

**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR**

BEFORE

HON'BLE SHRI JUSTICE ANAND PATHAK

ON THE 23rd OF FEBRUARY, 2024

ARBITRATION CASE No. 40 of 2022

BETWEEN:-

**M/S BANCO CONSTRUCTION PVT LTD
THROUGH ITS AUTHORIZED SIGNATORY
REGD.OFFICE- I, NEHRU COLONY,
THATIPUR, GWALIOR (MADHYA PRADESH)**

.....APPLICANT

(BY SHRI ARUN DUDHAWAT- ADVOCATE)

AND

**NARMADA EXTRUSIONS LTD THROUGH ITS
DIRECTOR REGD. OFFICE PLOT NO. 71
INDUSTRIAL AREA PITHAMPUR DHAR DIST
DHAR ADDITIONAL ADDRESS 403, RAJANI
BHAWAN 569/2 M.G. ROAD INDORE, 452001
(MADHYA PRADESH)**

.....RESPONDENT

(BY SHRI T.C. NARWARIYA- ADVOCATE)

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

the following:

ORDER

1. The present petition has been preferred under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as Act of,1996) seeking following reliefs:-

a) Filing of certified copies of ANNEXURE P-1 to P-5 be disposed with.

b) This Hon'ble Court may kindly be pleased by appointing any independent arbitrator(s) in terms of arbitration agreement clause 14.7.

c) That, this court has the territorial jurisdiction to appoint an independent Sole arbitrator.

d) Pass such further or other order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.

2. Precisely stated facts of the case are that an agreement dated 07.10.2016 was executed between the petitioner and respondent in which petitioner was Supplier of Electricity and respondent was the Purchaser of it. The electricity was to be supplied through execution of a tripartite agreement between the Supplier, The Madhya Pradesh Power Management Company Ltd. (M.P.P.M.C.L.), Jabalpur and Madhya Pradesh Paschim Kshetra Vidhyut Vitaran Company Ltd. (M.P.P.K.V.V.C.L.), Indore, and Purchaser whereby applicant had to supply the electricity generated through Solar Plant to the M.P.P.M.C.L. and M.P.P.K.V.V.C.L., and in turn, they had to supply the electricity to respondent. Respondent had to pay tariff/charges to applicant.

3. After some time, some dispute arose between the parties regarding payment of some amount due over respondent. A demand notice was issued on 02.06.2021 (Annexure P/5) at the instance of applicant but the same was not responded by respondent affirmatively. Thereafter, a legal notice invoking arbitration was issued on 07.02.2022 (Registered A.D.) and same was received by respondent, but no affirmative steps have been taken. Therefore, this application has been preferred for invocation of arbitration clause for dispute resolution. Arbitration Clause is part of agreement by way of Clause 14.7. Applicant is seeking appointment of arbitrator because respondent is not reacting to the demand/legal notice issued by applicant.

4. Learned counsel for respondent opposed the prayer on the ground that cheques were issued by respondent in favor of applicant vide Cheque No. 203979 (worth Rs.3,41,252/-), Cheque No. 203983 (worth Rs.4,34,829/-), Cheque No. 203984 (worth Rs.4,59,262/-), Cheque No. 101306 (worth Rs.4,69,377/-), Cheque No. 101305 (worth Rs.4,20,524/-), thus totaling Rs. 21,25,244/-. According to learned counsel for respondent, when this amount was paid through cheques and when cheques got dishonored, then applicant initiated proceedings under Section 138 of the Negotiable Instruments Act, and once proceedings as per Negotiable Instruments Act have been initiated, then applicant has no locus to file application under Section 11 of the Act of 1996 for appointment of arbitrator. Application suffers from maintainability. He is ready to pay the cheque amount.

5. At this stage, learned counsel for applicant submitted that dispute is

much deep rooted. Not only cheque amount, but other expenses and recoveries are also required to be made which respondent is avoiding.

6. Heard learned counsel for the parties and perused the documents appended thereto.

7. This is an application for appointment of arbitrator at the instance of applicant (Supplier of Electricity) and parties are guided by the agreement dated 07.10.2016 executed between them. The agreement was primarily in the form of Power Purchase Agreement. Dispute resolution mechanism has been provided in clause 14.7 of the said Agreement. The Same is reiterated herein for ready reference:-

14.7 DISPUTE RESOLUTION

If any dispute, difference or claim arises between the Parties hereto in connection with this Agreement or the Validity, interpretation, implementation or breach of this Agreement or anything done or omitted to be done pursuant to this Agreement, the Parties shall make a good faith effort in the first instance to resolve the same through negotiation. If the dispute is not resolved through negotiation within (3) days after commencement of discussions or within such longer period as the Parties may mutually agree to in writing, then the Parties may refer the dispute for resolution to a panel of three

Arbitrators on each appointed by the Parties and the third appointed by the two arbitrators. The arbitration shall be in accordance with the provisions of the Arbitration and Conciliation Act, 1996, or any statutory modification or re-enactment for the time being in force and shall take place in Gwalior. The award of arbitrator shall be final and binding on the Parties, and the Parties shall comply with/carry out all directions and orders of the arbitrators.

8. As per the said clause and agreement reached between the parties, their dispute resolution is to be carried out through appointment of an arbitrator. Here, dispute was raised by the applicant by sending notices and no response has been made by respondent. Quantum of amount, nature of dispute and way-out can only be ascertained, if parties approach arbitrator.

9. So far as maintainability of application under Section 11 of the Act of 1996 *viz. a viz.* pending proceedings under Section 138 of the N.I. Act is concerned, these are two proceedings moving in different jurisdictional realm and they are parallel in nature rather than overlapping. Therefore, both may continue because scope of Section 138 of the N.I. Act is confined to the dishonored cheques, whereas dispute between the parties appears to be such deep and exact depth can only be fathomed by the arbitrator where parties would have all opportunities to canvas their cause. Dispute goes much beyond the cheque amount mentioned over the

cheques which later on got dishonored. The said view is fortified by the judgment of Apex Court in the case of **Trisuns Chemical Industry Vs. Rajesh Agrawal and others (1999) 8 SCC 686** when the Apex Court held in following manner:-

9. We are unable to appreciate the reasoning that the provision incorporated in the agreement for referring the disputes to arbitration is an effective substitute for a criminal prosecution when the disputed act is an offence. Arbitration is a remedy for affording reliefs to the party affected by breach of the agreement but the arbitrator cannot conduct a trial of any act which amounted to an offence albeit the same act may be connected with the discharge of any function under the agreement. Hence, those are not good reasons for the High Court to axe down the complaint at the threshold itself. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach to conclusion of its own. Pre-emption of such investigation would be justified only in every extreme cases as indicated in State of Haryana v. Bhajan Lal.

10. Such view has further been reiterated in the case of **Shri Krishna**

Agencies Vs. State of Andhra Pradesh and another (2009) 1 SCC 69
and in the case of **Mitesh Kumar J. SHA. Vs. State of Karnataka and**
ors. (2022) 14 SCC 572.

11. Therefore, in the considered opinion of this Court, appointment of arbitrator is imperative for dispute resolution and therefore, application is **allowed** and consequently, prayer for appointment of arbitrator is hereby allowed.

12. At this Stage, learned counsel for both the parties suggested the name of Honorable Shri Justice M.K. Mudgal (former Judge of Madhya Pradesh High Court) as arbitrator.

13. Considering the submissions, this Court appoints Honorable Shri Justice M.K. Mudgal (former Judge of Madhya Pradesh High Court) as arbitrator in the present matter.

14. Parties are directed to approach learned arbitrator in accordance with law and learned arbitrator shall proceed as per Arbitration and Conciliation Act, 1996/ as amended in the year 2015.

15. With aforesaid directions, petition stands **allowed and disposed of.**

Certified copy as per rules.

(ANAND PATHAK)
JUDGE

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