitrator and Mr. Justice (Retd.) G.P. Mathur , Co-Arbitrator, which was constituted in May, 2021 pertaining to the same project between the same parties to avoid multiplicity of the proceedings. Further, vide its communication dated 2nd July, 2021 respondent appointed Justice (Retd.) G.P. Mathur as its nominee Arbitrator. However, vide letter dated 22nd July, 2021 petitioner objected the appointment of Justice (Retd.) G.P. Mathur upon declaration by him that he has been nominated as arbitrator in three other matters on behalf of respondent-NHAI. Again, vide letter dated 25th July, 2021 respondent communicated the petitioner that appointment of Justice (Retd.) G.P. Mathur was in compliance of the Act and disputes should be referred to the second arbitral tribunal. However, petitioner vide its communication dated 30th July, 2021 sought certain more clarifications/disclosures from Justice (Retd.) G.P. Mathur, in response to which respondent vide its communication dated 5th August, 2021 enclosed the declaration of its nominee arbitrator in accordance with Schedule VI and Section 12 of the Act, however, reiterated its stand to refer the disputes to the second arbitral tribunal.

15. Learned senior counsel submitted that the respondent has been in regular touch with the petitioner over appointment of its nominee arbitrator and thereby, petitioner cannot claim that respondent has failed to take steps to nominate its arbitrator within 30 days of notice invoking arbitration. Further submitted that where an arbitrator has been appointed by a party and intimation thereof has been conveyed to the other, an application for

appointment of an arbitrator under Section 11 of the Act is not maintainable. To submit so, reliance was placed upon Hon'ble Supreme Court's decision in *Antrix Corporation Ltd. v. Devas Multimedia Private Limited* (2014) 11 SCC 560.

16. Learned senior counsel next submitted that by filing this petition, petitioner is seeking appointment of third Arbitral Tribunal for adjudication of disputes relating to a project for which second arbitral tribunal has already been constituted and this would lead to multiplicity of proceedings which is wholly unwarranted and unsustainable. In support of this submission, learned senior counsel placed reliance upon a decision of this Court in *M/s Gammon India Ltd & Anr. Vs. NHAI* 2020 SCC Online Del 659.

17. Learned senior counsel also submitted that the plea of petitioner that the appointment of Justice (Retd.) G.P. Mathur is hit by Schedule V of the Act, which gives justifiable doubts with regard to the independence and impartiality of the arbitrator, cannot sustain in view of decision in *HRD Corporation (Marcus Oil and Chemical Division) Vs. Gail (India) Limited* (2018) 12 SCC 471 wherein the Hon'ble Supreme Court has distinguished between the persons who become ineligible to be appointed as arbitrators and persons whose appointment gives rise to justifiable doubts as to their independence or impartiality. It was submitted that the appointment of Justice (Retd.) G.P. Mathur is in accordance with Schedule V and VII of the Act.

18. With regard to plea of petitioner that Justice (Retd.) G.P. Mathur has made insufficient declarations, learned senior counsel submitted that the learned arbitrator has specifically stated that he has been nominated by

the respondent in three other matters out of which one nomination was made way back on 1st June, 2018 i.e. more than three years back. Also submitted that the fourth nomination was done by this Court vide order dated 4th May, 2021 [ARB.P.411/2021] with the consent of the petitioner.

19. It was also submitted by learned senior counsel that appointment of Justice (Retd.) G.P. Mathur in the second arbitral tribunal was with the consent of petitioner and therefore, petitioner cannot raise objection with regard to his impartially and since the disputes sought to be resolved in the present petition pertain to the same project between the parties, petitioner's objection to refer it to the second arbitral tribunal cannot sustain. It was emphatically submitted that if all the disputes between the parties for the same project arising out of common Concession Agreement are referred to the same arbitral tribunal, the Arbitral Tribunal will also be able to take a wholesome approach while deciding all the disputes which may be inter-linked.

20. Learned senior counsel further submitted that the appointment of Justice (Retd.) G.P. Mathur cannot be challenged under the purview of Section 11 of the Act and the only remedy available to the petitioner is to challenge the nomination under Section 13 of the Act. Lastly, it was submitted that the appointment of Justice (Retd.) G.P. Mathur as the nominee arbitrator of the respondent was in compliance with provisions of the Act and within the time period stipulated under the Act and also the appointment was in compliance of Schedule V and VII of the Act and, therefore, this petition deserves to be rejected.

21. In rebuttal, learned senior counsel for petitioner submitted that respondent's proposal to appoint Justice (Retd.) G.P. Mathur for the 5th

time in a row is hit by entry 22 of the fifth Schedule to the Arbitration and Conciliation Act, 1996 and also that Section 11(8)(b) of the Arbitration Act requires the Court to have due regard to the “contents of the disclosure and other considerations to secure impartial and independent arbitrator”. Reliance is placed by learned senior counsel upon decision of Hon’ble Supreme Court in *Perkins Eastman Architects DPC Vs. HSCC (India) Limited*, 2019 SCC OnLine SC 1517. Learned senior counsel also submitted that reliance placed by respondent upon decisions in *Antrix Corporation Ltd.; M/s Gammon India Ltd and HRD Corporation (Supra)* is of no help as these are prior to decision of Hon’ble Supreme Court *Perkins Eastman Architects DPC (Supra)*. Learned senior counsel also emphasized that the disclosure made by the nominee Arbitrator Justice (Retd.) G.P. Mathur is not accordance with the provisions of Sixth Schedule of the Act. It was submitted that respondent’s plea that the present petition is not maintainable and to challenge respondent’s nominee Arbitrator, petitioner should have filed petition under Section 13 of the Act, deserves to be rejected in view of Hon’ble Supreme Court’s decision in *Perkins Eastman Architects DPC (Supra)*. Reliance was also placed upon decisions of this Court in *SMS Ltd Vs. Rail Vikas Nigam Limited*, 2020 SCC OnLine Del 77; *BVSR KVR Vs. Rail Vikas* 2020 SCC OnLine Del 456; *Oyo Hotels Vs. Rajan*, 2021 SCC OnLine Del 44; *Dream Valley Vs. Religare* 2016 SCC OnLine Del 5584.

22. Learned senior counsel for petitioner also refuted the plea of respondent that the subject disputes can be referred to the second arbitral tribunal unless the counter party consent to that arrangement. On this aspect, reliance was placed upon a decision of this court in *Airone*

Charters Pvt Ltd Vs. Jetsetgo Aviation Private Limited, in Arb.P. 235/2020 dated 12th October, 2021.

23. The arguments advanced by learned senior counsel for the parties were heard at length and the material placed on record as well as decisions cited have also been gone through by this Court.

24. Much emphasis was laid by learned counsel for the petitioner upon the decision of Hon'ble Supreme Court in *Perkins Eastman Architects DPC (Supra)* to submit that respondent's contention that where an Arbitrator has already been appointed, the only remedy available is to file Section 13 of the Act, is entirely misplaced. This Court is in concurrence thereof.

25. On the aspect of maintainability of this petition under the provisions of Section 11(6) of the Arbitration and Conciliation Act, 1996, this Court finds that this enactment provides that in case a party fails to act as required under a procedure, that party may approach the Court to take necessary measures.

26. A two Judge Bench of the Hon'ble Supreme Court in *DLF Home Developers Limited Vs. Rajapura Homes Private Limited and Another* 2021 SCC OnLine SC 781 has expanded the jurisdiction of this Court for deciding petition under Section 11 of the Act and has held as under:-

17. There is no gainsaying that by virtue of the Arbitration and Conciliation (Amendment) Act, 2015, by which Section 11 (6-A) was introduced, the earlier position of law as to the scope of interference by this Court at the stage of referral has been substantially restricted. It is also no more res integra that despite the subsequent omission of Section 11(6-A) by the Arbitration and Conciliation (Amendment)

Act, 2019, the legislative intent behind thereto continues to be a guiding force for the Courts while examining an application under Section 11 of the Act.

18. The jurisdiction of this Court under Section 11 is primarily to find out whether there exists a written agreement between the parties for resolution of disputes through arbitration and whether the aggrieved party has made out a prima facie arbitrable case. The limited jurisdiction, however, does not denude this Court of its judicial function to look beyond the bare existence of an arbitration clause to cut the deadwood. A three-judge bench in Vidya Drolia (Supra), has eloquently clarified that this Court, with a view to prevent wastage of public and private resources, may conduct 'prima facie review' at the stage of reference to weed out any frivolous or vexatious claims.....

XXXXXX

20. To say it differently, this Court or a High Court, as the case may be, are not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen Arbitrator. On the contrary, the Court(s) are obliged to apply their mind to the core preliminary issues, albeit, within the framework of Section 11(6-A) of the Act. Such a review, as already clarified by this Court, is not intended to usurp the jurisdiction of the Arbitral Tribunal but is aimed at streamlining the process of arbitration. Therefore, even when an arbitration agreement exists, it would not prevent the Court to decline a prayer for reference if the dispute in question does not correlate to the said agreement.

27. In the present case, the Concession Agreement dated 9th May, 2008 contains the Dispute Resolution Clause, which reads as under:-

“
ARTICLE 44
DISPUTE RESOLUTION

44.1 Dispute resolution

44.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 44. 2.

44.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

44.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Independent Engineer to mediate and assist the Parties in arriving at an amicable settlement thereof Failing mediation by the Independent Engineer or without the intervention of the Independent Engineer, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Concessionaire for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) days from the date of reference to discuss and attempt to amicably resolve the Dispute, if such meeting does not take place within the 7 (seven) day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement

within 30 (thirty) days of the notice in writing referred to in Clause 44.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 44.3.

44.3 Arbitration

44.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 44.2, shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 44.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre [or Alternative Dispute Resolution, New Delhi (the "Rules"), or such other rules, may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be Delhi, and the language of arbitration proceedings shall be English.

44.3.2 *There shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules. "*

28. In the case in hand, the notice invoking arbitration for adjudication of disputes in respect of Concession Agreement dated 9th May, 2008 was sent by petitioner to respondent on 4th June, 2021. The said notice was replied to by the respondent on 17th June, 2021 stating that with respect to Concession Agreement dated 9th May, 2008 an Arbitral Tribunal comprising of Mr. Justice Dr. Mukundakam Sharma, Presiding Arbitrator, Mr. Justice A.K Sikri, Co- Arbitrator and Mr. Justice G.P Mathur, Co-

Arbitrator was constituted in May, 2021 and, therefore, these disputes should be referred to the same Arbitral Tribunal. Further, vide its letter dated 2nd July, 2021, the respondent appointed Justice (Retd.) G.P. Mathur as its nominee Arbitrator and sent its copy to petitioner as well as petitioner's nominee arbitrator Mr.V.K.Tyagi. Thereby, it cannot be said that respondent had failed to respond to petitioner's notice dated 4th June, 2021 invoking arbitration within the stipulated time. However, since the appointment of Justice (Retd.) G.P. Mathur as nominee Arbitrator of respondent as well reference of disputes to the second arbitral tribunal, have been objected to by the petitioner, these are the questions for determination by this Court.

29. Pertinently, with regard to the Concession Agreement dated 9th May, 2008 petitioner had sent a Notice of Dispute dated 25th October, 2019 to the respondent. Thereafter, respondent had suspended the Concession Agreement on 4th December, 2020, against which petitioner had preferred a petition under Section 9 of Arbitration and Conciliation Act, 1996 [OMP (I) (COMM) 421/2020]. During pendency of the said petition, respondent terminated the Concession Agreement on 5th March, 2021, which was also challenged by the petitioner in O.M.P.(I)(COMM) 98/2021. However, since second Arbitral Tribunal was already constituted on 20th May, 2021 by virtue of order dated 4th May, 2021 passed by this Court in ARB.P.411/2021, therefore, petitioner was directed to approach the arbitral tribunal for grant of interim reliefs.

30. The notice invoking arbitration in the present petition was sent on 4th June, 2021, which according to petitioner though pertains to the same Concession Agreement dated 9th May, 2008, however, disputes raised

therein are different than the one considered by the second arbitral tribunal.

Pertinently, the notice dated 4th June, 2021 reads as under:-

“Despite the Concessionaire's Notice invoking Arbitration under Clause 44.3 of the Concession Agreement dated 7.2.2020 requesting NHAI / Authority to confer on a set of arbitrators for formation of the Arbitral Tribunal at the earliest NHAI failed to respond to the Concessionaire's request for formation of the Arbitral Tribunal as regards the disputes that have been raised by the Concessionaire in its Notice of Dispute dated 25th October, 2019 which relates to the claims that have been raised by the Concessionaire as a consequence of the delays caused by the Authority as mentioned in the said Notice of Dispute dated 25th October, 2019 . Since the Concessionaire's request for conciliation meeting as per Clause 44.3 of the Concession Agreement has not taken place till date, all claims raised by the Concessionaire in its Notice of Dispute dated 25th October, 2019 is being referred to the Arbitral Tribunal to be formed in accordance with Clause 44.3 of the Concession Agreement and for which the Concessionaire nominates Mr. V.K. Tyagi (Former Engineering Chief] as its Arbitrator.

The Authority is called upon to nominate its Arbitrator within 30 days from the receipt of this notice failing which the Concessionaire shall exercise its rights to have the second Arbitrator nominated as per the provisions of the Arbitration and Conciliation Act, 1996.”

31. In response to the aforesaid notice dated 4th June, 2021, respondent vide its reply dated 17th June, 2021, stated as under:-

“2. It is pertinent to state that the Concessionaire has already initiated Arbitration before the Arbitration Tribunal Case No. 02 of 2021 which has recently been

constituted in May, 2021 comprising of Mr. Justice Dr. Mukundakam Sharma, Presiding Arbitrator, Mr. Justice A.K Sikri, Co-Arbitrator and Mr. Justice G.P Mathur, Co-Arbitrator. instead of referring the disputes to the aforesaid Arbitral Tribunal, the Concessionaire has now invoked a fresh Arbitration vide letter dated 4th June, 2021(Ref. vii.) thereby referring the disputes raised vide letter dated 25th October, 2019 (Ref. i.) to another Arbitral Tribunal.

3. In this regard, NHAI would like to state that since the disputes pertain to the same project, therefore these disputes should be referred to the same Arbitral Tribunal adjudicating Arbitration Tribunal Case No. 02 of 2021 as second reference. This will not only reduce duplicity of proceedings but will also be time effective. The tribunal will also be able to take a wholesome approach while deciding all the disputes which may be inter linked.

4. Therefore, you are advised to refer the present disputes to AT- 2 who is already seized of disputes arising from the same contract.”

32. The aforesaid notice dated 4th June, 2021 sent by petitioner to respondent records that **“all claims raised by the Concessionaire in its Notice of Dispute dated 25th October, 2019 is being referred to Arbitral Tribunal to be formed in accordance with Clause 44.3 of the Concession Agreement and for which the Concessionaire nominates Mr. V.K. Tyagi (Former Engineering Chief) as its Arbitrator”**. Meaning thereby, with regard to Concession Agreement dated 9th May, 2008, the disputes raised by the petitioner by virtue of Notice of Dispute dated 25th October, 2019 , which have been referred to the second arbitral tribunal having constituted

on 20th May, 2021, petitioner has sought appointment of third arbitral tribunal by notice dated 4th June, 2021. However, vide its reply dated 17th June, 2021, respondent has sought reference of disputes to the second arbitral tribunal itself.

33. A Coordinate Bench of this Court in ***Gammon India Ltd. and Another Vs. National Highways Authority of India*** 2020 SCC OnLine Del 659 while dealing on the aspect of ‘*Multiplicity- multiple invocations, multiple references, multiple Arbitral Tribunals, multiple Awards and multiple challenges, between the same parties, in respect of the same contract or the same series of contracts*’, has observed as under:-

“26. Filing of different claims at different stages of a contract or a project is thus permissible in law, inasmuch as the contract can be of a long duration and the parties may wish to seek adjudication of certain disputes, as and when they arise. Despite this permissibility, multiplicity ought to be avoided as discussed hereinafter.

27. The endeavour of Courts in the domain of civil litigation is always to ensure that claims of parties are adjudicated together, or if they involve overlapping issues, the subsequent suit is stayed until the decision in the first suit. It is with the intention of avoiding multiplicity that the principles enshrined in Order 2 Rule 2 CPC, Section 10 CPC and Res Judicata are part of the Code of Civil Procedure from times immemorial. However, since arbitral proceedings are strictly not governed by the Code of Civil Procedure, 1908, it is possible for parties to invoke arbitration as and when the disputes arise, but should the same be permissible

without any limitation and ignoring the principles of public policy as enshrined in these provisions.

28. Multiple arbitrations before different Arbitral Tribunals in respect of the same contract is bound to lead to enormous confusion. The constitution of multiple Tribunals in respect of the same contract would set the entire arbitration process at naught, as the purpose of arbitration being speedy resolution of disputes, constitution of multiple tribunals is inherently counter-productive.

29. Typically, in construction contracts, the claims may be multiple in number but the underlying disputes about breach, delays, termination etc., would form the core of the disputes for almost all claims. As is seen in the present case, parties have invoked arbitration thrice, raising various claims before three different Tribunals which have rendered three separate Awards. Considering that a previously appointed Tribunal was already seized of the disputes between the parties under the same contract, the constitution of three different Tribunals was unwarranted and inexplicable. A situation where multiple Arbitral Tribunals parallelly adjudicate different claims arising between the same parties under the same contract, especially raising overlapping issues, is clearly to be avoided.”

34. During arguments, learned senior counsel for the petitioner had submitted that the proposition laid down in **Gammon (Supra)** does not mean that consolidation must follow in each and every case. This Court does not dispute this submission, however, finds that such observations are guiding factors that should be followed to avoid constitution of separate

arbitral tribunals for separate claims in respect of same contract. The Coordinate Bench in *Gammon (Supra)* has relied upon decision of Hon'ble Supreme Court in *Dolphin Drilling Ltd. Vs. ONGC* (2010) 3 SCC 267 to observe that though multiple arbitrations are permissible, it would be completely contrary to public policy to permit parties to raise claims as per their own convenience.

35. In view of the above cited decisions, this Court finds that there is no justification for petitioner having invoked third arbitration by virtue of notice dated 4th June, 2021 within less than a month of constitution of second arbitral tribunal on 20th May, 2021 in respect of common Concession Agreement dated 9th May, 2008 and Notice of Dispute dated 25th October, 2019.

36. This Court shall now consider the objection raised by the petitioner that the nomination of Justice (Retd.) G.P. Mathur as Arbitrator by the respondent is hit by Entry No. 22 of the Fifth Schedule of the Arbitration Act and his declaration dated 5th August, 2021 is in contravention of provisions of Sixth and Seventh Schedule of the Act.

37. The relevant provision of the Fifth Schedule of the Act reads as under:-

Arbitration and Conciliation Act, 1996

The Fifth Schedule

See Section 12(1) (b)

The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators:

Arbitrator's relationship with the parties or counsel

1. XXXXX

2. XXXXX

XXXXXXXXXXXX

22. **The arbitrator has within the past three years been**

appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.

XXXXXXXXXX

Explanation 2: The term “affiliate” encompasses all companies in one group of companies including the parent company.”

38. On the aspect of applicability of Entry No. 22 of the Fifth Schedule of the Act, the Hon’ble Supreme Court in ***HRD Corpn. Vs. GAIL (India) Ltd.***, (2018) 12 SCC 471 while upholding dismissal of petition challenging the independence and impartiality of the appointed Arbitrator, observed as under:-

24. On reading the aforesaid guideline and reading the heading which appears with Item 16, namely, “Relationship of the arbitrator to the dispute”, it is obvious that the arbitrator has to have a previous involvement in the very dispute contained in the present arbitration. Admittedly, Justice Doabia has no such involvement. Further, Item 16 must be read along with Items 22 and 24 of the Fifth Schedule. The disqualification contained in Items 22 and 24 is not absolute, as an arbitrator who has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties or an affiliate, may yet not be disqualified on his showing that he was independent and impartial on the earlier two occasions. Also, if he currently serves or has served within the past three years as arbitrator in another arbitration on a related issue, he may be disqualified under Item 24, which must then be contrasted with Item 16. Item 16 cannot be read as including previous involvements in another arbitration on a related issue

involving one of the parties as otherwise Item 24 will be rendered largely ineffective. It must not be forgotten that Item 16 also appears in the Fifth Schedule and has, therefore, to be harmoniously read with Item 24. It has also been argued by the learned counsel appearing on behalf of the respondent that the expression “the arbitrator” in Item 16 cannot possibly mean “the arbitrator” acting as an arbitrator, but must mean that the proposed arbitrator is a person who has had previous involvement in the case in some other avatar. According to us, this is a sound argument as “the arbitrator” refers to the proposed arbitrator. This becomes clear, when contrasted with Items 22 and 24, where the arbitrator must have served “as arbitrator” before he can be disqualified. Obviously, Item 16 refers to previous involvement in an advisory or other capacity in the very dispute, but not as arbitrator. It was also faintly argued that Justice Doabia was ineligible under Items 1 and 15. Appointment as an arbitrator is not a “business relationship” with the respondent under Item 1. Nor is the delivery of an award providing an expert “opinion” i.e. advice to a party covered by Item 15.

25. The fact that Justice Doabia has already rendered an award in a previous arbitration between the parties would not, by itself, on the ground of reasonable likelihood of bias, render him ineligible to be an arbitrator in a subsequent arbitration..... ”

39. The aforesaid decision of Hon’ble Supreme Court in **HRD Corpn.** (*Supra*) has been succinctly followed by a Coordinate Bench of this Court

in *Sudesh Prabhakar & Ors. Vs. Emaar MGF Constructions Pvt. Ltd.*

2018 SCC OnLine Del 6847, wherein it has been observed as under:-

“14. In HRD Corporation (supra) Supreme Court had also quoted with approval from a leading text book, Liability Insurance in International Arbitration, 2nd ed. (2011), which states that in a situation where a loss, whether from boom or batch, gives rise to a number of arbitrations against different insurers who have subscribed to the same programme, a number of arbitrations may be commenced at around the same time, and the same arbitrator may be appointed at the outset in respect of all these arbitrations. In such circumstance, it would not attract the prohibition or disqualification as contained in Item 22 or 24 of Fifth Schedule of the Act.

40. The observations of Hon’ble Supreme Court in *HRD Corpn. (Supra)* make it manifestly clear that there is no embargo to appointment of an Arbitrator in cases more than stipulated in Entry 22 of Schedule Five of the Act. No doubt such enactments have been brought in force to ensure independence and impartiality of an Arbitrator, however, at the same time such provisions do not incapacitate the Court in arriving at just decision in the facts of a particular case.

41. To mete out the objection of petitioner with regard to insufficient declaration under the Sixth and Seventh Schedule of the Act by the learned nominee Arbitrator of respondent, this Court deems it appropriate to extract the relevant partition of disclosure made by Justice (Retd.) G.P. Mathur vide his communication dated 21st May, 2021, which reads as under:-

“Declaration u/s 12(1) Arbitration and Conciliation Act, 1996

*I have absolutely no interest of any kind in the subject matter of dispute. I have not given any advice or opinion to either party on the matter in dispute. I declare that neither me nor any member of my family has any financial or personal interest of any kind in the outcome of the Award. I further declare that neither me nor any member of my family has any financial or personal interest in any one of the parties or an affiliate of any party. Neither me nor any member of my family is a manager or director or part of management or has any kind of controlling influence in any of the parties. **None of the grounds mentioned in the Sixth or Seventh Schedule of the Arbitration and Conciliation Act, 1996, exist or have any application to me. I never had any past relationship with or interest in any of the parties. I have been nominated by NHAI as Arbitrator in three other matters in last 3 years, out of which in Lucknow-Sitapur Expressway vs. NHAI, I was nominated on 1.6.2018. Due to Coronavirus and extreme difficulty being faced by Law Firms and also by parties, practically no hearing has taken place since March 2020. I am functioning as Arbitrator and Presiding Arbitrator in limited number of Arbitration matters. I will devote sufficient time and will make every endeavour to conclude the Arbitration proceedings within one year.***

42. On 5th August, 2021, Justice (Retd.) G.P. Mathur tendered another declaration, which is as under:-

“Declaration u/s 12 (1) Arbitration and Conciliation Act, 1996

I have absolutely no interest of any kind in the subject matter of dispute.

I have not given any advice or opinion to either party on the matter in dispute.

I declare that neither me nor any member of my family has any financial or personal interest of any kind in the outcome of the Award.

I further declare that neither me nor any member of my family has any financial or personal interest in any one of the Parties or an affiliate of any party.

Neither me nor any member of my family is a manager or director or part of management or has any kind of controlling influence in any of the Parties.

None of the grounds mentioned in the Fifth or Seventh Schedule of the Arbitration and Conciliation Act, 1996, exist or have any application to me.

I never had any past relationship with or interest in any of the Parties.

I have been nominated by NHAI as Arbitrator in three other matters. In one matter I was nominated on 1.6.2018 which is more than 3 years back.

In ARB.P.411/2021 & I.A.5825/2021 Hon'ble Delhi High Court passed an order on 4.5.2021 appointing me as nominated Arbitrator on behalf of the Respondent NHAI. Thereafter, I received a communication dated 7.5.2021 from the Respondent regarding my appointment, which is the on going Arbitration Case No. 2 of 2021 between M/s Panipat Jalandhar NH-1 Tollway Pvt. Ltd. and National Highway Authority of India, in which Mr. Justice Mukundkam Sharma is the Presiding Arbitrator and Mr. Justice A. K. Sikri has been nominated by the Claimant.

I am functioning as Arbitrator and Presiding Arbitrator in limited number of Arbitration matters.

I will devote sufficient time and will make every endeavour to conclude the Arbitration proceedings within one year.”

43. A perusal of the aforesaid declaration by Justice (Retd.) G.P. Mathur makes it manifestly clear that all necessary disclosures under the relevant provisions of the Act have been made. A conjoint reading of both the declarations dated 21st May, 2021 and 5th August, 2021, clearly shows that the learned Arbitrator or any of his family member had no relationship with the respondent. The learned Arbitrator has in very clear words declared that he has been appointed Arbitrator in three other matters on behalf of respondent-NHAI and last was in the year 2018 and his fourth appointment is by this Court by virtue of order dated 4th May, 2021 i.e. the second arbitral tribunal for resolution of disputes between the parties. Meaning thereby, if nomination of Justice (Retd.) G.P. Mathur by respondent in response to petitioner's notice dated 4th June, 2021 is accepted, this would be his fifth appointment on behalf of respondent-NHAI. The afore-referred decisions in *HRD Corpn. (Supra)* and *Sudesh Prabhakar* make it clear that there is no bar in appointment of an Arbitrator in multiple cases, if so warranted.

44. In the light of afore-noted discussion, this Court finds that objections raised by the petitioner with regard to nomination and appointment of Justice (Retd.) G.P. Mathur as respondent's Arbitrator are baseless and liable to be rejected.

45. Moreover, vide order dated 4th May, 2021 [in ARB.P.411/2021] this Court with the consent of the petitioner has already constituted the second arbitral tribunal to adjudicate the disputes with regard to Concession Agreement dated 9th June, 2008, of which Justice (Retd.) G.P. Mathur is also a member, petitioner cannot now be heard to raise objection with regard to his independence and impartiality. Also, during the course of

hearing learned senior counsel for petitioner time and again reiterated that no question has been raised to the integrity and fairness of learned Arbitrator but the only objection raised is that he has been appointed arbitrator on more than three previous occasions and this objection has already been rejected by this Court as mentioned hereinabove.

46. This Court also finds that in any agreement or contract, an arbitration clause is maintained with the object to speedy resolution of disputes and in cases where the disputes are of larger magnitude and multiple in number, to avoid any confusion or infirmity, should be referred to the same arbitral tribunal. This Court cannot lose sight of the fact that in response to petitioner's notice dated 4th June, 2021, vide its reply dated 17th June, 2021 respondent had at the first hand sought reference of the disputes to the second arbitral tribunal and it is only when petitioner agitated to the same, that the respondent vide its letter dated 2nd July, 2021 nominated name of Mr. Justice (Retd.) G.P. Mathur and even thereafter, respondent has maintained the consistent stand to refer the disputes to the second Arbitral Tribunal. The stand of respondent while nominating name of Mr. Justice (Retd.) G.P. Mathur as its Arbitrator is clearly with the intent to refer the disputes to the second arbitral tribunal, of which he is a member. This court fails to understand as to why for one Concession Agreement dated 9th May, 2008 and Notice of Dispute dated 25th October, 2019, petitioner has insisted upon constitution of a separate arbitral tribunal that too within less than one month of constitution of second tribunal.

47. In the opinion of this Court multiple arbitrations can exist if the cause of action continues or arises after constitution of a tribunal. This

Court is informed that disputes pertaining to the year 2013 are pending before first arbitral tribunal. The suspension and termination of Concession Agreement in question are subject matter of consideration before the second arbitral tribunal. The petitioner has not been able to establish that the disputes, resolution of which is sought under the proposed third arbitral tribunal, cause of action thereof arose post suspension and termination of Concession Agreement. This fact is further substantiated by the language of Notice dated 4th June, 2021 invoking arbitration, which clearly stipulates that for resolution of differences which were subject matter of Notice of Dispute dated 25th October, 2019, the constitution of third arbitral tribunal is sought, which is already under consideration before the second arbitral tribunal and so, in the considered opinion of this court, it would lead to multiple observations and findings by two different tribunals, which cannot be permitted.

48. Consequentially, it is directed that the subject matter of disputes raised in Notice dated 4th June, 2021 with regard to Concession Agreement dated 9th May, 2008 and Notice of Dispute dated 25th October, 2019 shall be dealt by the Second Arbitral Tribunal.

49. This court is informed that proceedings before the second arbitral tribunal are in progress, however, not yet complete. This Court is conscious that if the disputes raised in the present petition are referred to the second arbitral tribunal, it may result in delay of proceedings before the second arbitral tribunal. However, since the members of the second arbitral tribunal are well conversant with the facts and disputes raised between the parties, having dealt the same Concession Agreement dated 9th May, 2008 and Notice of Dispute dated 25th October, 2019, it would

enable to expedite in resolution of disputes rather than delaying it. Moreover, there shall be no confusion or complexity in the outcome of the arbitration, having avoided multiple proceedings.

50. With aforesaid observations, the present petition is accordingly disposed of.

(SURESH KUMAR KAIT)
JUDGE

JANUARY 17, 2022

r

