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* **IN THE HIGH COURT OF DELHI AT NEW DELHI****RESERVED ON – 21.12.2023**

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PRONOUNCED ON – 29.01.2024

+ ARB.P. 255/2023

+ ARB.P. 257/2023

R.S.KHANNA AND SONS

..... Petitioner

Through: Ms. Shantha Devi Raman, Mr. Rachit Gupta, Ms. Rajasree, Mr. Mayank Yadav, Advs.

versus

rites LTD. THROUGH ITS EXECUTIVE DIRECTOR & ANR.

..... Respondents

Through: Mr. G.S. Chaturvedi, Mr. Ashok Kumar Chaudhary, Advs. for R-1 (VC).
Mr. SudhirNangrajog, Sr. Adv. (VC),
Mr. Anurag DayalMathur, Adv. for R-2.

CORAM:**HON'BLE MR. JUSTICE DINESH KUMAR SHARMA****J U D G M E N T****DINESH KUMAR SHARMA,J :**

1. By way of the present petitions filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as the 'A&C Act'), the petitioner seeks appointment of Arbitral Tribunal comprising of a Sole Arbitrator to adjudicate the disputes between the



parties.

2. The petition has been filed against Respondent No.1/ RITES Ltd. and Respondent No.2/Ramjas College, an educational institute affiliated with the University of Delhi. The petitioner stated that Respondent No.1 having been hired by Respondent No.2 invited to tender for construction work of renovation and upgradation of the Auditorium in the campus of Respondent No.2, at University Enclave, Delhi. The petitioner was declared as successful bidder and pursuant thereto entered into a contract with Respondent No.1 on 29.04.2016 through Agreement No. RITES/CP/TC/Ramjas/Auditorium/2015 for a contract value of Rs.2,46,34,549.41/-. The LOA was issued on 29.12.2015 with the stipulated start on 14.01.2016 and completion by 08.09.2016. However, the work was actually completed on 19.04.2018.
3. It has been stated that the work was delayed on account of various reasons such as not providing hindrance free site, nonsupply drawing and specifications etc. However, the work was completed to the satisfaction of the Respondent and provisional completion certificate was handed over on 19.04.2018 and final completion certificate was issued on 27.08.2018 with a delay of 3 months.
4. The petitioner submitted that the final bill was submitted by the Petitioner in January 2019 and the same was verified by the Respondents and certified for Rs. 2,69,83,534/- on 14.10.2019. However, the respondent only paid Rs. 2,17,66,547/- leaving balance amount of Rs.42,32,120/-. The petitioner alleged that the respondent wrongly withheld the balance amount Rs.42,32,120/- and GST amount of the certified final bill since from October 2019 amounting Rs.



6,06,346/-. It has further been submitted that on account of delay in issuance of the completion certificate the petitioner also incurred an extra expenditure of Rs. 1,20,000/- for engaging manpower for watch and ward for the safety of the building.

5. It has been submitted that the delay was attributable to the respondent only. The petitioner has also listed various other claims on account of freezing the Government Indices, extra expenditure for getting extension policy premium for vehicle and labour, site expenses due to extended period of contract and prolongation of contract. The loss of profit had also been claimed.
6. The petitioner raised the dispute with the respondent through General Manager on 08.03.2022 and invoked arbitration clause of the agreement for the appointment of an Arbitrator. Subsequently vide letter dated 12.04.2022, the arbitration was specifically invoked but no response was received. The petitioner again sent a reminder on 13.08.2022.
7. The notice was issued to the Respondent No.1. Respondent No.1 in its reply stated that the agreement was entered into by the Respondent No.1 for and on behalf of Respondent No.2 acting as an Agent/Power of Attorney holder of Respondent No.2. It was stated that the Letter of Acceptance and the tender was also floated on behalf of Respondent No.2 and Respondent No.1 acted only as an agent throughout. It was stated that in view of the same and as per Section 230 of the Indian Contract Act Respondent No.1 cannot be sued by the Petitioner and therefore, is entitled to be deleted from the array of parties.
8. Reliance has been placed upon *RITES Vs. Shabbir Ahmed, OMP*



No.13/2013 and RPP Construction (P) Ltd. Vs. RITES Ltd., Arb. P. No.35/2016.

9. The respondent has further submitted that even otherwise there is no liability/obligation upon Respondent No.1 to make any payment, even in respect of the certification of work done by the Answering Respondent.
10. Reference has been made to Clause 7 of the Contract which reads as under:

“Since the Contract is being entered into with the Contractor by RITES acting for and on behalf of the Employer as Agent/ Power of Attorney Holder, no RA Bill will be paid unless sufficient funds have been made available by the Employer.”
11. In the reply on merits, respondent No.1 stated that the work was delayed on account of on account of defaults on the part of the Petitioner. It was stated that on 31.08.2016 there was only physical completion which had a number of defects. It has been further submitted that since no funds were remitted by Respondent No.2, the certified amount could not be paid to the Petitioner.
12. Respondent No.2 in its reply submitted that there was a failure on the part of the petitioner to comply with the mandatory pre-conditions/pre-requisites as enumerated under Clause 25 of the Agreement dated 29.04.2016 before approaching this court. Respondent No.2 submitted that clause 25 of the agreement provides for the settlement of disputes and Arbitration with a complete redressal mechanism under the said clause.
13. Learned counsel for the respondent submitted that since the petitioner



filed the present petition without exhausting the mandatory agreed procedure of dispute resolution as contained in clause 25 of the agreement, the present petition is non-maintainable.

14. Respondent No.2 in its reply submitted that the Petitioner has failed to satisfy the condition for appointment of Arbitrator under Section 11 (6) of the Arbitration and Conciliation Act of 1996 as the appointment procedure agreed upon by the parties has not been followed by the petitioner. Respondent submitted that the petitioner in the first place failed to fulfill the pre-requisites and referred the disputes to the Engineer-in-Charge and therefore, the cause of action for taking subsequent steps i.e., going to Appellate Authority against the decision of the Engineer-in-Charge never arose. Respondent No.2 stated that it is only on being dissatisfied with the decision of the Appellate Authority that the petitioner could have the matter referred to Arbitration.
15. Respondent No.2 further stated that even otherwise the present petition is not maintainable as respondent No.2 was neither a party nor a signatory to the agreement dated 25.03.2014. The agreement was executed between the petitioner and Respondent No.1 and hence no liability can be attributed upon Respondent No.2.
16. Learned counsel for the petitioner submitted that respondent No.1 and 2 both have taken a preliminary objection that the arbitration cannot be invoked against them. Respondent No.1 has taken a plea that it has merely acted as an agent/power of Attorney of respondent No.2, whereas Respondent No.2 had agreed that he is neither a party nor a signatory to the agreement dated 25.03.2014.



17. Learned counsel submitted that thus both the respondents have taken contradictory stand and are avoiding their liability.
18. Learned counsel for the petitioner submitted that all other payments for the work have been released by Respondent No. 2 to Respondent No. 1 and in turn Respondent No. 1 has made the payment to the petitioner and therefore, Respondent No. 2 cannot be allowed to take the plea that he being non-signatory to the agreement cannot be proceeded against.
19. Learned counsel for the petitioner submitted that Respondent No. 1 was only acting as an 'Agent' and 'Power of Attorney Holder' of Respondent No. 2. It was submitted that thus in view of Section 226 and 230 of the Indian Contract Act, it is clear that once there is a disclosed principal in the contract, the Agent incurs no liability and takes no benefit and both the liability and benefit is only of the disclosed principal. In support of his submissions petitioner has relied upon for following judgments:

S. No.	Particulars
1.	Rites Ltd. Vs. Shabir Ahmed & Sons & Ors. (OMP No. 13/2013) Decided by Hon'ble High Court Of Delhi
2.	RPP Construction (P) Ltd. (Arb. P. 35/2016) Decided by Hon'ble High Court of Delhi.
3.	Raj & Associates & Ors. Vs. Videsh Sanchar Nigam Ltd. & Ors. (Suit No. 2380/2000) Decided by Hon'ble High Court of Delhi.
4.	Vivek Automobiles Ltd. Vs. Indian Inc. (2009) 17 SCC 657. Decided by Hon'ble Supreme Court of India.
5.	ACE Innovators Pvt. Ltd. Vs. Hewlett Packard India Sales Pvt. Ltd. & Ors. Decided by Delhi High Court

20. In regard to the pre-mature petition, learned counsel for the petitioner submitted that Clause-25 Sub-Clause-1 mandates 15 days' notice to be given to the Engineering-in-charge and it uses the expression "Shall"



which means the contractor is mandatorily to give 15 days request letter/notice in writing. The Petitioner complied with this requirement by giving a letter dated 08.03.2022. Learned counsel further submitted that Clause-25 (1) Sub-para gives an option to the contractor to give a 15-day letter/notice to the Appellate Authority, who is the Group General Manager. It was stated that this was not mandatory and nearly directory as it uses the expression “may” while specifying about the 15-day notice. Learned counsel for the petitioner submitted that this requirement is though optional, however the Petitioner fulfilled the same as the legal notice dated 21.12.2022 was issued to both the respondents which made it clear that the grievance of the Petitioner has been communicated to both the Respondents by way of legal notice.

21. Learned counsel further submitted that Clause-25 (1) mandates by using the expression “Shall” when it refers to adjudication through Arbitration. Learned counsel submits that the Arbitration Clause has duly been invoked vide notice dated 12.04.2022. Learned counsel further submitted that the petitioner apart from the legal notice had issued a letter dated 17.07.2020 to respondent No.2. Respondent No.1 had also sent a letter dated 24.04.2020 through email to Respondent No. 2 asking for the payment of the balance funds of Rs. 1. 08 Crores for making payment to the petitioner against the Final bills.
22. Learned counsel for the petitioner further submitted that the procedure laid down has to be followed because the opportunity should be given to the Respondents to settle the disputes amicably and also to make them aware of the grievance of the Petitioner. Learned counsel for the petitioner has placed reliance upon *Visa International Ltd. Vs.*



Continental Resources (USA) Ltd., Demerara Distilleries P. Ltd. V s. Demerara Distilleries Ltd. and Innovation Ltd. Vs. Nayati Healthcare & Research NCR Pvt. Ltd.

23. Learned counsel for the petitioner further submitted that the objection of Respondent No.1 is entitled to be rejected in view of Clause-12(6) of the agreement which states that “In case of any claims by the contractor, the employer as well as RITES Ltd. acting as Agent to the employer will implead themselves as parties to the arbitration proceedings”. It has been submitted that both the Respondents are necessary parties to the arbitration proceedings.
24. Learned counsel for the petitioner further submitted that even the non-signatories to the agreement can be impleaded as a party to the arbitration proceedings. Reliance has been placed upon ***Nirmala Jain & Others Vs. Jasbir Singh & Others***. Learned counsel submitted that in the said judgment the court has relied upon ***Cheran Properties Ltd. V s. Kasturi & Sons Ltd.*** and has inter alia held that the factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject matter and the composite nature of the transaction weigh in the balance. Learned counsel for the petitioner has also relied upon the judgment of ***Cox & Kings V s. SAP India Pvt. & Ltd.***
25. Learned counsel for the petitioner has also placed reliance upon ***Edelweiss Asset Re-construction Company Ltd. Vs. GTL Infrastructure Ltd. and Another***. Wherein the co-ordinate bench of this court inter alia found that third parties, whose rights are affected by the Arbitral proceedings are to be impleaded therein.



26. Learned counsel further submitted that the scope Under Section-11(6) of the Arbitration & Conciliation Act is very limited and at this stage, the court is only required to examine the existence of the Arbitration Agreement, and all other issues are required to be left to the Arbitrator. Reliance has been placed upon ***DLF Home Developers Ltd. Vs. Raja PuraHomes Pvt. Ltd. & Another*** (2021) 16 SCC 743.
27. Learned counsel for Respondent No.1 has submitted that Respondent No.2 approached Respondent No.1 for the construction of a new academic block and renovation of certain buildings in the college complex. Thus, Respondent No.1 floated the tender on behalf of Ramjas College. It was further stated that Apart from the floating of tender, finalization of contractor, supervision, and certification of work, Respondent No.1 also undertook to defend Respondent No.2 in arbitration proceedings if instituted. It was stated that however, the said service was subject to the charges, fees, and expenses for the arbitration being borne by Respondent No.2.
28. Learned counsel submitted that Respondent No.1 has merely worked as a Project Management Consultant and therefore cannot be burdened with the liability of making the payment. It has been submitted that Respondent No. 2 remains the Principal in the Contract and Respondent No.1 is only an agent. Learned counsel submitted that Respondent No.1 entered into a contract only on behalf of Respondent No.2 and not in its own capacity. It has been submitted that therefore Respondent No.1 is not a necessary party. Reliance has been placed upon ***rites Vs. Shabbir Ahmed, OMP No.13/2023, RRP Construction (P)Ltd. Vs. RITES LTD., Arb. P. No.35/2016 and Raj***



& Associates & Ors. Vs. Videsh Sanchar Nigam Limited & Ors. - Suit No.2380/ 2000. It has further been submitted that Respondent No.11 had certified the payments of the work done by the Petitioner to the tune of Rs. 1.09 Crores out of which payment for an amount of Rs. 77.54 lacs was already made by the Respondent No.1. However, the balance amount could not be paid as the funds were not made available by Respondent No.2.

29. Learned counsel submitted that in terms of Clause 7, there is no liability of the Answering Respondent for making payment to the contractor, until and unless the funds are available by the Principal/Employer/Respondent No.2 in the present case. Learned counsel further submitted that apart from the amount certified for the work done, the petitioner is not entitled for any other claim as mentioned in the petition. Learned counsel submitted that even Respondent No.2 has not paid the project management fees of Respondent No.2 and therefore in the absence of the bare minimum fees of Respondent No.1 and no assurance of the payment of the expenses/fees during the course of the arbitration, it will not be possible for the Respondent No.1 to participate in the arbitration proceedings for and on behalf of Respondent No.2.
30. Learned counsel for the Respondent No.2 stated that the present petition is not maintainable as Ramjas College was not a signatory to the agreement dated 25.03.2014 and thus no liability can be attributed upon him. It has further been submitted that under Section 11 (6A) of the Arbitration and Conciliation Act the referral Court is to consider and examine as to whether an arbitration agreement exist between the



parties.

31. Learned counsel submitted that the pre-referral jurisdiction of the Court under Section 11 (6) of the Arbitration Act is narrow and the primary inquiry which is to be undertaken by the court is to ascertain the existence of an arbitration agreement between the parties. Reliance has been placed upon *Magic Eye Developers Pvt. Ltd. vs Mis. Green Edge Infrastructure Pvt. Ltd. & Ors. 2023 (8)SCC 50*. Learned counsel submitted that the existence and validity of an arbitration agreement is to be decided by the referral court at the referral stage itself. Learned counsel submitted that Respondent No.2 being non-signatory is entitled to be deleted. It has further been submitted that even otherwise petitioner has not exhausted the mandatory agreed procedure of dispute resolution as contained in clause 25 of the agreement and the present petition is premature and is liable to be dismissed.
32. Learned counsel submitted that this court in *Sushil Kumar vs Union of India 2009 SCC Online Delhi 4355* while interpreting the very language of clause of 25 as contained in the agreement dated 25.03.2014 held that the conditions enumerated under the clause are mandatory and not directory in nature and the same have to be exhausted before a petition under section 11 of the arbitration act can be filed and can be held to be maintainable. It has further been submitted that the co-ordinate bench of this court in *M/s. Chambrays vs. HSCC Associates India Ltd.* has inter alia held that the procedure prescribed in the agreement before evocation of Arbitration Agreement necessarily needs to be followed as Section 11 of the Act can be invoked only where the parties have failed to act under the prescribed



procedure.

33. The present petition has been filed for an appointment of a Sole Arbitrator under Section 11 of the Arbitration and Conciliation Act by the petitioner for the appointment of a Sole Arbitrator. As the respondent failed to clear the final bill. Admittedly, an agreement for construction of New Academic(ScienceBlock) and renovation of Academic/ Administrative/Laboratory/library Block at Ramjas College, Delhi was awarded to the petitioner. In pursuance of which an agreement dated 25.03.2014 was executed between RITES Ltd. and the petitioner. However, it is pertinent to read the first paragraph of the agreement which reads as under:

“THIS AGREEMENT is made on 25th day of March Two thousand fourteen between RITES Ltd. a Government of India Enterprise and a Company registered under Companies Act, 1956 having its registered office at SCOPE Minar, Laxmi Nagar, Delhi 110092 and its Corporate Office at RITES BHAWAN, Plot No.1, Sector 29, Gurgaon (Haryana) representing through General Manager, RITES LIMITED acting for and on behalf of and as an Agent/ Power of Attorney Holder of Ramjas College, Delhi hereinafter called the Employer (which expression shall, wherever the context so demands or requires, include their successors in office and assigns) on one part and M/s R. S. Khanna & Sons, New Delhi hereinafter called the Contractor (which expression shall wherever the context so demands or requires, include his/ their successors and assigns) of the other part.

WHEREAS the Employer is desirous that certain works should be executed viz. Construction of New Academic Block (Science Block) and Renovation of Academic/Administrative/ Laboratory/Library Block at Ramjas College, Delhi, and has by Letter of Acceptance



dated 31.01.2014 accepted a tender submitted by the Contractor for the execution, completion, remedying of any defects therein and maintenance of such works at a total Contract Price of Rs. 14,39,29,150.74 (Rupees Fourteen Crore Thirty Nine Lakh Twenty Nine Thousand One Hundred Fifty and Paisa Seventy Four only)”

34. It is also pertinent to mention here that the RITES Ltd. signed the agreement in the capacity of Agent/ Power of Attorney holder and for and on behalf of Ramjas College, Delhi. Thus, the bare perusal of this makes it clear that the respondent No. 1 had entered into the agreement as an agent for and on behalf of Ramjas College, Delhi. Therefore, in the present case without any exception it can be stated that the Respondent No.2 is an principal and the Respondent No.1 is merely an agent.
35. In this regard, reference can also be made to letter of acceptance dated 31.01.2014 issued to the petitioner by Respondent No.1 which has also been signed by General Manager, CP, RITES Ltd. for an on behalf of Ramjas College, Delhi. Thus, this makes it clear that the contractual relationship was between the petitioner who performed the work and the Respondent No.2 who awarded the work and termed as an employer. The petitioner was only acting for and on behalf of the disclosed principal namely the Ramjas College, Delhi.
36. It is pertinent to mention Section 226 and 230 of Indian Contract Act, which are as under:

"226. Enforcement and consequences of agent's contract-

Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences,



as if the contracts had been entered into and the acts done by the principal in person.

230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.—

In the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Presumption of contract to contrary.—

Such a contract shall be presumed to exist in the following cases:—

(1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

(2) where the agent does not disclose the name of his principal;

(3) where the principal, though disclosed, cannot be sued. "

37. The perusal of this makes it clear that once there is a disclosed principal, an agent incurs no liability and takes no benefit and both the liability and benefit is only of the disclosed principal.
38. Thus Respondent No.2 even for a minute cannot take a plea that he being a non-signatory is entitled to be deleted from the array of the parties. The petitioner had performed the work for the Respondent No.2.
39. Similar question arose in **RPP Construction (P) Ltd. Vs. RITES Ltd.**, (presently RPP Infra Project Ltd. vs. RITES Ltd.) in this case, RPP Infra Project Ltd. (RIPL) had filed a petition under Section 11 of the Arbitration and Conciliation Act for the appointment of an



arbitrator with a plea that RITES had entered into an agreement with Sri Lankan Railways for upgradation of Colombo-Matara Coastal Railway Line in the Democratic Republic of Sri Lanka. Pursuant to the notice inviting tender, the work was awarded to the petitioner. However, later on the dispute arose between the parties and the petition was filed for appointment of an arbitrator. The petition was opposed by RITES on two grounds that there was no contract between RIPL and RITES since RITES had only acted as an agent of the “employer” which was the Sri Lankan Railways and secondly, the dispute in question was the international commercial arbitration.

40. The other issues raised were not considered by the co-ordinate bench of this court as were in relation to the merits of the dispute. The co-ordinate bench of this court after considering the arguments of both the parties inter alia held as under:

“16. At the outset it is necessary to note that the tenders were invited by RITES on behalf of Sri Lankan Railways. The opening words of the notice inviting tenders clearly indicated that tenders were invited by “RITES LIMITED for and on behalf of SRI LANKA RAILWAYS”. The LOA dated 08.02.2010 also clearly indicated that RIPL’s tender had been accepted by the Competent Authority of RITES LIMITED “in its capacity as an Agent/Power of Attorney Holder acting for and on behalf of Sri Lankan Railway”.

17. The Agreement also clearly stated that the agreement was entered into by RITES for and on behalf of Sri Lankan Railways who was referred to as the “employer”. The opening paragraph of the Agreement which describes the parties thereto reads as under:-

“THIS AGREEMENT is made on 7th day of May Two thousand Ten between RITES Ltd. a Government of



India Enterprise and a Company registered under Companies Act, 1856 having its registered office at SCOPE Minar, Laxmi Nagar, (Delhi) – 110092 and its Corporate Office at RITES BHAWAN, Plot No.1, Sector 29, Gurgaon (Haryana) representing through General Manager, RITES LIMITED for and on behalf of Sri Lankan Railways hereinafter called the Employer (which expression shall, wherever the context so demands or requires, include their successors in office and assigns) on one part and M/s R. P. P. Constructions (P) Ltd., P&C Tower, 3rd floor No.140, Perundurai Road, Erode-638011, Tamil Nadu, India hereinafter called the Contractor (which expression shall wherever the context so demands or requires, include his/their successors and assigns) of the other part.”

18. *The Agreement was also signed by RITES “in the capacity of Agent and Power of Attorney Holder for and on behalf of Sri Lankan Railways (The Employer)”. It is apparent from the above that RITES was not a party to the Agreement and the Agreement was only between RIPL and Sri Lankan Railways. Although, RITES had a significant role to play in the execution of the works, the same was only in its capacity as an Agent and a Power of Attorney Holder of Sri Lankan Railways.*

19. *Mr Manoharan’s contention that the present petition was maintainable against RITES since RITES had sufficient interest in the Agreement is difficult to accept. Undoubtedly, RITES was responsible for conduct of certain business including payment of bills raised by RIPL; however, even in this regard, RITES was acting on behalf of the employer – Sri Lankan Railways and not in any other capacity. RITES was not liable to pay any consideration to RIPL in its independent capacity and its obligations to do so were only in its capacity as an agent of the Sri Lankan Railways.”*

41. Thus the facts in the present case are identical in nature. RITES Ltd.



had merely signed the contract as an agent / power of attorney for an on behalf of Ramjas College, Delhi that is Respondent No. 2. Therefore, Respondent No. 2 cannot abandon its liability merely by stating that it is not signatory to the parties.

42. The petitioner has also referred to Clause-25(6) of the Agreement which provides that in case of any claims by the contractor, the employer as well as RITES Ltd. acting as Agent to the employer will implead themselves as parties to the arbitration proceedings.
43. Similar clause came of consideration before the co-ordinate bench of this court in aforementioned case ***M/s RPP Construction (P) Ltd.*** The court inter alia held in view of this employer Sri Lankan Railways is a necessary and proper party. Thus in the present case also, Ramjas College is a necessary and proper party. However, in view of the Clause-25(6) of the GCC the RITES acting as Agent to the employer and Respondent No.2 will implead themselves as parties to the arbitration proceedings.
44. Respondent No.2 has taken an objection and argued vehemently that since the Clause-25 of the agreement has not been followed by the petitioner, the present petition is premature and is liable to be dismissed.
45. Clause 25 of the Agreement provides as under:

“Clause 25

Settlement of Disputes & Arbitration

Except where otherwise provided in the Contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein 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.

1) 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 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 Engineer-in-Charge in writing for written instruction or decision. Thereupon, the Engineer-in-Charge shall give his written instructions or decision within a period of one month from the receipt of the Contractor's letter.

If the Engineer-in-Charge 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 Engineer-in-Charge, the Contractor may, within 15 days of the receipt of the Engineer-in-Charge decision, appeal to the Appellate Authority specified in Schedule 'F' who shall afford an opportunity to the Contractor to be heard, if the later so desires, and to other evidence in support of his appeal. The Appellate Authority shall give his decision within 30 days of receipt of Contractor's appeal if the Contractor is dissatisfied with this decision, the Contractor shall within a period of 30 days from receipt of the decision, give notice to the Appointing Authority specified in Schedule F for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator. 2) Except where the decision has become final, binding and conclusive in terms of sub para (1) above, disputes or difference shall be referred for adjudication through arbitration by a sole



arbitrator appointed by the Appointing Authority. The selection of Arbitrator by the Appointing Authority will be governed by the fact whether the dispute is (1) between two Public Sector Enterprises or (2) between a Public Sector Enterprise and a Government Department or (3) Otherwise.

In case the dispute does not fall under item (i) or (ii) of this para the Appointing Authority, shall appoint the sole Arbitrator. Within 30 days of receipt of notice from the Contractor to refer the dispute for Arbitration, the Appointing Authority stipulated in Schedule F shall send to the Contractor a list of three serving officers of RITES of appropriate status depending on the total value of claim, who have not been connected with the work under the Contract. The Contractor shall, within 15 days of receipt of this list select and then be appointed as the Sole Arbitrator. If the Contractor falls to communicate his selection of name within the stipulated period, the Appointing Authority shall without delay, select one officer from the list and appoint him as the Sole Arbitrator

3) In case the dispute falls under item (1) or (2) of sub para (2) above, the Appointing Authority shall refer the dispute for Arbitration by one of the Arbitrators in the Department of Public Enterprises to be nominated by the Secretary to the Govt. of India in charge of the Department of Public Enterprises. The Arbitration & Conciliation Act, 1996 shall not be applicable to the Arbitration in such a case. The Award of the Arbitrator shall be binding upon the parties to the dispute, provided however that any party aggrieved by such award may make a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law & Justice, Govt. of India. Upon such reference, the dispute shall be decided by the Law Secretary or the Special Secretary/Additional Secretary when so authorized by the Law Secretary, whose decision shall bind the parties finally and conclusively. The parties to the dispute will share equally the cost of Arbitration as intimated by the Arbitrator. The Arbitrator shall make a speaking Award and the Award may be published on plain



paper. In the event of the Sole Arbitrator dying, neglecting or refusing to act or being unable to act for any reason, it shall be lawful for the Secretary to the Govt. of India in charge of the Department of Public Enterprises to nominate another person in place of the outgoing Arbitrator to act as Sole Arbitrator. The new Arbitrator as appointed shall as far as practicable proceed from the stage where it was left by the outgoing Arbitrator.

It is a term of this Contract that the party invoking arbitration shall give a list of disputes with amount claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Appellate Authority of the appeal in the form at Annexure F. It is a term of this Contract that "Excepted matters or matters where the decision of the Engineer in-Charge or any higher authority has been stipulated as "Final and Binding in various Clauses of Contract, stand specifically excluded from the purview of Arbitration Clause.

It is also a term of this Contract that no person other than a person appointed by such Appointing Authority as aforesaid should act as arbitrator and it for any reason that is not possible, the matter shall not be referred to arbitration at all. It is also a term of this Contract that if the Contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the information from the Engineer-in-Charge that the final bill is ready for payment, the claim of the Contractor shall be deemed to have been waived and absolutely barred and the Employer shall be discharged and released of all liabilities under the Contract in respect of these claims.

4) Obligation during pendency of arbitration

Work under the Contract shall unless otherwise directed by the Engineer-in-Charge continue during the Arbitration proceeding and no payment due or payable by the Employer shall be withheld on account of such proceedings, provided



however, it shall be open for the Arbitrator to consider and decide whether or not such work should continue during arbitration proceedings.

5) Signing of "No Claim" certificate

The Contractor shall not be entitled to make any claim whatsoever against the Employer under or by virtue of or arising out of the Contract, nor shall the Employer entertain or consider any such claim if made by the Contractor after he shall have signed a "No Claim Certificate" in favour of the Employer in such form as stipulated by the Employer, after the works are finally measured up. The Contractor shall be debarred from disputing the correctness of any item covered by the "No Claim Certificate" or demanding a reference to arbitration in respect thereof.

6) Parties to be impleaded in the arbitration proceedings In case of any claims by the Contractor, the Employer as well as RITES Ltd. acting as Agent to the Employer will implead themselves as parties to the Arbitration Proceedings.

7) The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or reenactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause, except for cases failing under para 2(i) or (ii).

8) It is also a term of this Contract that the arbitrator shall adjudication on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs.1,00,000/- the arbitrator shall give reasons for the award.

9) It is also a term of the Contract that where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.



10) It is also a term of this Contract that the arbitrator shall indicate

i) the Award amount payable on the date of award

ii) the period within which it is to be paid and

iii) Simple rate of interest applicable beyond the stipulated free period for making payment of award amount.

11) It is also a term of the Contract that if any fees are payable to the arbitrator these shall be paid equally by both the parties.

12) It is also a term of the Contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to subject their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.”

46. Clause-25(1) provides basically 3 steps to be undertaken:

- a. In case of any dispute, arising out of the contract or carrying out of the work which not acceptable to the contract, the contract shall promptly within 15 days request the Engineer-in-charge in writing for written instruction or decision.
- b. The Engineer-in-charge shall give his written instructions or decision within a period of one month from the receipt of the Contractor's letter.
- c. If the Engineer-in-charge 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 Engineer-in-charge, the contractor may within 15 days of the Engineer-in-charge decision appeal to the appellate authority. The appellate authority shall afford an opportunity to the contractor to be heard, if the later so desires, and offer evidence in support his appeal. The appellate authority shall give his decision within 30 days of the receipt of contractor's appeal.

- d. If the contractor is dissatisfied with the decision. The contractor shall within a period of 30 days from receipt of the decision give notice to the appointing authority for appointment of an arbitrator.
47. Thus the petitioner was first required to give in writing within 15 days of his grievances to the Engineer-in-charge. The Engineer-in-charge was required to respond within one month and if the petitioner was not satisfied with the same he was required to file an appeal with the appellate authority within 15 days.
48. The plea of Respondent No.2 is that the petitioner has not exhausted the remedies as provided in Clause-25(1). Similar, Clause-25 came up for consideration before this court in ***Sushil Kumar Bhardwaj Vs. Union Of India*** 2009 SCC OnLine Del 4355. The court on the basis of clause framed the following questions:
- a. Whether the procedure prescribed in sub Clause. (i) of clause 25 is applicable to all disputes or to only the matters of the contractor being required to do any work considered by him to be outside the contract or where the contractor disputes any drawing, record or decision given in writing only.



- b. Whether the procedure prescribed in sub clause (i) is mandatory or directory.
 - c. Whether the designate of the Chief Justice under Section 11(6) of the Arbitration Act, 1996 is empowered to appoint an arbitrator if the procedure prescribed in sub-clause (i) is not followed.
49. The court while replying to the Question-A inter alia held as under:

“7. Not only is the language wide enough as aforesaid to cover all disputes, I also do not find any rationale in providing the aforesaid procedure for only some and not all disputes. The parties, in the making of contract, while interpreting the same, are expected to have been guided by reason, rather than having acted irrationally. Yet another reason for me to hold so, is that if procedure prescribed in sub-clause (i) is held to apply to some only and not all disputes, it will add another tier of conflict between the parties, leading to further delays in disposal of applications under Section 11(6) of the Act.

8. The aforesaid procedure has been prescribed so that before the parties resort to lengthy/costly arbitration, there is ample opportunity to the MCD to, if finds any merit in the claims of the contractor, to settle the same. The parties are perfectly within their right to provide for such a procedure. A public body as the MCD, in the discharge of its functions is dependent upon its officials and since such bodies are the largest employers for such works, and the value whereof may vary to a large extent, the intent seems to be that even if the engineer-in-charge or the superintending engineer for any reason whatsoever out of any differences with the contractor, have not acted reasonably, there is full opportunity at all levels for amicable settlement of the claims. The clause is also intended to prevent a contractor from without inviting the attention of the engineer-in-charge and/or superintending engineer approaching the chief engineer who may otherwise not be in know of all the facts, to appoint the arbitrator. Once the aforesaid procedure has



been followed, the Chief Engineer, before appointing the arbitrator would have the reasons of the engineer-in-charge and the superintending engineer before him and would also be entitled to, if he still finds merit in the claims of the contractor, to settle the same without resorting to arbitration.

9. Sub clause (ii) does not use the word "other disputes" so as to apply the same to any dispute other than that defined in sub clause (i). In fact sub clause (i) ends with a notice for appointment of arbitrator being required to be given and sub clause (ii) is in continuation of the said procedure by providing for appointment of arbitrator. The purpose seems to be that there should be due application of mind by the expert body of the public body before the contractor is compelled to take recourse to the arbitration proceedings. - Conversely, the possibility of the contractor being satisfied by the reasoning given by successive officials and hence not insisting on arbitration, cannot also be ruled out. Most of such contractors have several such projects with such public bodies and may be convinced/satisfied with the hearing of their grievance by higher officials. I would thus respectfully agree with Concrete India (supra), particularly when there, does not appear to be much discussion on this aspect in the latter judgment. The question No. 1 is thus answered to the effect that the procedure of inviting the decision in writing on any claim/dispute, of approaching the superintending engineer and thereafter the chief engineer for decision on the dispute is to be exhausted before the chief engineer can be approached for appointment of the arbitrator. "

50. In respect of Question-B the court has inter alia held as under:

"10. In Saraswati Construction Co. v. East Delhi Coop. Group Housing Society Ltd. (1995) 57 DLT 343 decided under the 1940 Act and relied upon by counsel for petitioners, a view was taken that such procedure as in clause 25 is directory and not mandatory and a petition to



the court for appointment of arbitrator cannot be defeated for the reason of the procedure having not been exhausted. It was held that once an arbitration clause is found, the court necessarily has to appoint the arbitrator. But I find that there is a marked shift in the provision qua filing of application in the court for appointment of the arbitrator, in the 1996 Act from the 1940 Act.

11. Under Section 20 of the 1940 Act any party to an arbitration agreement, instead of following the procedure prescribed in Chapter II thereof i.e., of themselves appointing an arbitrator, could apply to the court for having the arbitrator appointed by the court. Thus, under Section 20 of the 1940 Act, the party had a choice of either themselves appointing an arbitrator or straightway approach the court for appointment of the arbitrator. All that the court was required to see in a petition under section 20 - was as to whether there was an agreement of appointment of arbitrator. The court was not, required to see whether the party had attempted constitution of arbitral tribunal. themselves as per procedure prescribed in Chapter II and/or whether the parties were unable to do so. It was in the aforesaid state of law that it was held that the agreed procedure for appointment was directory and not mandatory.

12. Per contra, under Section 11 of the 1996 Act, the designate of the Chief Justice can be approached for appointment of an arbitrator only where a party has failed to act as required under the agreed procedure and/or where a person or an institution has failed to perform any function entrusted to him/it under that procedure. Thus, the parties now under the 1996 Act do not have a choice of either, attempt appointment of the arbitral Tribunal themselves or at least take steps therefor or approaching the court directly but are now before approaching the court required to first exhaust the agreed procedure or the procedure prescribed by law. Without the same being done, there would be no cause of action for approaching the designate of the Chief



Justice. I may in this regard also refer to the judgments relied upon by the counsel for the Government of NCT of Delhi.

13. In The Iron & Steel Co. Ltd. v. Tiwari Road Lines (2007) 5 SCC 703: AIR 2007 SC 2064 it was held that in the matter of settlement of dispute the agreement executed by the parties has to be given great importance and an agreed procedure for appointing the arbitrator has been placed on high pedestal and has to be given --- preference to any other mode for securing appointment of an arbitrator. Similarly in Municipal Corp, Jabalpur v. Rajesh Construction Co. (2007) 2 Arb LR 65 (SC), the agreement required furnishing security before demanding constitution of Arbitral Tribunal, the Apex Court held that the obligation of corporation to constitute an - Arbitration Board to resolve disputes could not arise because of failure of applicant to furnish security and the designate of the Chief Justice of the High was held to be in error in appointing an independent arbitrator. The Kerala High Court also in Bel House Associates Pvt. Ltd. v. General Manager Southern Railway AIR 2001 Ker 163 and NirmanSindia v. IndalElectromelts Ltd. AIR 1999 Ker 440 held that where agreement stipulated reference to arbitration to be proceeded by a decision by the Engineer and a challenge to that decision before the adjudicator, without resorting to those essential or preceding steps for arbitration or waiver thereof, the agreement prohibited either party from enforcing the arbitration clause; the application under Section 11(6) was held to be premature.

14. The counsel for the petitioners relied upon Kailash v. Nankhe (2005) 4 SCC 480 in paragraphs 28 to 30 whereof it has been emphasized "procedure are the handmade of justice". Reliance was also placed on Hindustan Petroleum Corpa v. Pinkcity Midway Petroleums (2003) 6 SCC 503 to urge that in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer parties to arbitration. However, neither of the said judgments is on the controversy before this court. There is a definite purpose, as



aforesaid in the agreement providing for steps to be taken before resorting to arbitration and such agreement ought not to be interfered with specially when Section 11(6) also provides cause of action only after such agreement has been followed.

15. There is yet another aspect of the matter. The 1940 Act deals with arbitration only. Per contra, the 1996 Act gives legal recognition to conciliation and the two are not repugnant to each other. The steps preceding arbitration are to encourage conciliation and the designate of the Chief Justice ought to encourage such mechanism for conciliation agreed upon by the parties.

16. The second question is also thus answered to the effect that the procedure prescribed is mandatory and not directory.”

51. In respect of Question-C the court has inter alia held as under:

“17. Axiomatically this question has to be answered to the effect that following the agreed procedure being mandatory, in the absence of an averment or a pleading to the effect that the agreed procedure or the procedure prescribed in law has been followed, there would be no option but to reject the application under Section -11(6) of the Act as without cause of action and/or premature.

18. In this regard I may also notice a recent judgment of the Apex Court in P Manohar Reddy v. Maharashtra Krishna Valley Development Corp., (2009) 2 SCC 494 giving supremacy to contractual terms in arbitration. Arbitration is a feature of an agreement and in arbitration matters the agreement is supreme and cannot be given a go-bye by the parties, especially when it is found to be in the interest of the parties and to have been inserted with a view to avoid unnecessary arbitrations in matters in which the higher authorities find a possibility of settlement.”

52. Thus a similar clause 25 of the GCC came up for examination before



the co-ordinate bench of this court in *M/s Chhabra Associates vs. M/s HSCC India Limited &Anr.* in ARB. P. 782/2022. Wherein the co-ordinate bench of this court followed the view taken **Sushil Kumar Bhardwaj (Supra)** and dismissed the petition as premature.

53. The issue in the present case is squarely covered in *Sushi Kumar Bhardwaj (Supra)* and *M/s Chhabra Associates vs. M/s HSCC India Limited &Anr.* in ARB. P. 782/2022. and there is no reason for this court to have any further discussion on the matter. Thus the petitioner having not exhausted the remedies as provided in clause-25, the present petition is liable to be dismissed being premature.

JANUARY 29, 2024/AR/SJ/HT..

DINESH KUMAR SHARMA, J

न्यायमेव जयते