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

**Date of Decision: 26.05.2025**

+ **ARB.P. 345/2025**

SCC INFRASTRUCTURE PRIVATE LIMITED .....Petitioner

Through: Mr. Sanjeev Kumar Sharma, Mr.  
Rajiv Dalal, Advs.

versus

rites limited & ANR. ....Respondents

Through: Mr. GS Chaturvedi, Mr. Virat Singh,  
Advs.

**JASMEET SINGH, J. (ORAL)**

1. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator to adjudicate the disputes between the parties.
2. The facts are that the respondent No. 1 company acting as an agent/power of Attorney holder for respondent No. 2 floated a tender for design, supply and erection of pre-engineered superstructure for Traction Alternator Factory project. Thereafter, the parties entered into an Agreement dated 29.03.2016.
3. The arbitration clause is contained as clause 25 of the GCC and the same reads as under:

*“25. Settlement of Disputes and 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 anyway 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.*

*.....*

*3) In case the dispute false under item (i) or (ii) 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 of the Govt. Of India in charge of the Department of Public Enterprises. The Arbitration and Conciliation Act 1996 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 a side or revision of the award to the law secretary, department of legal affairs, ministry of law and justice, Govt. Of India. Upon such reference, the dispute shall be decided by the Law Secretary or the sSecial Secretary/Additional Secretary when so authorised 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 of 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 practicably proceed from the stage where it was left by the outgoing Arbitrator.*

*It is a term of this contract that the party in walking 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 the 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 if for any reason that is not possible, the matter shall not to 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 claim in writing as a forced with in 120 days of receiving the intimation from 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. The petitioner complied with the pre-arbitral procedure and thereafter invoked arbitration vide legal notice dated 01.09.2022.
5. Hence, the present petition has been filed.
6. It is stated by Mr. Chaturvedi, learned counsel for the respondent No. 1 that the present petition is not maintainable. The petitioner invoked arbitration on 01.06.2021 and the present petition is filed in February 2025. Hence, the petition is beyond the limitation period of 3 years.
7. Mr. Sharma, learned counsel for the petitioner states that in the present case, notice invoking arbitration is dated 01.09.2022 and hence the petition is within the time.
8. As regards this contention, even assuming that the notice was issued on 01.06.2021, a combined reading of ***Re Interplay*** 2023 INSC 1066 and ***Arif Azim Company Limited vs Aptech Limited*** (2024) 5 SCC 313 shows that if in the COVID period, limitation expires, the balance period available is to be added.



9. Hence, the period of 3 years from 01.06.2021 would expire on 31.05.2024 and adding the period of 8 months available from 01.06.2021 to 28.02.2022, the petition filed will be well within the period of limitation.

10. As regards the second contention, Mr. Chaturvedi, learned counsel for the respondent states that in view of the arbitration clause, it is clear that once the appointing authority as specified in Schedule F of the agreement is unable to appoint the arbitrator, then the parties have agreed to no arbitration at all. Hence, the petitioner can and should file a civil suit.

11. He relies on the judgment in **Vindhya Vasini Construction Co. v. Bharat Heavy Electricals Ltd.** 2023 SCC OnLine Del 2768 wherein an identical clause was interpreted by a Coordinate Bench, which held as follows:

*“21. The Court struck down the said Clause and also observed that the same being severable from the rest of Clause 25, will not affect the remaining part of Clause 25. However, in the present case, it cannot be said that the condition stipulated in the subsequent part of Clause 23 in the Agreement in the question is severable. In fact, it is an express stipulation of non-enforceability of the Arbitration Agreement in case the condition mentioned therein exists.*

*22. There can be no dispute on the proposition laid down in Enercon (India) Limited and Others (supra), which holds that in interpreting or construing terms of the Arbitration Agreement, the Courts must adopt a pragmatic approach and not a pedantic or technical approach, however, in the present case, the Agreement being unambiguous, Question of interpretation thereof does not*



*arise. The learned counsel for the petitioner submits that the dominant intention of the parties was to have their disputes resolved through Arbitration and therefore, such intent be not defeated by the subsequent portion of the Clause. I do not find merit in the submission inasmuch as the parties themselves agreed that in case the nominee of the Head TBG cannot act as an Arbitrator, there shall be no Arbitration. Having expressly agreed to such stipulation, the parties are bound by this.*

*23. The submission of the learned counsel for the petitioner that the stipulation in Clause 23 of the Work Order insofar as it provides that in case the nominee of the Head TBG cannot act as an Arbitrator, the dispute shall not be referred to Arbitration, is unconscionable or unenforceable, also does not impress me. As noted hereinabove, arbitration is by the consent of the parties. It provides for an alternate dispute resolution mechanism. The parties in fact voluntarily agreed to have their disputes resolved through a mechanism other than the one provided by the State in form of Courts of Law. There is no mandate on the parties to necessarily have their matters resolved through Arbitration in case they do not wish to provide for the same in their Agreement. The remedy to have the disputes resolved through the mechanism of ordinary Civil Courts is still open to the petitioner. It is not as if the petitioner is left remediless by the stipulation in Clause 23.*

*24. I, therefore, find no merit in the present petition. The same is dismissed, leaving it open to the petitioner to avail the legal remedy*



*that may be open in accordance with the law.”*

12. An SLP was filed against the said judgment which was dismissed by the Hon’ble Supreme Court.

13. I am of the view that the said judgment will not be of assistance to the learned counsel for the respondent.

14. My reason is that the same clause was considered in ***TK Engineering Consortium vs. Director (Projects) Rites Ltd. and Anr.***” (2021) SCC OnLine Del 1188, wherein the Coordinate Bench of this Court *inter alia* held as under:

*“17. The next question to be addressed is whether the parties can be referred to arbitration in view of TKE’s stand that the Appointing Authority, cannot appoint an arbitrator.*

.....

*31. In the present case, the Appointing Authority is concededly, ineligible to act as an arbitrator by virtue of Section 12(5) of the A&C Act. In view of the decision of the Supreme Court in TRF Ltd. (supra), he cannot nominate another person to act as an arbitrator. However, that cannot be construed to mean that the entire arbitration agreement would be frustrated.*

*32. The foundation of an arbitration agreement is the willingness of the parties to have the inter se disputes adjudicated by an independent and impartial arbitrator. A condition imposed that disputes cannot be referred to arbitration except on the condition that only one party retains the authority to determine the mandate of the arbitral tribunal, would militate against the said fundamental*



*premise that arbitration is an alternate mechanism for a just and fair adjudication of disputes.*

*33. It is also necessary to bear in mind that the legislative policy is to encourage arbitration, thus, any interpretation that would nullify an arbitration clause must be avoided. In Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641, the Supreme Court had expressly observed that as under:*

*“96. Examined from the point of view of the legislative object and the intent of the framers of the statute, i.e., the necessity to encourage arbitration, the Court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious cause of action, parties and prayers.”*

*34. In view of the legislative intent, it is necessary to construe the arbitration clause in a manner so as to sustain the same. Therefore, the terms and conditions that fall foul of the Statute must, insofar as possible, be severed.*

*35. It is also relevant to note that in Perkins (supra), the controversy also centered around an arbitration clause, which expressly provided that no person other than a person appointed by the Chairman cum Managing Director of HSCC should act as an arbitrator.*

*36. The controversy can also be addressed from another*



*perspective and that is the power of the court to derogate from the procedure as contemplated under the arbitration clause.*

.....

*39. At this stage, it is also relevant to refer to the decision of the Supreme Court in Indian Oil Corporation Ltd. v. Raja Transport (P) Ltd. : (2009) 8 SCC 520. The said decision was rendered in an appeal against an order passed by the Chief Justice of the Uttaranchal High Court in an application filed under Section 11(6) of the A&C Act appointing a former Judge of that Court as the Sole Arbitrator to adjudicate the disputes between the parties.*

*40. It is necessary to note that the said decision was rendered prior to the enactment of the Arbitration and Conciliation (Amendment) Act, 2015. The Chief Justice of the Uttaranchal High Court accepted the respondent's application for appointment of an independent arbitrator for essentially two reasons. First, that the Director (Marketing) of the appellant was an employee and it was presumed that he would not act independently or impartially. And second, that the appellant had failed to act as was required under the agreed procedure.*

*41. In the aforesaid context, the Supreme Court framed the following questions for its consideration:*

*“(i) Whether the learned Chief Justice was justified in assuming that when an employee of one of the parties to the dispute is appointed as an arbitrator, he will not act independently or Impartially?”*



*(ii) In what circumstances, the Chief Justice or his designate can ignore the appointment procedure or the named arbitrator in the arbitration agreement, to appoint an arbitrator of his choice?*

*(iii) Whether respondent herein had taken necessary steps for appointment of arbitrator in terms of the agreement, and the appellant had failed to act in terms of the agreed procedure, by not referring the dispute to its Director (Marketing) for arbitration?"*

42. Insofar as the first question is concerned, the Supreme Court held that a person being an employee of one of the parties cannot per se be a bar to his appointment as an arbitrator. And, the learned Chief Justice was not justified in his assumption of bias. This decision would not hold good after the Arbitration and Conciliation (Amendment) Act, 2015 had come into force.

43. Insofar as the second question is concerned that is, whether the Chief Justice could ignore the procedure and appoint an arbitrator of his own choice the Court held that in cases where there is material that creates a reasonable apprehension that the person mentioned in the arbitration agreement as an arbitrator is not likely to act independently or impartially, or if the named person is not available, then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure of referring the disputes to the named arbitrator, appoint an independent arbitrator in accordance with Section 11(8) of the



A&C Act.

44. It is material to note that the arbitration agreement which fell for consideration before the Supreme Court in that case also provided that "no person other than the Director, Marketing or a person nominating by such Director, Marketing of the Corporation as aforesaid shall act as Arbitrator". The Court held that the said condition would interfere with the power of the Chief Justice under Section 11(8) of the A&C Act to appoint a suitable person as an arbitrator in appropriate cases. Therefore, the said portion of the clause was liable to be ignored as being contrary to the A&C Act.

45. The Supreme Court held that a Court could appoint an Independent arbitrator in cases where it found that the arbitrator named in the arbitration agreement or to be appointed as per the procedure as agreed under the arbitration agreement, would not be Impartial or independent. This reasoning has resonated in several decisions delivered thereafter,

46. This principle would hold good equally in the context of the present case. After the enactment of the Arbitration and Conciliation (Amendment) Act, 2015, it is statutorily recognized that circumstances as set out in Schedule Seven of the A&C Act would render a person Ineligible to act as an arbitrator on account of justifiable doubts as to his impartiality and independence. Plainly, under such circumstances, the Court would have the power under Section 11 of the A&C Act to appoint an independent and impartial arbitrator. As held in *Indian Oil Corporation Ltd. (supra)*



*even in cases where the arbitration agreement provides for a procedure for appointment of an arbitrator, a court could appoint an independent arbitrator if there were reasonable grounds to doubt the independence and impartiality of the named arbitrator to be appointed in accordance with the procedure as stipulated under the arbitration agreement.*

*47. Thus, the very term which provides that no other person other than the one appointed by the Appointing Authority should act as an arbitrator and in absence of the same, the disputes would not be referred to arbitration, must be held contrary to the basic principles on which an arbitration agreement is founded and therefore, is liable to be ignored.”*

15. The judgment of **Vindhya Vasini** (supra) has also been declared per incuriam by a Coordinate Bench in **S.K. Engineering and Construction Company India vs. Bharat Heavy Electricals Ltd.** (2023) SCC OnLine Del 7575. Relevant para reads as under:

*“9. Per contra, learned counsel for the petitioner submitted that in light of the decisions of the Supreme Court in TRF Ltd. v. Energo Engineering Projects Ltd., (2017) 8 SCC 377 and Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2020) 20 SCC 760, it is impermissible for the respondent to unilaterally appoint an arbitrator and that an independent sole arbitrator is liable to be appointed. It is submitted that intention of the parties to refer their disputes to arbitration is manifest from the arbitration clause and procedure for appointment of an arbitrator being contrary to law*



*should be excised therefrom. To support this contention reliance has been placed on the decisions of this Court in Ram Kripal Singh Construction (P) Ltd. v. NTPC, 2022 SCC OnLine Del 3743, T.K. Engineering Consortium Pvt. Ltd. v. Director (Project) Rites Ltd., 2021 SCC OnLine Del 1188, ARSS Infrastructure Pvt. Ltd. v. Ircon International Ltd., 2021 SCC OnLine Del 5100 and NIIT Technologies Ltd v. Directorate General, Border Security Force 2017 SCC OnLine Del 12538, wherein arbitrators were appointed on similar clauses. It is also submitted that the decision of this Court in Vindhya Vasini Construction (supra) relied upon by the respondent is per incuriam since it failed to consider the said decisions.”*

16. I am of the view that the judgment of **TK Engineering Consortium** (supra) is prior in time to the judgment of **Vindhya Vasini** (supra) and the judgment of **Vindhya Vasini** (supra) does not advert to the judgment of **TK Engineering Consortium** (supra). Hence, keeping in mind the objective behind the Arbitration and Conciliation Act, 1996 which is to promote party autonomy, minimize judicial intervention, and ensure expeditious resolution of disputes, the leaning of the Court must be towards upholding and facilitating the arbitral process.

17. For the aforesaid reasons, the contentions of the respondent do not find merit and the same are rejected.

18. For the said reasons, the petition is allowed and disposed of with the following terms and conditions:

- i) Mr. Gautam Narayan, Sr. Adv. (Mob. No. 9811411735) is



- appointed as a Sole Arbitrator to adjudicate the disputes between the parties.
- ii) The arbitration will be held under the aegis and rules of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi (hereinafter, referred to as the 'DIAC').
  - iii) The remuneration of the learned Arbitrator shall be in terms of DIAC (Administrative Cost and Arbitrators' Fees) Rules, 2018.
  - iv) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
  - v) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims/counter-claims and merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
  - vi) The parties shall approach the learned Arbitrator within two weeks from the date of release of this order.

**JASMEET SINGH, J**

**MAY 26, 2025/DM**  
*(corrected and released on 02.06.2025)*