

Superintending Engineer, Srbc and anr. Vs. Srinivasa Constructions Ltd., Engineers and Contractors and anr.

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Court : Andhra Pradesh

Decided On : Nov-19-2003

Reported in : 2003(6)ALD847; 2003(6)ALT707

Judge : B. Sudershan Reddy and ;K.C. Bhanu, JJ.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 11(5) and 11(6)

Appeal No. : WP No. 3296 of 2003

Appellant : Superintending Engineer, Srbc and anr.

Respondent : Srinivasa Constructions Ltd., Engineers and Contractors and anr.

Advocate for Def. : M.R.K. Choudary, Adv.

Advocate for Pet/Ap. : Government Pleader

Disposition : Writ petition allowed

Judgement :

B. Sudershan Reddy, J.

1. The present writ petition has been filed by the petitioner aggrieved by the order dated 13.12.2002 of the Hon'ble Chief Justice passed in Arbitration Application No.

81 of 2002 appointing a retired Judge of this Court as the sole Arbitrator. The said arbitration application has been filed by the 1st respondent herein under Section 11(5) and (6) of the [Arbitration and Conciliation Act, 1996](#) (for short 'the Act') read with the Scheme for Appointment of Arbitrators, 1996 of A.P High Court praying to appoint a sole Arbitrator for getting the disputes resolved between the parties as to the fixation of the rate by the Technical Expert at Rs. 261.43 and for passing an award by such sole Arbitrator. The learned Chief Justice allowed the application and accordingly appointed a retired Judge of this Court as the sole Arbitrator.

2. In order to consider the issue as to whether the impugned order appointing the sole Arbitrator suffers from any error apparent on the face of the record, it is just and necessary to notice the relevant facts leading to the filing of the writ petition:

3. That under agreement dated 3.5.1999, respondent No. 1 was entrusted with the work of earthwork excavation, lining of canal and construction of structures on Sanjamala Sub-Branch Canal, major, minors and sub-minors in Block-X of Srisailem Right Branch Canal by the Superintending Engineer, Nandyal for an amount of Rs. 24,73,00,848/-. The period of contract was 24 months from the date of handing over of the site. That first and second extensions were granted, in all up to 30.6.2002. That during the execution of the work, there arose necessity to execute additional quantities beyond 25%. That for execution of additional quantities of Cohesive Non-Swelling (C.N.S) Soils over and above 25% excess, over the agreement quantities at the rates to be fixed by the Department, the 1st respondent had been addressed by the Executive Engineer vide letter dated 13.2.2001 to give the consent to execute the additional quantities of work. In response, the 1st respondent-Contractor has furnished a quotation vide letter dated 22.2.2001 for CNS Soils at Rs. 313.26 per cubic meter. The Executive Engineer having scrutinized the rates for additional quantities of CNS Soil found that the rate quoted by the Contractor is unreasonable and high. Accordingly, the rates were finalized by the Engineer on his own accord as per agreement Clause No. 40.3 and the proposals were furnished to the Department vide letter dated 22.3.2001 for approval of the rates. The Department fixed the same rate as suggested for quantities of work done over 25% of the agreement quantities at Rs.227.05 vide letter dated 24.3.2001 and directed the Executive Engineer to

inform the 1st respondent-Contractor accordingly.

4. The 1st respondent-Contractor did not accept the rates fixed by the Department. Thereafter, a meeting was held between the Department and the 1st respondent-Contractor. It is not necessary to notice the further details except to note that the 1st respondent-Contractor refused to accept the rates fixed by the Department. The 1st respondent-Contractor approached the Technical Expert vide letter dated 30.3.2002 for redressal of his grievance regarding fixation of rates for (a) C.N.S Soils; (b) Side Borrow Soils over and above 25% excess of the agreement quantities as per Clause 25 of conditions of contract. The Technical Expert had discussed on 16.4.2002 with the Department and the 1st respondent. The Technical Expert has passed award on 29.4.2002 and communicated the same to the Department on 1.5.2002.

5. That questioning the award of the Technical Expert, the Department filed O.S. No. 22 of 2002 in the Court of the Principal District Judge, Kurnool as per agreement Clause 25 which inter alia provides that if the amount of claim is below Rs. 50,000/-, the dispute has to be referred to the Arbitrator and in case, the claim is more than Rs. 50,000/-, the remedy is only by way of a suit in a Civil Court. Therefore, the Department has approached the Civil Court seeking redressal of its grievance.

6. That in the meanwhile, the 1st respondent-Contractor addressed a letter to the writ petitioner on 25.5.2002 seeking appointment of Arbitral Tribunal for adjudicating the dispute in respect of fixation of rate by the Technical Expert as he was claiming a higher rate than that was fixed by the Technical Expert.

7. That in the absence of any response from the petitioner, the 1st respondent filed Arbitration Application No. 81 of 2002 under Section 11(5) and (6) of the Act praying that a sole Arbitrator may be appointed to adjudicate the dispute as to the fixation of rate.

8. That on behalf of the petitioner, a counter-affidavit was filed contesting the claim of the 1st respondent and opposing the maintainability of the arbitration application. The Hon'ble Chief Justice appointed a retired Judge of this Court as

the sole Arbitrator and accordingly disposed of the arbitration application overruling the objection raised by the petitioner as to the maintainability of the arbitration application filed by the 1st respondent-Contractor. Hence this writ petition.

9. Sri M. Jagannadha Sharma, learned Government Pleader for Appeals contended that the order passed by the Hon'ble Chief Justice appointing the sole Arbitrator is vitiated by an error apparent on the face of the record. The learned Government Pleader contended that the contract data lays down the pecuniary limits of claims that may be referred to arbitration and claims that are required to be settled by having recourse to regular civil suits. The settlement of claims for Rs. 50,000/- and below is by arbitration and all claims of above Rs. 50,000/- are to be settled by a civil Court of competent jurisdiction by way of civil suit. The parties including the petitioners are bound by the terms of agreement and precisely for that reason, the Department aggrieved by the decision of the Technical Expert fixing the rate at Rs. 261.43 per cubic meter approached the civil Court and filed O.S No. 22 of 2002 in the Court of the Principal District Judge, Kurnool. The learned Government Pleader contended that the documents including (a) letter of acceptance; (b) notice to proceed with the works; (c) contractor's bid; (d) contract data of quantities and (e) any other document listed in the contract data shall be deemed to form and be read and construed as part of the agreement. It was also contended that in view of Condition No. 2.3 of conditions of contract, the contract data has priority over conditions of contract. Therefore, the pecuniary limit laid down in contract data controls the procedure of arbitration laid down in Condition Nos. 24 to 25.5. The value of the dispute raised by the 1st respondent-Contractor is more than Rs. 50,000/- and the only remedy available to him is to approach the civil Court. The learned Government Pleader further contended that ostensibly the dispute at this stage might appear as if with regard to the rate but in reality, it will determine the amount payable ultimately upon completion of the work.

10. Sri M.R.K. Choudary, learned Senior Counsel appearing on behalf of the 1st respondent-Contractor contended that the writ petition filed by the petitioner challenging the order of the learned Chief Justice in appointing the sole Arbitrator is not maintainable in law. The learned Senior Counsel contended that the

question of claim of more than Rs. 50,000/- does not arise and the dispute on hand is a case of dispute relating to the correctness of the finding recorded by the Technical Expert in fixing the rate per unit for excavation of work covered by excess quantity referred to in the clauses of the agreement. The terms of the contract themselves specifically provide for a reference of the dispute in certain circumstances to the Technical Expert. On disagreement with the opinion of the Technical Expert, it is always open to either of the parties to seek reference of such dispute for fixation of the rate by the Arbitrator. The terms of the contract provided for disputing the correctness of the opinion expressed by the Technical Expert in the matter of fixation of the rate per unit. The learned Senior Counsel further contended that under Section 16(1) of the Act, the Arbitral Tribunal is clothed with the jurisdiction to consider objections with regard to the existence or validity of the arbitration agreement and in the process, entitled to go into its own jurisdiction to determine the dispute referred. In view of an alternative and effective remedy, the petitioner cannot be allowed to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. The learned Senior Counsel contended whether there is any arbitration clause at all enabling the parties to get the dispute resolved through the medium of arbitration itself is required to be gone into only by the Arbitrator. The learned Senior Counsel accordingly submitted to dismiss the writ petition in limini.

11. Before we proceed to consider the question as to the maintainability of the writ petition, we are required to notice that the 1st respondent-Contractor in his arbitration application as against Column No. 8 relating to valuation of the subject-matter, mentioned: more than Rs. 1,00,00,000/- and no claim is made for the said amount. But it is only valuation of the subject-matter and the details are explained in the enclosed affidavit.

12. The learned Chief Justice while disposing of the arbitration application observed that in the instant case, the only question that arises for consideration is with regard to fixation of rate in respect of excess quantity over and above 25% of that in Bill of Quantities, exceeding 1 % of the contract value of the rate fixed by the Technical Expert. 'Whether such fixation was done after following the proper procedure by the Technical Expert or not is to be examined. The Contractor is of

the view that the rate is not properly fixed by the Executive Engineer as required by Clause 40.3 of General Conditions of Contract according to which the effect of the variation on the Contractor's costs is to be taken into consideration. Thus the dispute is relating to fixation of rate per unit. Therefore, the question of fixing the value of the claim or quantifying the claim has to be done only by arbitration'.

13. Clause 2.3 of the conditions of contract provide that the documents forming the contract shall be incorporated in the following order of priority:

'1. Agreement.

2. Letter of Acceptance, notice to proceed with the works.

3. Contractor's bid.

4. Contract data.

5. Conditions of contract including special conditions of contract.

6. Specifications.

7. Drawings.

8. Bill of Quantities.

9. Any other documents listed in the Contract Data as forming part of the Contract.'

14. Clause 25 provides for the procedure for disputes, the details of which we have already noticed hereinabove and that as per Condition No. 2.3 of the conditions of contract, the contract data has priority over conditions of contract.

15. The contract data lays down the pecuniary limits of claims that should be referred to arbitration and of claims that should be settled by having recourse to a regular civil suit.

The relevant position of contract data reads thus:

'Arbitration will take place in accordance with the Indian [Arbitration and Conciliation Act, 1996](#). Settlement of claims for Rs. 50,000/-and below by Arbitration.

All disputes or difference in respect of which the decision, if any, of the Technical Expert has not become final and binding as aforesaid, shall be referred to the Arbitration as follows:

(a) Claims upto value of Rs. 10,000/-. Superintending Engineer, I & CAD, Dam Maintenance Circle, Srisaillam Project.

(b) Claims above Rs. 10,000/- and up to Rs. 50,000/- Chief Engineer, I & CAD, Major Irrigation, Hyderabad.

The Arbitration shall be conducted in accordance with the provisions of Indian [Arbitration and Conciliation Act, 1996](#) or any statutory modifications thereof. The Arbitrator shall state his reasons in passing the Award.

Claims above Rs. 50,000/-

All claims above Rs. 50,000/- are to be settled by a Civil Court of competent jurisdiction by way of Civil Suit.'

16. It is so specifically agreed by and between the parties that all claims of above Rs. 50,000/- are to be settled by a Civil Court of competent jurisdiction by way of Civil Suit. The conditions of contract particularly Condition Nos. 24 to 25.3 of the conditions of contract upon which reliance has been placed by the learned Senior Counsel appearing for the respondent-Contractor are required to be read along with the pecuniary limits imposed under the contract data. The decision of the Technical Expert given in terms of Condition No. 25.1 of the conditions, no doubt, may be referred to an arbitrator within 28 days of his written decision. If neither party refers the dispute to arbitration within the above 28 days, the Technical Expert's decision will be final and binding. Clause 25.2 of the conditions of contract cannot be read in isolation and in exclusion to the pecuniary limits imposed under the contract data. If both of them are so read harmoniously, it becomes clear that settlement of claims for Rs. 50,000/- and below is to be resolved by arbitration and

all claims above Rs. 50,000/- are to be settled by a Civil Court of competent jurisdiction by way of Civil Suit. The stipulations laid down in the contract data which is again an integral part of agreement by which both the parties are bound would be clearly applicable even in cases of disputes in respect of which the Technical Expert is required to give his decision in writing within the stipulated time of receipt of notification of dispute. The Technical Expert's decision may be referred to an Arbitrator as provided for but only in cases of claims for Rs. 50,000/- and below, and claims above Rs. 50,000/- are to be settled by a Civil Court of competent jurisdiction by way of civil suit.

17. Sri M.R.K. Choudary, learned Senior Counsel, however, relied upon the decision of the Supreme Court in Hythro Power Corporation Ltd. v. Delhi TRANSCO Ltd., : AIR 2003 SC4219 , in support of his submission whether on the facts and in the circumstances, an arbitration agreement can be said to have existed is required to be decided only by the Arbitral Tribunal under Section 16 of the Act and not by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. The decision requires a careful and close reading in order to appreciate the submission made by the learned Senior Counsel. The facts leading to the enunciation and declaration of law by the Supreme Court as to the nature of power under Section 11 of the Act require to be understood in proper perspective. The appellant therein Hythro Power Corporation approached the Supreme Court aggrieved by rejection of its application under Section 11 of the Act by a learned Judge of the Delhi High Court acting as designate or nominee of the Chief Justice in exercise of power under Section 11 of the Act by order dated 7.12.2000. The learned Judge came to the conclusion that no agreement in writing having been executed by the parties to the arbitration clause, the prayer made by the appellant for seeking reference of the dispute raised to the Arbitral Tribunal has to be rejected. The Division Bench of the High Court also took the view by the order dated 29.8.2001 and came to the same conclusion that there exists no written arbitration agreement and hence the dispute cannot be referred for arbitration under Section 11 of the Act. The Supreme Court noticed the undisputed facts in the case before it which are to the following effect.

'The respondent Delhi Transco Limited issued a notice inviting tenders (NIT) for awarding the work of erection, testing and commissioning of balance work of 220 KV DC tower line from Samaypur to Mehrauli. The NIT contained Clause 25 which is an arbitration clause. Pursuant to the NIT, the appellant submitted its tender. The respondent issued a letter of intent in favour of the appellant. According to the appellant, the respondent also sent a detailed letter showing acceptance of the award of the work to the appellant. It was also indicated that all terms and conditions of the NIT would form part of the contract.'

18. According to the appellant therein, the exchange of letters between the parties and submission of offer and its acceptance constituted a contract as the terms and conditions in the NIT, on which the contract was awarded contained a clause providing forum of arbitration. That arbitration agreement as defined in Section 7(4)(b) of the Act had come into existence to enable the appellant therein to invoke the said arbitration clause.

19. On the facts and background of the dispute, the Supreme Court observed 'that the designate of the Chief Justice acting administratively under Section 11 and the Division Bench of the High Court exercising powers under Article 226 of the Constitution were clearly in error in adjudicating upon the dispute regarding the validity and existence of the arbitration agreement' and holding that the dispute was not referable to arbitration'. The Court observed 'whether on the facts mentioned above, an arbitration agreement can be said to have existed by recourse to the arbitration clause in NIT was itself a dispute which deserved to be referred to the Arbitral Tribunal in accordance with the arbitration clause. Section 16 empowers the Arbitral Tribunal to decide the question of existence and validity of the arbitration agreement'. The Supreme Court relied upon its decision in the case of Food Corporation of India v. Indian Council of Arbitration, : AIR 2003 SC3011 , in which it was inter alia observed that 'even if there are any objections as to the existence of an enforceable or valid arbitration agreement, it has to be adjudicated by the very Arbitral Tribunal after a reference is made to it after it is constituted and it is not for the ICA or the High Court to undertake this impermissible adjudicatory task of adjudging highly contentious issues between the parties'.

20. In *State of Orissa v. Gokulananda Jena*, : AIR 2003 SC4207 , the Supreme Court observed that an order made by the Designated Judge under Section 11(6) of the Act which is in the nature of an administrative order is amenable to the writ jurisdiction under Article 226 of the Constitution of India as any other administrative order. It is observed 'in our view even though a writ petition under Article 226 of the Constitution is available to an aggrieved party, ground available for challenge in such a petition is limited because of the alternative remedy available under the Act itself. The order passed by the Designated Judge was challenged in the said case on the following grounds:

(i) The contract between the parties was executed before the Act came into force, hence, the Act does not apply.

(ii) Dispute is a stale one having arisen nearly 20 years ago.

(iii) Clause 23 of the agreement contemplates the adjudication of a dispute by a company arbitrator.

(iv) No person other than an arbitrator nominated in Clause 23 of the agreement has any jurisdiction to entertain the disputes.'

21. Having referred to the nature of the attack and on the facts of the case, the Supreme Court held that the writ petition of the appellant was liable to be dismissed by the High Court.

22. In *Wellington Associates Ltd. v. Kirit Mehta*, : AIR 2000 SC1379 , the learned Designated Judge while disposing of arbitration application filed under Sub-sections (2), (6), (10) and (12) of Section 11 of the Act and while considering the scope of Section 16 of the Act observed thus:

'But it must be noted that the language employed by Section 16 of the new Act shows that the said provision is only an enabling one which, unlike Section 33 in the old Act of 1940, - now permits the Arbitral Tribunal to decide a question relating to the 'existence' of the arbitration clause. This section corresponds to Article 16 of the UNCITRAL Model Law and Article 21 of the UNCITRAL Arbitration Rules. While Article 16 of the Model Law says that the Arbitral Tribunal

may rule on its own jurisdiction, Article 21 of the Rules states that the 'Arbitral Tribunal shall have power to rule' on these questions. Such power given to the Arbitral Tribunal is also referred to as 'Kompetenz'.

The more important question however is whether Section 16 excludes the jurisdiction of the Chief Justice of India or his designate in this behalf if a question as to the existence of the arbitration clause is raised by the respondent in his reply to the petition filed under Section 11. (I am not concerned with the question of the validity or effect of the arbitration clause, in the present case.) In my view, Section 16 does not take away the jurisdiction of the Chief Justice of India or his designate, if need be, to decide the question of the 'existence' of the arbitration agreement. Section 16 does not declare that except the Arbitral Tribunal, none else can determine such a question. Merely because the new Act permits the arbitrator to decide this question, it does not necessarily follow that at the stage of Section 11 the Chief Justice of India or his designate cannot decide a question as to the existence of the arbitration clause.'

23. The following observations are very crucial to appreciate the question as to whether the present writ petition on hand is to be dismissed on the ground of availability of alternative remedy:

'It is well settled and has been repeatedly held that the source of the jurisdiction of the arbitrator is the arbitration Clause (See Waverly Jute Mills case above referred to). When that is the position, the arbitrator cannot, in all situations, be the sole authority to decide upon the 'existence' of the arbitration clause. Supposing again, the contract between the parties which contained the arbitration clause remained at the stage of negotiation and there was no concluded contract at all. Then in such a case also, there is no point in appointing an arbitrator and asking him to decide the question as to the existence of the arbitration clause. But I may point out that there can be some other situations where the question as to the 'existence' of an arbitration clause can be decided by the arbitrator. Take a case where the matter has gone to the arbitrator without the intervention of an application under Section 11. Obviously, if the question as to the existence of the arbitration clause is raised before the Arbitral Tribunal, it has power to decide the

question. Again, in a case where the initial existence of the arbitration clause is not in issue at the time of the Section 11 application but a point is raised before the Arbitral Tribunal that the said clause or the contract in which it is contained has ceased to be in force, then in such a case, the arbitrator can decide whether the arbitration clause has ceased to be in force. A question may be raised before the arbitrator that the whole contract including the arbitration clause is void. Now Section 16 of the new Act permits the Arbitral Tribunal to treat the arbitration clause as an independent clause and Section 16 says that the arbitration clause does not perish even if the main contract is declared to be null and void. Keeping these latter and other similar situations apart, I am of the view that in cases where- to start-with there is a dispute raised at the stage of the application under Section 11 that there is no arbitration clause at all, then it will be absurd to refer the very issue to an arbitrator without deciding whether there is an arbitration clause at all between the parties to start with. In my view, in the present situation, the jurisdiction of the Chief Justice of India or his designate to decide the question as to the 'existence' of the arbitration clause cannot be doubted and cannot be said to be excluded by Section 16.'

24. While referring to the words in Sub-section (1) of Section 7, 'means an agreement by the parties to submit to arbitration', the Court observed, 'in my opinion, postulate an agreement which necessarily or rather mandatorily requires the appointment of an arbitrator/arbitrators. Section 7 does not cover a case where the parties agree that they 'may' go to a suit or that they 'may' also go to arbitration'.

25. The learned Judge took the view that unless there is an arbitration agreement as defined under Section 7 requiring a reference in a mandatory sense, no reference can be made to the Arbitral Tribunal. That whenever an objection is raised that the so called arbitration clause is not an arbitration clause at all falling within Section 7, that such a question will have to be decided in the proceedings under Section 11 of the Act.

26. In *Nimet Resources Inc. v. Essar Steels Ltd.*, : AIR 2000 SC3107 , Hon'ble Justice Rajendra Babu of the Supreme Court acting as designate of the Chief

Justice of India while exercising powers under Section 11 of (he Act having made a reference to the view taken in Willington Associates Ltd. v. Kirit Mehta (supra) observed thus:

'I am conscious of the fact that M. Jagannadha Rao, J., in Willington Associates Ltd. v. Kirit Mehta held that the jurisdiction of the nominee of the Chief Justice of India to decide the question is not excluded by Section 16 of the Act and such a poer can be exercised in a suitable case. On this basis, it is no doubt permissible under Section 11 of the Act to decide a question as to the existence or otherwise of the arbitration agreement but when the correspondence or exchange of documents between the parties are not clear as to the existence or non-existence of an arbitration agreement, in terms of Section 7 of the Act, the appropriate course would be that the arbitrator should decide such a question under Section 16 of the Act rather than the chief Justice of India or his nominee under Section 11 of the Act.

I take this view because the power that is exercised by the nominee of the Chief Justice of. India under Section 11 of the Act is in the nature of an administrative order. In such a case, unless the chief Justice of India or his nominee can be absolutely sure that there exists no arbitration agreement between the parties it would be difficult to state that there should be no reference to arbitration. Further, such a view may not be conclusive in view of the nature of the powers that are exercised under Section 11(6) of the Act.'

27. In that case, the correspondence and exchange of documents between the parties were not clear as to the existence or non-existence of an arbitration agreement in terms of Section 7 of the Act and for that reason, the learned Designated Judge took the view that the Arbitrator should decide such a question under Section 16 of the Act rather than the Chief Justice of India or his nominee under Section 11 of the Act.

28. The arbitration agreement in the case on hand is in the form of an arbitration clause in the contract. It is in writing signed by both the parties. The clause containing the provision for arbitration is simple and is not capable of admitting more than one interpretation. That it inter alia provides that arbitration will take

place in accordance with the Indian [Arbitration and Conciliation Act, 1996](#). It provides for settlement of claims for Rs. 50,000/- and below by arbitration. All disputes or differences in respect of which, the decision, if any of the Technical Expert has not become final and binding as aforesaid, shall be referred to the arbitration as follows:

'(a) Claims upto a value of Rs. 10,000/-Superintending Engineer, I & CAD, Dam Maintenance Circle, Srisailem Project.

(b) Claims above Rs. 10,000/- and upto Rupees 50,000/- Chief Engineer, I & CAD, Major Irrigation, Hyderabad.

The arbitration shall be conducted in accordance with the provisions of Indian [Arbitration and Conciliation Act, 1996](#) or any statutory modifications thereof.

The arbitrator shall state his reasons in passing the award.'

29. All claims of above Rs. 50,000/-are to be settled by a civil Court of competent jurisdiction by way of civil suit.

30. In the circumstances, can it be said that there is an arbitration clause for resolution of the disputes involving claims of above Rs. 50,000/- by an Arbitrator? The answer is emphatic 'no'. In the light of the admitted facts, there is no difficulty to hold that claims of above Rs. 50,000/- are to be settled by a civil Court of competent jurisdiction by way of civil suit and there is no arbitration clause for resolving the disputes relating to all claims of above Rs. 50,000/-. In arriving at this conclusion, we have not undertaken any impermissible adjudicatory task in order to adjudicate highly contentious issues between the parties. We have perused the arbitration clause incorporated in the agreement entered into by and between the parties which is plain in its terms and reveals that the disputes relating to all claims of value of Rs. 50,000/- and less alone are required to be resolved through the medium of arbitration and such arbitration shall be conducted in accordance with the provisions of the Act. This crucial aspect of the matter escaped the attention of the learned Chief Justice while disposing of the arbitration application filed by the 1st respondent herein. The order suffers from errors apparent on the face of the

record.

31. We are not impressed by the submissions made by the learned Senior Counsel that the 1st respondent in his application only quantified as to the amounts claimed by him and the dispute raised by him is only with regard to fixation of rate and therefore, the dispute raised by the applicant does not attract the arbitration clause reflecting the claim of above Rs. 50,000/- to be settled by a civil Court of competent jurisdiction by way of civil suit. In the application itself, as against column valuation of the subject-matter, the applicant himself indicated it to be more than Rs. 1,00,000/-. The explanation that it is not a claim but only a valuation of the subject-matter is neither here nor there. We have to look at the substance and not the form. It is not as if the respondent-applicant's claim is of less than Rs. 50,000/-. Had it been so, we would not have interfered with the order passed appointing a sole Arbitrator to resolve the dispute raised by the 1st respondent-applicant.

32. That a cumulative reading of the clauses referred to hereinabove from which it is clear that it is not the intention of the parties to have recourse to arbitration irrespective of the value of the claim. There is no agreement between the parties nor there is any procedure agreed upon by the parties for appointment of Arbitrator for resolving the disputes between the parties irrespective of the value of the claim. Existence of agreement to resolve the disputes and agreed procedure for appointment of Arbitrator are the basic requirements to invoke the jurisdiction under Section 11(5)(6) of the Act. It is not as if anybody can approach the Chief Justice or Designated Judge as the case may be and request for appointment of an Arbitrator, even in cases where there exists no arbitration agreement between the parties.

33. In the case on hand, there is not only no arbitration agreement between the parties to resolve the disputes and settlement of claims involving more than Rs. 50,000/- but there is a specific agreement that whenever the claim and dispute is beyond Rs. 50,000/- no arbitration is available and such disputes and claims are required to be settled in a properly constituted civil suit. There is no doubt whatsoever that it is a case where there exists no arbitration agreement between

the parties.

34. For the aforesaid reasons, the impugned order is set aside. The writ petition is accordingly allowed. No costs.

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