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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 16.01.2026

+ ARB.P. 1301/2025

SWADESHI CIVIL INFRASTRUCTURE PVT LTD

.....Petitioner

Through: Mr. Dinkar Singh and Mr Rohit
Singh, Advocates.

versus

rites limited & ANR.

.....Respondents

Through: Mr. G. S. Chaturvedi, Advocate
for Respondent No-1.

CORAM:

**HON'BLE MR. JUSTICE HARISH VAIDYANATHAN
SHANKAR**

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JUDGEMENT (ORAL)

HARISH VAIDYANATHAN SHANKAR, J.

1. The present petition has been filed under Section 11(6) of the **Arbitration and Conciliation Act, 1996¹**, for the appointment of an Arbitrator to adjudicate upon a commercial dispute between the parties.

2. Learned counsel appearing for the Petitioner contends that the Arbitration clause is set out at Clause 25 of the Agreement dated 22.08.2017, and which clause reads as under:

¹Act



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**“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 latter so desires, and to offer 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 (i) between two Public Sector Enterprises or (ii) between a Public Sector Enterprise and a Government Department or (iii) Otherwise.



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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 communicate to the Appointing Authority, the name of one officer from the list who shall then be appointed as the Sole Arbitrator. the Contractor fails 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 (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 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



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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 if 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 intimation 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 falling under para 2 (i) or (ii).



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8) It is also a term of this Contract that the arbitrator shall adjudicate 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 submit 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.”

3. Learned counsel appearing for the Respondent submits that the arbitration clause prescribes certain mandatory pre-conditions which are required to be satisfied before a dispute can be referred to arbitration. It is contended that the said pre-conditions have admittedly not been complied with and, therefore, the present petition is premature. In this regard, learned counsel specifically draws attention to Clause 25(1) of the arbitration clause, submitting that the clause contemplates a detailed two-tier mechanism, whereby, in the first



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instance, the dispute is required to be referred to the Engineer-in-Charge, and upon failure thereof, an appeal is required to be preferred before the designated Appellate Authority. It is urged that only upon exhaustion of the said two-step process can recourse to arbitration be taken.

4. On these contentions, learned counsel for the Petitioner, after placing reliance upon the letter dated 07.11.2024, which is annexed as *Document 14* along with the Petition, submits that the pre-arbitration procedure had been complied with and that the letter had been sent to Mr. Kailash Chand, Joint General Manager[“JGM”], RITES Ltd.

5. He further relies upon the letter dated 30.12.2024, which is annexed as *Document No. 15* along with the Petition, and contends that since the Engineer-in-Charge failed to respond, the Petitioner thereafter invoked the Appellate mechanism in terms of the Arbitration clause.

6. Learned counsel for the Respondent, however, submits that the definition of the Engineer-in-charge, which is set out in Clause 25 of the *conditions of the contract*, provides for the General Manager [“GM”] or the Group General Manager [“GGM”] as being the necessary officers. He also submits that the Engineer-in-charge is the General Manager, which he submits is on the basis of the specified proforma, which is made under the heading of *conditions of the contract*, wherein a tick mark is placed against the GM in clause 2(v).

7. Learned counsel for the Respondent further submits that the Appellate Authority, as prescribed under the applicable framework, is the GGM. He then submits that neither the letter dated 07.11.2024 nor the letter dated 30.12.2024 is addressed to the authorities as set out in



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the Arbitration clause, *namely*, the Engineer-in-Charge and the Appellate Authority, and resultantly, the present petition is premature.

8. This Court has heard the learned counsel for the parties at length and has carefully perused the contractual clauses relied upon by them. Upon such consideration, this Court is of the considered view that the present petition is premature.

9. The reliance placed by the learned counsel for the Petitioner on the letter dated 07.11.2024 is misconceived, as the said communication was addressed to the JGM, who is not designated as the Engineer-in-Charge under the terms of the Agreement. Similarly, the letter dated 30.12.2024 was also addressed to the JGM and, therefore, does not satisfy the contractual requirement stipulated under the Agreement.

10. In view thereof, it is evident that the Petitioner has failed to comply with the mandatory pre-conditions prescribed under the Agreement. Consequently, the present petition is liable to be dismissed as premature, on account of non-compliance with the contractual stipulations.

11. As regards the contention of the learned counsel for the Petitioner that the stipulated pre-condition is merely directory and not mandatory, this Court finds the said submission to be misconceived.

12. In the present case, the arbitration clause unequivocally contemplates a two-step procedure, which has admittedly not been complied with. The judgment relied upon by the learned counsel for the Petitioner, *Sri Ganesh Engineering Works v. Northern Railway & Anr.*², particularly paragraph no. 12 thereof, in fact reinforces the

²2024 SCC OnLine Del 8985



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prescribed procedure rather than supporting the Petitioner's case.

13. It is further contended on behalf of the Petitioner that, as is evident from a reading of the aforesaid judgment, the conciliation clause has been held to be largely directory and not mandatory, and that non-invocation thereof would not disentitle the Petitioner from preferring an application under Section 11(6) of the Act for appointment of an Arbitrator.

14. Learned counsel for the Petitioner also places reliance on the judgment of this Court in *Jhajharia Nirman Ltd. v. South Western Railways, through Dy. Chief Engineer/IV Construction*³, which holds as follows:

“18. In numerous judicial precedents, this Court has taken the view that any pre-condition in an arbitration agreement obliging one of the contracting parties to either exhaust the pre-arbitral amicable resolution avenues or to take recourse to Conciliation are directory and not mandatory.”

15. Upon a careful examination, it is evident that the aforesaid judgments have no applicability to the present case. The decisions relied upon by the Petitioner pertain to the pre-arbitral amicable or conciliatory mechanisms, whereas, in the present matter, the Agreement prescribes a specific and structured pre-arbitral procedure for dispute resolution, which is neither conciliatory in nature nor intended for amicable settlement.

16. The said two-step pre-arbitration procedure, as stipulated under the Agreement, is, in the considered view of this Court, mandatory and not merely directory, and therefore cannot be waived or dispensed with.

³2024 SCC OnLine Del 7133



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17. In light of the above, the objections raised by the learned counsel for the Respondent are found to be well-founded and are accordingly upheld. Consequently, the present petition is dismissed.

18. No Order as to costs.

HARISH VAIDYANATHAN SHANKAR, J.
JANUARY 16, 2026/v/kr/jk