Visa International Ltd vs Continental Resources (Usa)Ltd on 2 December, 2008

Equivalent citations: AIR 2009 SUPREME COURT 1366, 2009 AIR SCW 791, 2009 (3) AIR JHAR R 422, 2009 CLC 271 (SC), 2009 (2) SCC 55, (2009) 1 CLR 393 (SC), 2008 (15) SCALE 497, (2008) 15 SCALE 497, (2008) 4 ARBI L.R. 539, (2009) 2 MAD LW 504, (2009) 1 ICC 180, (2009) 4 ALL WC 3896, (2009) 1 CURCC 103

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Bench: B. Sudershan Reddy

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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NO. 16 OF 2007

VISA International Ltd. ...Applicant

Versus

Continental Resources (USA) Ltd. ...Respondent

JUDGMENT

B.SUDERSHAN REDDY,J.

This application under sub-section (5) and (9) of Section 11 of the Arbitration and Conciliation Act, 1996 (for short "the Act") has been filed with a prayer to appoint an Arbitrator in terms of Clause VI of the agreement dated 15.2.2005 entered into by and between the applicant and the respondent.

2. The facts leading to filing of this application may briefly be noticed:

3. The applicant is, inter alia, engaged in the business of providing services in international trading of Minerals, Metals and Ship Chartering. The respondent with an intention to make substantial

investments to set up an integrated aluminium complex in Orissa with an Alumina refinery to be catered by the bauxite deposits of Gandhamardan Mines entered into a Memorandum of Understanding (for short "MOU") with Orissa Mining Corporation Ltd. (for short "OMC") for mining of bauxite deposits from the Gandhamardan Mines situated in the State of Orissa. In order to help set up integrated aluminium complex in Orissa, OMC had decided and agreed to enter into a Joint Venture Agreement with the respondent on certain terms and conditions.

4. In terms of the proposed joint venture agreement, the respondent was required to set up an integrated alumina complex in the vicinity of the Gandhamardan area and was further obliged to utilize the bauxite lifted from the said mines as raw material in the proposed aluminum complex. The respondent proposed to the applicant to set up the said integrated aluminum complex in joint venture with the applicant by duly incorporating a Special Purpose Vehicle (SPV) for the purpose.

5. The applicant relying upon representations and assurances had accepted the proposal for setting up of the said aluminum complex in joint venture with the respondent. The parties mutually agreed to execute a MOU and an agreement to clearly define their respective rights and obligations thereto. Accordingly, a MOU dated 14.2.2005 was executed by and between the applicant and the respondent whereby and whereunder it was agreed that the applicant and the respondent would incorporate a company in the name and the style of "VISA Aluminum Ltd" for the purpose of setting up an integrated Aluminum Complex. The said MOU was followed by an agreement dated 15.2.2005 executed between the parties. In terms of the said agreement it was agreed that the respondent would enter into the joint venture agreement with OMC while the applicant and the respondent would incorporate a company in the name and style of "VISA Aluminum Limited" for setting up an integrated Aluminum Complex. In terms of the said agreement 26% of the issued and paid up equity shares of the proposed company to be retained by the respondent and the remaining 74% of the shareholding to be held by the applicant. The applicant agreed to bear a sum of US$ 7,40,000 being 74% of US$ 10,00,000 to have been incurred by the respondent on the pre-project activities. Day to day control was agreed to be that of the applicant exclusively. The applicant also undertook to pay a sum of US$ 22,50,000 to the respondent for the future overseas costs in terms of the said agreement. Article IV of the said agreement stipulated that the agreement to be effective upon signing by both the parties with immediate effect. The whole controversy centers around the interpretation of Article VI in the said agreement which according to the applicant contains the Arbitration Clause.

6. It may not be necessary for the purpose of disposal of this application to note further details as to what transpired between the applicant and the respondent after entering into the agreement till 31st August, 2006. Suffice it to note that on 31st August, 2006 the respondent addressed a letter to the applicant, inter alia, alleging the agreement entered into between them is not `appropriate and is obsolete' as it does not address the changes in the OMC draft agreement itself. The respondent proposed a new agreement to be prepared on the lines suggested therein. This is the starting point leading to unending and acrimonious correspondence between the applicant and the respondent accusing each other of overreach. The applicant asserted that the agreement dated 15.2.2005 entered into by and between the parties continued to be valid and subsisting and whereas the respondent contended that the agreement became unworkable. On 25.9.2006 the respondent

informed the applicant that MOU dated 14.2.2005 and agreement dated 15.2.2005 "stand discharged and CRL stands discharge" of its obligations under the said agreement. MOU dated 14.2.2005 and agreement dated 15.2.2005 was treated as cancelled. The applicant vide letter dated 6.3.2007 informed the respondent that its action of unilaterally terminating the said MOU and also the agreement was not acceptable to it. The applicant accordingly invoked the arbitration clause duly informing the respondent that disputes thus have arisen out of the said MOU and the agreement which are required to be resolved by the Arbitrator. The respondent in its turn vide letter dated 3.4.2007 rejected the names suggested by the applicant to be appointed as Arbitrator for the reasons that (a) the arbitration will not be cost effective; and (b) the arbitration is pre-mature.

7. Be it noted that the respondent never disputed the existence of the arbitration clause. Nor was the case of the respondent that dispute if any between the parties may have to be resolved by way of conciliation and not by arbitration. It is under those circumstances the present application has been filed by the applicant under Section 11(5) & (9) of the Arbitration and Conciliation Act, 1996.

8. The respondent admits the execution of the said MOU as well as the agreement dated 15.2.2005 but contends that the agreement is an inchoate document, a contingent matter, not capable of being enforced as an arbitration agreement. The exchange of letters by and between the parties is not in dispute. It is also the case of the respondent that the applicant failed to identify the dispute that could not be resolved amicably and as such there is no question of referring the matter to arbitration by appointing an arbitrator.

9. Having regard to the pleadings and contentions the following questions arise for consideration:

1. Whether there exists a valid arbitration agreement between the parties?

2. Whether there exists a live claim between the parties?

10. It is now well settled that the power exercised by the Chief Justice of India or the Designated Judge under Section 11 (6) of the Arbitration and Conciliation Act, 1996 is not an administrative power. It is a judicial power. In SBP & Co. Vs. Patel Engineering Ltd. & Anr. [(2005) 8 SCC 618] this Court in its authoritative pronouncement held that while exercising the power or performing the duty under Section 11 (6) of the Act, the Chief Justice or the designated Judge has to consider whether the conditions laid down by the Section for the exercise of that power or the performance of that duty, exist. The Chief Justice or the designated Judge as the case may be, is bound to decide whether he has jurisdiction to entertain the request, in the sense, whether there is a valid arbitration agreement in terms of Section 7 of the Act and whether the person before him with a request is a party to the arbitration agreement or whether there was no dispute subsisting which was capable of being arbitrated upon. These principles ought to be borne in mind while deciding the application under Section 11 (6) of the Act.

Whether there exists a valid arbitration agreement between the parties?

11. The disputed arbitration clause in the present case reads as under:

> "Any dispute arising out of this agreement and which cannot be settled amicably shall be finally settled in accordance with the Arbitration and Conciliation Act, 1996."

12. Arbitration agreement is defined under Section 7 of the Act. It does not prescribe any particular form as such. In terms of the said provision arbitration agreement means:

> (1) An agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (3) An arbitration agreement shall be in writing.
>
> (4) An arbitration agreement is in writing if it is contained in -
>
> a) a document signed by the parties;
>
> b) .....
>
> c) .....
>
> (5) .....

13. This Court in Rukmani Bai Gupta Vs. Collector of Jabalpur [(1980) 4 SCC 556] had an occasion to construe a clause in the lease deed which provided:

> "Whenever any doubt, difference or dispute shall hereafter arise touching construction of these presents or anything herein contained or any matter or things connected with the said lands: or the amount or payment of any rent or royalty reserved or made payable hereunder in the matter in difference shall be decided by the lessor whose decision shall be final."

14. In that case the lessor was the Governor of the State. This Court took the view that the said clause read as a whole provided for referring future disputes to the arbitration of the Governor.

15. Be it noted the said clause does not use any expression of "arbitration, a settlement of dispute by the arbitrator". This Court observed that arbitration agreement is not required to be in any particular form. It was held what is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement.

16. In M. Dayanand Reddy Vs. A.P. Industrial Infrastructure Corp. Ltd. & Ors. [(1993) (3) SCC 137] the legal position has been further clarified when this Court in clear and categorical terms held:

> "An arbitration clause is not required to be stated in any particular form. If the intention of the parties to refer the dispute to arbitration can be clearly ascertained from the terms of the agreement, it is immaterial whether or not the expression `arbitration' or `arbitrator' or arbitrators' has been used in the agreement."

17. The Court is required to decide whether the existence of an agreement to refer the dispute to arbitration can be clearly ascertained in the facts and circumstances of the case. This, in turn, may depend upon the intention of the parties to be gathered from the correspondence exchanged between the parties and the surrounding circumstances. In the instant case, the respondent while rejecting the names suggested by the applicant for resolution of the disputes by the arbitrator never disputed the existence of the arbitration clause. The applicant vide letter dated 20.9.2006 in response to the respondent's letters dated 7,8,13 and 15.9.2006 and duly placing reliance upon MOU dated 14.2.2005 and agreement dated 15.2.2005 asserted that agreement entered into between the parties provided for resolution of all disputes by arbitration. The applicant accordingly expressed its willingness to refer the matter to arbitration. The respondent in its reply dated 25.9.2006 stated that referring the matter for arbitration "is irrelevant and inappropriate" in absence of any valid agreement, in as much as the MOU dated 14.2.2005 was itself conditional and not effective. The respondent did not dispute the existence of a valid arbitration clause in the agreement. The plea was that agreement entered into between the parties on 15.2.2005 itself was not a valid one.

18. That an arbitration agreement is not required to be in any particular form has been reiterated in more than one decision. [see:

> Bihar State Mineral Development Corporation Vs. Encon Building (2003) 7 SCC 418]. What is required is to gather the intention of the parties as to whether they have agreed for resolution of the disputes through arbitration. What is required to be decided in an application under Section 11 of the Act is whether there is any arbitration agreement as defined in the Act? It needs no reiteration that Section 7 of the Act does not prescribe any particular form and it is immaterial whether or not expression `arbitration' or `arbitrator' or `arbitrators' has been used in the agreement.

19. Shri K.K. Venugopal, learned senior counsel appearing on behalf of the respondent submitted that MOU dated 14.2.2005 does not contain any arbitration clause and further the agreement dated 15.2.2005 itself is a contingent agreement incapable of being enforced.

20. Dr. Singhvi, learned senior counsel for the applicant in response to the said contention submitted that MOU dated 14.2.2005 culminated in the agreement dated 15.2.2005 which contained a valid arbitration clause and there is no legal hindrance to appoint an arbitrator for resolving the disputes.

21. The crucial question centers around the interpretation of Clause VI of the agreement dated 15.2.2005. Shri Venugopal, in response to a pointed query from the court submitted that the intention of the respondent was to agree for settlement of the disputes through conciliation in accordance with the provisions of the Act in case of failure to settle disputes amicably between the parties. The submission was in a case of arbitration, there is no settlement; the award of an arbitrator who has to be independent and impartial from the parties is binding by and between the parties not because both the parties finally have settled the matter but because of legal sanctity. There has been no attempt whatsoever to amicably settle the matter which is a pre-condition to invoke the latter limb of Article VI and therefore, the application under Section 11 is liable to be rejected. The learned counsel in this regard placed reliance on the decision in Iron and Steel Company Ltd. Vs. Tiwari Roadlines reported in [2007) 5 SCC 703]. In the said case the parties have agreed for resolution of disputes by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. No efforts were made to have the disputes settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. On the contrary, one of the parties moved an application under Section 11 of the Act. It is under those circumstances this Court held:

> "Since the parties here had agreed on a procedure for appointing an arbitrator for settling the dispute by arbitration as contemplated by Section 11 (2) and there is no allegation that any one of the contingencies enumerated in Section 11 (6) clause (a) or (b) or (c) had occurred, the application moved by the respondent was clearly not maintainable and the court had no jurisdiction to entertain such an application and pass any order." (emphasis supplied)

22. The case has no application to the fact situation in hand. It was a case where one of the parties invoked Section 11(6) of the Act without there being no allegation that any one of the contingencies enumerated in Section 11(6) Clause (a) or (b) or (c) had occurred.

23. In the present case the parties did not agree upon any particular procedure for the appointment of the arbitrator. Clause VI provides that disputes arising out of the agreement which could not be settled amicably shall be finally settled in accordance with the provisions of the Act.

The question is whether the parties have agreed to resolve their disputes by arbitration or through conciliation?

24. Be it noted that at no stage the respondent took any plea that the dispute was required to be settled through conciliation in accordance with the Arbitration and Conciliation Act, 1996. It is evidently an afterthought. Shri Venugopal submitted that on a comparison with dispute resolution clause in the MOU entered into between the OMC and CRL with the settlement clause in the agreement dated February 15, 2005, it is apparent that there was no specific intention of the parties to refer the disputes to arbitration. It is true that the dispute resolution clause in MOU entered into between OMC and CRL is more specific in its terms but the said clause would not throw any light in construing clause VI in the agreement dated 15th February, 2005. One cannot take into consideration terms of other contracts especially when the contract is not between the same parties.

25. Shri Venugopal, relied on that clause and submitted that in the absence of a similar clause in the present agreement the parties have made their intention expressly clear to resolve their disputes through conciliation in case of failure to settle the disputes amicably among themselves.

26. The submission is unsustainable for more than one reason. No party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of parties to go for arbitration in case of any future disputes is evident from the agreement and material on record including surrounding circumstances.

27. What is required to be gathered is the intention of the parties from the surrounding circumstances including the conduct of the parties and the evidence such as exchange of correspondence between the parties. The respondent in none of its letters addressed to the applicant suggested that the dispute between the parties is required to be settled through conciliation and not by arbitration. In response to the applicant's letter invoking the arbitration clause the respondent merely objected to the names inter-alia contending the suggested arbitration would not be cost effective and the demand for arbitration itself was a premature one.

Is there any material available on record suggesting that the parties intended to resolve their disputes through conciliation on failure to settle the disputes amicably among themselves?

28. Part III of the Act deals with conciliation. Section 61 provides:

> "save as otherwise provided by any law and unless have otherwise agreed, Part III shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto. Section 62 speaks of commencement of conciliation proceedings. It says the party initiating conciliation shall send to the other party a written invitation to conciliate under Part III, briefly identifying the subject of the dispute and the conciliation proceedings shall commence when the other party accepts in writing the invitation of conciliation. If the other party rejects the invitation, there will be no conciliation proceedings. Part III of the Act does not envisage any agreement for conciliation of future disputes. It only provides for an agreement to refer the disputes to conciliation after the disputes had arisen. Whereas Section 7 of the Act which speaks of arbitration agreement provides for an agreement between the parties to submit to the arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

29. Clause VI in the present case obviously provides for resolution of the disputes between the parties which may arise out of the agreement after its execution. There was no dispute between the parties even as on the date of the agreement. That apart the conciliator only assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their disputes. The conciliator provides guidance as provided for under Section 67 of the Act. Under Section 73 of the Act the Conciliator formulates the terms of a possible settlement when it appears to him that there exist elements of a settlement which is acceptable to the parties. Ultimately it is the

parties who are required to reach an agreement on a settlement of dispute. The conciliator merely authenticates the settlement agreement. The settlement agreement shall have the same effect as the arbitral award on agreed terms on the substance of the dispute rendered by the arbitral tribunal under Section 30.

30. In the present case as is evident from Clause VI of the agreement the parties intended to settle the disputes amicably among themselves and only in case of failure the disputes were required to be settled in accordance with the provisions of the Act. It is clearly evident from the language employed in Clause VI that on failure to settle the disputes amicably the parties intended to invite a binding verdict in accordance with the provisions of the Act. The parties never intended to go through the conciliation proceedings even after their failure to arrive at an amicable settlement among themselves. It is pertinent to observe that the respondent never initiated any conciliation by sending any written invitation to conciliate under Part III of the Act. In the circumstances, it is impossible to accede to the submission that the parties intended to settle their future disputes arising out of the agreement through conciliation.

31. Shri Venugopal submitted that the agreement dated 15th February, 2005 is of inchoate nature and is a contingent agreement, therefore, even if any dispute had arisen the same cannot be referred to any Arbitral Tribunal to resolve it.

32. The decision reported in E.J.R. Lovelock Ltd. Vs. Exportles [1968] Vol.1 Lloyd's Law Reports 163 and AIG Europe S.A. vs. QBE International Insurance Ltd. reported in [2001] Vol.2 LLR 268 upon which reliance was placed are not applicable to the facts of the case and render any assistance to resolve the issue. In E.J.R. Lovelock Ltd.(supra) the arbitration clause was divided into two parts. The first part (which was lifted bodily from a standard form and contract) provided for arbitration before English arbitrators. The second part provided for arbitration in Russia in accordance with Russian Chamber of Commerce Arbitration Rules. Lord Denning having interpreted the arbitration clause contained in the agreement in that case observed that the clause was so uncertain that the court cannot give effect to it.

> "The clause is divided into two parts which are inconsistent with one another: and it is impossible to reconcile them. The first part of this arbitration clause would send "any dispute and/or claim to arbitration in England. The second part of the clause would send "any other dispute" to arbitration in Russia. It is beyond the wit of man or at any rate beyond my wit - to say which dispute comes within which part of the clause.....the whole clause is meaningless. It must be rejected.
>
> The court cannot give effect to it. The dispute cannot be sent to arbitration." In AIG Europe S.A.; Queen's Bench Division while construing a contract of reinsurance which inter-alia provided:
>
> "All terms clauses and conditions as original in all respects including settlements:
>
> The underlying policy contained among its general conditions the following clauses:

> (L) Arbitral Procedure In case of dispute between the insured and the insurers the parties will apply to Tribunal de Commerce in Paris who will appoint an arbitrator.....
>
> (M) Law and Jurisdiction In the event of dispute between the insured and the insurer.....the.....parties should address themselves to the French Courts which have sole jurisdiction; foreign companies which have accepted part of the risk are also subject to the jurisdiction of the French Courts..."

observed that clause (L) on its face merely provided for a preliminary procedure involving appointment of persons described as arbitrators; but it was clear that it was at best a procedure for consideration which might or might not result in a compromise of a dispute; it was clearly not an arbitration agreement in the sense in which that expression was normally used, nor did it deprive the courts of jurisdiction; as between the insured and insurer.

33. In the present case the parties have agreed that the disputes arising out of the agreement which cannot be settled amicably to be finally settled in accordance with the provisions of Arbitration and Conciliation Act, 1996. The Act not only provides for the procedure involving appointment of arbitrator but also comprehensively provides as to jurisdiction of Arbitral Tribunal and conduct of arbitral proceedings such as determination of rules of procedure; place of arbitration etc. and for making arbitral award and termination of proceedings. The arbitral award shall be final and binding on the parties and persons claiming under them respectively. The award is enforceable under the Code of Civil Procedure in the same manner as if it was a decree of the court. The parties have thus agreed for the resolution of the disputes making all the provisions of the Arbitration and Conciliation Act, 1996 applicable until the final termination of their disputes arising out of the agreement. The absence of word `Reference' may not clinch the issue inasmuch as it is the whole clause providing for the resolution/settlement of the disputes arising out of the agreement and not a word or two is required to be interpreted in order to gather the intention of the parties. In my considered opinion clear intention to refer the disputes to arbitration in accordance with the provisions of Arbitration and Conciliation Act, 1996 is clearly evident from Article VI incorporated in the agreement. It is also required to notice that clause VI contains expression "shall be finally settled....." which is of some significance. The award passed by the Arbitral Tribunal is final and binding on the parties and the persons claiming under them respectively of course subject to the provisions contained in Chapter III of the Act. A plane reading of the arbitration clause reveals that parties intended to settle disputes finally in accordance with the provisions of the Act in case of failure to arrive at amicable settlement.

34. Further the respondent has placed reliance and referred to the checklist of matters to be considered/suggested by Russel in his treatise, Russel on Arbitration. The contention was that the disputed clause does not satisfy the checklist of matters to be considered. Russel in his treatise suggests that while drafting an arbitration agreement care needs to be taken to ensure whether they need to be addressed in the particular circumstances of the case. The following is the checklist of the matters which according to Russel need to be considered when drafting an arbitration agreement. But it may not be necessary to include any provision for all of them. But thought should be given as to whether they need to be addressed in the particular circumstances of the case. A close scrutiny of

clause VI of the agreement which provides for the applicability of the provisions of Arbitration and Conciliation Act reveals that essential elements stated in the checklist have been addressed to namely:

1. The parties have been properly identified;

2. There is a clear reference to arbitration in accordance with the provisions of Arbitration and Conciliation Act, 1996;

3. The disputes that had arisen between the parties which could not be amicably settled are to be referred to arbitration;

4. The seat of the arbitration is to be in terms of Section 20 (1) and 20(2). The arbitral tribunal in the absence of any agreement between the parties is entitled to determine the place of arbitration;

5. The substance of the dispute is to be determined in accordance with the provisions of Sections 19,23,24,25,26,27 and other provisions of the Arbitration and Conciliation Act, 1996.

35. The arbitration clause states that the disputes arising out of the agreement which cannot be settled amicably to be finally settled in accordance with the Arbitration and Conciliation Act, 1996. Therefore, the provisions of the said Act will govern the appointment of Arbitrator, the reference of disputes and the entire process and procedure of arbitration from the stage of appointment of arbitration till the award is made and executed/given effect to. The provisions of the said Act would meet the requirement of checklist of the matters enumerated in the treatise. Once the parties agree for resolution of dispute in accordance with the Arbitration and Conciliation Act, 1996 the said Act will take care of the entire processes and procedure. Be that as it may when the specific intention of the parties is clearly evident from the arbitration clause the same cannot be treated as vague on the ground that it does not satisfy the suggested checklist of all matters to be considered while drafting an arbitration agreement.

Whether invocation of Article VI providing for arbitration is premature?

36. It was contended that the pre-condition for amicable settlement of the dispute between the parties has not been exhausted and therefore the application seeking appointment of arbitrator is premature. From the correspondence exchanged between the parties at pages 54-77 of the Paper-book, it is clear that there was no scope for amicable settlement, for both the parties have taken rigid stand making allegations against each other. In this regard a reference may be made to the letter dated 15th September, 2006 from the respondent herein in which it is inter-alia stated ".....since February, 2005 after the execution of the agreements, various meetings/discussions have taken place between both the parties for furtherance of the objective and purpose with which the agreement and MOU was signed between parties. Several correspondences have been made by CRL to VISA to help and support its endeavour for achieving the goal for which the above mentioned

agreements were executed." In the same letter it is alleged that in spite of repeated requests the petitioner has not provided any Funding Schedules for their portion of equity along with supporting documents to help in convincing OMC of financial capabilities of the parties and ultimately to obtain financial closure of the project. The exchange of letters between the parties undoubtedly discloses that attempts were made for an amicable settlement but without any result leaving no option but to invoke arbitration clause.

Whether there is any live issue between the parties ?

37. The next question that falls for consideration is as to whether there is a live issue between the parties? The application for arbitration can be made only when a dispute arises between the parties to the arbitration agreement and such dispute gives rise to a live issue. As to what is the meaning and nature of dispute has been summed up by Mustill and Boyd in their treatise on Arbitration law titled Law and Practice of Commercial Arbitration, 1982.....

> "A dispute means that there may be a difference of opinion as to the future performance of a contract. For example, one party may be denying that any further performance is due, on the ground that the contract has been discharged by repudiation or frustration; or it may be a common ground that the contract is subsisting, but the parties may be in a dispute about whether a particular act would constitute a valid performance, or whether one party is entitled to give a particular order, or exercise an option in a particular way. If the parties stand their ground in such a situation, a time will come when it is too late for the right view to prevail; one party will irremediably in the wrong; and serious financial loss is likely to ensue. All this can be prevented if the parties can mount arbitration with sufficient speed to enable them to know the true position under the contract before the time for performance has finally expired."

38. In the present case, in this sense there is a dispute and live issue between both the parties. It is not a stale claim or a claim barred by any limitation. However, it is required to note that this finding as to the existence of dispute is confined only for the purpose of finding out whether the arbitral procedure has to be started for resolving the live issue in between the parties.

39. In SBP & Co. vs. Patel Engineering Ltd. & Anr. [(2005) 8 SCC 618] it is observed:

> "39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by

> receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal."

40. It is amply clear from the facts as pleaded and as well as from the exchange of correspondence between the parties that there has not been any satisfaction recorded by the parties with respect to their claims. There has been no mutual satisfaction arrived at between the parties as regards the dispute in hand. The claims are obviously not barred by any limitation. It is thus clear that there is a live issue subsisting between the parties requiring its resolution.

41. In the light of foregoing discussion I am of the clear opinion that a clear case is made out for appointment of an arbitrator to decide the disputes between the parties.

42. Hon'ble Shri Justice Dr. A.S. Anand, former Chief Justice of India is appointed as the sole Arbitrator with a request to him to decide the disputes between the parties arising out of the agreement referred to in this order. The sole Arbitrator shall be at liberty to fix his fee in the matter.

43. The application is accordingly allowed.

.....J. [B.SUDERSHAN REDDY] New Delhi, December 2, 2008