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

+ **ARB.P. 907/2025**

M/S HAQUE CONSTRUCTION COMPANYPetitioner

Through: **Mr. Abhishek Pandey, Adv.**

versus

UNION OF INDIARespondent

Through: **Mr. Bhagvan Swarup Shukla, CGSC**
with **Mr. Sarvan Kumar, Adv**

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

30.07.2025

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1. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996, seeking the appointment of an Arbitrator to adjudicate the disputes between the parties.
2. The brief facts of the case are that the respondent invited tenders for upgradation of MP's 2024 Flats/Bungalows under Sub Div. I of PaWD-1 and Sub-Div-I of DED-201 dg 2024-2S (Sub-Head: Upgradation of Balance Bungalows Windsor Place, HCM Lane Telegraph Lane & Atul Grove Road Bungalows under Sec-II in respect of services of Civil and Electrical Works).
3. In response to the said tender, the petitioner submitted its bid and was declared the successful bidder. Pursuant thereto, a Letter of Acceptance dated 07.09.2024 and a Letter of Start dated 17.09.2024 were issued by the respondent in favour of the petitioner. Subsequently, Agreement No.



60/EE/PAWD-I/A-1/2024-25 was executed between the Petitioner and the Respondent. Clause 25 of the said Agreement contains an arbitration clause.

4. However, the respondent was dissatisfied with the work performed by the petitioner and issued a show-cause notice dated 08.04.2025. Thereafter, the Contract was terminated by the respondent on 25.04.2025, and the performance bank guarantee, along with the security deposit, was encashed.

5. The Petitioner invoked the Arbitration Clause 25.2 on 27.05.2025 and thereafter filed the present petition.

6. Even though the reply has been filed, the same is not on record.

7. Mr. Shukla, learned CGSC has handed over the reply in court today which is taken on record.

8. He states, that there are no disputes between the petitioner and the respondent and with respect to the petitioner's claim concerning the encashment of the bank guarantee, it is submitted that the matter stands resolved by the order dated 26.07.2025 passed by the learned District Judge, Commercial Court, who has held that the bank guarantee has been correctly encashed by the respondent.

9. He further states that as regards the claim of Rs. 2,16,50,586/- is concerned, the respondent had already asked the petitioner to rectify the bill, and as and when the same will be rectified, it can be paid by the respondent as per law. It is also stated claims 1, 2 and 7 of the petitioner are not relevant, wherein claim 7 is towards the cost of Arbitration, which has not yet commenced.

10. Mr. Pandey, learned counsel for the petitioner, states that the respondent is only delaying the proceedings and the petitioner has disputes subsisting between the parties which need to be settled through arbitration.



11. I have heard the learned counsel for the parties.

12. In the present case, the arbitration clause reads as under:

“25.1 Conciliation: If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawing, record or decision given in writing by the Engineer-in-Charge; or if the Engineer-in-Charge considers any act or decision of the contractor on any matter in connection with or arising out of the contract or carrying out of the work to be unacceptable and disputed; such party may promptly refer such disputes and amount claimed for each dispute to the Conciliator (Special Director General or the Additional Director General concerned with the work, as applicable) in the proforma prescribed in Appendix XVII mentioned in Schedule F, under intimation to the other party. The Conciliator may then request each party to submit to him a brief written statement describing the disputes and the points at issue. Each party shall send a copy of such statement to the other party. At any stage of the conciliation proceedings, the Conciliator may request a party to submit to him such additional information as he deems appropriate. When it appears to the Conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, he may re-formulate the terms of a possible settlement in the light of such observations. If the parties reach agreement on a settlement of the disputes, they may draw up and sign a written settlement agreement on non-



judicial stamp paper as per Stamp Act. The Conciliator shall authenticate the settlement agreement and furnish a copy thereof to each party. The termination of conciliation proceedings shall be in accordance with Section 76 of The Arbitration and Conciliation Act, 1996. No party shall be represented before the said Conciliator by an advocate or legal counsel. The conciliation proceedings shall be completed within 45 days from the receipt of reference. This time may be enlarged by 15 days by the Conciliator. The conciliation proceedings shall be deemed to have been terminated at the end of 60 days from the receipt of reference.

25.2 Arbitration: If the aforesaid conciliation proceedings fail or the Conciliator fails to give proposal for settlement within the aforesaid period, either party may promptly give notice in the proforma prescribed in Appendix XVIII, under intimation to the other party, to the Chief Engineer or the Superintending Engineer concerned with the work (as applicable), hereinafter referred to as the Arbitrator Appointing Authority as indicated in Schedule F, for appointment of Arbitrator.

However, a party may seek appointment of Arbitrator without taking recourse to the process of conciliation mentioned in sub-clause 25.1 above. In the event of either party giving a notice to the Arbitrator Appointing Authority for appointment of Arbitrator, the said Authority shall appoint Arbitrator as per the procedure given below and refer such disputes to arbitration.

(a) Number of Arbitrators: If the contract amount is less than Rs.100 crore, the disputes may be referred for adjudication by a



sole Arbitrator. If the contract amount is Rs.100 crore or more, the disputes may be referred to an Arbitral Tribunal of three Arbitrators.

(b) Qualification of Arbitrators: It is a term of this contract that each member of the Arbitral Tribunal shall be Graduate Engineer with experience in execution of public works engineering contracts, and he should have worked earlier at a level not lower than the Chief Engineer (equivalent to level of Joint Secretary to the Government of India). The aforesaid educational qualification and work experience shall be mandatory for appointment as Arbitrator. The age of Arbitrator at the time of appointment shall not exceed 75 years. An Arbitrator may be appointed notwithstanding the total number of active arbitration cases with him.

(c) Parties to select Arbitrator: Based on the criteria specified above, a list of empanelled Arbitrators has been prepared in CPWD, and the parties shall have option to select an Arbitrator from the list sent to them.

25.3 Appointment of Sole Arbitrator: The parties may opt for appointment of the Arbitrator of the Ministry of Housing and Urban Affairs. In such cases, the party seeking arbitration has to submit an express agreement in writing as per Appendix XIX towards waiver of Section 12(5) of the Arbitration and Conciliation Act, 1996 along with the notice for appointment of Arbitrator in the proforma prescribed in Appendix XVIII, under intimation to the other party. The Arbitrator Appointing Authority shall, within 30 days of receipt of the said notice, appoint Arbitrator of the Ministry



of Housing and Urban Affairs as Arbitrator in the matter, provided the other party also submits waiver of Section 12(5), ibid in Appendix XIX within 7 days of the receipt of the said notice. Where any one of the parties does not opt for the Arbitrator of the Ministry of Housing and Urban Affairs, or does not submit the waiver agreement, the Arbitrator Appointing Authority shall propose five Arbitrators from the list of CPWD Empanelled Arbitrators to the party seeking arbitration under intimation to the other party within 15 days of receiving the notice. The party seeking arbitration shall give his choice for one of them within 15 days of receiving the list, and the Arbitrator Appointing Authority shall appoint the chosen person as the Sole Arbitrator within 15 days of the receipt of choice.

It is a term of this arbitration agreement that if the parties fail to select, within the period prescribed above, an Arbitrator of their choice from the list of CPWD Empanelled Arbitrators forwarded to them, the Arbitrator Appointing Authority shall himself select and appoint Arbitrator from the said list.

25.4 Appointment of Arbitral Tribunal of three Arbitrators: The Arbitrator Appointing Authority shall prepare two separate lists of five Arbitrators each from the list of CPWD Empanelled Arbitrators, and send one to the party seeking arbitration and other to the responding party, within 15 days of the receipt of notice. The parties will then choose any one Arbitrator from the list provided to them within 15 days of receipt of the list. The Arbitrator Appointing Authority shall then appoint those chosen by the respective parties



as Arbitrators and also a third Arbitrator from the list of CPWD Empanelled Arbitrators to act as presiding Arbitrator, within 15 days of receipt of choice from both the parties. It is a term of this arbitration agreement that if the parties fail to select, within the period prescribed above, an Arbitrator of their choice from the list of CPWD Empanelled Arbitrators forwarded to them, the Arbitrator Appointing Authority shall himself select and appoint Arbitrator from the said list.

25.5 Applicable Law: The provisions of the Arbitration and Conciliation Act, 1996 (Act 26 of 1996) and any further statutory modification or re-enactment thereof shall be applicable. Further, the fast-track procedure for arbitration contained in Section 29B of the said Act shall apply.

.....”

13. A perusal of the clause shows that the petitioner can directly seek the appointment of an Arbitrator without undergoing the conciliation process. Additionally, it states that the respondent has the right to appoint the Arbitrator.

14. The letter dated 04.06.2025 annexed along with the reply shows that it is the respondent who has referred names of 5 Arbitrators to the petitioner to choose any one of them.

15. The same is contrary to the judgment of the Supreme Court in ***Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755***, wherein the Hon’ble Court held as under:

“14. From a conspectus of the above decisions, it is clear that Section 12(1), as substituted by the Arbitration and



Conciliation (Amendment) Act, 2015 [“the Amendment Act, 2015”], makes it clear that when a person is approached in connection with his possible appointment as an arbitrator, it is his duty to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality. The disclosure is to be made in the form specified in the Sixth Schedule, and the grounds stated in the Fifth Schedule are to serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Once this is done, the appointment of the arbitrator may be challenged on the ground that justifiable doubts have arisen under sub-section (3) of Section 12 subject to the caveat entered by sub-section (4) of Section 12. The challenge procedure is then set out in Section 13, together with the time-limit laid down in Section 13(2). What is important to note is that the Arbitral Tribunal must first decide on the said challenge, and if it is not successful, the Tribunal shall continue the proceedings and make an award. It is only post award that the party challenging the appointment of an arbitrator may make an application for setting aside such an award in accordance with Section 34 of the Act.

15. Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the



moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be “ineligible” to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an “express agreement in writing”. Obviously, the “express agreement in writing” has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.”

16. Similarly in **Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2020) 20 SCC 760**, the Hon’ble Court held as under:

“20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd. [TRF Ltd. v. Energo Engg.



Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator.



21. But, in our view that has to be the logical deduction from TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 50 of the decision shows that this Court was concerned with the issue, “whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator” The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation



(Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]”

17. In view of the above, it is clear that there cannot be unilateral appointment of an Arbitrator.

18. The argument that since the bank guarantee has been encashed, there is a finding that the same has correctly been done is misconceived. The bank guarantees are encashed on the principles relating to encashment of bank guarantee, wherein the petitioner is required to show irreparable loss and injury which cannot be compensated in terms of money to seek restrain on its encashment. The fact whether the bank guarantee has been rightly or wrongly encashed is always a dispute which needs to be adjudicated by the Arbitrator.

19. Additionally, the arbitration clause between the parties is admitted and the fact that the petitioner has demanded amounts due and payable to it and the fact that the same have not been paid, in itself is a dispute. Thus, I am inclined to allow the petition.

20. For the said reasons, the petition is allowed and disposed of with the following directions:

- i) Mr. Shyam Sharma (Adv.) (Mob. No. 9810153965) 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 today.

JASMEET SINGH, J

JULY 30, 2025/DM