

RLW - Pg. - 08.06.2013

2013(3) RLW Simpark Infrastructure Vs. Jaipur Municipal Corpn. (Asopa, J.) 2133

was observed that when the materials relied upon by a party are required to be proved, no inference can be drawn on the basis of those materials to conclude the complaint to be unacceptable. The Court should not act on annexures to the petitions under Section 482 of the Cr.P.C., which cannot be termed as evidence without being tested and proved.”

19. Applying the test in the present case, the allegations are clear. The present petitioner had attacked the injured with deadly weapons. The injured received both blunt and sharp injuries. It is a settled proposition of law that the intention and not the injury is to be seen while determining the offence under Section 307 IPC. Thus, the argument of the learned counsel that the injuries were simple and there is no finding that the said injuries were dangerous to life, has no merit. As such, no ground to set aside the impugned order dated 11.12.2012 passed by Additional District & Sessions Judge, Balotra in Cr. Case No.40/2012 is made out.

20. In view of the above, the present criminal revision petition being devoid of merit, is hereby dismissed.

[Citation : 2013(3) RLW 2133 (Raj.)]

(Rajasthan High Court)
Jaipur Bench

HON'BLE PREM SHANKER ASOPA, J.

Simpark Infrastructure Pvt. Ltd. (M/s.)

Versus

Jaipur Municipal Corporation

S.B. Arbitration Application No. 27 of 2011, decided on 11.10.2012

(a) Arbitration and Conciliation Act, 1996, Sec. 11(6) — Agreed arbitral procedure of dispute resolution — Made condition precedent for invoking the arbitration clause — Whether required to be followed by applicant — Held — Where the parties have agreed arbitral procedure of dispute resolution, which has been made a condition precedent for invoking the arbitral clause, then it is required to be followed before filing an application u/S. 11 of the Act. (Paras 19, 20)

(क) माध्यस्थम एवं सुलह अधिनियम, 1996, धारा 11(6) – विवाद के समाधान की सहमत माध्यस्थम प्रक्रिया – माध्यस्थम खण्ड का अवलम्बन लेने हेतु पुरोभाव्य शर्त बनाई – क्या प्रार्थी द्वारा अनुसरण किया जाना आवश्यक था – अभिनिर्धारित – जहां पक्षकार विवाद के समाधान की माध्यस्थम प्रक्रिया पर सहमत थे, जिसे माध्यस्थम खण्ड का अवलम्बन लेने हेतु पुरोभाव्य शर्त बनाई गई है, तो अधिनियम की धारा 11 के तहत आवेदन दायर करने से पूर्व उसका अनुसरण किया जाना आवश्यक है। (पद संख्या 19, 20)

(b) Arbitration and Conciliation Act, 1996, Sec. 11(6) — Invocation of sub-sec. (6) of Sec. 11 on expiry of thirty days notice, as required u/S. 11(4) of the Act in a case where the agreed arbitral procedure for appointment of Arbitral Tribunal has not been followed by the

2134 Simpark Infrastructure Vs. Jaipur Municipal Corpn. (Asopa, J.) 2013(3) RLW

Applicant — Held — It cannot be invoked directly on expiry of thirty days notice by the applicant for appointment of the Arbitral Tribunal ignoring the arbitral procedure — Applicant has not followed the agreed arbitral procedure — Arbitration application being premature dismissed with the liberty to file it afresh after following the agreed arbitral procedure. (Paras 19, 20)

Application dismissed.

(ख) माध्यस्थम एवं सुलह अधिनियम, 1996, धारा 11(6) —जहां माध्यस्थम अधिकरण की नियुक्ति हेतु सहमत माध्यस्थम प्रक्रिया का प्रार्थी द्वारा अनुसरण नहीं किया गया हो ऐसे मामले में अधिनियम की धारा 11(4) के तहत यथा वांछित तीस दिन के नोटिस के अवसान पर धारा 11 की उपधारा (6) के प्रावधानों का अवलम्बन लेना — अभिनिर्धारित — माध्यस्थम प्रक्रिया की उपेक्षा करते हुए माध्यस्थम अधिकरण की नियुक्ति हेतु प्रार्थी द्वारा तीस दिन के नोटिस के अवसान पर सीधे ही इसका अवलम्बन नहीं लिया जा सकता — प्रार्थी ने सहमत माध्यस्थम प्रक्रिया का अनुसरण नहीं किया — माध्यस्थम आवेदन समय पूर्व होने के कारण इस स्वतंत्रता के साथ खारिज किया कि सहमत माध्यस्थम प्रक्रिया का अनुसरण करने के पश्चात् इसे नये सिरे से दायर करें। (पद संख्या 19, 20) आवेदन खारिज किया।

Case Law Referred**(Para No.)**

20	Sunil Manchanda & Ors. vs. Ansal Housing and Construction Ltd. ((2004) 113 DLT 813 : 2004 (3) ARBLR 100 (Delhi)	14
	Datar Switchgears Ltd. vs. Tata Finance Ltd. & Anr. ((2000) 8 SCC 151)	14
	Punj Llyod Ltd. vs. Petronet MHB Ltd. ((2006) 2 SCC 638)	14
25	Union of India vs. Bharat Battery Manufacturing Co. (P) Ltd. ((2007) 7 SCC 684)	14
	Bharat Sanchar Nigam Ltd. & Anr. vs. Dhanurdhar Champatiry ((2010) 1 SCC 673)	14

Advocates Appeared

Vivek Dangi on behalf of Mahendra Singh, *for Applicant*;
30 Vinod Singhal on behalf of Mrs. Naina Saraf, *for Non-applicant*

Hon'ble ASOPA, J.—This is an arbitration application under Section 11 of the Arbitration and Conciliation Act, 1996 (in short 'the Act of 1996') for appointment of the Arbitral Tribunal consisting of three Arbitrators, to resolve the dispute arising out of the Development Agreement dt. 17.2.2010 (Anx.A).

35 2. Briefly stated, the facts of the case, are that in order to regulate the traffic position in Jaipur, after following the procedure, the Jaipur Municipal Corporation (in short 'JMC'), entered into the development agreement dated 17.2.2010 (Anx.A) with the Applicant — a Company incorporated under the Companies Act, 1956 - for Design, Built, Finance, Operate and Transfer (i.e. 40 DBFOT Basis) of multi-level parking and Commercial project at Opposite Mall-21 which contained Dispute Resolution Article 16 and further, Clause 16.3 provided for Arbitration. In the said Agreement, reference to the 'Developer' is the Applicant and the 'authority' means the JMC. After fulfilling certain obligations, as referred to in Clause 4.1.1 and 4.1.2, the JMC shall have to

RLW - Pg. - 08.06.2013

2013(3) RLW Simpark Infrastructure Vs. Jaipur Municipal Corpn. (Asopa, J.) 2135

procure for the Applicant, peaceful possession of the site, free from all encumbrances along with permission for commencement of the construction. It is further stated in the arbitration application that subsequent to the execution of the Agreement, the Applicant deposited the following amount:

- 5 Performance Security – Rs.2,00,00,000/- (Rupees Two Crores Only)
 Ist instalment of premium paid as upfront: Rs.1,05,00,000/- (Rupees One Crore and Five Lacs Only)

3. The Applicant requested for the project site, free from all encumbrances and a letter to this effect was sent on 14.4.2010 (Anx.B) which
10 was replied to by the JMC alleging willful default on the part of the Applicant to comply with the provisions of the development agreement. The Applicant again requested the JMC to hand over the project site, free from all encumbrances, within the working area so that the Applicant may commence the work at the earliest. It was further stated that on 30.12.2010 (Anx.C) in case
15 appropriate orders in this respect with requisite statutory compliances are not made within another 2 weeks, the Applicant shall be constrained to presume that the Government and its instrumentalities are disinclined to abide by and adhere to the assurances given to the Applicant.

4. The Applicant vide its letter dated 1.2.2011 (Anx.D) brought to the
20 notice of the JMC that the 'peaceful possession' of the site for construction of the proposed Multi Level Parking and Commercial Complex Project opposite Mall-21 has still not been handed over to the Applicant free from all encumbrances. The Applicant in the said letter also mentioned that the on-site survey, which was conducted by the Applicant, revealed that there are still
25 following encumbrances on the project site:

1. Four shops / kiosks allotted by the Jaipur Development Authority to people who were displaced during Operation Pink for 10 i.e. till the year 2012.
2. Jaipur Dairy Booth
- 30 3. Water boring operated by the Jaipur Jal Board.
4. Electric Transformers, Panel Boxes – 11000 V.
5. A Sulabh Complex, etc. existed as on date on the site i.e. Opposite Mall-21.

5. In view of the said disputes, the Applicant in the said letter dated
35 1.2.2011 (Anx.D) also requested the JMC to refer the dispute and differences arisen between the parties – the Applicant and the JMC - with regard to the fact of not handing over the project site free from all encumbrances, to a panel of arbitrators in terms of the provisions of the Arbitration and Conciliation Act, 1996 as also the provisions of Clause 16.3 of the Agreement
40 executed on 20.2.2010 and further requested to form a panel of arbitrators immediately on receipt of this communication.

6. Subsequently, the Applicant filed an application u/S. 9 of the Act of 1996 for seeking interim measure which was decided by the Court vide order dated 1.2.2011 with the direction that the Applicant shall extend the bank
45 guarantee for a period of six months and that unless the peaceful possession of the land in question was handed over to the Applicant free from all

2136 Simpark Infrastructure Vs. Jaipur Municipal Corpn. (Asopa, J.) 2013(3) RLW

encumbrances and further, no coercive action shall be taken by the JMC. The Court also observed that the parties are free to resolve their dispute through arbitration /conciliation.

5 7. On 3.2.2011 (Anx.E), the Applicant requested to the JMC in unequivocal terms that the Non-applicant may fulfill the warranties, guarantees and assurances given by them within three days of the receipt of the said communication, failing which the Applicant would be constrained to presume that the said warranties given by the Non-applicant in respect of the agreement were false and misleading.

10 8. On 17.2.2011 (Anx.F), the Applicant sent a notice to the Non-applicant for appointment of the Arbitrator under the Act of 1996 as also the provisions of Clause 16.3 of the Agreement and requested the JMC to form a Panel of Arbitrators on receipt of the said notice. However, even after lapse of more than thirty days, the JMC has failed to act upon the request and has not formed
15 any panel of Arbitrators so far, therefore, the JMC knowingly and willingly forfeited its right to do so under the agreement. After expiry of thirty days when no panel of Arbitrators was supplied, the present arbitration application has been filed.

20 9. The Non-applicant has filed reply to the arbitration application wherein the preliminary objection has been taken that the Applicant has not taken the recourse to the amicable settlement as per the procedure set forth for reconciliation in accordance with Clause 16.1 and 16.2 which is a condition precedent for appointment of Arbitrator under Clause 16.3, therefore, the application is not maintainable. The Non-applicant has also
25 mentioned the fact that in the interim measure of the Court dated 2.2.2011, there is reference of reconciliation proceedings and the Non-applicant has sent number of letters on 3.3.2011, 30.3.2011, 20.4.2011 and 13.6.2011 (Anx.R-1 to 5), to attend the conciliation meetings but despite receiving such letters sent by the JMC, none of the representative of the Applicant ever appeared
30 before the conciliation meeting.

10. The Applicant has filed rejoinder stating therein that a conspectus of the un-controverted averments made in the arbitration application as also un-rebutted documents annexed thereto, clearly demonstrate that the issues raised by the Applicant are so fundamental that they vitiate the contract itself
35 and are plainly incapable of being resolved merely by conciliation or reconciliation and further annexed a copy of the letter dated 9.3.2011 (Anx.G) in reply to the JMC letter dated 3.3.2011.

40 11. On 2.5.2012, the Applicant has filed an additional affidavit stating therein that the representative of the Applicant on several occasions also met the concerned official of the Non-applicant in person to sort out the dispute and to try and explore the possibility of any amicable settlement. The efforts so made by the Applicant for resolution of the disputes, before referring the matter to the Arbitrator, could not succeed because of the gross inaction and failure on the part of the Non-applicant to do the needful.

45 12. The Non-applicant has filed counter affidavit to the said affidavit stating therein that the contents mentioned by the Applicant that representatives of the Applicant company, on several occasions also met the concerned

RLW - Pg. - 08.06.2013

2013(3) RLW Simpark Infrastructure Vs. Jaipur Municipal Corpn. (Asopa, J.) 2137

officials to the respondent authority in person to sort out the dispute and to try and explore possibility for any amicable settlement are false and incorrect. It was further averred that the Applicant never took any interest for any amicable settlement. It was also stated therein that the without following the necessary
5 provision of Article 16.2-Conciliation of the Agreement, the Applicant has filed the present arbitration and now has further filed the present additional affidavit narrating the false facts. It has been further repeated that the Applicant never participated in any of the conciliation meetings for amicable settlement despite receiving number of letters sent by the JMC.

10 13. The preliminary objection raised by the counsel for the JMC is that the Applicant never took any interest to participate in the conciliation meetings, therefore, the matter could not be referred for amicable settlement in accordance with the conciliation procedure set forth in Clause 16.2. Counsel for the JMC further submits that a bare reading of Clauses 16.1 and
15 16.2 of the Dispute Resolution would reveal that any dispute or difference or controversy of whatever nature, howsoever arising under or out of or in relation to this Agreement between the parties, and so notified in writing by either party to the other party shall in first instance attempted to resolved amicably in accordance with the Conciliation Procedure set forth in Clause
20 16.2. The said Clause 16.2 relates to reference to the Authority concerned and fixing of the time limit for resolution of the said dispute through conciliation and further, in case of not amicably settling the dispute within fifteen days of the meeting or thirty days of notice in writing referred to in Clause 16.1.1, either party may refer the dispute to arbitration in accordance with the
25 provisions of Clause 16.3, therefore, the clause relating to amicable settlement in accordance with the conciliation procedure set forth in Clause 16.2 is a condition precedent which has not been followed in the present case and directly, the arbitration application has been filed on expiry of thirty days' notice for appointment of Arbitrator which is premature, therefore, the same is
30 not maintainable.

14. Submission of counsel for the Applicant on the aforesaid preliminary objection is that availability of the provision for amicable settlement through conciliation prior to initiation of arbitral proceedings under the agreement cannot act as a restraint on the power of the Court in a proceeding under
35 section 11 of the Act of 1996 to appoint an Arbitrator directly when the nature of the dispute is such that it cannot be resolved amicably by conciliation or when either party rejected invitation for commencement of the conciliation proceedings within the meaning of Sec. 62(3) of the Act of 1996. In support of the aforesaid contention, counsel for the Applicant has placed reliance on
40 Sunil Manchanda & Ors. vs. Ansal Housing and Construction Ltd. (2004) 113 DLT 813 : 2004 (3) ARBLR 100 (Delhi), paras 2,4,8, 9 and 10. On the issue of appointment of Arbitrator under section 11(6) of the Act of 1996 when the JMC has failed to provide the panel of Arbitrators as per Clause 16.3, even after lapse of thirty days and thereafter, up to the date of filing of the present
45 arbitration application i.e. 23.3.2011, submission of counsel for the Applicant is that the right of the JMC to make appointment of the Arbitrator ceases to exist or the same is forfeited, therefore, the Applicant is entitled to appointment of the Arbitrator and on the said issue, he has placed reliance on Datar

2138 Simpark Infrastructure Vs. Jaipur Municipal Corpn. (Asopa, J.) 2013(3) RLW

Switchgears Ltd. vs. Tata Finance Ltd. and another (2000) 8 SCC 151 (Paras 7, 9, 11, 18, 19), Punj Llyod Ltd. vs. Petronet MHB Ltd. (2006) 2 SCC 638 (Paras 3,5 and 6), Union of India vs. Bharat Battery Manufacturing Co. (P) Ltd. (2007) 7 SCC 684 (Paras 9, 12 and 13) and Bharat Sanchar Nigam Ltd. & Anr. vs. Dhanurdhar Champatiry (2010) 1 SCC 673 (Paras 7 and 10).

15. In this particular case also, the following two Issues are involved:

(i) Whether the agreed arbitral procedure of dispute resolution which has been made condition precedent for invoking the arbitration clause is required to be followed or not by the Applicant?

(ii) Whether sub-section (6) of Sec.11 of the Act of 1996 can be invoked on expiry of thirty days' notice, as required under sub-section (4) of Sec.11 of the Act of 1996 in a case where the agreed arbitral procedure for appointment of Arbitral Tribunal has not been followed by the Applicant ?

16. The relevant sub-section (1) to (6) of Sec. 11 of the Arbitration and Conciliation Act, 1996 as also Clause 16 consisting of Clauses 16.1 Dispute Resolution, Clause 16.2 Conciliation and Clause 16.3 with sub-clauses of arbitration contained in the Agreement 17.2.2010 (Anx.A) are as follows:

(i) Sub-sec.(1) to (6) of Sec.11 of the Act of 1996

"11. Appointment of arbitrators

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and -

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties -

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

RLW - Pg. - 08.06.2013

2013(3) RLW Simpark Infrastructure Vs. Jaipur Municipal Corpn. (Asopa, J.) 2139

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment. “

(ii) Relevant Clause 16 of the Agreement

16.1 Dispute Resolution

16.1.1 Any Dispute or Difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the parties and so notified in writing by either party to the other party (“the Dispute”) shall, in first instance attempted to resolved amicably in accordance with the Conciliation Procedure set forth in clause 16.2.

16.1.2 The parties agree to see their best efforts for resolving all disputes arising under or in respect of this Agreement promptly, equitably and in good faith and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any dispute.

16.2 Conciliation

In the event of any Dispute between the parties, either party may require such Dispute to be referred to the Chief Executive Officer and / or Mayor of the Authority and the Director of the Developer for the time being (in case of consortium / JV the director of th Lead Member), for amicable settlement. Upon such reference, the two shall meet at earliest and not later than seven (7) days from the date of reference to discuss and attempt to amicably resolve the dispute. If such meeting does not take place within the period of seven (7) days or Dispute is not amicably settled within fifteen (15) days of the meeting or the Dispute is not resolved as evidenced by signing the written terms of settlement within thirty (30) days of notice in writing referred to in clause 16.1.1 above or such longer period as may be mutually agreed by the parties, either party may refer the Dispute to arbitration in accordance with the provisions of clause 16.3.

16.3 Arbitration

16.3.1 Any Dispute which is not resolved amicably shall be referred to a panel of three (3) arbitrators in terms of the Arbitration and Conciliation Act, 1996. For this purpose Authority will make out a panel of five (5) possible arbitrators. Each party shall nominate an arbitrator out of this panel submitted by the Authority and these two (2) arbitrators will appoint the third arbitrator in writing and also inform the concerned parties about such appointment and call upon the other party to appoint its arbitrator. If within fifteen (15) days of receipt of such intimation the other party fails to appoint its arbitrator, the party seeking appointment of arbitrator may take further steps in accordance with Arbitration and Conciliation Act, 1996. The arbitrator

RLW - Pg. - 08.06.2013

2140 Simpark Infrastructure Vs. Jaipur Municipal Corpn. (Asopa, J.) 2013(3) RLW

shall give item-wise and reasoned award. Where three (3) arbitrators have been appointed, the award of the majority will prevail.

16.3.2 Place of Arbitration:

The place of arbitration shall be at Jaipur.

16.3.3 English Language:

The request for arbitration, the answer to the request, the terms of reference, any written submissions, any orders and awards shall be in English and, if oral hearings take place, English shall be the language to be used in the hearings. The award shall be made in writing.

16.3.4 Enforcement of Award:

The parties agree that the decision or award, which shall be a speaking order, resulting from arbitration shall be final and binding upon the parties and shall be enforceable in accordance with the provision of the Arbitration and Conciliation Act, 1996 subject to the rights of the aggrieved parties to secure relief from any higher forum.

16.3.5 Performance during Arbitration:

Pending the submission of and / or decision on a Dispute and until the arbitral award is published, the Parties shall continue to perform their respective obligations under this Agreement without prejudice to a final adjustment in accordance with such award. “

17. In this case on 6.9.2012, counsel for both the parties submitted that the issues raised in this arbitration application are the same which have been raised in connected SB Arbitration Application No.26/2011 wherein the judgment was reserved. The aforesaid SB Arbitration Application No.26/2011 has been dismissed vide order dated 12.9.2012 as premature with liberty to the Applicant to file fresh arbitration application for constitution of the Arbitral Tribunal after following the agreed arbitral procedure.

18. I have gone through record of the arbitration application and further considered the rival submission of the counsel for the parties in the light of Sec.11 of the Act of 1996 along with the order dated 12.9.2012 passed in identical SB Arbitration Application No.26/2011.

19. In identical SB Arbitration Application No.26/2011, all the aforesaid judgments cited by the parties along with other judgments on the aforesaid issues have been considered, therefore, the relevant portion of the findings on Issue No.(i) given in para No.30 and further, finding on Issue No.(ii) given in paras No.32, 33 and 34 along with the conclusions on the aforesaid issues in para No.35 in identical SB Arbitration Application No.26/2011 decided on 12.9.2012 are as follows:

Finding on Issue No.(i) in identical SB Arbitration Application No.26/2011

“(30) In view of the aforesaid discussion, I am of the view that where an agreed procedure of dispute resolution has been made a condition precedent for invoking the arbitration clause, the same is required to be followed. In the present case, Clause 16.1 for amicable settlement to resolve the dispute in accordance with the procedure set forth in Clause 16.2, is a condition precedent for invoking Clause 16.3 for

RLW - Pg. - 08.06.2013

2013(3) RLW Simpark Infrastructure Vs. Jaipur Municipal Corpn. (Asopa, J.) 2141

appointment of Arbitral Tribunal consisting of three Arbitrators out of the panel of five possible Arbitrators made out by the Authority, has not been followed, therefore, the present arbitration application is premature. (emphasis supplied)

5 Finding on Issue No.(ii) in identical SB Arbitration Application No.26/2011

10 (32) In the instant case, the opening words of arbitration clause 16.3 are that “any dispute which is not resolved amicably shall be referred to a panel of three Arbitrators in terms of Arbitration and Conciliation Act, 1996”, which reveals the intention of the parties to first make attempt to resolve the dispute amicably as referred in Clause 16.1 in accordance with the conciliation procedure set forth in Clause 16.2 of the dispute resolution. Considering the submission of Mr. Mahendra Singh, admittedly, the said procedure has not been followed by the Applicant and the Applicant has invoked the arbitration clause directly after expiry of the period of thirty days of the notice when the JMC failed to supply to the Applicant the panel of five Arbitrators and appoint its Arbitrator for constitution of the Arbitral Tribunal of three Arbitrators out of which one was to be appointed by the Applicant and both the Arbitrators have to appoint the third Arbitrator, the present arbitration application has been filed which is not maintainable under section 11(6) of the Act of 1996.

25 (33) In the aforesaid Constitution Bench judgment, the Supreme Court has emphasized in paras 39 and 47(iv) whether the applicant has satisfied the condition for appointing the Arbitrator under section 11(6). The opening words of Sec. 11(6) are “where, under an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure”. Here, the Applicant has failed to act as required under the appointment procedure.

30 (34) An Applicant cannot file an arbitration application directly on expiry of the period of thirty days' notice under sub-section (4) of Sec.11 of the Act of 1996 when the JMC / Authority has failed to supply the panel of five Arbitrators and further appoint one of its Arbitrators for constitution of the Arbitral Tribunal of three Arbitrators as per the agreed arbitral procedure and for this reason also, the present arbitration application is not maintainable.

35 (35) In view of the aforesaid consideration and findings on the above two issues in this particular case, my conclusions on the aforesaid two Issues are as under:

40 (i) Where the parties have agreed arbitral procedure of dispute resolution, which has been made a condition precedent for invoking the arbitration clause, then it is required to be followed before filing an application under section 11 of the Act of 1996.

45 (ii) Sub-section (6) of Sec.11 of the Act of 1996 cannot be invoked directly on expiry of thirty days' notice under sub-sec.(4) of Sec.11 of the Act of 1996, by the Applicant for appointment of the Arbitral Tribunal ignoring the agreed arbitral procedure.

2142 **Surendra Singh Vs. State of Rajasthan (Rathore, J.)** 2013(3) RLW

20. In this particular case also, the agreed arbitral procedure has not been followed by the Applicant, therefore, the arbitration application is premature and the same is dismissed as such with liberty to the Applicant to file fresh arbitration application for constitution of the Arbitral Tribunal after following the agreed arbitral procedure.

[Citation : 2013(3) RLW 2142 (Raj.)]

(Rajasthan High Court)
Jaipur Bench

HON'BLE RAGHUVENDRA S. RATHORE, J.

Surendra Singh
Versus
State of Rajasthan

15 S.B. Cri. Misc. Bail Application Nos. 11800 & 11487 of 2011, decided on 31.05.2012
Cr.P.C., 1973, Secs. 439; Penal Code, Secs. 302, 364, 346, 201 and 120-B —
Bail — Petitioners are Head Constable and Driver in Special Operation
Group of Police — Charges of killing a most wanted criminal Dara
Singh in Fake encounter — In custody for over one year — Held —
20 **Applicants had no control or supervision in the S.O.G. team — They had**
no involvement in the case — Trial is still to proceed a long way — In all
17 accused and voluminous record containing statements of 254
witnesses and 221 documents which is in 7564 pages — They cannot be
25 **detained in jail for indefinite period — Refusal of bail is a restriction**
on personal liberty of an individual guaranteed under Article 21 of the
Constitution of India — Deserves to be enlarged on bail.

Bail granted conditionally. (Paras 20 to 24)

दं.प्र.सं., 1973, धारा 439; दण्ड संहिता, 302, 364, 346, 201 एवं 120-ख — जमानत
— प्रार्थीगण पुलिस के विशेष कार्यान्वयन समूह (एस.ओ.जी.) में मुख्य आरक्षी एवं
30 यान चालक हैं — फर्जी मुठभेड़ में सर्वाधिक वांछित अपराधी दारासिंह को मारने
का आरोप — एक वर्ष से भी अधिक समय से अभिरक्षा में है — अभिनिर्धारित —
प्रार्थीगण का एस.ओ.जी. टीम पर न तो कोई नियन्त्रण और न ही कोई पर्यवेक्षण
— वे मामले में शामिल नहीं थे — विचारण अभी लम्बी चलेगी — कुल मिलाकर
17 अभियुक्त एवं विशालकाय अभिलेख जिसमें 254 साक्षीगण के कथन एवं 221
35 दस्तावेज जो 7564 पृष्ठों में फैले हैं — उन्हें अनिश्चित अवधि हेतु जेल में
अवरुद्ध नहीं किया जा सकता — जमानत से इंकार करना भारत के संविधान के
अनुच्छेद 21 के तहत एक व्यक्ति को दी गई निजी स्वतंत्रता पर अवरोध है —
जमानत पर छोड़े जाने योग्य है। (पद संख्या 20 से 24)
सशर्त जमानत मंजूर की।

40 **Case Law Referred (Para No.)**
State of Rajasthan, Jaipur vs. Balchand @ Baliay ((1977) 4 SCC 308) 21
Gudikanti Narasimhulu & Ors. vs. Public Prosecutor, High Court of
Andhra Pradesh ((1978) 1 SCC 240) 21
Gurcharan Singh & Ors. vs. State (Delhi Admn.) ((1978) 1 SCC 118) 21