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**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

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Date of decision: 30.09.2024

B L KASHYAP AND SONS LTD**...PETITIONER**

VS.

IREO GRACE REALTECH PVT LTD**...RESPONDENT****CORAM: HON'BLE MR. JUSTICE SUVIR SEHGAL**

Present: Ms. Sukhmani T. Patwalia, Advocate &
Mr. Abhishek Masih, Advocate for the petitioner.

Mr. Shubham Daymar, Advocate through VC,
Ms. Charu Sangwan, Advocate and
Mr. Yogender Verma, Advocate
for the respondent (present in Court).

SUVIR SEHGAL J. (ORAL)

1. This petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996, (for short 'the Arbitration Act'), for appointment of an Arbitrator.
2. Counsel for the petitioner submits that the parties entered into an agreement dated 30.12.2014, Annexure P-1, whereunder petitioner was to undertake some construction, etc. of a Residential Group Housing by the name of "The Corridors" in Sector 67-A, Gurugram. She submits



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that a work order dated 30.12.2014, Annexure P-2, was placed upon the petitioner and Clauses 83.1 and 83.2 of the General Conditions of Contract (GCC), Annexure P-3, contain provision for settlement of disputes and appointment of an Arbitrator. She submits that the work was duly completed but some dispute arose between the parties as the respondent retained some payments due to the petitioner. She submits that in terms of the arbitration clause, notice dated 23.03.2023, Annexure P-9, was issued to the Engineer-in-charge, who was to give his decision within a period of 28 days. She asserts that when no response was received, petitioner served a notice dated 15.05.2023, Annexure P-10, invoking the arbitration clause. It is her positive case that even this notice remained unattended.

3. Petition has been contested by the respondent by filing a reply. Counsel for the respondent has taken three objections in opposition. Firstly, it is his objection that the petitioner has not adhered to the conciliation proceedings, which were mandatory; that notice for appointment of the Arbitrator is pre-mature; and thirdly that some of the claims are *ex-facie* barred by time. Petitioner has filed replication to the stand taken by the respondent in its reply.

4. I have heard counsel for the parties and considered their respective submissions.

5. It is apposite to notice and reproduce the arbitration clause:-

“83.1 If any dispute or difference of any kind whatsoever shall arise between the Owner and



the Principal Contractor in connection with or arising out of the Contract or the carrying out of the Works including any dispute as to any decision, instruction, order, direction, certificate or valuation by the Engineer In-Charge whether during the progress of the Works of after their completion and whether before or after the termination, abandonment or breach of the Contract, it shall be referred to and settled by the Engineer-in-Charge who shall state his decision in writing and give notice of the same to the Owner and the Principal Contractor. Unless the Contract shall have been already terminated or abandoned, the Principal Contractor shall in every case continue to proceed with the Works with all due diligence and it shall give effect forthwith to every such decision of the Engineer-in-Charge unless and until the same shall be revised in conciliation or arbitration as hereinafter provided. Such decision shall be final and binding upon the Principal Contractor and the Owner unless either of them shall require that the matter be referred by conciliation or arbitration, as hereinafter provided. If the Engineer-in-Charge shall fail to give such decision for a period of 28 days after being requested to do so or if either the Owner or the Principal Contractor be dissatisfied with any such decision of the Engineer-in-Charge then either the Owner or the Principal Contractor may within 28 days after receiving notice of such decision, or within 28 days after the expiry of the said decision period of 28 days, as the case may be



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request that the matter be referred to conciliation in accordance with the (Indian) Arbitration and Conciliation Act, 1996 or any modification thereof being in force at the date of such request. Conciliation between the parties shall be governed by the Provisions of the [Indian] Arbitration and Conciliation Act, 1996.

83.2 If the matter cannot be resolved by conciliation, or if either the Owner or the Principal Contractor do not wish the matter to be referred to conciliation then either the Owner or the Principal Contractor may within the time specified herein require that the matter shall be referred to arbitration, to a sole arbitrator to be appointed by the Owner, in accordance with and subject to the provisions of the [Indian] Arbitration and Conciliation Act, 1996 or any statutory modification thereof for the time being in force and any such reference shall be deemed to be a submission to arbitration within the meaning of such Act. Any reference to arbitration shall be made within 90 days of:

a. the receipt of a request for conciliation and subsequently the recipient of such request having failed to respond, or

b. the refusal to conciliate, or

c. the failure of the conciliation proceedings to produce a settlement acceptable to the Owner and the Principal Contractor, or

d. the abandonment of the conciliation proceedings, or



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e. the Engineer-in-Charge failing to make a decision for a period of 28 days after being so requested to do so and subsequently neither the Owner nor the Principal Contractor having requested conciliation, or

f. the receipt of a notice of a decision by the Engineer-in-Charge and subsequently neither the Owner nor the Principal Contractor having requested conciliation.” (emphasis added)

6. A perusal of the above reproduced clauses, particularly the highlighted portion, shows that in case of failure of the Engineer-in-charge to give a decision, option was available to the parties to either go in for an arbitration or for conciliation. A conjoint reading of the two clauses clearly shows the intention of the parties that conciliation was only directory and not mandatory. Mere fact that the petitioner has not chosen conciliation as a mode of resolution of disputes, would not bar the petitioner from invoking the arbitration clause and for seeking reference to an Arbitrator. Reliance in this regard can be placed upon the judgment of the Delhi High Court in **Oasis Projects Limited Versus Managing Director, National Highway and Infrastructure Development Corporation Limited 2023 SCC OnLine Delhi 645**. The observations of the High Court in Para 12 are reproduced hereunder:-

“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



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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.”

7. In view of the above, the first objection raised by the respondent, is rejected. Insofar as the second objection is concerned, suffice is to notice that no time period could be fixed for invoking the arbitration clause. Supreme Court in **Grasim Industries Ltd. Versus State of Kerala, (2018) 14 SCC 265** has held that any condition in the arbitration clause, which restricts the time period for raising the claim, is hit by the amended provisions of Section 28 of the Indian Contract Act, 1872. Coming to the third objection raised by the respondent that some claims are time barred, this aspect would lie within the domain of the Arbitrator. Accordingly, this Court does not have any hesitation in accepting the prayer made in the petition.



8. Petition is allowed. Mr. Chief Justice (Retd.) Ravi Shanker Jha, H.No. 913, Old B-68, Pandit Lajja Shankar Jha Road, Wright Town, Jabalpur, Mobile No.94251-53362, is nominated as a sole Arbitrator to adjudicate the dispute between the parties.
9. Liberty is granted to the parties to raise all claims, counter claims, defences, pleas etc. before the learned Arbitrator.
10. Needless to mention that all the questions arising between the parties shall remain open for determination in the arbitral proceedings and any observation made hereinabove will not be binding on the learned Arbitrator.
11. A request letter alongwith a copy of this order be sent to Mr. Chief Justice (Retd.) Ravi Shanker Jha.

30.09.2024

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(SUVIR SEHGAL)

JUDGE

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No