IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 1ST DAY OF AUGUST, 2022

BEFORE

THE HON'BLE MR.JUSTICE S.R.KRISHNA KUMAR

CIVIL MISCELLANEOUS PETITION NO.180 OF 2020

BETWEEN:

S.R. RAVI
SON OF M.L. SINGEGOWDA,
AGED ABOUT 54 YEARS,
NO.18/5, 1ST MAIN, RATHNA,
VYALIKAVAL, BANGALORE-560 003.

…PETITIONER

(BY SRI. M.V. SUNDARA RAMAN, ADVOCATE)

AND:

KARNATAKA STATE TOURISM DEVELOPMENT CORPORATION,
GROUND FLOOR, BMTC YESHWANTPUR TTMC,
(BUS STAND), YESHWANTPUR CIRCLE,
BANGALORE-560 022.
REPRESENTED BY ITS
MANAGING DIRECTOR.

…RESPONDENT

(BY SRI. GURURAJ JOSHI, ADVOCATE)

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THIS C.M.P. IS FILED UNDER SECTION 11(5) OF THE ARBITRATION AND CONCILIATION ACT 1996, PRAYING TO APPOINT A SOLE ARBITRATOR AS THIS HON'BLE COURT MAY DEEM FIT AND REFER THE DISPUTES BETWEEN THE PARTIES, ARISING OUT OF ANNEXURE A1 AND ANNEXURE A2 CONTRACTS DATED 27.4.2011, TO ARBITRATION; DIRECT RESPONDENTS TO PAY COSTS OF THESE PROCEEDINGS AND GRANT SUCH OTHER RELIEF OR RELIEFS AS THIS HON'BLE COURT MAY DEEM FIT, IN THE INTEREST OF JUSTICE AND EQUITY.

THIS C.M.P. BEING HEARD AND RESERVED ON 28.06.2022, COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

In this petition, under Section 11(5) of the Arbitration and Conciliation Act, 1996 (for short "the said Act of 1996"), the petitioner seeks appointment of a sole arbitrator to refer the disputes to arbitration between the parties arising out of the contracts at Annexures-A1 and A2, dated 27.04.2011 entered into between the petitioner and respondent and for other reliefs.

2. Heard learned counsel for the petitioner and learned counsel for the respondent and perused the material on record.

3. In addition to reiterating the various contentions urged in the Memorandum of Petition and referring to the material on record, learned counsel for the petitioner submits that the material on record clearly establishes that the dispute between the parties deserves to be referred to arbitration. Reliance is placed on the following judgments:

i. ***S.N. Prasad, Hitek Industries (Bihar) Vs. Monnet Finance Limited and Others – (2011) 1 SCC 320.***

ii. ***M/s. Shyamaraju & Company (India) Pvt. Ltd Vs. City Municipal Council - CMP No.134/2018 C/W CMP No.135/2018 dated 18.02.2019.***

iii. ***Bharat Sanchar Nigam Limited and another Vs. Nortel Networks India Private Limited – (2021) 5 SCC 738.***

iv. ***Vidya Drolia and Others Vs. Durga Trading Corporation – (2021) 2 SCC 1.***

v. ***D.Pal & Co. Vs. MCG – ILR SUPP.6(2007) DELHI 175.***

4. Per contra, learned counsel for the respondent submits that the claim of the petitioner is barred by limitation and as such, the question of referring the dispute to arbitration does not arise. Secondly, it is contended that the material on record that the claim of the petitioner was settled with due accord and satisfaction leaving no arbitral dispute between the parties that was capable of being referred to arbitration. Thirdly, it is contended that the arbitration agreement/clause exists only in respect of package No.2 and not in respect of package No.3 and on this ground also, the present petition is not maintainable and the same is liable to be dismissed. In support of his

contentions, learned counsel placed reliance on the following judgments:

i. ***Shri Vimal Kishor Shah & Ors. Vs. Mr. Jayesh Dinesh Shah & Ors. – (2016) 8 SCC 788.***
ii. ***Atul Singh & Others Vs. Sunil Kumar Singh & Ors. – (2008) 2 SCC 602.***
iii. ***Secunderabad Cantonment Board Vs. M/s B. Ramachandraiah and Sons – (2021) 5 SCC 705.***
iv. ***United India Insurance Co. Ltd. Vs. Antique Art Exports Pvt. Ltd – (2019) 5 SCC 362.***

5. I have given my anxious consideration to the rival submissions and perused the material on record.

6. The material on record indicates that pursuant to tender notification dated 27.12.2010 issued by the respondent for upgradation of Rajbhavan and allied works, the respondent issued two work orders for package No.1 and package No.2, pursuant to which petitioner and respondent entered into two agreements, both dated 27.04.2011, in respect of the works mentioned in the work orders. It is contended by the petitioner that since the

respondent did not make payment due to the petitioner under the aforesaid work orders and contracts. petitioner preferred W.P.No.9885/2016 before this Court. By final order dated 22.09.2016, this Court disposed of the said petition reserving liberty in favour of the petitioner to submit a representation along with the copies of the bills to the respondent, who was directed to consider the same and pass appropriate orders.

7. It is further contended that since the respondent did not comply with the aforesaid order, contempt proceedings in CCC.(c) No.847/2017 were initiated by the petitioner and during its pendency, certain part payments were made by the respondent to the petitioner and communicated to him vide letter dated 25.09.2017. Under these circumstances, this Court disposed of the said contempt proceedings by reserving liberty in favour of the complainant (petitioner herein) to seek redressal before the appropriate forum if he was aggrieved by the quantum of payment already made by the respondent.

8. Subsequently, on 23.02.2019, petitioner got issued a legal notice to the Department of Tourism ventilating his grievances, but the said demands were not complied with and as such, the petitioner got issued an arbitration notice dated 19.02.2020 to the respondent nominating and appointing their nominee arbitrator and calling upon the respondent to give its consent to refer the dispute to arbitration before the sole arbitrator. It is the grievance of the petitioner that instead of complying with the request and demand made in the arbitration notice, the respondent got issued an untenable reply dated 15.05.2020 and as such, the petitioner is before this Court by way of the present petition.

9. In so far as the contention urged by the respondent that an arbitration agreement/clause is in existence between the parties only in respect of package No.2 and not in respect of package No.3 is concerned, as rightly contended by the learned counsel for the petitioner, two work orders dated 19.04.2011 and two agreements dated 27.04.2011 were entered into between the petitioner and the respondent in relation to two packages i.e.,

package No.2 and package No.3. The work orders and the agreements in relation to package No.2 provide for resolution of dispute by reference to arbitration as can be seen from Clause No.24 of the Conditions of Contract and Clause No.4 of the Special Conditions of Contract. In this context, it is necessary to extract Clause No.24 referred to supra, which reads as under:

> ***24. Procedure for resolution of Disputes:***
>
> *24.1 If the Contractor is not satisfied with the decision taken by the Employer, the dispute shall be referred by each*
>
> *24.2 If neither party refers the dispute to Arbitration within the above 30 days, the Employer's decision will be final and binding.*
>
> *24.3 The Arbitration shall be conducted in accordance with the arbitration procedure stated in the Special Conditions of Contract."*

Similarly, the Clause No.4 of the Special Conditions of Contract, which provides for arbitration reads as under:

> *"**4. Arbitration (Clause 24)***
>
> *The procedure for arbitration shall be as follows:*
>
> *a) In case of dispute or difference arising between the Employer and the Contractor relating to any matter arising out of or connected with this agreement it shall be settled in accordance with*

the Arbitration and Conciliation Act 1996. The disputes or differences shall be referred to a Sole Arbitrator. The Sole Arbitrator shall be appointed by agreement between the parties; failing such agreement, by the Appointing Authority (any one of the Organizations as per list enclosed in annexure).

b) Arbitration proceedings shall be held at Bangalore, Karnataka, India.

c) The cost and expenses of arbitration proceedings will be paid as determined by the Arbitrator. However, the expenses incurred by each party in connection with the preparation, presentation, etc., shall be borne by each party itself.

d) Performance under the contract shall continue during the arbitration proceedings and payments due the Contractor by the Employer shall not be withheld, unless they are the subject matter of the arbitration proceedings."

10. The material on record also indicates that though the work order and agreement in relation to package No.3 does not refer to the aforesaid Clause No.24 or Clause No.4 supra, both the work orders and contracts are intrinsically interlinked and intertwined with each other and were in respect of the same project; both work orders and contracts were executed on the same day and the

works under both were identical and common instructions were given to the petitioner on behalf of the respondent in relation to both work orders and contracts; so also, all correspondence, discussions, communications etc., between the petitioner and the respondent were joint in respect of both the work orders and contracts in respect of which the completion certificate were also issued on the same day; further, the earlier aforesaid proceedings before this Court includes both work orders and contracts.

11. The material on record also indicates that the arbitration notice dated 19.02.2020 issued by the petitioner to the respondent was in respect of both work orders and contracts in relation to both package No.2 and package No.3. In this context, it is relevant to note that in its response/reply dated 20.03.2020, though the respondent has denied the claim of the petitioner for payment of dues and other aspects on merits, the specific contention urged by the petitioner in its aforesaid notice dated 19.02.2020 that the dispute between the parties arising out of both work orders and contracts in relation to both package No.2

and package No.3 has not been disputed/denied by the respondent.

12. Section 7 of the said Act of 1996 reads as follows:

> *"**7. Arbitration agreement.-** (1) In this part, "arbitration agreement" by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*
>
> *(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
>
> *(3) An arbitration agreement shall be in writing.*
>
> *(4) An arbitration agreement is in writing if it is contained in –*
>
> *(a) a document signed by the parties;*
> *(b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or*
> *(c) an exchange of statement is alleged by one party and not denied by the other.*
>
> *(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and*

the reference is such as to make that arbitration clause part of the contract."

13. In ***S.N. Prasad's case supra,***, the Apex Court held as under:

"11. What therefore remains to be considered is whether there is an arbitration agreement as contemplated under Section 7(4)(c) of the Act, which provides that an arbitration agreement in writing can be said to exist, if it is contained in an exchange of statements of claim and defence in which the existence of the arbitration agreement is alleged by one party and not denied by the other. The statement of claim filed by the first respondent before the arbitrator does not contain an allegation or assertion of an arbitration agreement between the first respondent and the appellant. Nor has the appellant accepted the existence of any arbitration agreement by not denying such arbitration agreement in the defence filed before the arbitrator. On the other hand, the appellant specifically contended before the arbitrator that there was no arbitration agreement between them (the first respondent and the appellant) and therefore the arbitrator did not have jurisdiction.

12. But the words, "statements of claim and defence" occurring in Section 7(4)(c) of the Act, are not restricted to the statements of claim and defence filed before the arbitrator. If there is an assertion of

> *existence of an arbitration agreement in any suit, petition or application filed before any court, and if there is no denial thereof in the defence/counter/written statement thereto filed by the other party to such suit, petition or application, then it can be said that there is an "exchange of statements of claim and defence" for the purposes of Section 7(4)(c) of the Act. It follows that if in the application filed under Section 11 of the Act, the applicant asserts the existence of an arbitration agreement with each of the respondents and if the respondents do not deny the said assertion, in their statement of defence, the court can proceed on the basis that there is an arbitration agreement in writing between the parties."*

The said judgment was followed by this Court in **M/s. Shyamaraju's case supra**, which was rendered in circumstances identical to the case on hand, wherein it was held as under:

> *"8. I have considered the submissions on both the sides and have perused the record. An agreement to refer existing disputes to arbitration can in an appropriate case be implied by the conduct of the parties. Where a party denies that it has entered into an agreement to arbitrate, the court will consider whether a reasonable person, knowing the relevant background and observing matters from the perspective of the party asserting the existence*

of the arbitration agreement, would have concluded from the other party's conduct that it was agreeing to participate in the proposed arbitration [See: ***ATHLETIC UNION OF CONSTANTINOPLE VS NATIONAL BASKETBALL ASSOCIATION (2002) 1 ALL E.R. (COMM) 70****], Before proceeding further it is apposite to take note of Section 7(4)(c) of the Act, which reads as under:*

> ***7. Arbitration agreement. -*** *1. In this Part, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not*
>
> *Xxxx*
> *xxxx*
>
> *4. An arbitration agreement is in writing if it is contained in-*
>
> *a. a document signed by the parties;*
>
> *b. an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or*
>
> *c. an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.*

*9. The Supreme Court in '****S.N.PRASAD, HITEK INDUSTRIES (BIHAR)LIMITED VS. MONNET FINANCE LIMITED AND OTHERS', (2011) 1 SCC 320*** *while interpreting Section 7(4)(c) of the Act has held that the words '. But the words, "statements of*

claim and defence" occurring in Section 7(4)(c) of the Act, are not restricted to the statements of claim and defence filed before the arbitrator. If there is an assertion of existence of an arbitration agreement in any suit, petition or application filed before any court, and if there is no denial thereof in the defence/counter/written statement thereto filed by the other party to such suit, petition or application, then it can be said that there is an "exchange of statements of claim and defence" for the purposes of Section 7(4)(c) of the Act.

10. In the backdrop of aforesaid legal principles facts of the case on hand may be seen. In the instant case, in the notice dated 19.01.2018, the petitioner has made the following averments:

> *We have already forwarded our list of claims vide letter under reference and we would request you to kindly make payment of the same. A copy of the letter under reference with all the claims are appended hereto and may be read as part and parcel of this letter.*
>
> *12. We hereby submit that the claims be referred to arbitration and wish to place on record our agreement and understanding to refer disputes to arbitration. The arbitration can be conducted under the auspices of the Arbitration and Conciliation Centre Rules 2012 framed by the Hon'ble High Court of Karnataka at Bangalore. In any event, we hereby nominate Mr.L.V.Srirangak Raju as the Sole Arbitrator to adjudicate on all disputes that have arisen between the parties*

and call upon you to concur to the same within a period of thirty days from the date of receipt of notice.

*11. Admittedly, the respondent has not denied the aforesaid averments. Therefore, in view of Section 7(4) as interpreted by Supreme Court in **'S.N.Prasad'** supra, **'Hitek Industries (Bihar)'** supra, there is an implied agreement to refer the existing dispute between the parties to the arbitration.*

*14. So far as reliance placed by learned counsel for the respondent in the case of **'P.Dasaratharama Reddy'** Complex supra is concerned, in the aforesaid decision, the Supreme Court has interpreted clause 29 of the agreement executed between the parties and has held that the same is not an arbitration agreement. The aforesaid decision does not deal with Section 7(4) of the Act and therefore has no application to the fact situation of the case. Similarly, in **'Oriental Insurance Company Limited'** supra the Supreme Court was dealing with a Clause which provided that no dispute or difference shall be referable to arbitration if company has disputed or not accepted liability under or in respect of this policy. The aforesaid decision also does not deal with Section 7(4) of the Act. Therefore, the same also does not apply to the obtaining factual matrix of the case.*

> *15. In view of preceding analysis the petition filed by the petitioner under Section 11(6) of the Act succeeds and is hereby allowed. In view of the aforesaid submissions and as prayed by learned counsel for the parties, Mr.G.Raghvendra Rao, Retired District and Sessions Judge is appointed as sole Arbitrator to adjudicate the dispute between the parties."*

14. As stated supra, the arbitration notice dated 19.02.2020 issued by the petitioner encompasses and includes disputes between the parties in relation to both package No.2 and package No.3. Though the claims and contentions on merits made on behalf of the petitioner have been denied and disputed by the respondent in its reply dated 20.03.2020, the reference of the dispute to arbitration has not been denied or disputed by the respondent in its reply and consequently, the aforesaid decisions of the Apex Courts and this Court to the effect that Section 7(4)(c) would be applicable and can be invoked are clearly applicable to the facts of the instant case also. The aforesaid facts and circumstances clearly indicate that the dispute between the parties to be referred to arbitration includes and encompasses both the work orders and

contracts in respect of both package No.2 and package No.3, both of which deserve to be referred to arbitration and as such, the said contention urged by the respondent cannot be accepted.

15. In so far as the other contentions urged by the respondent with regard to the claim being barred by limitation and not arbitrable since it was settled with due accord and satisfaction are concerned, the material on record clearly indicates that both issues arise out of disputed questions of fact and law, which would necessarily have to be decided by the Arbitral Tribunal. In this context, it is relevant to note that the Apex Court in ***Vidya Drolia's case supra***, held as under:

> *"148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage*

can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed "no-claim certificate" or defence on the plea of novation and "accord and satisfaction". As observed in Premium Nafta Products Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)] , it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.

154. Discussion under the heading "Who Decides Arbitrability?" can be crystallised as under:

154.1. Ratio of the decision in Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the

party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

244. Before we part, the conclusions reached, with respect to Question 1, are:

244.1. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

244.2. Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.

244.3. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. "when in doubt, do refer".

244.5. The scope of the court to examine the prima facie validity of an arbitration agreement includes only:

244.5.1. Whether the arbitration agreement was in writing? Or

244.5.2. Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?

244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?

244.5.4. On rare occasions, whether the subject-matter of dispute is arbitrable?"

16. Similarly, in ***Bharat Sanchaar Nigam Limited's case supra***, it is held as under:

"21. Given the vacuum in the law to provide a period of limitation under Section 11 of the Arbitration and Conciliation Act, 1996, the courts have taken recourse to the position that the limitation period would be governed by Article 137, which provides a period of 3 years from the date when the right to apply accrues. However, this is an unduly long period for filing an application under Section 11, since it would defeat the very object of the Act, which provides for expeditious resolution of commercial disputes within a time-bound period. The 1996 Act has been amended twice over in 2015

and 2019, to provide for further time-limits to ensure that the arbitration proceedings are conducted and concluded expeditiously. Section 29-A mandates that the Arbitral Tribunal will conclude the proceedings within a period of 18 months. In view of the legislative intent, the period of 3 years for filing an application under Section 11 would run contrary to the scheme of the Act. It would be necessary for Parliament to effect an amendment to Section 11, prescribing a specific period of limitation within which a party may move the court for making an application for appointment of the arbitrator under Section 11 of the 1996 Act."

17. In view of the aforesaid judgments of the Apex Court, I am of the considered opinion that the various contentions urged by the respondent with regard to limitation, maintainability etc., would necessarily have to be decided by the arbitral tribunal and not for the purpose of disposal of the present petition. In my considered opinion, in the peculiar/special facts and circumstances obtaining in the instant case, the judgments relied upon by the learned counsel for the respondent are not applicable to the facts of the case on hand; It is however to be stated that all rival contentions between the parties on all aspects of the matter

would necessarily have to be decided by the arbitral tribunal and the same are hereby kept open.

18. In the result, I pass the following:

ORDER

(i) Petition is hereby ***allowed***.

(ii) ***Hon'ble Justice V. Jagannathan,*** former Judge, High Court of Karnataka, is hereby appointed as the sole Arbitrator to resolve the dispute between the parties as per the Rules governing the Arbitration and Conciliation Centre (Domestic & International) at Bengaluru.

(iii) All rival claims, contentions, etc., of both parties including contentions relating to maintainability, arbitrability, jurisdiction, limitation, stamp duty, etc., are left/kept open to be decided by the Arbitral Tribunal and no opinion is expressed on the same.

(iv) A copy of this order be sent forthwith to the Arbitration and Conciliation Centre

(Domestic & International), Khanija Bhavan, Bengaluru, for proceeding further and also to **Hon'ble Justice V. Jagannathan, former Judge, High Court of Karnataka, Bengaluru**, to the address available with the said Centre.

(v) Registry is directed to return all original documents produced by any of the parties after obtaining Photostat copies of the same.

Sd/-
JUDGE

Bmc/-