

GAHC010275442023



**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Arb.P./46/2023**

M.S. OIL INDIA LIMITED  
HAVING ITS REGISTERED OFFICE AT DULIAJAN- 786602  
DISTRICT DIBRUGARH  
ASSAM  
DULY REPRESENTED BY ITS RESIDENT CHIEF EXECUTIVE.

VERSUS

M.S. BADRI RAI AND COMPANY

STATION ROAD  
P.O. DULIAJAN 786602  
DISTRICT DIBRUGARH  
ASSAM.

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Advocate for : MR. K KALITA  
Advocate for : appearing for M.S. BADRI RAI AND COMPANY

**BEFORE**  
**HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI**

**ORDER**

**11.12.2023**

Heard Shri B Chowdhury, learned counsel for the petitioner.

**2.** This petition has been instituted under Section 11 (6) of the Arbitration

and Conciliation Act, 1996 with the following prayer:

“i. Allow the present petition and appoint an Arbitral Tribunal in accordance with law and as per the procedure prescribed under Section 15(2) of the Conciliation Arbitration and Act, 1996 and as per Clause 15 of the Contract No. 6208760 dated 10.01.2019 to adjudicate upon the disputes between the parties arising out of Contract No. 6208760 dated 10.01.2019 and/or;

ii. Pass any such order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of this case.”

**3.** It is the case of the petitioner- Oil India Ltd. that pertaining to certain alleged dispute, the respondent-claimant had issued a notice dated 27.09.2022 for referring the matter to arbitration in accordance with the clause pertaining to such procedure to be adopted in case of any dispute arising between the parties. It has also been stated in the said notice that since the claim exceeds Rs. 5 crores, a nominee was appointed by the claimant. It is pointed out that a copy of the notice was also marked to the said nominee and therefore, it has been projected on behalf of the petitioner that prior consent from the same nominee was apparently taken by the claimant. Responding to the said notice, the present petitioner had issued a communication dated 19.08.2023 to the nominee Arbitrator on behalf of the petitioner. The controversy has started from a subsequent communication issued by the respondent dated 12.10.2023 whereby, the nominee earlier appointed by the respondent- claimant was changed and another nominee was appointed. The same was followed by a

communication dated 03.11.2023 issued by the Presiding Arbitrator by which a declaration required under Section 12 of the Arbitration and Conciliation Act, 1996 (Act) has been made.

**4.** Shri Chowdhury, learned counsel for the petitioner by referring to Section 21 of the Act has submitted that under the said section, the arbitral proceeding in respect of a particular dispute commences from the date on which a request for that dispute to be referred to an arbitration is received by the respondent. It is emphasized that the first notice dated 27.09.2022 having contained the genesis of the claim and the same being received by the present petitioner would mean that the arbitral proceeding has commenced. The learned counsel for the petitioner, therefore, contends that unless the procedures prescribed in the Act as well as the Contract are duly followed, the present Tribunal cannot proceed with the matter.

**5.** The learned counsel has also referred to Clause 15.0 which is with regard to settlement of dispute and arbitration. Clause 15(5) of the Contract which reads as follows:

*“If any of the Arbitrators so appointed dies, resigns, becomes incapacitated or withdraws for any reason from the proceedings, it shall be lawful for the concerned party/arbitrators to appoint another person in his place in the same manner as aforesaid. Such person shall proceed with the reference from the stage where his predecessor had left if both parties consent for the same; otherwise, he shall proceed de novo.”*

**6.** After hearing the learned counsel for the petitioner, this Court had put a specific query as to whether a petition under Section 11 (6) of the Act would be maintainable. This Court had further wanted to have a look at the order/communication of appointment of the Presiding Arbitrator which presupposes that the nominee Arbitrator of both the parties in dispute have agreed upon the said appointment. However, the learned counsel for the petitioner is not in possession of such order.

**7.** Therefore, this Court proceeds with the presumption that there is a consent by the nominee Arbitrators of both the parties towards the appointment of the Presiding Arbitrator in absence of which such Presiding Arbitrator will not assume jurisdiction to adjudicate the dispute and for that matter, issue a declaration under Section 12 of the Act.

**8.** Under Section 21 of the Act, the expression used is "commencement of the proceeding". The argument advanced on behalf of the petitioner with regard to the aforesaid provision of the Act is that on receipt of the claim by the respondent, the arbitral proceeding is deemed to be commenced. However, such submission is not acceptable in the facts and circumstances of the instant case. Admittedly, it is the provision of the Contract that in case the claim exceeds Rs. 5 crores, the Tribunal would be constituted by three members and unless and until the Arbitral Tribunal is constituted, the question of commencement will not arise at all.

**9.** With regard to application of Section 11 (6) of the Act in making a

challenge of the present nature, the learned counsel has relied upon a decision of the Hon'ble Supreme Court in the case of ***Huawei Technologies Company Ltd. Vs. Sterlite Technologies Ltd.***, reported in **(2016) 1 SCC 7**. However, on a reading of the said decision, this Court is of the opinion that the same would not have any application in the present case. Rather, on reading of the contents of paragraph 8, a different interpretation would be available which will not come to the aid of the petitioner.

**10.** This Court is of the firm opinion that a challenge of this nature would not be maintainable under the provision of Section 11 (6) of the Act and unless a petition is presented before the appropriate forum under the appropriate provisions of law, such challenge cannot be maintained.

**11.** In view of the above, the petition stands dismissed.

**JUDGE**

**Comparing Assistant**