**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**R/PETN. UNDER ARBITRATION ACT NO. 36 of 2021**

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LITE BITE FOODS PVT. LTD.

Versus

AIRPORTS AUTHORITY OF INDIA

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Appearance:
MR NAVIN PAHWA SR. ADVOCATE with MR NACHIKET A DAVE(5308) for the Petitioner(s) No. 1
MS HARSHAL N PANDYA(3141) for the Respondent(s) No. 1

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***CORAM:HONOURABLE MR. JUSTICE ASHUTOSH J. SHASTRI***

**Date : 08/06/2022**

**ORAL ORDER**

**1.** By way of present petition under Section 11 of the Arbitration and Conciliation Act, 1996, petitioner has prayed for the following reliefs:-

(a) Appoint an independent Arbitrator for Resolution of dispute arising out of License Agreement annexed at Annexure-C to the Petition;

(b) Any other and further relief deemed just and proper be granted in the interest of justice.

**2.** The background of facts which has given rise to present petition is that petitioner company is incorporated under the provisions of the Companies Act, 2013 as a Private Limited company. The respondent, which is a body corporate, created under the Airport Authority of India, 1994 has floated tenders for food court facility in Domestic Terminal at S.V.P.I. Airport, Ahmedabad and in response thereto, petitioner's bid found to be eligible was accepted by the authority. On 20.3.2018, respondent issued an award of license for food court facility in Terminal-1 at S.V.P.I, Airport and executed a

license agreement on 9.4.2018. Initial period of license was fixed as one year from 19.5.2018 to 18.5.2019 and then by virtue of amendments, extended upto 30.6.2020 on the terms and conditions which are fixed.

**3.** By virtue of said terms of license agreement, petitioner had to pay monthly license fee of Rs.20,07,000/- + GST and other applicable taxes and had to deposit a sum of Rs.47,36,520/-, equal to two months license fee as a security deposit in the form of Demand Draft/ Pay Order/ Bank Guarantee in favour of the respondent payable at Ahmedabad.

**4.** It is the case of the petitioner that pursuant to the said execution of the license agreement dated 20.3.2018, on 27.3.2018, bank guarantee was issued of Rs.47,36,520/- and expiry date of bank guarantee was made upto 30.6.2020 in view of extension. Due to certain layouts and orientation of outlet, the authority said to have revised the layout vide email dated 19.4.2018 and respondent changed the location and handed over new location to the petitioner on 18.5.2018. According to the petitioner, there was a delay of 60 days in handing over the site by respondent. On account of multiple differences, as stated in the petition, opening of outlet got delayed by a further period of more than 45 days and as such, petitioner made a request for refund of the license fee charged with respect to that period, but said request was rejected by email communication dated 10.9.2020. Then the license agreement tenure by efflux of time got terminated on 30.6.2020.

**5.** It is the case of the petitioner that after such termination by efflux of time, petitioner forthwith delivered the possession and since there was no means of access the premises, assets and material of the petitioner lying in such premises, an attempt was made to

explore the possibility of extension of terms of license agreement and as such, petitioner did not remove its assets of more than rupees one crore lying at the Airport premises at the time of handing over the possession and then extension in the form of email exchanged between the parties and by that time, pandemic effect of Covid-19 prevailed. As a result of this, petitioner was unable to remove its goods and other material. Even respondent on account of limited operational activities at the Airport due to Covid-19 pandemic and in view of various Government guidelines, did not consider it necessary to request the petitioner to remove its assets lying at the Airport.

**6.** Surprisingly, according to the petitioner, on 18.9.2020, respondent raised invoice for the month of April to June 2020 and due to payments have also been prescribed, same was shared vide email dated 22.9.2020 and then according to petitioner, respondent authority had wrongly raised invoices for the period beyond the license period and on the contrary, petitioner is entitled to seek adjustment of an amount to the extent of Rs.13,54,454.84 and by giving details in the petition, it has been mentioned by petitioner that only an amount of Rs.1,01,895.56 remained to be paid to the respondent. Payment of such amount was processed by petitioner on 26.9.2020. But, then, in view of this conflict, an attempt was made to reconcile or resolve the issue. However, it appears that same has not attained any result and by raising the issues related to the amount payable by petitioner, when an attempt was made to encash the bank guarantee by respondent, petitioner filed Civil Misc. Application No.265 of 2020 before learned City Civil Court, Ahmedabad under Section 9 of the Arbitration and Conciliation Act, 1996 seeking interim relief basically against encashment of bank guarantee. On appreciation of evidence of facts, learned City Civil Court, vide order dated 30.9.2020, granted an interim relief in favour of the petitioner and said order has been extended from time to time. According to the

petitioner, respondent had been in breach of various obligations under the license agreement, whereas respondent is having a stand contrary and in that situation, petitioner was constrained to invoke clause 18 of the license agreement on 29.12.2020, so as to see that differences/ disputes to be resolved between the parties through arbitration and for that purpose, name was also proposed of Hon'ble Mr. Justice K.M. Thaker (retired former Judge of Gujarat High Court) to act as a sole Arbitrator but, then upon receipt of said notice, according to petitioner, said request was not acceded to vide communication dated 16.2.2021 and in turn, respondent authority requested the petitioner to give acceptance to clause 18(a), (b) and (c) and to deposit the disputed amount for constitution of the Dispute Resolution Committee.

**7.** It is the case of the petitioner that on 17.2.2021, an email was sent by the petitioner disputing the contents of the letter dated 16.2.2021 and insisted for arbitration, has contended that it is a settled position of law that clauses deterring a party from invoking arbitration and requiring it to pre-deposit certain sums before initiation of arbitration proceedings are arbitrary and unconstitutional and have got effect of discouraging the arbitration and as such, setting up of the Dispute Resolution Committee at the Airports is not a mandatory condition and as such, clause 18 which has been tried to be pressed into service by respondent and insisting for pre-deposit of disputed claimed is absolutely arbitrary and unconstitutional. As a result of this, for seeking an appointment of an independent Arbitrator for resolution of the dispute arising out of the license agreement, present petition under Section 11 of the Arbitration and Conciliation Act, 1996 is brought before the Court.

**8.** When petition came up for consideration on initial hearing on 5.3.2021, Coordinate Bench of this Court was pleased to issue notice

upon respondent and after completion of the pleadings, lastly, the matter was heard by the Court upon request of both learned advocates and arguments were concluded.

**9.** Learned senior advocate Mr. Navin Pahwa appearing with learned advocate Mr. Nachiket A. Dave has vehemently contended that the stand of the authority is absolutely arbitrary, irrational and smacks with malafides and as such, the relief prayed for deserves to be granted.

**10.** Learned senior advocate Mr. Pahwa has submitted that though there was a serious dispute with regard to change of location and belated handing over of possession of the site in question, petitioner had to suffer a lot and by referring to the contents of the petition, has submitted that unauthorirzedly and arbitrarily, a huge amount is claimed by the respondent which in no circumstance is liable to be paid by petitioner. According to Mr. Pahwa, the only amount which is payable is Rs.1,01,895.56 and nothing beyond but as against the huge amount is claimed by the authority. In fact, while demanding amount through email communication in the month of September 2020, several amounts which were required to be adjusted as noted down in para 2.15, have not at all been considered and instead, in an arbitrary manner, insisted for recovery.

**11.** Learned senior advocate Mr. Pahwa has submitted that in fact, looking to the chronology of events, as stated in the body of the petition, stand of the authority of insisting for pre-deposit of the disputed amount and to insist for approaching the Dispute Resolution Committee is absolutely impermissible and clause contained therein itself is unconstitutional and arbitrary and as such, it is not open for respondent authority even to refer the dispute to arbitration independently as suggested by the petitioner. The

authority has acted as a power charged authority by refusing the request for appointment of Hon'ble former Judge of Gujarat High Court and has dragged on the issue which has got effect of frustrating the very object for creation of arbitration forum. That being so, by discarding the stand of the authority, the relief prayed for may be considered. Mr. Pahwa has vehemently contended that there are series of decisions in which a view is taken on interpretation of these very clauses and relying upon the same, has requested the Court to appoint an independent Arbitrator to resolve the grievance of the petitioner. Following are the decisions pressed into service by learned senior counsel Mr. Pahwa for seeking appointment of an independent arbitrator:-

(1) DURO FELGUERA, S.A Versus GANGAVARAM PORT LIMITED [2017)9 SCC 729];

(2) MAYAVATI TRADING PVT. LTD Versus PRADYUAT DEB BURMAN [(2019) 8 SCC 714]

(3) UTTARAKHAND PURV SAINIK KALYAN NIGAM LIMITED Versus NORTHERN COAL FIELD LTD. [(2020) 2 SCC 455]

(4) VIDYA DROLIA & Ors. Versus DURGA TRADING CORPORATION [(2021)2 SCC 1]

(5) SANJIV PRAKASH Versus SEEMA KUKREJA & Ors [2021 SCC OnLine SC 282]

(6) ICOMM TELE LTD. Versus PUNJAB STATE WATER SUPPLY & SEWERAGE BOARD & Ors. [Decision dated 11.3.2019 in Civil Appeal No.2713 of 2009]

(7) PERKINS EASTMAN ARCHITECTS DPC & Ors. Versus HSCC (INDIA) LIMITED.[Decision dated 26.11.2019 in Arbitration Application Nos.32, 34 & 35 of 2019]

(8) LITE BITE FOODS PVT. LTD Versus AIRPORTS AUTHORITY OF INDIA (HIGH COURT OF KERELA) [Decision dated 28.10.2020 in A.R. No.103 of 2019]

(9) LITE BITE FOODS PVT. LTD Versus AIRPORTS AUTHORITY OF INDIA (HIGH COURT OF BOMBAY) [Decision dated 4.12.2019 in Comm. Arbitration Application (L) No.495 of 2019]

(10) DATAR SWITCHGEARS LTD. Versus TATA FINANCE LIMITED & ANOTHER [(2000) 8 SCC 151]

(11) DHARTI MADRID COUNTY LLP Versus CHAITAL RASMIKANT & 6 Ors. [Decision dated 13.12.2019 in R/Petition Under Arbitration Act No.132 of 2018]

(12) M/S P AND T TEX FAB Versus THE NEW INDIA INSURANCE CO. LTD [Decision dated 13.12.2019 in R/Petition Under Arbitration Act Nos.43 to 48 of 2019]

(13) LIQUIDATOR, THE KARAMSAD URBAN COOPERATIVE BANK LTD. Versus THE SUPERINTENDENT OF POST OFFICES ANAND [Decision dated 29.10.2020 in R/Petition Under Arbitration Act No.30 of 2020]

(14) Bharat Sanchar Nigam Ltd. And Another Vs. Nortel Networks India Private Limited (2021) 5 SCC 738;

(15) Decision of High Court of Calcutta in the case of Bholanath Rajpati Shukla Vs. Airport Authority of India and Another, dated 20.2.2019 in A.P. No.837 of 2018.

**12.** By referring to the aforesaid decisions, learned senior counsel Mr. Pahwa has reiterated to grant the relief as prayed for in the petition.



**13.** As against this stand of the petitioner, learned advocate Ms. Harshal Pandya appearing on behalf of respondent Airport Authority has vehemently opposed the petition by contending that with open eyes, petitioner has filled in the tender which was accepted by the authority and from that initial movement itself, petitioner was aware about the terms and conditions of the agreement and also with open eyes, executed not only the license agreement, but even on its own

volition executed the extension agreement and document about reading the terms as well and as such now it is not open for the petitioner to raise any grievance which is nothing but an afterthought theory.

**14.** Learned advocate Mr. Pandya has contended that one sided version which has been tried to be canvassed by petitioner is far from truth. In fact, there is no unilateral change of location at any point of time. On the contrary, after receipt of the award letter, officials of the petitioner company visited the site on 2.4.2018 and submitted that there should be a decent gap between the food court and the executive lounge and the plans related to it have also been exchanged and then request of acceptance was materialized and as such, revised layout of 'L' shape, was not a unilateral decision of respondent authority. On the contrary, upon personal visit by officers of the company, time and again, design was requested to be submitted for approval of Airport Authority of India (AAP) and as such, when details were shared about layout indicating the location etc., subsequently, petitioner did not provide in time its design of food court for approval and as such, it is absolutely incorrect to say that respondent authority had changed the location on their own. Said fact is seriously in dispute.

**15.** Learned advocate Ms. Pandya submitted that so far as delay, as alleged in the petition is concerned, same is also not correct in view of the fact that date of handing over the side is specifically mentioned as 18.5.2018 with necessary notes and details and as such, question of delay gestation period does not arise at all.

**16.** Learned advocate Ms. Pandya on instructions has further seriously commented that petitioner after termination of license agreement by efflux of time on 30.6.2020 did not remove material

deliberately from the Airport premises and on the contrary, the premises were locked by petitioner and, keys were not handed over to respondent and peaceful possession had also not been given, which had constrained the respondent to make a request vide letter dated 9.9.2020 to handover quiet and peaceful possession and as such, the claim which has been generated by respondent authority is just and proper. Petitioner was aware about non-extension and termination of contract by efflux of time in their own communication dated 3.7.2020. But, with a view to see that authority did not remove articles and allowed the license to be run by new operators and that was the conduct which has been considered by the authority while raising invoices which are just and proper.

**17.** Learned advocate Ms. Pandya submitted that petitioner had not cleared the outstanding amount nor even extended the bank guarantee nor vacated the premises and as such, the authority was left with no other option but to raise demand upto the month of September 2020, i.e. from July to September. It has been emphatically submitted that interim order which has been passed by the Court below, i.e. learned City Civil Court, against encashment of bank guarantee was an ex-parte ad-interim relief and as such, petitioner cannot create an impression that even the Court has found favour with petitioner. In fact, with open eyes, when petitioner has entered into an agreement without any demur, even extension was also sought and when payment issue comes up, all these niceties are projected by petitioner which conduct itself speaks volumes about the intent of petitioner.

**18.** According to Ms. Pandya, in the agreement itself, there is a specific mechanism contained which relates to the resolution of dispute amongst the parties and said clause 29 as a part of General Conditions which has been accepted by the petitioner cannot be

deviated, and as such, when the authority has provided clearly the dispute resolution mechanism, it is hardly open for petitioner to seek an independent arbitration forum *de hors* the terms of the agreement.

**19.** Learned advocate Ms. Pandya has submitted that said clause and precondition contained in the terms have to be scrupulously observed by petitioner and during contract period nor even till date, said clause has been challenged in the petition and simple relief is sought to appoint an independent arbitrator and as such, in view of the fact, that Court cannot travel beyond the relief, the petition under Section 11 does not deserve to be entertained in view of this peculiar background of fact.

**20.** According to learned advocate Ms. Pandya, specific mechanism which has been provided cannot be bypassed by petitioner but even if stand of the petitioner to be accepted then also, looking to the limited scope of Section 11, petitioner cannot insist for appointment of an independent arbitrator. However, at last, Ms. Pandya has submitted that if the Court is not inclined to accept the stand of the Airport Authority, then in that case, alternatively instead of name which has been suggested by petitioner, anyone out of following names may be appointed nominated as arbitrator and for that purpose, suggested to appoint Hon'ble Mr. Justice K.S. Jhaveri, Hon'ble Mr. Justice M.D. Shah and Hon'ble Mr. Justice J.C. Upadhayay, former Judges of this High Court, but has submitted that this is in alternative to the stand which has been taken by her in the present proceedings and has left to the discretion of the Court.

**21.** Having heard learned advocates appearing for the parties and having gone through the position prevailing on record, before dealing with the request of the petitioner, the law on the issue for

appointment of arbitrator deserves consideration. The object of the Arbitration and Conciliation Act, 1996 is to see that the grievance can be resolved at the earliest point of time. While framing the enactment, it was felt that the economic reforms taking place in the Country may not become fully effective if the laws dealing with the settlement of both domestic and international commercial dispute remains out of tune with such reforms. Considering conciliation like arbitration was also getting worldwide recognition as an instrument for settlement of disputes and as such, with the main object to make provisions for an arbitral procedure which may be fair, efficient and capable of meeting the needs of specific arbitration and to minimize the supervisory role of courts for the arbitral process and to permit the Arbitral Tribunal to use the mediation, conciliation and/or other proceedings during the arbitral proceedings in the settlement of disputes, the Act has been enacted.

**22.** Amongst various provisions under the Scheme of Arbitration and Conciliation Act, 1996, and amended thereafter, since we are concerned with an issue related to appointment of an independent arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996, the proposition relates to that is the central issue.

**23.** While dealing with the question which crop up for consideration before the Hon'ble Apex Court in the year 2017 as to whether the Chief Justice or any other person designated by him is bound to nominate arbitrator as specified in the agreement for arbitration while exercising power under Section 11(6) of the Arbitration and Conciliation Act, 1996. It was observed that Chief Justice or designated Judge of the High Court, if circumstances so warrant is free to appoint an independent arbitrator having due regard to qualification and other aspects as required under the

provisions. While coming to this conclusion, the Hon'ble Apex Court in the case of ***Union of India v. Besco Limited*** reported in ***(2017) 14 SCC 187*** has dealt with several decisions delivered in past by the Hon'ble Apex Court and after considering this, the aforesaid conclusion is derived, which the Court deems it proper to reproduce hereunder:-

> *"8. On the facts of the present case, one wonders whether the issue actually arose or not. Clause 2900 of the Standard Conditions of Contract no doubt provides that the sole arbitrator shall be Gazetted Railway Officer but in Clause 19.0 of the agreement dated 16.01.2012 executed between the parties, it is clearly stipulated that the contract shall be governed by the General Conditions and Special Conditions of Contract. Clause 19.0 specifically provides that "….. the contract shall be governed by the General Conditions and Special Conditions of Contract….."*

**24.** Further, when the arbitration clause contained under the agreement is enforceable or not is also to be looked into to the limited extent while exercising jurisdiction under Section 11 of the Act. Here, on the case on hand, the relevant clause which is contained in the License Agreement is Clause 18 which reads as under :-

> *"Clause-18: All disputes and differences arising out of or in any way touching or concerning this Agreement (except those the decision whereof is otherwise herein before expressly provided for or to which the Airports Authority of India, 1994 as amended by Act, 2003 and the rules framed thereunder (Chapter VIA – Eviction of Unauthorized Occupants etc. of Airport Premises) which are now enforced or which may hereafter come into force are applicable, shall be in the first instance, be referred to a Dispute Resolution Committee (DRC) setup at the airports, for which a written application should be submitted by the party and the points clearly spelt out. In case the dispute is not resolved within 45 days of reference, then the case shall be referred to the sole arbitration of a person, to be appointed by the Tender Accepting Authority under*

*delegation of power. The award of the arbitrator so appointed shall be final and binding on the parties. The Arbitration and Conciliation Act, 1996 shall be applicable. Once the arbitration clause has been invoked, the DRC process will cease to be operative.*

*It will be no bar that the Arbitrator appointed as aforesaid is or has been an employee of the Authority and the Award of the Arbitrator will not be challenged or be open to question in any Court of Law, on this account. The Venue of Arbitration shall be RHQ, WR Mumbai.*

*(a) The case shall be referred to the Sole Arbitrator by the Chairman/Member of the Authority subject to the condition that the license shall have to deposit the disputed amount with AAI as condition precedent before making reference to the Arbitrator for adjudication of dispute.*

*(b) Similarly before making a reference to the Dispute Resolution Committee, the licensee will have to first deposit the disputed amount with AAI and the consent shall have to be obtained from the licensee for acceptance of the recommendations of the Dispute Resolution Committee.*

*(c) During the arbitral and Dispute Resolution proceedings the licensee(s) shall continue to pay the full amount of license fees/dues regularly as per the award/ agreement and perform all covenants of the agreements.*

*(d) The licensee(s) undertake to pay the full amount of license fee/dues regularly as per the award/agreement and perform all the covenants of the agreement even he/they have requested for appointment of Arbitrator and/or during the course of arbitral proceedings."*

**25.** By virtue of aforesaid clause what has been narrated is that at the first instance, the dispute or difference is to be referred to a Dispute Resolution Committee (DRC) set up at the Airports in the manner which is stipulated in this clause and then if the said dispute is not resolved within 45 days then there shall be an appointment of a sole arbitrator of a person to be appointed by Tender Accepting Authority and there is no bar that the arbitrator so appointed is or

has been an employee of the authority and as such, the award of the arbitrator will not be challenged. So by virtue of this clause, the first approach is to DRC then to be referred to the sole arbitrator who may be an employee and would be appointed by the Tender Accepting Authority only. This clause also contained the same view, same condition precedent by virtue of which before approaching the Dispute Resolution Committee, the licensee shall have to first deposit the disputed amount with AAI and later on the process will be undertaken. Further, by virtue of Clause 22 of the License Agreement, the authority and the licensee are bound to by General Terms and Conditions stipulated in Annexure-III. The said Annexure-III attached to the License Agreement is also referring to similar terms as that of Clause 18 and since the said terms contained in Clause 22 is almost similar, the same is not being reproduced hereunder, but the process which has been indicated is very same process.

**26.** It appears from the record that moment the dispute arose between the present parties to the agreement, protest appears to have been made by the petitioner specifically indicating that this clause is not having any sound legal force and is arbitrary and unconstitutional and as such, on 29.12.2020, the petitioner wrote a letter to the authority to appoint one retired Hon'ble High Court Judge as a sole arbitrator to adjudicate the dispute which arose between the petitioner and the respondent, but then, in a communication dated 16.02.2021, the respondent authority has specifically refused to agree to such suggestion made by the petitioner on the terms that the said mode is impermissible by virtue of Clause 18 (a)(b) & (c ) of the License Agreement and as such, before processing the same, the petitioner has to approach DRC on stipulated conditions, the same appears to have been promptly

resisted by the petitioner vide communication dated 17.02.2021 on the premise that the said clause and the conditions contained therein is absolutely arbitrary and unconstitutional and as such, the same would not be thrust upon and reiterated to give consent to appointment of sole arbitrator.

**27.** So in the aforesaid terms, a short controversy cropped up in the proceedings is that on one hand, a specific process is stipulated by the Tender Inviting Authority i.e. the respondent and on the other hand, upon dispute being raised a request is made to appoint an independent arbitrator by virtue of exercise of power under Section 11 of the Act and such course whether permissible or not, is the question for consideration before the Court. In light of the aforesaid object of Arbitration and Conciliation Act, as stated herein-before, and in view of the stand of the authority that with attached conditions of pre-depositing, the first approach should be before DRC to resolve the dispute and then in case of failure, to be referred to an arbitrator who may be an employee of the authority and the same can be appointed by the authority only whether this circumstance is valid or not is an issue for consideration. Hence, in this context, yet again it would be profiteering for the Court to have an assistance from few proposition propounded by Hon'ble Apex Court which deserves to be considered.



**28.** First of all a perusal of the relevant clause contained in the petition is to appoint an independent Arbitrator for resolution of the dispute arising out of License Agreement at Annexure-C. The said License Agreement contains several stipulations which stipulations are not requested and prayed to be declared as arbitrary or no request is made to set aside the said conditions. In the context of this, a perusal of License Agreement clearly indicates that the same

has been specifically signed in the presence of witness and executed on 09.04.2018. The terms of the said License Agreement are in addition to Condition no. 18 as further stipulated in Clause 22 that the conditions which are reflecting even in Annexure-III are also binding on the parties. The said Clause 22 reads as under :

> *"Clause 22- The Authority and the Licensee further agree that they are bound by the General Terms and Conditions found in Annexure-III annexed hereto, Special Terms and Conditions found in Annexure-IV and Award letter dated 20.03.2018 Annexure-X annexed hereto."*

**29.** Correspondingly, if Annexure-III which consists of general Terms and Conditions is also very specific and in the form of condition no. 29, similar terms as that of Clause 18 of License Agreement is incorporated. Anneure-IV is the Special Terms and Conditions which also with open eyes agreed upon by the petitioner. As a part of the tender acceptance conditions, the petitioner is also required to give acceptance letter in the form of Annexure-VI, which is attached to the petition compilation at page 46. The said acceptance letter about tender conditions appears to have been executed by the petitioner and reading of second condition out of others would make it clear that the petitioner has unconditionally accepted the tender conditions and the same has been clearly understood by the petitioner. Condition no. 2 of 4 also deserves to be quoted hereunder :-

> *"2. I/We hereby unconditionally accept the tender conditions of AAI's tender documents in its entirety for the above facility.*
>
> *4. I/We have carefully read and understood the terms and conditions of the license as contained in Tender Documents issued by the Airports Authority of India (AAI) including the following*
>
> *a) Earnest Money Deposit of Rs.2,50,000/- (Rupees Two*

*lakhs and fifty thousand only) liable to be forfeited by AAI, if on award of license, I/We do not accept the award or do not fulfill any of the conditions stipulated in tender documents, within prescribed time.*

*b) On account of non-acceptance of award or on account of non-completion of tender conditions with the prescribed time, I/We shall be debarred by AAI for a period of one (1) year.*

*c) In case the documents submitted by my/our firm along with tender are false/incorrect, the tender of my/our firm will be liable to be rejected without assigning any reasons. In addition, AAI reserves its right to forfeit the EMD of my/our firm and debar my/our firm from participation in the further tender of AAI."*

**30.** In the background of aforesaid situation which the petitioner has bound himself and the same is not disputed, it appears that the said conditions are to be observed by the petitioner.

**31.** It is a trite law that it is the domain of Tender Inviting Authority to impose condition according to their requirement and in that sphere, there is hardly any scope of judicial review unless it is challenged before the Court and it is also quite well propounded that it is not open for the Court to rewrite the terms and conditions of the contract which the authority has executed. In the very recent past, the Hon'ble Apex Court while dealing with the judicial review in contractual matters has clearly propounded the scope of interference. On analysis of various decisions of past, the Hon'ble Apex Court in ***M/s. N.G. Projects Limited v. M/s. Vinod Kumar Jain & Ors.,*** delivered in ***Civil Appeal No. 1846 of 2022*** decided on 21.03.2022 has clearly propounded that interference in contract is illegal, unwarranted, unless it is manifestly arbitrary or unjust and has conveyed in no uncertain terms that there are inheritance limitations in exercising power of judicial review since the Government is a guardian of finances of the State and it is expected

to protect the financial interest of the State and the duty of the Court is just to confine itself to few parameters. While opining this, the Hon'ble Apex Court has also relied upon the decision delivered by the three Judges Bench of the Hon'ble Apex Court in the case of ***Galaxy Transport Agencies v. New J.K. Roadways*** reported in ***2020 SCC Online SC 1035*** which Bench reiterated that the authority which authors the tender document is the best person to understand and appreciate its requirements and even its interpretation should not be second-guessed by a court in judicial review proceedings and while observing this, the Hon'ble Apex Court has made certain observations in paragraph 22 contained in paragraph 16 of the said decision since relevant the Court would like to reproduce hereunder:-

> *"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderer with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interference,*

*either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender, or contractual matters in exercise of power of judicial review, should pose it itself the following questions:*

*(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;*

*or*

*Whether the process adopted or decision made is so arbitrary and irrational that the court can say:" the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";*

*(ii) Whether public interest is affected.*

*If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tender/contractor or distribution of State largesse (allotment of sites/shops, grant of licenses, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."*

*xxx xxx xxx"*

**32.** And after analysis of series of decisions, the Hon'ble Apex Court has observed an interference of writ Court in what circumstances.

*"23. In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine*

*as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work.*

*25. In view thereof, we find that the action of the respondent in setting aside the letter of acceptance granted to the appellant suffers from manifest illegality and cannot be sustained. Consequently, the appeal is disposed of with a direction to the respondent State to allow the appellant to resume and complete the work by excluding the period spent in the stay of execution of the contract.*

*26. A word of caution ought to be mentioned herein that any contract of public service should not be interfered with lightly and in any case, there should not be any interim order derailing the entire process of the services meant for larger public good. The grant of interim injunction by the learned Single Bench of the High Court has helped no-one except a contractor who lost a contract bid and has only caused loss to the State with no corresponding gain to anyone."*

**33.** In view of this recent pronouncements also, in absence of any prayer in respect of terms and conditions being arbitrary or irrational, the Court sitting in jurisdiction under Section 11 of the Arbitration and Conciliation Act cannot examine the validity of the terms which are unequivocally with open eyes have been accepted and here in the case on hand, not only the terms at the initial stage after thorough understanding have been accepted but even extension was also sought for and granted on the very basic terms and the same have been accepted without any demur at any point of time in past.

**34.** As said earlier, the scope of Section 11 of the Arbitration and Conciliation Act is very limited in which the Court has to examine the acceptance of arbitration clause itself and nothing more or nothing less.

**35.** Yet in another decision of the recent past of Hon'ble Apex Court in the case of ***Oriental Insurance Company Limited v. Narbheram Power And Steel Private Limited*** reported in ***(2018) 6 SCC 534***, wherein the Hon'ble Apex Court has clearly propounded that it is not open for the Court to rewrite the terms of the contract and the related observations contained in paragraph 9.1, 9.2, 9.3 and 10 are reproduced hereunder :

> *"9.1. In General Assurance Society Ltd., the Constitution Bench, while dealing with the contract of Insurance, has opined that such a contract is entered into on the basis of commercial transactions and while interpreting the documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties because it is not for the court to make a new contract, howsoever reasonable.*
>
> *9.2. In Oriental Insurance Co. Ltd., a two-Judge Bench has opined that insurance policy has to be construed having reference only to the stipulations contained in it and no artificial far-fetched meaning could be given to the words appearing in it.*
>
> *9.3. In United India Insurance Co. Ltd., the Court has ruled that the terms of the policy shall govern the contract between the parties and they are bound to abide by the definitions given therein. That apart, the expression appearing in the policy should be given interpretation with reference to the terms of the policy and with reference to the definitions given in any other law because the parties have entered into the contract with eyes wide open.*
> *10. The aforesaid principles are in the realm of settled position of law. The natural corollary of the said propositions is that the*

*parties are bound by the clauses enumerated in the policy and the court does not transplant any equity to the same by rewriting a clause. The court can interpret such stipulations in the agreement. It is because they relate to commercial transactions and the principle of unconscionability of the terms and conditions because of the lack of bargaining power does not arise. The said principle comes into play in a different sphere."*

**36.** In this very decision, the relevant observation contained in paragraph 23 and 25 are also worth to be taken note of hence reproduced hereunder :-

*"23. It does not need special emphasis that an arbitration clause is required to be strictly construed. Any expression in the clause must unequivocally express the intent of arbitration. It can also lay the postulate in which situations the arbitration clause cannot be given effect to. If a clause stipulates that under certain circumstances there can be no arbitration, and they are demonstrably clear then the controversy pertaining to the appointment of arbitrator has to be put to rest.*

*25. The aforesaid communication, submits the learned senior counsel for the respondent, does not amount to denial of liability under or in respect of the policy. On a reading of the communication, we think, the disputation squarely comes within Part II of Clause 13. The said Part of the Clause clearly spells out that the parties have agreed and understood that no differences and disputes shall be referable to arbitration if the company has disputed or not accepted the liability. The communication ascribes reasons for not accepting the claim at all. It is nothing else but denial of liability by the insurer in toto. It is not a disputation pertaining to quantum. In the present case, we are not concerned with regard to whether the policy was void or not as the same was not raised by the insurer. The insurance-company has, on facts, repudiated the claim by denying to accept the liability on the basis of the aforesaid reasons. No inference can be drawn that there is some kind of dispute with regard to quantification. It is a denial to indemnify the loss as claimed by the respondent. Such a situation, according to us, falls on all fours within the concept of denial of disputes and non-acceptance of liability. It is not one of the arbitration clauses which can be interpreted*

*in a way that denial of a claim would itself amount to dispute and, therefore, it has to be referred to arbitration. The parties are bound by the terms and conditions agreed under the policy and the arbitration clause contained in it. It is not a case where mere allegation of fraud is leaned upon to avoid the arbitration. It is not a situation where a stand is taken that certain claims pertain to excepted matters and are, hence, not arbitrable. The language used in the second part is absolutely categorical and unequivocal inasmuch as it stipulates that it is clearly agreed and understood that no difference or disputes shall be referable to arbitration if the company has disputed or not accepted the liability. The High Court has fallen into grave error by expressing the opinion that there is incongruity between Part II and Part III. The said analysis runs counter to the principles laid down in the three-Judge Bench decision in The Vulcan Insurance Co. Ltd (supra). Therefore, the only remedy which the respondent can take recourse to is to institute a civil suit for mitigation of the grievances. If a civil suit is filed within two months hence, the benefit of Section 14 of the Limitation Act, 1963 will ensure to its benefit."*

**37.** Further, it is also a clear proposition that principle of waiver cannot be applied when the question of public interest comes into. Now. In the backdrop of aforesaid principles even it is well propounded that the scope of exercising jurisdiction under Section 11 of the Arbitration and Conciliation Act and the scope of extra ordinary jurisdiction under Article 226 of the Constitution are altogether different and Section 11 of the Arbitration and Conciliation Act is requiring the Court only to look into the existence of arbitration clause. Had there been a petition under Article 226 of the Constitution of India, the Court would have probably examine the arbitrariness as alleged in the terms of contract, but here is a petition smartly placed simply under Section 11 of the Arbitration and Conciliation Act to appoint an independent arbitrator to resolve the grievance without there being process through the Specific Terms and Conditions contained in clause 18 of the License Agreement.

**38.** A close perusal of condition no. 18 which is unequivocally accepted for which the petitioner is bound to follow is firstly requiring the petitioner to approach the Dispute Resolution Committee (DRC) setup at Airports with written application and then if the dispute is not resolved within 45 days then the question would come up for referring the matter to the sole arbitrator to be appointed by the Tender Inviting Authority. So the question of appointment of arbitrator would come at a later stage and not before approaching DRC. Now for approaching DRC, terms are clearly set up and certain steps to be taken by the petitioner and this condition was very much prevailing right from day one when the petitioner entered into contract and as such, without complying the requirement of approaching DRC, the petitioner cannot avoid the steps and directly request for appointment of an independent arbitrator and if this be entertained it would be allowing the petitioner to circumvent the process of terms which are clearly deduced in writing and well accepted by the petitioner. The Court in absence of challenge to this terms being arbitrary or unconstitutional cannot allow the parties to circumvent the terms which are well accepted and emphaized and as such, the Court is of the considered opinion that the question of appointing independent arbitrator in this background fact would not be safely to be answered and if the same would tantamount to allow the parties to go and flout the terms which are specifically understood to be complied with, the Court cannot be a party to such kind of strategic move of the petitioner in the absence of any challenge.

**39.** In almost similar circumstance while dealing with the issue related to arbitration clause in the case of ***Punjab State Water Supply and Sewerage Board*** in ***Civil Appeal No. 2713 of 2019*** decided on 11.03.2019 initially the concerned appellant had

requested for appointment of arbitrator and sought waiver of ten percent deposit fee which was condition precedent and after having received no response, the appellant had filed Civil Writ Petition no. 18917 of 2016 before the High Court of Punjab & Haryana and the said writ petition was dismissed vide judgment and order dated 14.09.2016 *inter alia* stating that such tender conditions can in no way said to be arbitrary or unreasonable and then a substantive writ petition appears to have been filed for challenging the validity of that part of the condition which was numbered as Civil Writ Petition No. 4882 of 2017 and in that context the Hon'ble Apex Court then has examined the issue and struck down clause 25(viii) of the notice inviting tender and observed that clause being severable from the rest of Clause 25 will not affect the remaining parts of Clause 25. The relevant extract of the part contained in paragraph 3, 4 and 28 are reproduced hereunder :

> *"3. The Appellant had entered into similar contracts with Respondent No.2 which contained the same arbitration clause. It had therefore addressed letters to Respondent No. 2 with regard to appointment of arbitrator in those matters and sought for waiving the 10% deposit fee. After having received no response, the Appellant had filed a writ petition, being Civil Writ Petition No. 18917 of 2016, before the High Court of Punjab and Haryana. This writ petition was dismissed by a judgment dated 14.09.2016 stating that such tender condition can in no way be said to be arbitrary or unreasonable.*
>
> *4. On 08.03.2017, the Appellant approached the High Court of Punjab and Haryana challenging the validity of this part of the arbitration Clause by filing Civil Writ Petition No. 4882 of 2017. The High Court in the impugned judgment merely followed the earlier judgment and dismissed this writ petition as well.*
>
> *28. For all these reasons, we strike down Clause 25(viii) of the notice inviting tender. This Clause being severable from the rest of Clause of 25 will not affect the remaining parts of Clause 25. The judgment of the High Court is set aside the*

*appeal allowed."*

**40.** So the entire observations in the said judgment have been in the context of later part of challenge in a substantive petition assailing the validity and the part of the arbitration clause, whereas here on the case on hand, a simple prayer is made to appoint an independent arbitrator. Neither this prayer till date of the final arguments have been requested to be amended nor the terms of the contract have questioned about its validity and as such, the Court cannot travel beyond the relief which has been sought in the petition and this petition being simply a petition under Section 11 of the Arbitration and Conciliation Act, and not under Article 226 of the Constitution of India, the Court is not inclined to even mould the relief and set aside or declare the conditions of the contract as invalid in absence of any relief. Accordingly, in the considered opinion of this Court, the petitioner is bound to observe the terms and the conditions of the contract and then the question would arise for referring the matter to arbitrator. Had there been petition under Article 226 of the Constitution of India, the Court would have examine probably the grievance which is voiced out in the oral submissions about the validity of the conditions, but in the peculiar background of this fact, the Court would not like to exercise such jurisdiction which otherwise is not called for to be exercised.



**41.** At this stage, the assertions which have been made in the petition by the petitioner are also seriously disputed version which the Court may not dwell into for its adjudication. For example the petitioner has stated on oath in paragraph 2.9 that it has handed over the possession of the premises forthwith upon the License Agreement being terminated by efflux of time on 30.06.2020, but the assets are lying in such premises. Now this assertion has been stoutly controverted by the authority in paragraph 10 of the affidavit-

in-reply on page 144 clearly pointing out that not only the petitioner has not cleared the outstanding dues nor even extended the bank guarantee, but has also not vacated the premises and has submitted in paragraph 7 of the said affidavit that not only the possession was not delivered back to the authority after termination of contract, but even did not remove the material lying in the Airport premises and has locked the premises and keys have not been handed over to the authority and as such, has clearly flouted one of the conditions of the License Agreement as well and despite the fact that specific request was made by the respondent vide communication dated 09.09.2020 requesting to hand quiet and peaceful possession, same has not been done and as such, the authority was constrained to ask for dues even for subsequent period i.e. upto September, 2020 on account of possession having not been handed over. So in this context it is the assertion of the authority that the petitioner is liable to pay dues to the extent of 2,09,01,768/- but instead keeping all circumstances in mind, including Covid pandemic effect has raised invoice only to the extent of Rs.51,95,505/- and as such, the conduct of the petitioner is also appearing to be not trustworthy even as per the respondent authority and as such, all these issues about the conduct of the petitioner and the circumstances related to it are not to be examined in simple petition under Section 11 of the Arbitration and Conciliation Act and hence, conjoint effect of records of case and the submissions made by the learned counsel appearing for both the sides, it appears that the question of appointment of independent authority at this stage. The question of appointment of arbitrator would come into effect when all other terms precede to such are being observed by the petitioner and that having not done, at this stage the Court would not like to allow the petitioner to circumvent the process unless.

**42.** Further, learned counsel appearing for the petitioner has submitted that the discretion is left with the authority to appoint an arbitrator of its own choice may be an employee as well, but that stage having not reached; it is not open for the petitioner to agitate at this stage. The Court would like to quote certain observations contained in the decision delivered by the Hon'ble Apex Court in the case of ***Press Council of India v. Union of India and Anr.,*** reported in ***(2012) 12 SCC 329***, where the Court cannot travelled beyond the relief and the said observation contained in paragraph 6 would with full emphasis apply here when this petition is basically under Section 11 of the Arbitration and Conciliation Act and not under Article 226 of the Constitution of India. The said paragraph 6 reads thus:

> *"6. Having gone through the prayers in the writ petition and the orders passed by the High Court, we are of the opinion that the High Court ought not to have issued the aforesaid direction for the sole and simple reason that the prayers int eh writ petition were entirely different from the order passed by the High Court and the order passed by the High Court as aforesaid is also not in consonance with the prayers so made. On this short ground alone, the appeals are required to be allowed and they are allowed accordingly and the order passed by the High Court is set aside. We clarify that we have not gone into other issues raised by the appellants in these appeals. Ordered accordingly."*



**43.** In view of the aforesaid discussion and in view of the peculiar background of facts and the conduct of the petitioner, this is not a fit case in which the Court can allow the petitioner to simply circumvent the process of resolution of dispute which has been specifically agreed upon and signed by him.

**44.** In this background of fact and having gone through the decisions which have been cited by the learned counsel appearing for

the petitioner the circumstances prevailing on record are altogether different and peculiar in nature. The object and purpose of bringing this petition of the petitioner is also self-explanatory to avoid compliance of his obligation and as discussed above, those decisions which have been referred to and relied upon are in different contextual facts situation, same are not assisting the petitioner to claim relief as prayed for in the petition. Hence, having gone through the said decisions which have been cited by the learned counsel appearing for the petitioner, the Court is of the opinion that the same are not coming to the rescue of the petitioner from achieving the object for which the petitioner has brought petition at this stage without approaching DRC. On the contrary, from the pleadings and the annexures, the petitioner has not approached or made any attempt at first instance to approach DRC which would clearly indicate that the intention of the petitioner is to avoid the terms of the contract and to keep him away from its obligation to observe. Hence, this being a different background of facts, the judgments which have been pointed out no doubt reflecting salutary principle, but the Court is unable to apply the same to extend the relief to the petitioner.

**45.** No doubt the object of Arbitration Act to encourage a speedy resolution dispute amongst the parties and to see that minimum intervention of judicial forum would take place in dispute resolution, but under the guise of such object of the act and the parameters of jurisdiction under Section 11 of the Arbitration and Conciliation Act, the Court would not like to encourage such kind of litigant who are out to circumvent the process of dispute resolution once having agreed upon in a specific terms with open eyes and then turn around to contend that such terms are arbitrary or unconstitutional without praying also and thereto in a proceedings which are not in extra

ordinary jurisdiction. Hence, despite the aforesaid object, this is not a fit case in which the petitioner can take undue advantage of the object of the Act. Hence, the Court would like to refrain from exercising jurisdiction in this specific background of facts under Section 11 of Arbitration and Conciliation Act. Accordingly the petition being devoid of merit stands dismissed. Notice is discharged with no order as to costs.

***(ASHUTOSH J. SHASTRI, J)***

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