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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **ARB.P. 1154/2023****M/S RAM GOPAL AGRAWAL**

.....Petitioner

Through: Mr. Sahil Garg, Ms. Samiksha Jain and Ms. Mithil Malhotra, Advs.

versus

**UNION OF INDIA THROUGH NORTHERN****RAILWAY MORADABAD**

.....Respondent

Through: Mr. Farman Ali, CSPC with Ms. Usha Jamnal and Mr. Krishan Kumar, Advs.

Mr. Ashok Deo and Mr. Chandra Shekhar, Advs.

**CORAM:****HON'BLE MR. JUSTICE C.HARI SHANKAR****JUDGMENT (ORAL)**

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**31.07.2024****ARB.P. 1154/2023**

1. The petitioner was awarded three contracts by the respondents for carrying out construction activities on 28 November 2017, 22 December 2017 and 10 September 2020. The contracts dated 28 November 2017 and 22 December 2017 were governed by General Conditions of Contract<sup>1</sup>, whereas the contract dated 10 September 2020 was governed by GCC of 2018<sup>2</sup>.

2. There is no dispute that both the GCCs of 2014 and 2018 envisage resolution of disputes between the parties by arbitration, though Mr. Farman Ali, learned Counsel for the respondent submits

<sup>1</sup> GCC<sup>2</sup> GCC of 2018



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that there is a slight difference in the arbitration clause in the two GCCs.

3. The relevant clauses in the two GCCs read thus:

2014 GCC

**“63. Matters Finally Determined By The Railway:** All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination 'of the contract, shall be referred by the contractor to the GM and the GM shall, within 120 days after receipt of the contractor's representation, make and notify decisions on all matters referred to by the contractor in writing provide that matters for which provision has been made in Clauses 8, 18, 22(5). 39, 43(2), 45(a), 55, 55-A(5), 57, 574,61(1), 61(2) and 62(1) to (XIII)(B) of Standard General Conditions of Contract or in any Clause of the Special Conditions of the Contract shall be deemed as 'excepted matters' (matters not arbitrable)and decision of the Railway authority, there on shall be final and binding on the contractor, provided further that 'excepted matters' shall stand specifically excluded from the preview of the Arbitration Clause.

**64.(1) Demand For Arbitration:**

**64.(1)(i)** In the event of any dispute or difference between the parties hereto as to the construction or operations of this contract or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the “excepted matters” referred to in Clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

**64.(1)(ii)** The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute(s)or difference(s) in respect of which the demand has been made, together with counter claims or set off, given by the Railway, shall be referred to arbitration



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and other matters shall not be included in the reference.

**64.(1)(iii)** (a) The Arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway.

(b) The claimant shall submit his claim stating the facts supporting the claims along with all the relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of appointment of the Arbitral Tribunal.

(c) The Railway shall submit its defence statement and counter claim(s) if any, within a period of 60 days of receipt of copy of claims from Tribunal thereafter, unless otherwise extension has been granted by Tribunal.

(d) Place of Arbitration: The place of arbitration would be within the geographical limits of the Division of the Railways where the cause of action arose or the Headquarters of the concerned Railway or any other place with the written consent of both the parties.

**64.(1)(iv)** No new claim shall be added during proceedings by either party. However, a party may amend or supplement the original claim or defence thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in making it.

**64.(1)(v)** If the contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Railways that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims.

**64.(2)** Obligation During Pendency of Arbitration: Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Railway shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to consider and decide whether or not such work should continue during arbitration proceedings.



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**64.(3) Appointment of Arbitrator:**

**64.(3)(a)(i)** In cases where the total value of all claims in question added together does not exceed Rs. 25,00,000 (Rupees twenty-five lakh only), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below JA Grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM.

**64.(3)(a)(ii)** In cases not covered by the Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a Panel of three Gazetted Railway Officers not below JA Grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM.

Contractor will be asked to suggest to General Manager at least names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them is from the Accounts Department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA grade of other departments of the Railway for the purpose of appointment of arbitrator.



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**64.(3)(a)(iii)** If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator (s)

**64.(3)(a)(iv)** The Arbitral Tribunal shall have power call for such evidence by way of affidavits or otherwise as the Arbitral Tribunal shall think proper, and it shall be the duty of the parties hereto to do or cause to be done all such things as may be necessary to enable the Arbitral Tribunal to make the award without any delay. The Arbitral Tribunal should record day to-day proceedings. The proceedings shall normally be conducted on the basis of documents and written statements.

**64.(3)(a)(v)** While appointing arbitrator(s) under Sub-Clause (i), (ii) & (iii) above, the care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Railway servant(s) expressed views on all or any of the matters under dispute or differences. The proceedings of the Arbitral Tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.

**64.(3)(b)(i)** The arbitral award shall state item wise the sum and reasons upon which it is based. The analysts and reasons shall be detailed enough so that the award could be inferred & therefrom.

**64.(3)(b)(ii)** A party may apply for corrections of



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any computational errors, any typographical or clerical errors or any error of similar nature occurring in the award of a Tribunal and interpretation of a specific point of award to Tribunal within 60 days of receipt of the award.

**64.(3)(b)(iii)** A party may apply to Tribunal within 60 days of receipt of award to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

**64.(4)** In case of the Tribunal, comprising of three Members, any ruling on award shall be made by a majority of Members of Tribunal. In the absence of such a majority, the views of the Presiding Arbitrator shall prevail.

**64.(5)** 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.

**64.(6)** The cost of arbitrator shall be borne by the respective parties. The cost shall inter-alia include fee of the arbitrator(s), as per the rates fixed by Railway Board from time to time and the fee shall be borne equally by both the parties. Further, the fee payable to the arbitrator(s) would be governed by the instructions issued on the subject by Railway Board from time to time irrespective of the fact, whether the arbitrator(s) is/are appointed by the Railway Administration or by the court of law unless specifically directed by Hon'ble-court otherwise on the matter.

**64.(7)** Subject to the provisions of the aforesaid Arbitration and Conciliation Act 1996 and the rules thereunder and any statutory modifications thereof shall apply to the arbitration proceedings under this Clause.”

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## 2018 GCC

### **“64.(1): Demand for Arbitration:**

**64.(1)(i):** In the event of any dispute or difference between the parties hereto as to the construction of



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operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the Contractor may claim to be entitled us, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in Clause 63.1 of these Conditions, the Contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

**64.(1)(ii)(a):** The demand for arbitration shall specify the matters which are in question, of subject of the dispute or difference as also the amount of claim item-wise. Only such dispute or difference, in respect of which the demand has been made, together with counter claims or set off, given by the Railway, shall be referred to arbitration and other matters shall not be included in the reference

**64.(1)(ii)(b):** The parties may waive at the applicability of Sub-Section 12(5) of Arbitration and Conciliation (Amendment) Act 2015, if they agree for such waiver in writing, after dispute having arisen between them, in the format given under Annexure XV of these conditions.

**64.(1)(iii)(a):** The Arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway.

**64.(1)(iii)(b):** The claimant shall submit his claims stating the facts supporting the claims along with all the relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of appointment of the Arbitral Tribunal

**64.(1)(iii)(c):** The Railway shall submit its defence statement and counter claim(s), if any, within a period of 60 days of receipt of copy of claims from Tribunal, unless otherwise extension has been granted by Tribunal.

**64.(1)(iii)(d):** Place of Arbitration: The place of arbitration would be within the geographical limits of the Division of the Railway where the cause of action arose or the headquarters of the concerned Railway or any other place with the written consent of both the parties.

**64.(1)(iv):** No new claim shall be added during





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proceedings by either party. However, a party may amend or supplement the original claim or defence thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in making it.

**64.(1)(v):** If the Contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Railways that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims

**64.(2): Obligation During Pendency of Arbitration:** Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Railway shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to consider and decide whether or not such work should continue during arbitration proceedings

**64.(3): Appointment of Arbitrator:**

**64.(3)(a): Appointment of Arbitrator where applicability of section 12 (5) of Arbitration and Conciliation Act has been waived off:**

**64.(3)(a)(i):** in cases where the total value of all claims in question added together does not exceed 1,00,00,000/- (Rupees One Crore), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below Junior Administrative Grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by General Manager.

**64.(3)(a)(ii):** In cases not covered by the Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below Junior Administrative Grade or 2 Railway Gazetted Officers not below Junior Administrative Grade and a retired Railway Officer, retired not below the rank of Senior Administrative Grade Officer, as the arbitrators. For this purpose, the Railway will send a panel of at least four (4) names of Gazetted Railway





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Officers of one of more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the Contractor within 60 days from the day when a written and valid demand for arbitration is received by the CGeneral Manager.

Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as Contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the Contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the presiding arbitrator' from amongst the 3 arbitrators so appointed. General Manager shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of Contractor's nominees While nominating the arbitrators, it will be necessary to ensure that one of them is from the Accounts Department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in Senior Administrative Grade of other departments of the Railway for the purpose of appointment of arbitrator.

**64.3.(a).iii:** The serving railway officer working in arbitral tribunal bi the ongoing arbitration cases as per clause 64. (3)(a)(1) and clause-64(3)(a)(ii) above, can continue as arbitrator in the tribunal even after his retirement.

**64.(3)(b):** Appointment of Arbitrator where applicability of Section 12 (5) of Arbitration und Conciliation Act has not been waived off:

(i) In cases where the total value of all claims in question added together does not exceed 50,00,000/- (Rupees Fifty Lakh), the Arbitral Tribunal shall consist of a Retired Railway Officer, retired not below the rank of Senior Administrative Grade Officer, as the arbitrator. For this purpose, the Railway will send a panel of at least four (4) names of retired Railway Officers) empanelled to work as Railway Arbitrator duly indicating their



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retirement dates to the Contractor within 60 days from the day when a written and valid demand for arbitration is received by the General Manager Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as arbitrator within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the arbitrator

(ii) In cases where the total value of all claims in question added together exceed 50,00,000/- (Rupees Fifty Lakh), the Arbitral Tribunal shall consist of a Panel of three (3) retired Railway Officer, retired not below the rank of Senior Administrative Grade Officer, as the arbitrators. For this purpose, the Railway will send a panel of least four (4) names of retired Railway Officer(s) empanelled to work as Railway Arbitrator duly indicating their retirement date to the Contractor within 60 days from the day when a written and valid demand for arbitration is received by the General Manager.

Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as Contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the Contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the Presiding Arbitrator from amongst the 3 arbitrators so appointed. General Manager shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of Contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them has served in the Accounts Department.

**64.(3)(c)(1):** If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new



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arbitrator/arbitrators to act in his their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator (s).

**64.(3)(c)(ii):** (a) The Arbitral Tribunal shall have power to call for such evidence by way of affidavits or otherwise as the Arbitral Tribunal shall think proper, and it shall be the duty of the parties hereto to do or cause to be done all such things as may be necessary to enable the Arbitral Tribunal to make the award without any delay. The proceedings shall normally be conducted on the basis of documents and written statements.

(b) Before proceeding into the merits of any dispute, the Arbitral Tribunal shall first decide and pass its orders over any plea submitted objections raised by any party, if any appointment of Arbitration Tribunal, validity of arbitration agreement, jurisdiction and scope of regarding the Tribunal to deal was the dispute(s) submitted to arbitration, applicability of time 'limitation' to any dispute, any violation of agreed procedure regarding conduct of the arbitration proceedings of plea for interim measures of protecting and record its orders in day to day proceedings. A copy of the proceedings duly signed by all the members of tribunal should be provided to both the parties.

**64.(c)(iii):** (i) Qualification of Arbitrator(s):

(a) Serving Gazetted Railway Officers of not below JA Grade level

(b) Retired Railway Officers not below SA Grade level, one year after his date of retirement.

(c) Age of arbitrator at the time of appointment shall be below 70 years.

(ii) An arbitrator may be appointed notwithstanding the total number of arbitration cases in which he has been appointed in the past.

(ii) While appointing arbitrator(s) under Sub



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Clause 64.(3)(a)(i), 64.3(a)(ii), 64.(3)(b) (i) & 64.(3)(b)(ii) above, due care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Railway servant(s) expressed views on all or any of the matters under dispute or differences. A certification to this effect as per annexure- XVI shall be taken from Arbitrators also. The proceedings of the Arbitral tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one of more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his their duties expressed views on all or any of the matters under dispute

**64.(3)(d)(i):** The arbitral award shall state item wise, the sum and reasons upon which it is based. The analysis and reasons shall be detailed enough so that the award could be inferred therefrom.

**64.(3)(d)(ii):** A party may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award of a Tribunal and interpretation of a specific point of award to Tribunal within 60 days of receipt of the award.

**64.(3)(d)(iii):** A party may apply to Tribunal within 60 days of receipt of award to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

**64.(4):** In case of the Tribunal, comprising of three members, any ruling on award shall be made by a majority of members of Tribunal. In the absence of such a majority, the views of the Presiding Arbitrator shall prevail.

**64.(5):** 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.

**64.(6):** The cost of arbitration shall be borne by the respective parties. The cost shall inter alia include fees of the arbitrators as per the rates fixed by Railway Board from time to time and the fee shall be borne equally by both the



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parties, provided parties sign an agreement in the format given at Annexure XV to these condition after/while referring these disputes to Arbitration. Further, the fee payable to the arbitrator(s) would be governed by the instructions issued in the subject by Railway Board from time to time irrespective of the fact whether the arbitrators) is/are appointed by the railway Administration or by the court of law unless specifically directed by Hon'ble court otherwise on the matter.

**64.(7)** Subject to the provisions of the aforesaid Arbitration and Conciliation Act 1996 and the rules thereunder and relevant para of General Conditions of Contract (GCC) and any statutory modifications thereof shall apply to the appointment of arbitrators and arbitration proceedings under this Clause.”

4. The petitioner claims payments to be due from the respondent under various heads, including escalation, price variation and GST, amongst others.

5. As attempts at settling the matter with the respondent did not prove fruitful, the petitioner addressed a notice dated 17 July 2023 to the respondent under Section 21 of the Arbitration and Conciliation Act, 1996<sup>3</sup>, seeking appointment of a sole arbitrator to adjudicate on the disputes. I may note, here, that, though the arbitration clause envisages any claims in excess of ₹ 10 lakhs being arbitrated by a three member Arbitral Tribunal, learned Counsel for the parties agree *ad idem* that the arbitration could be by a sole arbitrator in order to facilitate expeditious disposal and reduce costs.

6. The respondent, in its reply dated 10 August 2023, contested the petitioner's claims.

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<sup>3</sup> “the 1996 Act” hereinafter



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7. As, therefore, there was no consensus regarding arbitration, the petitioner has moved this Court by means of the present petition, seeking reference of the disputes to the arbitrator to be named by this Court.

8. Mr. Sahil Garg, learned Counsel for the petitioner submits that the disputes are interconnected and they may, therefore, be referred to a common arbitrator. Mr. Farman Ali, learned Counsel for the respondent refutes the contention that the disputes are interconnected, but does not oppose reference of all the matters to a common arbitrator reserving his rights to advance objections on all counts before the learned arbitrator.

9. Given the position of law most recently enunciated by the Supreme Court in *SBI General Insurance Co Ltd v. Krish Spinning*<sup>4</sup>, the Court exercising jurisdiction under Section 11(6) of the 1996 Act has essentially to satisfy itself regarding the existence of an arbitration agreement between the parties. The Supreme Court has unequivocally advocated relegating other controversial issues to the Arbitral Tribunal, so as to maintain arbitral autonomy.

10. In that view of the matter, this Court appoints Mr. J Sai Deepak (Tel. 9711116574), a respected advocate of this Court, as the arbitrator to arbitrate on the disputes between the parties.

11. The arbitration would take place under the aegis of the Delhi

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<sup>4</sup> 2024 SCC OnLine SC 1754



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International Arbitration Centre (DIAC) and would abide by its rules and regulations. The learned arbitrator shall be entitled to fees as per schedule of fees maintained by the DIAC.

12. The learned arbitrator is also requested to file the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on reference.

13. All contentions of fact and law, including contentions regarding maintainability, shall remain open for adjudication before the learned arbitrator.

14. This order has been passed without prejudice to all rights and contentions of the parties.

15. The petition stands allowed accordingly.

**C.HARI SHANKAR, J**

**JULY 31, 2024**

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*Click here to check corrigendum, if any*