IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ON THE 19th OF MARCH, 2024

ARBITRATION CASE No. 7 of 2024

BETWEEN:-

1. KAMAL NACHANI S/O SHRI KESHAV NACHANI 69,

BASANT PURI COLONY, INDORE (MADHYA PRADESH)

2. ANKUSH NACHANI S/O SHRI KESHAV NACHANI 69,

BASANT PURI COLONY, INDORE (MADHYA PRADESH)

.....PETITIONERS

(BY SHRI MANOJ MUNSHI, ADVOCATE)

AND

1. SUNIL MANDWANI S/O LATE SHRI TARACHAND

MANDWANI 53, PALSIKAR COLONY, INDORE

(MADHYA PRADESH)

2. ASHOK MANDWANI S/O LATE SHRI TARACHAND

MANDWANI 53, PALSIKAR COLONY, INDORE

(MADHYA PRADESH)

.....RESPONDENTS

(BY SHRI VIJAY ASSUDANI, ADVOCATE)

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Reserved on : 12.02.2024

Delivered on : 19.03.2024

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This petition coming on for admission this day, the court passed the following:

ORDER

01] This application has been filed by the applicants under Section 11(6) of the Arbitration and Conciliation Act, 1996 read with Rule 2 of the Scheme for appointment of Arbitrator by the Hon'ble Chief Justice of Madhya Pradesh High Court.

02] Heard finally with the consent of the parties.

03] The application has been filed as aforesaid on the ground that an agreement was executed between the parties on 27.10.2022, regarding the sale of 51% of the shares of M/s Santosh Devcon Private Ltd. which, according to the applicants, have been purchased by them for a consideration of Rs. 14 Crores for one agreement and 43 Crores for another agreement. It is undisputed that the aforesaid arbitration agreement bears Arbitration Clause and a dispute has arisen between the parties and as a result of which, the non-applicants Sunil Mandwani and Ashok Mandwani proposed the named Arbitrator, as provided under Clause 15 of the Agreement, Shri Manohar Parmani to adjudicate the dispute between the parties, and subsequently, shri Manohar Parmani has also started the arbitration proceedings.

04] In the present application, the applicants have challenged the appointment of the Arbitrator Shri Manohar Parmani on the ground that soon after the applicants were served with a notice of appointment of the Arbitrator, a preliminary objection has been raised by them on the ground that Mr.Manohar Parmani had already initiated *conciliation proceedings* between the parties under Section 80 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to "the Act of 1996") and apart from that, it was also alleged that Mr. Parmani's approach in the conciliation proceedings was also biased, and thus, the applicants have no faith in Mr. Manohar Parmani.

05] Shri Manoj Munshi, counsel for the applicants has submitted that although the letter was issued by the applicants to this effect on 16.12.2023, but shri Pamnani unilaterlly entered into the reference vide letter dated 20.12.2023, and fixed the date of meeting on 29.12.2023.

06] It is further the contention of the applicant is that after receiving of the notice of hearing on 29.12.2023, the applicants sought adjournment on the ground that their Advocate was travelling from 28.12.2023 to 07.01.2024 and requested to schedule the meeting on 13.01.2024 or any other convenient date but, the adjournment was not granted, and instead the counsel appearing for the respondent sent his statement of claim through his e-mail dated 28.12.2023 and an interim order was passed by the Arbitrator on 29.12.2023 directing the applicant not to sell the plot.

07] In the meantime, certain notices have also been exchanged

between the parties regarding the biased approach of the Arbitrator to which, non-applicant's reply was that the earlier meeting with the Arbitrator was only a discussion regarding the car agency and has nothing to do with the dispute between the parties.

08] Shri Munshi has submitted that the non-applicants have not denied the meeting with the Arbitrator, which according to the applicants, was nothing but conciliation between the parties which ultimately failed due to the biased approach of the Arbitrator, hence the applicants were compelled to file the present application.

09] Counsel for the applicants has further submitted that the averments made in para 5.2 and 8.4 of the application under Section 11(6) of the Act of 1996 have not been rebutted by the non-applicants with respect to the same allegation.

10] In support of his submissions, Shri Manoj Munshi, counsel for the applicants has relied upon the decisions rendered by the Hon'ble Supreme Court in the case of ***Union of India vs. Besco Ltd. (Civil Appeal No. 4483/2017 {arising out of S.L.P. (C) No. 17838 of 2014*** decided on 27.03.2017} reported as *(2017) 14 SCC 187)*; ***Mahindra Lifespace Developers Ltd. Vs. New Great Eastern Spinning & Weaving Company Ltd. & another*** reported as *(2009) SCC OnLine Bom 592* and the decision rendered by the Delhi High Court in the case of ***Oyo Hotels and Homes Pvt. Ltd. vs. Rajan Tewari and others*** {Arb. P.424/2020 decided on 09.02.2020} in which, the Delhi High Court has held that despite appointment of Arbitrator by one party, the High Court can appoint the Arbitrator under Section 11(6) of the Act

of 1996.

11] On the other hand, the non-applicants have filed an application (I.A.No.1182/2024) for vacating the stay, instead of reply to the application. However, counsel for the non-applicants Shri Vijay Assudani has submitted that the said application may be treated as their reply to the main application. It is submitted that the allegation levelled by the applicants that there was a conciliation meeting between the parties in the office of the Arbitrator is a blatant lie as there was no conciliation took place between the parties. Counsel has also submitted that a conciliation can only take place in accordance with Sections 62 and 64 of the Act of 1996, and admittedly, the applicants have never moved any application for conciliation of the matter and the applicants have never sent any written communication in this regard to the non-applicants that they intend to initiate any conciliation proceedings, and merely a meeting which took place between the applicants and the non-applicants in the office of the Arbitrator regarding car dealership is now being projected as a conciliation proceedings which cannot be accepted even in the eyes of law.

12] Counsel for the non-applicants has further submitted that it is true under Section 80, a Conciliator cannot act as an Arbitrator, however, in the present case, the conciliation proceedings have not taken place in any manner much less, as provided under Sections 62 & 64 of the Act of 1996.

13] In support of his submissions, Shri Assudani has relied upon

the decisions rendered by the Supreme Court in the case of ***Swadesh Kumar Agarwal vs. Dinesh Kumar Agarwal and others*** reported as *(2022) 10 SCC 235*, in which it is clearly provided that once the dispute is referred to arbitration and the sole arbitrator is appointed by the parties by mutual consent, and the arbitrator is so appointed, the arbitration agreement cannot be invoked for the second time.

14] In rebuttal, counsel for the applicants has submitted that the aforesaid decision is not applicable in the facts and circumstances of the case as the applicants had raised a preliminary objection even before the appointment of the Arbitrator about his biasedness and the fact that he could not act as an Arbitrator after entering into the conciliation proceedings between the parties.

15] Heard the counsel for the parties and perused the record.

16] The question which has arisen for consideration of this Court is whether the Arbitrator already appointed by the non-applicant in the present case, has to be approved by this Court or a new Arbitrator can be appointed accepting the contention of the applicant that the Arbitrator was biased, and that he had already entered into conciliation proceedings between the parties, and thus, cannot act as an Arbitrator under Section 80 (a) of the Act of 1996.

17] To decide the aforesaid issue, it would be apt to referred to the relevant provisions 62, 64 and 80 of the Act of 1996, which read as under:-

> **"62. Commencement of conciliation proceedings.**- (1) The party initiating conciliation shall send to the other party a written invitation to

conciliate under this Part, briefly identifying the subject of the dispute.

(2) Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate and if he so elects, he shall inform in writing the other party accordingly.

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64. Appointment of conciliators. - (1) Subject to sub-section (2),

(a) in conciliation proceedings with one conciliator, the parties may agree on the name of a sole conciliator;

(b) in conciliation proceedings with two conciliators, each party may appoint one conciliator;

(c) in conciliation proceedings with three conciliators, each party may appoint one conciliator and the parties may agree on the name of the third conciliator who shall act as the presiding conciliator.

(2) Parties may enlist the assistance of a suitable institution or person in connection with the appointment of conciliators, and in particular,

(a) a party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

(b) the parties may agree that the appointment of one or more conciliators be made directly by such an institution or person:

Provided that in recommending or appointing individuals to act as conciliator, the institution or

> person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.
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> **80. Role of conciliator in other proceedings.-** Unless otherwise agreed by the parties,
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> (a) the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings;
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> (b) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings.
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> (***emphasis supplied***)

18] A perusal of the aforesaid provisions of law clearly reveal that a Conciliator can only be appointed by taking recourse to Section 62 as provided under part 2 of the Act of 1996, which refers to conciliation, and by no stretch of imagination it can be said that the parties or Conciliator can commence the conciliation proceeding without there being any request sent to the other parties in writing.

19] In such circumstances, the contention of the applicant that the conciliation proceedings have already taken place along with the sole Arbitrator cannot be accepted, and even if the non-applicant has not denied the meeting with the applicant in the office of the Arbitrator, it cannot be presumed that it was for a conciliation proceeding, as admittedly the parties and the arbitrator are known to each other that is why they had already chosen the name of the arbitrator at the time of entering into the agreement, and if they have met prior to

invocation of arbitration clause, it cannot be presumed that the conciliation has taken place or that the named arbitrator is biased, especially when there is no documents to demonstrate the same.

20] So far as the decisions relied upon by the counsel for the petitioner are concerned, the same are distinguishable on facts.

21] In the case of ***Mahindra Lifespace Developers Ltd.*** (supra), the Bombay High Court has recorded the finding that there is a definite documents on record to show that the respondent No.2 acted as Mediator or Conciliator and always attempted to reconcile the dispute between the parties by mutual agreement and persuasion, which is not the case in the present case, and is distinguishable from the facts of the present case.

22] Similarly in the case of ***Besco Ltd.*** (supra), the question before the Supreme Court for consideration was whether the Chief Justice of the High Court or any persons or Institutions designated by him, while exercising the power under Section 11 (6) of the Act of 1996 is bound to nominate an Arbitrator as specified in the agreement for arbitration. The designated Judge in the High Court took the view that the appellant has lost the mandate to appoint an Arbitrator since it failed to appoint an Arbitrator within the permitted time, and hence, nominated an independent Arbitrator. Relevant para 7 reads as under :-

> **"7.** Thus, the issue is no more res integra. Though an arbitrator is specified in the agreement for arbitration, if circumstances so warrant, the Chief Justice or the Designated Judge is free to appoint an independent

> arbitrator, having due regard to the qualification, if any, and other aspects as required under Section 11(8) of the Act."
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> (***emphasis supplied***)

23] So far as the decision relied upon by the counsel for the respondent in the case of ***Swadesh Kumar Agrawal*** (supra) is concerned, wherein the Supreme Court has held in para 9 and 11 as under:-

> **9.** The following questions arise for our consideration:
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> **9.1.**(*i*) Whether the High Court in exercise of powers under Section 11(6) of the 1996 Act, can terminate the mandate of the sole arbitrator?
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> **9.2.** (*ii*) Whether in the absence of any written contract containing the arbitration agreement, the application under Section 11(6) of the 1996 Act would be maintainable?
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> **9.3.** (*iii*) Is there any difference and distinction between sub-section (5) of Section 11 and sub-section (6) of Section 11 of the 1996 Act?
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> **9.4.** (*iv*) Whether the application under sub-section (6) of Section 11 shall be maintainable in a case where the parties themselves appointed a sole arbitrator with mutual consent?
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> **9.5.**(*v*) Whether in the facts and circumstances of the case the High Court was justified in terminating the mandate of the sole arbitrator on the ground that there was undue delay on the part of the sole arbitrator in concluding the arbitration proceedings which would lead to the termination of his mandate, in an application under Section 11(6) of the 1996 Act?
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> **13.** In the present case, the sole arbitrator was appointed by the parties themselves by mutual consent and in the absence of any written contract containing the arbitration agreement. Therefore, application under Section 11(6) of the 1996 Act in absence of any written agreement containing arbitration agreement was not maintainable at all.
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> **14.**Now the next question which is posed for consideration of this Court is, whether, in exercise of powers under sub-section (6) of Section 11 of the 1996 Act, the High

Court can terminate the mandate of the sole arbitrator and substitute the arbitrator in view of Section 14(1)(*a*) of the 1996 Act on the ground that he has failed to act without undue delay and in such a situation aggrieved party has to approach the "court" to terminate his mandate.

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21. Therefore, on a conjoint reading of Sections 13, 14 and 15 of the Act, if the challenge to the arbitrator is made on any of the grounds mentioned in Section 12 of the Act, the party aggrieved has to submit an appropriate application before the Arbitral Tribunal itself. However, in case of any of the eventualities mentioned in Section 14(1)(*a*) of the 1996 Act and the mandate of the arbitrator is sought to be terminated on the ground that the sole arbitrator has become de-jure and/or de facto unable to perform his functions or for other reasons fails to act without undue delay, the aggrieved party has to approach the "court" concerned as defined under Section 2(1)(*e*) of the 1996 Act. The court concerned has to adjudicate on whether, in fact, the sole arbitrator/arbitrators has/have become de jure and de facto unable to perform his/their functions or for other reasons he fails to act without undue delay. The reason why such a dispute is to be raised before the court is that eventualities mentioned in Section 14(1)(*a*) can be said to be a disqualification of the sole arbitrator and therefore, such a dispute/controversy will have to be adjudicated before the court concerned as provided under Section 14(2) of the 1996 Act.

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23. Now the next question which is posed for consideration of this Court is, whether, in a case where the parties themselves have referred the dispute for arbitration and appointed and/or nominated the sole arbitrator by mutual consent and in the absence of any arbitration agreement and contract containing an arbitration agreement once the arbitrator is appointed, an application under Section 11(6) of the 1996 Act to terminate the mandate of the arbitrator and to substitute the arbitrator would be maintainable.

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27. Even otherwise, once the arbitrator was appointed by mutual consent and it was alleged that the mandate of the sole arbitrator stood terminated in view of Section 14(1)(*a*) of the 1996 Act, the application under Section 11(6) of the 1996 Act to terminate the mandate of the arbitrator in view of Section 14(1)(*a*) of the Act shall not be maintainable. Once the appointment of the arbitrator is made,

the dispute whether the mandate of the arbitrator has been terminated on the grounds set out in Section 14(1)(*a*) of the Act, shall not have to be decided in an application under Section 11(6) of the 1996 Act. Such a dispute cannot be decided on an application under Section 11(6) of the Act and the aggrieved party has to approach the "court" concerned as per sub-section (2) of Section 14 of the Act.

28. In *Antrix Corpn.* [*Antrix Corpn. Ltd.* v. *Devas Multimedia (P) Ltd.*, (2014) 11 SCC 560 : (2014) 4 SCC (Civ) 147] in paras 31 and 33, it is observed and held as under : (SCC pp. 572-73)

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> "*31*. The matter is not as complex as it seems and in our view, once the arbitration agreement had been invoked by Devas and a nominee arbitrator had also been appointed by it, the arbitration agreement could not have been invoked for a second time by the petitioner, which was fully aware of the appointment made by the respondent. It would lead to an anomalous state of affairs if the appointment of an arbitrator once made, could be questioned in a subsequent proceeding initiated by the other party also for the appointment of an arbitrator. In our view, while the petitioner was certainly entitled to challenge the appointment of the arbitrator at the instance of Devas, it could not do so by way of an independent proceeding under Section 11(6) of the 1996 Act. While power has been vested in the Chief Justice to appoint an arbitrator under Section 11(6) of the 1996 Act, such appointment can be questioned under Section 13 thereof. In a proceeding under Section 11 of the 1996 Act, the Chief Justice cannot replace one arbitrator already appointed in exercise of the arbitration agreement.
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> *33*. Sub-section (6) of Section 11 of the 1996 Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of sub-section (6) may be invoked by any of the parties. Where in terms of the agreement, the arbitration clause has already been invoked by one of the parties thereto under the ICC Rules, the provisions of sub-section (6) cannot be

invoked again, and, in case the other party is dissatisfied or aggrieved by the appointment of an arbitrator in terms of the agreement, his/its remedy would be by way of a petition under Section 13, and, thereafter, under Section 34 of the 1996 Act."

29. Following the aforesaid decision in the subsequent decision of this Court in *S.P. Singla Constructions* [*S.P. Singla Constructions (P) Ltd.* v. *State of H.P.*, (2019) 2 SCC 488 : (2019) 1 SCC (Civ) 748] , it is observed and held by this Court that once the arbitrator had been appointed as per Clause 65 of the agreement (in that case) and as per provisions of the law, the arbitration agreement could not have been invoked for second time.

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32. In view of the aforesaid discussion and for the reasons stated above, it is observed and held as under:

32.1. That there is a difference and distinction between Section 11(5) and Section 11(6) of the 1996 Act.

32.2. In a case where there is no written agreement between the parties on the procedure for appointing an arbitrator or arbitrators, parties are free to agree on a procedure by mutual consent and/or agreement and the dispute can be referred to a sole arbitrator/arbitrators who can be appointed by mutual consent and failing any agreement referred to Section 11(2), Section 11(5) of the Act shall be attracted and in such a situation, the application for appointment of arbitrator or arbitrators shall be maintainable under Section 11(5) of the Act and not under Section 11(6) of the Act.

32.3. In a case where there is a written agreement and/or contract containing the arbitration agreement and the appointment or procedure is agreed upon by the parties, an application under Section 11(6) of the Act shall be maintainable and the High Court or its nominee can appoint an arbitrator or arbitrators in case any of the eventualities occurring under Sections 11(6)(*a*) to (*c*) of the Act.

32.4. Once the dispute is referred to arbitration and the sole arbitrator is appointed by the parties by mutual consent and the arbitrator/arbitrators is/are so appointed, the arbitration agreement cannot be invoked for the second time.

32.5. In a case where there is a dispute/controversy on the mandate of the arbitrator being terminated on the ground mentioned in Section 14(1)(*a*), such a dispute has to be

> raised before the "*court*", defined under Section 2(1)(*e*) of the 1996 Act and such a dispute cannot be decided on an application filed under Section 11(6) of the 1996 Act."
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> (***emphasis supplied***)

24] On perusal of the record, it is found that the applicant has tried to raise a dispute regarding the impartiality of the Arbitrator-Shri Manohar Parmani who has already been appointed as the arbitrator by the non-applicant as per the agreement. In considered opinion of this Court, although the applicant has tried to raise the dispute on the ground that the aforesaid Arbitrator had already entered into mediation proceedings with the parties by relying upon Section 80 of the Act, 1996, which provides that the Conciliator shall not act as an arbitrator or as a representative or counsel of the party in any arbitral or judicial proceeding in respect of a dispute that is that subject of the conciliation proceedings, however, admittedly, the conciliation proceedings as prescribed under Part III of the Act of 1996 have not taken place and it is only alleged by the applicant that oral conciliation proceedings have taken place, to which, the non-applicant has vehemently denied. In such circumstances, when the allegations of the applicant are not backed by any concrete evidence, except the bald allegations made by the applicant that the Arbitrator is biased, they does not pass the test of Sections 62 and 80. Thus, the decisions relied upon by Shri Munshi are of no avail to the applicants.

25] Whereas, if the facts of the case in hand are tested on the anvil of the aforesaid decision of the Supreme Court in the case of ***Swadesh Kumar Agarwal (supra)*** it leaves no manner of doubt that

the application u/s.11(6) of the Act of 1996 is not maintainable.

26] In view of the same, the Arbitration Case being devoid of merits is hereby ***dismissed***. However, with liberty reserved to the applicant to file his reply before the Arbitrator -Shri Manohar Parmani, and Shri Manohar Parmani is also directed to accept the reply if the same is filed by the applicant within further period of three weeks from today.

27] With the aforesaid, the present Arbitration Case stands ***disposed of.***

(SUBODH ABHYANKAR)
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