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

Judgment reserved on: 07.02.2023
% **Judgment pronounced on: 17.04.2023**

\+ ARB.P. 1295/2022

SUBHASH INFRAENGINEERS PVT LTD ..... Petitioner
Through: Mr. Brijesh Kumar Goel and Mr. Sajat Goel, Advs.

versus

NTPC LTD ..... Respondent
Through: Mr. Puneet Taneja and Ms. Laxmi Kumari, Advs.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

SACHIN DATTA, J.

1. The present petition filed under Section 11 of the Arbitration & Conciliation Act, 1996[1] seeks appointment of a sole arbitrator to adjudicate the disputes between the parties.

2. The disputes between the parties have arisen in the context of a Letter of Award in the form of Purchase Order dated 17.10.2019 for works relating to *"Starter Ash Dyke package For Barauni Thermal Power Project (2X250MW)"*.

3. The said Letter of Award was followed by a Contract Agreement

[1] "the Act"

dated 31.10.2019. Various disputes are stated to have arisen between the parties in the context of the said contract including, *inter alia*, on account of the alleged non-handing over of the work fronts and reimbursement of recurring overhead expenses stated to have been incurred by the petitioner.

4. Admittedly, the applicable General Conditions of Contract[2] include an arbitration clause which is in the following terms:-

> ***"7. Settlement of Disputes***
> ***7.1 Mutual Consultation***
> *If any dispute of any kind whatsoever shall arise between the Employer and the Contractor in connection with or arising out of the Contract, including without prejudice to the generality of the foregoing, any question regarding its existence, validity or termination, or the execution of the Works, whether during the progress of the works or after their completion and whether before or after the termination, abandonment or breach of the Contract, the parties shall seek to resolve any such dispute or difference by mutual consultation. If the parties fail to resolve such a dispute or difference by mutual consultation, then the dispute may be settled through Expert Settlement Council/ Arbitration / other remedies available under the applicable laws.*
>
> ***7.2 Resolution of Dispute through Expert Settlement Council***
> *If the parties fail to resolve such a dispute or difference by mutual consultation, the dispute if the parties agree, may be referred to Conciliation in cases involving disputed amount up to Rs. 250 crores, which is to be arrived at considering the claim and counter claim of the parties to the dispute.*
>
> *7.2.1* ***Invitation for Conciliation:***
>
> *7.2.1.1 A party shall notify the other party in writing about such a dispute it wishes to refer for conciliation within a period of 30 days from the date of raising of the dispute in case of failure to resolve the sake through mutual consultation. Such invitation for Conciliation shall contain sufficient information as to the disputes to enable the other party to be fully informed as to the nature of the dispute, amount of the monetary claim, if any, and apparent cause of action.*
>
> *7.2.1.2 Upon acceptance of the invitation to conciliate, the other party shall submit its counter claim, if any, within a period of 30 days from the date of the invitation to conciliate. If the other party rejects the invitation or disputed*

[2] "GCC"

amount exceeds Rs.250 crores, there will be no Conciliation proceedings. There shall be no Conciliation where claim amount is only up-to Rs. 5 Lakhs.

7.2.1.3 If the party initiating Conciliation does not receive a reply within thirty days from the date on which it sends the invitation, or within such other period of time as specified in the invitation, it shall treat this as rejection of the invitation to conciliate from the other party.

7.2.2 ***Conciliation****:*

7.2.2.1 Where invitation for Conciliation has been furnished under GCC sub clause 7.2.1, the parties shal attempt to settle such dispute through Expert Settlement Council (ESC) which shall be constituted by CMD, NTPC.

7.2.2.2. ESC will be formed from experts comprising of three members from the panel of conciliators maintained by NTPC. However, there will be single member ESC for disputes involving claim and counter claim (if any) up-to Rs.1 crore. CMD will have authority to reconstitute an ESC to fill any vacancy.

7.2.2.3 The eligible persons for consideration for empanelment in the panel of conciliators shall be amongst Retired Civil Servants of Govt. Of India not below the rank of Joint Secretary, Retired Judges, Retired Executive directors/Directors/Chairman of any Maharatna/Navratna company in India other than NTPC Ltd, Retired Independent Directors who have served on the Board of any Maharatna/Navratna company in India other than NTPC Ltd and Independent experts in their respective fields preferably registered with the Indian Council of Arbitration of Delhi International Arbitration Centre or Federation of Indian Chambers of Commerce and Industry or SCOPE Arbitration Forum.

7.2.3 ***Proceedings before ESC****:*

7.2.3.1 The claimant shall submit its statement of claims along with relevant documents to ESC members, and to the party(s) indicated in the appointment letter within 30 days of the issue of the appointment letter. The respondent shall ifle its reply and counter claim (if any) within 30 days of the receipt of the statement of claims. Parties may file their rejoinder/additional documents. If any in support of their claim/counter claim within next 15 days. No documents shall be allowed thereafter.

7.2.3.2. The parties shall file their claim and counter claim in the following format

a. Chronology of the dispute
b. Brief of the contract
c. Brief history of the dispute

d. issues

Sl. No.	*Description of Claims/ Counter claims*	*Amount (in foreign currency/INR)*	*Relevant Contract Clause*

e. Details of Claim(s) /Counter Claim(s)
f. Basis/Ground of claim(s)/counter claim(s) along with relevant clause of contract
Note: Statement of claims shall be restricted to maximum limit of 20 pages.

7.2.3.3 In case of 3 members ESC, 2 members will constitute a valid quorum and the meeting can take place to proceed in the matter after seeking consent from the member who is not available. However, ESC recommendations will be signed by all the members.

7.2.3.4 The parties shall be represented by their in house employees. No party shall be allowed to bring any advocate or outside consultant/advisor/agent to contest on their behalf. Ex-officers of NTPC who have handled the subject matter in any capacity shall not be allowed to attend and present the case before ESC on behalf f contractor. However, ex-employees of parties may represent their respective organizations. Parties shall not claim any interest on claims/counter-claims from the date of notice invoking Conciliation till execution of settlement agreement, if so arrived. In case, parties are unable to reach a settlement, no interest shall be claimed by either party for the period from the date of notice invoking Conciliation till the date of ESC recommendations and 30 days thereafter in any further proceedings.

7.2.3.5. ESC will conclude its proceedings in maximum 10 meetings, and give its recommendations within 90 days of its first meeting. ESC will give its recommendations to both the parties recommending possible terms of settlement. CMD, NTPC may extend the time/number of meetings, in exceptional cases, if ESC requests for the same with sufficient reasons.

7.2.3.6. Depending upon the location of ESC members and the parties, the venue of the ESC meeting shall be either Delhi/Mumbai/Kolkata/Chennai or any other city whichever is most economical from the point of view of travel and stay etc. All the expenditure incurred in ESC proceedings shall be shared by the parties in equal proportion.

7.2.4 Fees & Facilities to the Members of the ESC

The cost of Conciliation proceedings including but not limited to fees for Conciliator, Airfare, Local transport, Accommodation, cost towards conference facility etc shall be as provided herein below:

S. No.	***Fees/Facility***	***Entitlement***
1	*Fees*	*As paid to NTPC Independent Directors [Presently Rs.20,000/- per meeting]. In addition each conciliator to be paid Rs.10,000/- for attending meeting to authenticate the settlement agreement-max of Rs.2,10,000/- per case per Conciliator.*
2	*Secretarial expenses*	*Rs.10,000/- lump sum (to 1 member only)*
3	*Transportation in the city of the meeting*	*Car as per entitlement of Rs.2,000/- per day*
4	*Venue for meeting*	*NTPC conference rooms*
Facilities to be provided to the out-stationed member		
5	*Travel from the city of residence to the city of meeting*	*As per entitlement of Independent Directors. Executive class air tickets/first class AC train tickets/ Luxury car/reimbursement of actual fare. However, entitlement of air travel by Business class shall be subject to austerity measures, if any, ordered by Govt. of India.*
6	*Transport to and fro airport/railway station in the city of residence*	*Car as per entitlement or Rs.3,000*
7	*Stay for out stationed members*	*As per entitlement of Independent Directors*
8	*Transport in the city of meeting*	*Car as per entitlement or Rs.2,000 per day*

Aforesaid fees is subject to revision by NTPC from time to time and subject to government guidelines on austerity measures, if any. All the expenditure incurred in the ESC proceedings shall be shared by the parties in equal proportions. The Parties shall maintain the account of expenditure and present to the other for the purpose of sharing on conclusion of the ESC proceedings.

7.2.5 If decision of NTPC is acceptable to the contractor, a Settlement Agreement under section 73 of the Arbitration and Conciliation Act 1996 will be signed within 15 days of contractor's acceptance and same shall be authenticated by all the ESC members. Parties are free to terminate Conciliation proceedings at any stage as provided under the Arbitration and Conciliation Act 1996.

7.2.6. The parties shall keep confidential all matters relating to the Conciliation proceedings. Parties shall not rely upon them as evidence in arbitration proceedings or court proceedings.

7.3 Arbitration

7.3.1 *If the process of mutual consultation and/or ESC fails to arrive at a settlement between the parties as mentioned at GCC Sub-Clauses 7.1 & 7.2 above, Employer or the Contractor may, within Thirty (30) days of such failure, give notice to the other party, with a copy for information to the ESC (as applicable), of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given. The mechanism of settling the disputes through arbitration shall be applicable only in cases where the disputed amount (i.e. total amount of claims excluding claims of interest) does not exceed Rs. 25 crores. In case the disputed amount exceeds Rs. 25 crores, the parties shall be within their rights to take recourse to remedies as may be available to them under the applicable laws other than Arbitration after prior intimation to the other party. There shall be no arbitration where the claim amount is only upto Rs. 5 lakhs.*

The parties at the time of invocation of arbitration shall submit all the details of the claims and the counter-claims including the Heads/Sub-heads of the Claims/Counter-Claims and the document relied upon by the parties for their respective claims and counter-claims. The parties shall not file any documents/details of the claims and counter-claims thereafter.

The claims and the counter claims raised by the parties at the time of invocation of the arbitration shall be final and binding on the parties and no further change shall be allowed in the same at any stage during arbitration under any circumstances whatsoever.

The parties to the contract shall invoke arbitration within Six months from the date of completion of the execution of work under the contract or the termination of the contract as the case may be and the parties shall not invoke arbitration later on after expiry of the said period of six months. The parties shall not invoke arbitration other than in the case of completion of execution of work or the termination of the contract as mentioned above.

Notwithstanding the above, in case of disputes with Indian Contractor who is a Central Government Department/Enterprise/organisation or a State Level Public Enterprise (SLPE), the aforesaid limit of Rs. 25 crores shall not be applicable and arbitration proceeding may be commenced irrespective of the amount involved in dispute if the dispute could not be resolved through Conciliation as brought out at GCC Sub Clause 7.2 above.

***7.3.2**. Any dispute in respect of which a notice of intention to commence arbitration has been given, in accordance with GCC Sub Clause 7.3.1, shall be finally settled by arbitration.*

***7.3.3** Any dispute raised by a party to arbitration shall be adjudicated by a Sole Arbitrator appointed by CMD, NTPC from the List of Empanelled Arbitrators of NTPC in the following manner :-*
a) A party willing to commence arbitrator proceedings shall invoke Arbitration Clause by giving 60 days notice to the other party.
b) If the Arbitrator so appointed dies, resigns, becomes incapacitated or withdraws for any reason from the proceedings, it shall be lawful for CMD, NTPC to appoint another person in his place in the same manner as aforesaid. Such person shall proceed with the reference from the stage where his predecessor had left.
c) It is agreed between the parties that the Arbitration proceedings shall be concluded as per the provisions of Fast Track Procedure as provided under Section 29B of the Arbitration and Conciliation Act, 1996 as amended.
d) Arbitrator shall be paid fees at the following rates:

Amount of Claims and Counter Claims (excluding interest)	*Lump sum fees (including fees for study of pleadings, case material, writing of the award, secretarial charges etc.) to be shared equally by the parties.*
Upto Rs. 50 lakhs	*Rs. 10,000 per meeting subject to a ceiling of Rs. 1,00,000/-.*
Above Rs. 50 lakhs to Rs. 1 Crore	*Rs. 1,35,000/- plus Rs. 1,800/- per lakh or a part there of subject to a ceiling of Rs. 2,25,000/-.*
Above Rs. 1 crore and upto Rs. 5 crore	*Rs. 2,25,000/- plus Rs. 33,750/- per crore or a part there of subject to a ceiling of Rs. 3,60,000/-*
Above Rs. 5 crores and upto Rs. 10 crores	*Rs. 3,60,000/- plus Rs. 22,500/- per crore or a party there of subject to a ceiling of Rs. 4,72,500/-*
Above Rs. 10 crores	*Rs. 4,72,500/- plus Rs. 18,000/- per crore or part thereof subject to a ceiling of Rs. 10,00,000/-*

If the claims is in foreign currency, the SBI Bills Selling Exchange rate prevailing on the date of claim shall be used for the purpose of converting the claim in Indian Rupee which may be used for determining the arbitration fee as brought out above.

e) If after commencement of the Arbitration proceedings, the parties agree to settle the dispute mutually or refer the dispute to Conciliation, the arbitration shall put the proceedings in abeyance until such period as requested by the parties. Where the proceedings are put in abeyance or terminated on account of mutual settlement of dispute by the parties, the fees payable to the arbitrator shall be determined as under :

(i) 40% of the fees if the Pleadings are complete.

(ii) 60% of the fees if the Hearing has completed.

(iii) 80% of the fees if the Hearing is concluded but the Award is yet to be ` passed.

f) Each party shall pay its share of arbitrator's fees in stages as under:

(i) 40% of the fees on Completion of Pleadings.

(ii) 40% of the fees on Conclusion of the Final Hearing.

(iii) 20% at the time when arbitrator notifies the date of final award.

g) The claimant shall be responsible for making all necessary arrangements for the travel/stay of the Arbitrator including venue of arbitration, hearings. The parties shall share the expenses for the same equally.

h) The Arbitration shall be held at Delhi only.

i) The Arbitration shall give reasoned and speaking award and it shall be final and binding on the parties.

j) Subject to the aforesaid conditions, provisions of the Arbitration and Conciliation Act, 1996 and any statutory modifications or re-enactment thereof shall apply to the arbitration proceedings under this clause."

5. It is specifically averred in the petition that the aforesaid disputes remain unsettled despite mutual consultation meetings held between the parties. As such, the petitioner *vide* letter dated 04.08.2022 served a notice under Clause 7.2 of the GCC for settlement of disputes by conciliation through Expert Settlement Council[3].

6. In response, the respondent addressed a communication dated 14.10.2022 whereby the respondent appointed certain persons as conciliators for "adjudication of disputes between the parties".

7. The said unilateral appointment of the conciliators/ESC members was

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[3]"ESC"

not accepted by the petitioner and as such the petitioner sent a letter dated 18.10.2022 stating as under:-

"Ref. No.: SIPL/NTPC-BTPP/2022-23/237 Date : 18.10.2022

<u>Without Prejudice</u>

To,
The Head of Project-Barauni,
NTPC Limited,
Barauni Thermal Power Project,
Distt: Begusarai,
Bihar-851116.

Sub:- STARTER ASH DYKE PACKAGE FOR BARAUN THERMAL POWER PROJECT (2x250 MW), LOA NO. CS-8004-331-9-CS-LOA-6869 dated 17.10.2019.

Dear Sir,
We are astonished to find the content of NTPC email dated 15.10.2022 wherein, NTPC has unilaterally appointed the ESC members without giving any opportunity to us for mutual selection of names.

In view of above, we decline to participate in such ESC proceedings, which we find is not impartial and neutral.

Please take notice that our above communication of denial of conciliation proceedings is hereby served upon NTPC under Section 62(2) of the The Arbitration and Conciliation Act, 1996.

Needless to state that without prejudice to any of our contractual or legal rights, we may proceed ahead further, as deemed appropriate for seeking justice / relief in this matter.

Thanking you.
Yours faithfully,
For Subhash Infraengineers Pvt. Ltd.
(D. S. Saini)
Managing Director"

8. The respondent *vide* its letter dated 20.10.2022 is stated to have requested the petitioner to review its aforesaid contention, in view of the contractual provisions, and participate in the proceedings before the ESC.

9. Thereafter, a notice of arbitration dated 08.11.2022 was sent by the petitioner to the respondent stating as under:-

"Ref. No.: SIPL/NTPC-BTPP/2022-23/260 Date : 08.11.2022

Without Prejudice

To,
The Head of Project,
NTPC Limited, Barauni Thermal Power Project,
Distt: Begusarai,
Bihar -851116.

Sub: STARTER ASH DYKE PACKAGE FOR BARAUN THERMAL POWER PROJECT (2x250 MW), LOA NO. CS-8004-331-9-CS-LOA-6869 dated 17.10.2019.
Our "NOTICE FOR ARBITRATION" under Contract GCC Clause 7.3 for the settlement of disputes so arisen in the said Contract.

Ref:

1. *Our letter No. 123 dated 04.08.2022 – Notifying NTPC the dispute/differences/ claims of about Rs. 21.82 crores so arisen; needing resolution/settlement.*
2. *Your letter No. 02 dated 14.10.2022- Informing us Expert Settlement Council (ESC) constituted, unilaterally by NTPC- for CONCILIATION of disputes so arisen.*
3. *Our letter No. 237 dated 18.10.2022- Communicating our denial to NTPC for any such CONCILIATION as per Section 62(2) of the Arbitration and Conciliation Act, 1196.*
4. *Your letter dated 20.10.2022- Reg. such Conciliation be commenced, in interest of both parties.*
5. *Our letter dated 21.10.2022 – Reiterating our denial dated 18.10.2022 to NTPC for any such CONCILIATION proceedings.*

Dear Sir,
With reference to above cited correspondence and in the interest of justice to be furthered, we hereby serve our instant "Notice for Arbitration" upon NTPC for resolution of our long pending disputes / claims through ARBITRATION provided under GCC Clause 7.3 of the Contract.

Please take notice that in line with GCC Clause 7.3.1 (2nd para thereof) our disputes/claims were already notified to NTPC on 04.08.2022 vide Ref.1 cited above, which claims amount is about Rs. 21.82 crores (Interest thereon extra). Accordingly, we would be submitting all such disputes/

claims and amount thereof, in the ARBITRATION reference so sought.

Further, we wish to pertinently state that the GCC clause 7.3.3 regarding 'Appointment of a Sole Arbitrator' by CMD, NTPC – now lies in teeth of settled law of Perkin Eastman; Judgement delivered on 26.11.2019 by the Hon'ble Supreme Court of India, and therefore, please take notice that a Sole Arbitrator in the present case/matter would be now be appointed by the jurisdictional Hon'ble High Court.
Suffice to say that our instant "NOTICE for ARBITRATION" is without prejudice to any of our rights or remedies as provided under the Contract and/or those available in law, and we would proceed further, as deemed necessary or expedient, for seeking ends of justice.

Thanking you,
Yours faithfully,
For Subhash Infraengineers Pvt. Ltd.
(D. S. Saini)
Managing Director"

10. In response, the respondent sent communication dated 14.11.2022 stating as under:-

"Ref. No. NTPC/ESC/Barauni/02-a Dated : 14.11.2022

To,
M/s Subhash Infraengineers Private Limited,
Plot No. B-1, Infocity, Sector-34,
Near Hero Honda Chowk,
Gurugram (Haryana)
Kind Attention: Sh. DS Saini, Managing Director

Subject : - ***Constitution of Expert Settlement Council (ESC) for settlement of dispute between M/s Subhash Infraengineers Private Limited and NTPC – Barauni TPS pertaining to the Package of Starter Ash Dyke Package for Barauni TPS vide LOA No. CS-8004-331-9-CS-LOA-6869 dated 17.10.2019.***
Ref:

1) *SIPL's letter dated 04.08.2022, ref no. SIPL/NTPC-BTPP/2022-23/123*
2) *NTPC's letter dt. 14.10.2022, ref no. NTPC/ESC/Barauni/ 02*
3) *SIPL's letter dt. 18.10.2022, ref no. SIPL/NTPC-BTPP/2022-23/237*
4) *NTPC's letter dt. 20.10.2022, ref no. nil*

5) SIPL's letter dt. 21.10.2022, ref. No. SIPL/NTPC-BTPP/2022-23/241
6) SIPL's letter dt.08.11.2022, ref. No. SIPL/NTPC-BTPP/2022-23/260

Dear Sir,

The above-mentioned communications exchanged between the parties may be referred.

It is reiterated that on the request of M/s SIPL, NTPC vide letter dt. 14.10.2022 constituted ESC and informed all the concerned including M/s SIPL. It may please be again noted that as per Clause 7.2.2 of GCC, forming part of the Contract, ESC is to be constituted by CMD, NTPC. Accordingly, in line with the contractual provisions, ESC has been constituted for resolution of disputes between the parties.

As such refusal by M/s SIPL to participate in ESC proceedings, subsequent to constitution of ESC as per its own request raises doubts on the efforts of M/s SIPL towards settlement of disputes. NTPC reserves its right to raise this issue at appropriate forum.

M/s SIPL vide letter dt. 08.11.2022 has now given notice under Cl. 7.3.3 of GCC regarding appointment of Sole Arbitrator and has also cited the judgement of Perking Eastman Architects DPC &Anr. Vs. HSCC (India) Ltd. pronounced by Hon'ble Supreme Court.

In this regard, it is to inform that NTPC, subsequent to pronouncement of Perkins Eastman Judgement, is not appointing Sole Arbitrator in any matter. Accordingly, NTPC can provide four names of prospective Arbitrators to M/s SIPL and M/s SIPL can choose two names out of these four names. Thereafter, NTPC will appoint one person out of two aforesaid names, as sole Arbitrator.

NTPC can proceed accordingly, if you so consent.

Thanking You.

Yours' Truly
(Avnish Srivastava)
Chief General Manager (DRC)"

11. In the above background, it is contended by the counsel for the petitioner that in view of law laid down by the Supreme Court in ***Perkins***

Eastman Architects DPC Vs. HSCC (India) Ltd.[4], an independent arbitrator is liable to be appointed to adjudicate the disputes between the parties. Further, it is contended that it was not open for the respondent to unilaterally devise a procedure as set out in respondent's letter dated 14.11.2022 (supra) and seek to suggest a panel of four names, out of which the petitioner was asked to choose any two names. It is submitted that aforesaid procedure, in discord with the contract and the law laid down by the Supreme Court in ***Perkins***[4] (supra).

12. *Per contra*, learned counsel for the respondent opposes constitution of an arbitral tribunal on the ground that the petitioner has not complied with the mandatory pre-arbitral steps as envisaged under Clause 7 of GCC.

13. It is further contended by learned counsel for the respondent that the withdrawal of the petitioner from conciliation is contrary to Clause 7.2 of the GCC. It has been specifically averred in the reply filed by respondent, as under:-

> ***"8.*** *In fact, the proceedings before ESC through independent persons, can easily be said to be the first layer of arbitration proceedings. Therefore, Clause 7.3.1 related to arbitration gets triggered only upon failure to arrive at settlement between the parties either under sub-clause 7.1 or 7.2. The purpose of having ESC as a proceedings prior to arbitration is that only such disputes which remain unsettled are only to be referred to arbitration as the last layer for settlement of disputes. Thus, the petitioner cannot thwart the agreed Settlement of Disputes Clause at its own whims and fancies. Therefore, in the absence of compliance of pre-arbitral steps as provided under Clause 7.1 & 7.2, the question of seeking appointment of Arbitrator under Section 11(6) of Arbitration and Conciliation Act does not arise.*
>
> *xxx xxx xxx*
>
> ***10.****From the perusal of the provisions of Section 11(6) of Arbitration and Conciliation Act 1996, it is evident that the party may request to the Hon'ble High Court for appointment of Arbitrator only upon the failure of*

[4] (2020) 20 SCC 760

> *the appointment procedure agreed upon by the parties. In the present case, the procedure for appointment of Arbitrator is provided under Clause 7 which states that the arbitration can be invoked only after complying with the pre-arbitral steps/procedure i.e. first undertaking mutual consultation and thereafter, settlement through Expert Settlement Council. Since, the petitioner has not exhausted the procedure of seeking settlement through ESC, it cannot be said that there is any failure on the part of the respondent as required under the procedure stipulated under Clause 7 of GCC and therefore, there is no cause of action for the petitioner to invoke the provisions of Section 11(6) of the Act for seeking appointment of Arbitrator. Accordingly, the present petition is liable to be rejected as being pre-mature."*

14. Having considered the respective averments and having heard the respective counsel for the parties, I find no merit in the contentions raised by the respondent.

15. At the outset, it is noticed that in the communication dated 14.11.2022 sent by the respondent in response to the petitioner's invocation of arbitration, the respondent has acceded to constitute an arbitral tribunal *albeit* in the manner suggested in said the communication. What has been proposed in the said communication is that the respondent would provide names of four prospective arbitrators to the petitioner and the petitioner has been called upon to choose two of the four names. It has been further proposed that out of the said two names chosen by the petitioner, the respondent would appoint one person as the sole arbitrator.

16. It is noticed that vide the said communication dated 14.11.2022, the respondent did not, *per se,* have any objection to the constitution of arbitral tribunal. As such, the respondent cannot be heard to contend that the appointment of Arbitrator in the matter would be premature, having itself acceded to the constitution of the arbitral tribunal.

17. Moreover, the appointment procedure suggested by the respondent is

not envisaged in the relevant contractual stipulation i.e. Clause 7 of GCC. The relevant contractual stipulation contemplates that the sole arbitrator would be appointed by the CMD of the respondent from the list of empanelled arbitrators of the respondent.

18. Clearly, any unilateral appointment by the respondent would be in derogation of the law laid down by the Supreme Court in ***Perkins***[4]. This position is not disputed by learned counsel appearing for the respondent. In such a situation, it is incumbent for this Court to appoint an independent sole arbitrator to adjudicate the disputes between the parties and it is not open for the respondent to insist upon an appointment procedure which is not envisaged in the Arbitration Agreement between the parties.

19. There is also no merit in the contentions raised on behalf of respondent with regard to the non-adherence to the pre-arbitral mechanism as envisaged under Clause 7 of GCC.

20. As noticed, it has been specifically averred by the petitioner in the present petition that the disputes between the parties remain unsettled/unresolved despite mutual consultation meetings held between the parties. Furthermore, it is incorrect to allege that the petitioner has not exhausted the procedure of seeking settlement through conciliation. *Vide* communication dated 04.08.2022, the petitioner specifically took recourse to Clause 7.2 of GCC for resolution of disputes through Expert Settlement Council, however, subsequently, the petitioner declined to participate/withdrew from the conciliation proceedings before the ESC since no opportunity was given to it for mutual selection of names of the concerned conciliators.

21. In this regard, it is relevant to note that in terms of Section 62(3) of

the Act, it is open for a party to reject the invitation to conciliate. Further, in terms of Section 76 of the Act, the conciliation proceedings can be terminated by a written declaration of a party and there is no legal bar in this regard. In the present case, Clause 7.2.5 of the GCC expressly provides that "parties are free to terminate Conciliation proceedings at any stage as provided under the Arbitration and Conciliation Act 1996."

22. In the context of a *pari materia* arbitration clause, it has been held by a Coordinate Bench of this Court in the case of ***Abhi Engg. Corporation Pvt. Ltd. Vs. NTPC Ltd.***[5]***,*** as under:-

> *"**11**. It has been rightly argued on behalf of the learned counsel for the 'petitioner that the process of "conciliation" could be resorted to only if both the parties agreed. Since the petitioner was not agreeable to resolution through conciliation, the Invocation of Arbitration cannot be held to be in non-compliance of mechanism agreed between the parties.*
> *....*
>
> ***13**. In the present case, it is not as if there was a detailed multiple-tier procedure given before the hierarchy of officers for addressing the grievances in regard to execution of the Contract of the petitioner. The first two tiers are mutual consultation and conciliation. As already nominated above, conciliation can take place only if both the parties consent. Rather, it is a case of abandonment of the Contract by the respondent due to inability to delay in issuance of NOC by the Pollution Control Board. Moreover, the first tier of dispute resolution was only to see if the parties could agree at any mutual settlement. As has been rightly argued on behalf of the petitioner, the nature of disputes which had arisen between the parties was not of the kind which may see any fruitful result through mutual consultation. In this case, a reference may be made to the Judgement of Supreme Court in Demarara Distilleries Pvt. Ltd. vs. Demerara Distillers Ltd. (2015) 13 SCC 610, wherein it was opined that the relegation of the parties to the avenue of amicable resolution, when the an application under Section 11(6) of A&C Act, 1996 has been filed, would be unjustified as in case, where such relegation would be merely in the nature of an empty formality.*
>
> ***14**. A reference has also been made to the decision of this Court in*

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[5] 2022:DHC:4280

Kunwar Narayan vs. Ms Ozone Overseas Pvt Ltd and Anr. in ARB.P. 538/2020 decided on 10th February, 2021, wherein a similar mechanism for resolution of disputes was provided. Reliance has also been place on Demarara Distilleries Pvt. Ltd. vs. Demerara Distillers Ltd. (supra) and Ravindra Kumar Verma vs. BPTP Ltd. MANU/DE/3028/2014, wherein it was observed that nothing worthwhile would be achieved by relegating the parties to explore any avenue of amicable resolution. Besides, the appointment of an Arbitrator by this Court would not act as an impediment to the parties to resolve their disputes amicably should it be possible at any point of time.

***15**. In the present case, considering the nature of dispute, it may be an empty formality as observed above, to relegate the parties to first explore the possibility of mutual consultation. Moreover, this cannot be considered as a ground to dismiss the present petition under Section 11(6) of A&C Act, 1996."*

23. In ***Kunwar Narayana vs. M/s Ozone Overseas Pvt. Ltd. & Anr***.[6], this Court relied upon the judgment of the Supreme Court in ***Demarara Distilleries Pvt. Ltd. vs. Demerara Distilleries Ltd.***[7] and the judgment of this Court in ***Ravindra Kumar Verma vs. BPTP Ltd***.[8] and has held as under:-

*"**5**. Ms. Pahwa, learned Counsel for the respondents submitted that her only objection, to the petition, was that the petitioner has not exhausted the avenue of amicable resolution, contemplated by Clause 12 of the Share Buyback Agreement. I am not inclined to agree with this submission. The recital of facts, as set out in the petition, indicate that efforts at trying to resolve the disputes, amicably were made, but did not succeed. Even otherwise, the Supreme Court in Demarara Distilleries Pvt. Ltd. v Demerara Distilleries Ltd. and this Court, in its judgment in Ravindra Kumar Verma v. BPTP Ltd., <u>opined that relegation of the parties to the avenue of amicable resolution, when the Court is moved under Section 11(6) of the 1996 Act, would be unjustified, where such relegation would merely be in the nature of an empty formality</u>. The arbitration clause in the present case does not envisage any formal regimen or protocol for amicable resolution, such as issuance of a notice in that regard and completion of any stipulated time period thereafter, before which arbitral proceedings could be invoked. In the absence of any such stipulation, I am of the opinion, following the law laid down in Demarara Distilleries Pvt.*

[6] 2021:DHC:496
[7] (2015) 13 SCC 610
[8] MANU/DE/3028/2014

Ltd..and Ravindra Kumar Verma v. BPTP Ltd nothing worthwhile would be achieved, by relegating the parties to explore any avenue of amicable resolution. Besides, the appointment of an arbitrator by this Court would not act as an impediment in the parties resolving their disputes amicably, should it be possible at any point of time."

[emphasis supplied]

24. In the case of ***M/s Oasis Projects Ltd. Vs. Managing Director, National Highway and Infrastructure Development Corporation Limited***[9], a Coordinate Bench of this Court, has held as under:-

*"**12**. The primary issue to be decided in the present petition is, therefore, as to whether it was mandatory for the petitioner to resort to the Conciliation process by the Committee before invoking arbitration. Though Article 26.2 clearly states that before resorting to arbitration, the parties agree to explore Conciliation by the Committee, in my opinion, the same cannot be held to be mandatory in nature. It needs no emphasis that Conciliation as a Dispute Resolution Mechanism must be encouraged and should be one of the first endeavours of the parties when a dispute arises between them. However, having said that, Conciliation expresses a broad notion of a voluntary process, controlled by the parties and conducted with the assistance of a neutral third person or persons. It can be terminated by the parties at any time as per their free will. Therefore, while interpreting Article 26.2, the basic concept of Conciliation would have to be kept in mind."*

[emphasis supplied]

25. Learned counsel for the respondent has relied upon the judgment of this court in the case of ***M/s Chabbras Associates vs. M/s HSCC India Limited &Anr.***[10]**,** where the court refused to exercise jurisdiction under Section 11 of the Act on the ground that the procedure prescribed in the arbitration agreement in that case was not adhered to. It is noticed that arbitration clause in the said case was in the following terms:-

"SETTLEMENT OF DISPUTES & ARBITRATION
Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings

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[9] 2023/DHC/000828
[10] 2023/DHC/000388

and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

(i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-inCharge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the authority indicating in schedule 'F" (Reviewing Authority) in writing for written instruction or decision. Thereupon, the Reviewing Authority shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Reviewing Authority fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Reviewing Authority, the contractor may, within 15 days of the receipt of the Reviewing Authority's decision, appeal to the authority as indicated in schedule 'F" (Appealing Authority) who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Appealing Authority shall give his decision within 30 days of receipt of contractor's appeal

If the contractor is dissatisfied with the decision of the Appealing Authority, the contractor may within 30 days from the receipt of the Appealing Authority's decision, appeal before the Dispute Redressal Committee (DRC) along with a list of disputes with amounts claimed in respect of each such dispute and giving reference to the rejection of his disputes by the Appealing Authority. The Dispute Redressal Committee (DRC) shall give his decision within a period of 90 days from the receipt of Contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F'.

If the Dispute Redressal Committee (DRC) fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC), then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Client for appointment of arbitrator on prescribed proforma as per Appendix XV, failing which, the said *decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.*

(ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Client.....
It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection of the Appealing Authority of the appeal."

26. A bare perusal of the aforesaid clause makes it evident that the same mandated reference of the disputes to a "Reviewing Authority" and thereafter to, "Appealing Authority" followed by another appeal to the "Disputes Redressal Committee (DRC)". In the context of ***Chabbras Associates (supra),*** the aforesaid authorities were entrusted to perform an adjudicatory function after hearing the parties. In fact, the relevant clause which fell for consideration in the said case, specifically mentioned that it was open for the contractor to "offer evidence in support of his appeal" before the appealing authority. It was in this context that this Court felt that bypassing the aforesaid authorities and straightaway filing a petition under Section 11 of the Act seeking appointment of an arbitrator, was not apposite in the facts of that case and in view of the nature of the arbitration clause.

27. Likewise, the arbitration clause that fell for consideration by this Court in ***Sushil Kumar Bhardwaj vs. Union of India***[11] was similar to the clause in case of ***Chabbras Associates***[10] and is quite different from the clause in the present case.

28. In the present case, the clause/pre arbitral mechanism contemplates mutual consultation followed by conciliation. As noticed in ***Abhi Engg.***[5] and

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[11] 2009 SCC OnLine Del 4355

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Signing Date:17.04.2023
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Oasis Projects[9]***,*** conciliation is a voluntary process and once a party has opted out of conciliation, it cannot be said that the said party cannot take recourse to dispute resolution through arbitration.

29. In the notice invoking arbitration dated 08.11.2022, it has been mentioned that the claim amount in respect of which the disputes are sought to be raised is to the tune of Rs. 21.28 crores. As such, it is below the ceiling amount of Rs. 25 crores referred to in Clause 7.3.1 of the GCC.

30. In the circumstances, Mr. Justice (Retd.) A.M. Khanwilkar, Former Judge, Supreme Court of India (Mob. No. 9967437111) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

31. The appointment of the arbitrator is based on a *prima facie* examination of the matter. In terms of the judgment of the Supreme Court in ***Vidya Drolia v. Durga Trading Corpn.***[12], it shall be open for the respondent to raise objections as to jurisdiction and/or arbitrability/maintainability of the claims before the learned Sole Arbitrator which shall be adjudicated by the learned Sole Arbitrator on their merits, in accordance with law.

32. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under Section 12 of the Act. The fees payable to the Sole Arbitrator shall be in terms of the stipulations contained in the arbitration agreement between the parties or as may otherwise agreed to between the parties and the learned Sole Arbitrator.

33. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Sole Arbitrator on their merits, in accordance with law.

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[12] (2021) 2 SCC 1

34. Needless to say, nothing in this order shall be construed as an expression of opinion of this court on the merits of the case.

35. The present petition stands disposed of in the above terms.

SACHIN DATTA, J

APRIL 17, 2023/neelam/rohit