$~8

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 27.05.2025*

\+ **EFA(OS) (COMM) 15/2024, CM No.14977/2025 & 33334/2025**

M/S. JAIPRAKASH HYUNDAI CONSORTIUM .....Appellant

Through: Mr Lovkesh Sawhney, Senior Advocate with Mr Rohit Kumar and Mr Akash Sharma, Advocates.

Versus

M/S. SJVN LIMITED .....Respondent

Through: Mr Uttam Datt, Senior Advocate with Ms Sonakshi Singh and Mr Kumar Bhaskar, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE TEJAS KARIA

VIBHU BAKHRU, J. (*Oral*)

CM No.33333/2025 (for amendment of the appeal)

1. For the reasons stated in the application, the same is allowed.

2. The application is disposed of.

EFA(OS) (COMM) 15/2024, CM No.14977/2025 & 33334/2025

3. The appellant [**JHC**] has filed the present appeal under Section 13(1A) of the Commercial Courts Act, 2015, *inter alia,* impugning an order dated 11.07.2024 [**impugned order**] passed by the learned Single Judge in *OMP(ENF.)(COMM) 201/2021* captioned *M/s Jaiprakash Hyundai Consortium (JHC) v. M/s SJVN Limited*.

4. JHC had filed the afore-mentioned petition [OMP(ENF.)(COMM) 201/2021] under Section 36 of the Arbitration and Conciliation Act, 1996

[**A&C Act**] read with Order XXI Rule 11 of the Code of Civil Procedure, 1908 [**CPC**] for enforcement of the recommendations [**the Award**] of the Dispute Review Board [**DRB**] dated 21.12.2006; 04.05.2007 (Review) and 27.06.2007 (Clarification) pertaining to Dispute No. 18 – reimbursement of extra cost for generating power by DG sets[1]. According to JHC, the DRB's recommendations being in the context of a claim of an amount less than five crores, is required to be construed as an arbitral award rendered under the A&C Act.

5. The learned Single Judge had declined to entertain the JHC's petition for enforcement of the Award on the ground that it was barred by limitation. JHC had filed its petition on 16.12.2021, which concededly was beyond the period of twelve years from the date of the Award. However, it is contended on behalf of JHC that although the Award was binding on the parties, the same could not be considered as an arbitral award till a declaration to the said effect was made by the court.

6. Mr Sawhney, the learned senior counsel appearing for JHC contended that the respondent [**SJVN**] had filed a civil suit [being CS(OS) 1708/2008] impugning the Award. JHC had contested the said suit. JHC had filed an application under Order VII Rule 11 of the CPC for dismissal of the suit contending that the Award was required to be considered as an arbitral award under the A&C Act and therefore, the suit was not maintainable. JHC had withdrawn its application while reserving its right to address the issue at the final hearing. SJVN's suit was dismissed on 02.12.2021 following a

[1] The impugned order erroneously mentions DRB recommendations' dates which were subject matter of OMP(ENF.)(COMM) 201/2021 as well as the civil suits challenging the said DRB recommendations.

similar declaration in another similar suit. It is contended that it is at this stage that the Award became capable of being enforced under Section 36 of the A&C Act.

PREFATORY FACTS

7. JHC (the appellant) is a joint venture consortium constituted of a company named Jaiprakash Associates Limited, formerly known as Jaiprakash Industries, incorporated under the laws of India and having its registered office at Sector 128, Noida, Uttar Pradesh; and a foreign company namely M/s. Hyundai Engineering and Construction Co. Ltd. having its registered office at Overseas Business Development Department, 140-2, Kye-Dong, Jongru-Ku, Seoul, South Korea.

8. SJVN (the respondent) – a joint venture between the Government of India and the Government of Himachal Pradesh – is a public company incorporated under the Companies Act, 1956 and having its registered office at D-15, Sector 1, Phase 1, New Shimla. SJVN is primarily engaged in the production and generation of electricity through hydroelectric power projects and also undertakes the construction of dams and other related civil construction works.

9. SJVN undertook the construction of Nathpa Jhakri Hydro Electric Project (1500 MW) located in the State of Himachal Pradesh on National Highway No. 22 and completed the same in 2003. JHC was awarded the contract pursuant to a competitive bidding process, to execute Civil Works for Pressure Shafts and Powerhouse Complex of Nathpa Jhakri Hydro Electric Project. SJVN (then known as Nathpa Jhakri Power Corporation

Limited) had entered into an agreement being Agreement No.4/93 dated 24.06.1993 [**the Agreement**] for the said purpose.

10. The scope of the Agreement covered mostly underground works, involving deployment of construction plant and machineries. During the execution of the agreement, dispute arose between the parties and the JHC raised a claim for reimbursement of extra cost for generating power by DG sets.

11. The Engineer-in-Charge of SJVN rejected the said claim. JHC appealed the said decision before the CMD, (SJVN) and sought approval of reimbursement of additional cost. However, the CMD (SJVN) rejected JHC's appeal as well. Aggrieved by the same, JHC referred the dispute to the DRB in terms with Clause 67 of GCC as modified. The DRB was constituted in terms of the Annexure A and Clause 67 of the Agreement, to conduct its proceedings following the principles of natural justice. Clause 67 of GCC is an integral part of the Agreement between the parties. The scheme of resolution of disputes classifies the disputes in two categories. The first relates to disputes including claims up to ₹5 crores (₹50 million) and the second relates to disputes involving claims above ₹5 crores (₹ 50 million). The decision of the DRB in cases involving individual claims not exceeding ₹5 crores is final and binding.

1. Clause 67 of the GCC as modified is reproduced as under:

> "(i) If the Contractor considers any work demanded of him to be outside the requirements of the Contract or considers any decision of the Engineer-in-Charge on any matter in connection with or arising out of the Contract or carrying out of work to be unacceptable, he shall promptly ask the Engineer-in-Charge in writing for written instructions or decision. There-upon the

Engineer-in-Charge shall give his written instructions or decision within a period of thirty days of such request.

Upon receipt of the written instructions or decision, the Contractor shall promptly proceed without delay to comply with such instructions or decision.

If the Engineer-in-Charge fails to give his instructions or decision in writing within a period of thirty days after being requested for or if the Contractor is dissatisfied with the instructions or decision of the Engineer-in-Charge, the Contractor may within thirty days after receiving the instructions or decision, file a written appeal with the CMD, NJPC stating clearly, and in detail, the basis for the objection. The CMD will consider the written appeal and make his decision on the basis of the relevant Contract provisions, together with the facts and circumstances involved in the dispute. The decision will be furnished in writing to the Contractor within thirty days after the receipt of the Contractor's written appeal.

If the Contractor is dissatisfied with this decision, the Contractor, within a period of fifteen days from the receipt of the decision, shall indicate to the CMD, NJPC (SJVN Ltd) his intention to refer the matter to the Disputes Review Board (DRB) and within a period of another fifteen days shall formally appeal to the Disputes Review Board.

The constitution of the Disputes Review Board and the procedure to be adopted by it for resolving the disputes is elaborated in the Annexure-A, provided, however, all such disputes which may arise to the Constitution of the Board, shall be taken up for consideration at its first meeting convened not later than 30 days upon its constitution. As specified para I of Annex-A, the disputes involving the individual up to Rs.50.00 (fifty) million shall be binding on the NJPC (SJVN Ltd) and the Contractor. In the case of the dispute involving individual claim beyond Rs.50.00 (fifty) million, if inspite of the recommendations/decision of the Disputes Review Board, the dispute remains unresolved, either party, within 15 days of the receipt of the aforesaid recommendations/decision of the Board, may appeal the decision back to the Board for review. However,

if even after this review of its recommendations/decision by the Disputes Review Board, the two parties still fail to resolve the dispute, either party may resort to arbitration. In that case, within a period of 30 days of the receipt of the Disputes Review Board's final recommendations/decision, the party desiring to resort to arbitration shall indicate its intention to refer the dispute to Arbitration, failing which, the said final recommendations/decision of the Disputes Review Board shall be conclusive and binding.

(ii) The dispute arising between a foreign Contractor and the NJPC (SJVN Ltd) shall be referred to the adjudication of three Arbitrators, one to be nominated by the NJPC (SJVN Ltd), the second by the Contractor and the third by the President of the International Chamber of Commerce. The arbitration shall be conducted in accordance with the provisions of Indian Arbitration Act, 1940 or any statutory amendments thereof or at the Contractor's option, in accordance with the Rules or procedure for arbitration of the International Chamber of Commerce, Paris.

The term "Foreign Contractor" applies to a Contractor who is not registered in India and is not a juristic person under Indian Law.

(iii) The disputes arising between an Indian Contractor and the NJPC shall be resolved by 'arbitration' in accordance with the provisions of Indian Arbitration Act, 1940 or any statutory amendments thereof. The Board of arbitrators shall be constituted by three 'arbitrators' one to be nominated by the Contractor, the second by the NJPC and the third by the Secretary (Power), Ministry of Energy, Govt. of India.

The term 'Indian Contractor' applies to a Contractor who is registered in India and is a juristic person under Indian Law or to a Joint Venture of Indian and Foreign firms eligible for price preference as stipulated in Para 1.29.2 (Chapter-I) of these documents.

(iv) The said arbitrators shall have full power to open up, revise and review any decision, opinion, direction, certificate of value etc. relating to the matter of dispute.

(v) If either of the parties fail to appoint its arbitrators in pursuance of sub-clauses (ii) and (iii) above, within sixty days after receipt of the notice of the appointment of its arbitrators, then the President of International Chamber of Commerce in case of Foreign Contractor or the Secretary (Power), Ministry of Energy, Govt. of India in case of Indian Contractor, as the case may be, shall have the power, at the request of either party to appoint arbitrator. A certified copy of the President's /Secretary (Power)'s order making such an appointment shall be furnished to both the parties

(vi) Neither party shall be limited in the proceedings before such arbitrators to the evidence or arguments already put before any authority hereinabove provided for the purpose of obtaining its said recommendation/decisions. No recommendations/decisions given by the DRB shall disqualify any of its members from being called as a witness and giving evidence before the arbitrators on any matter whatsoever relevant to the dispute or difference referred to the arbitrators as aforesaid.

(vii) The reference to arbitration may proceed notwithstanding that the Words shall not then be or be alleged to be complete, provided always that the obligations of the NJPC (SJVN Lad), the Engineer-in-Charge and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works. Neither party shall be entitled to suspend such Work to which the dispute relates and payment to the Contractor shall be continued to be made in terms of the Contract.

(viii) (a) All arbitration shall be held at New Delhi, India.

(b) the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

(ix) The decision of the majority of arbitrators shall be final and binding upon the parties. The expenses of the arbitrators as determined by the arbitrators shall be shared equally by the NJPC (SJVN Ltd) and the Contractor. However, the expenses incurred by each party in connection with the preparation, presentation etc. of its cases prior to, during and after the arbitration

proceedings shall be borne by each party itself.

(x) All awards of arbitration shall be in writing and shall state reasons for the amounts awarded."

12. The DRB allowed the JHC's claim in respect of Dispute No. 18 and held that SJVN was liable to pay ₹1,83,10,703/- and was further liable to pay interest at the rate of 10% per annum from the date of submission of the claim to the DRB till its payment. SJVN did not implement the said Award.

13. As is apparent from Clause 67 of the GCC as amended, the dispute resolution clause provides a multi-tier dispute resolution mechanism. In terms of the dispute resolution clause, the DRB's decision in respect of any dispute involving claims up to Rupees fifty million (₹5 crores) would be final and binding between the parties. However, in respect of disputes involving larger claims, the party dissatisfied with the decision of the DRB has an option to resort to arbitration. If desires to take the said recourse it is required to indicate its intention to do so, failing which the decision of the DRB would be final and binding in respect of disputes involving claims larger than ₹5 crores as well. In the present case, the dispute escalated to the DRB involves claims less than ₹5 crores.

14. It is material to note that the Himachal Pradesh High Court had rendered a decision on 07.06.2006 in *OMP No.113/2005 in Civil Suit No.56/2004* captioned *Satluj Jal Vidyut Nigam Limited v. M/s Nathpa Jhakri Joint Venture* holding that such a decision rendered by the DRB in respect of disputes of a value less than ₹5 crores is required to be construed as an arbitral award under the A&C Act and the same could not be challenged by

an aggrieved party by filing a suit. The only remedy available to such a party would be to file an application under Section 34 of the A&C Act to set aside the award. Although the said decision was rendered in the context of another contract of which JHC was not a party, however, there is no cavil that the said decision was rendered in the context of a clause, which is identical to Clause 67 of the GCC as modified.

15. SJVN had also filed suits in respect of other disputes involving other contractors raising a challenge to the decisions of the DRB [being CS(OS) 1498/2013; 1510/2013, 1511/2013; 958/2009; 1072/2009].

16. As noted above, SJVN had filed a suit [CS(OS) 1708/2008], *inter alia*, challenging the Award delivered by the DRB. JHC filed applications in the said suit, under Order VII Rule 11 of the CPC, relying on the decision dated 27.08.2018 of the Delhi High Court in *SJVN Limited v. Jaipraksh Hyundai Consortium (JHC)*. JHC sought dismissal of the suit as being not maintainable on the ground that the Award rendered by the DRB was an arbitral awards and thus, could not be impugned by filing a suit.

17. SJVN had also filed similar suits challenging the decision of the DRB rendered in respect of different disputes, but amongst the same parties [CS(OS) 958/2009 and CS(OS) 1072/2009]. JHC filed applications under Order VII Rule 11 of the CPC in these suits as well.

18. However, after some arguments, JHC withdrew its applications on 12.03.2010 filed under Order VII Rule 11 of the CPC and reserved its right to press the challenge at the stage of final hearing. A common order dated 12.03.2010 was passed in the aforementioned three suits [CS(OS) 958/2009, CS(OS) 1072/2009, CS(OS) 1708/2008] consolidating the three suits and

directing that CS(OS) 958/2009 be considered as a lead case.

19. On 20.03.2013, the learned Single Judge framed the following issues in CS(OS) 958/2009:

> "1. Whether the decision/observations of the Dispute Review Board dated 6.8.2005 and 21.11.2006 respectively under contract No. 3.0, Agreement 4/93 dated 24.06.1993 are null, void, illegal and of no consequence? OPP
>
> 2. Whether the defendant is not entitled to the additional payment for providing stiffener rings on steel liners under contract No. 3.0 Agreement 4/93 dated 24.06.1993? OPP
>
> 3. Whether the decision/observations of the Dispute Review Board DRB dated 21.12.2006, 4.5.2007 & 27.06.2007 respectively under challenge are in fact awards under the Arbitration and Conciliation Act, 1996? OPD
>
> 4. Whether the suit framed is liable to be rejected/dismissed in view of Order & Rule 11 CPC r/w Section 5, 34(1), 35 and 26 of the Arbitration and Conciliation Act, 1996? OPD
>
> 5. Whether the plaintiff is entitled to the relief of declaration and permanent injunction? OPP
>
> 6. Whether the decisions of the Dispute Review Board dated 6.8.2005 and 21.11.2006 respectively are binding upon the parties in view of modified clause 67 of the General Conditions of Contract? OPD
>
> 7. Whether the suit is liable to be dismissed for suppression of facts with regard to invocation of jurisdiction of Courts in Himachal Pradesh against the decisions of DRB pertaining to other contractors but under modified clause 67 of GCC? OPD"

20. The issue whether a suit is maintainable to challenge a decision of the DRB was also subject matter of challenge in *CS(OS) 1498/2013* captioned *SJVN Limited v. Jaiprakash Hyundai Consortium (JHC).* JHC had also filed an application under Order VII Rule 11 of the CPC, *inter alia*, on the ground

that the decision of the DRB was an arbitral award covered under the A&C Act [being IA No.1784/2018 in CS(OS) 1498/2013]. It is material to note that in the said case, SJVN had sought a declaration that the decision of the DRB was factually and legally correct. The learned Single Judge after hearing the parties allowed JHC's application for dismissal of the plaint under Order VII Rule 11 of the CPC and held that the suit was not maintainable. The relevant extract of the said decision is set out below:

> "8. Having heard learned counsel for the parties, this Court is of the view that the issues raised in the present application are not *res integra*. The High Court of Himachal Pradesh after interpreting the same dispute resolution Clause 67 and after hearing the plaintiff and the defendant has already held that the decision of the DRB amounts to an arbitral award. The said judgment has attained finality and cannot be challenged by filing a separate proceeding in another High Court.
>
> 9. The fact that in the present case the plaintiff does not challenge the decision of the DRB but only seeks a declaration that the decision of the DRB is factually and legally correct makes no difference to the nature of the decision of the DRB.
>
> 10. Consequently, in view of the judgment in *Satluj Jal Vidyut Nigam Limited* (supra), this Court is of the view that the relief sought by the plaintiff for declaration that the decisions of the DRB dated 20th September, 2008 and 12th August, 2009 are factually and legally correct is not maintainable.
>
> 11. This Court is further of the view that it cannot decree the amount that has already been awarded by the DRB as the said dispute had already been adjudicated in favour of the plaintiff and against the defendant. Grant of such a relief would also amount to re-litigation and re-determination of disputes that had already been adjudicated upon by a Forum agreed upon between the parties.
>
> 12. In the event, the defendant refuses to pay to the plaintiff for any reason whatsoever, the remedy lies with the plaintiff in filing an

execution petition and not by way of the present suit.

13. Consequently, the present suit is dismissed with liberty to the plaintiff to file appropriate legal proceedings in accordance with law. The rights and contentions of all the parties are left open."

21. SJVN appealed the said decision before the Division Bench of this court [being *RFA(OS) 15/2019* captioned *SJVN Ltd. v. Jaiprakash Hyundai Consortium*], which was dismissed by a judgment dated 18.02.2009.

22. In view of the aforesaid decision, JHC filed fresh applications under Order VII Rule 11 of the CPC in the three consolidated suits [CS(OS)958/2009, CS(OS) 1072/2009, 1708/2008], which were allowed by the order dated 02.12.2021. The learned Single Judge – following the decision of the Division Bench of this court in RFA(OS) 15/2019 – allowed the said applications and dismissed the suits with liberty to the SJVN to file appropriate legal proceedings in accordance with law in respect of the decision of the DRB.

23. Thereafter, JHC filed an execution petition [being OMP(ENF.)(COMM) No. 201 of 2021] in this court seeking enforcement of the Award [DRB recommendations dated 21.12.2006, 04.05.2007 and 27.06.2007]. SJVN filed its reply, *inter alia*, objecting to the said petition as being time barred for the reason that it was filed twelve years after the recommendations of the DRB. The appellant placed reliance upon Section 15 of the Limitation Act, 1963 while contending that the time spent in the prosecution of civil suit [CS(OS) No. 1708/2008] cannot be excluded as there was no stay order passed in the said suit.

24. The aforementioned execution petition was dismissed by the

impugned order dated 11.07.2024 holding it to be time barred. This court found that the delay cannot be condoned as the judgment dated 27.08.2018 was merely declaratory in nature and did not apply prospectively.

REASONS AND CONCLUSION

25. It is apparent from the facts as narrated above that SJVN was not accepting the Award or other similar decisions rendered by the DRB as an arbitral award, covered under the A&C Act. However, it was JHC's consistent stand that the Award was an arbitral award within the meaning of Clause (c) of Section 2 of the A&C Act.

26. JHC had prevailed in its view and this court had accepted the said contention. The court had accordingly, dismissed the suits filed by SJVN. As noted above, the applications filed by JHC under Order VII Rule 11 of the CPC challenging the maintainability of the suit preferred by SJVN was allowed. It is, thus, not open for JHC to now contend that the Award was not an arbitral award till a decision accepting the JHC's plea, was rendered by this court.

27. There were no interim orders granted by the court at any stage interdicting JHC from taking steps for enforcement of the Award. The learned Single Judge had rightly observed that the Award was enforceable immediately on being rendered.

28. There is no substance in the argument that the Award became an arbitral award only pursuant to the decision rendered by this court dismissing the suits filed by SJVN and recognizing the decision of the DRB as an arbitral award. There is no provision in the A&C Act, which precludes

a party to arbitration from instituting proceedings for enforcement of the award unless the same is recognized as an arbitral award in any other proceedings. In terms of Section 36 of the A&C Act, the arbitral award is required to be enforced as a decree.

29. The suit instituted by SJVN did not eclipse the efficacy or the ability of the JHC to institute proceedings for enforcement of the Award.

30. In view of the above, we find no infirmity in the impugned order rejecting JHC's petition for enforcement of the Award as being barred by limitation. The appeal is, accordingly, dismissed.

31. All pending applications are also disposed of.

VIBHU BAKHRU, J

TEJAS KARIA, J

MAY 27, 2025
RK

Click here to check corrigendum, if any