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

Judgment pronounced on: 01.12.2023

\+ **ARB.P. 737/2023**

S K ENGINEERING AND CONSTRUCTION COMPANY INDIA
..... Petitioners

Through: Mr. Adarsh Ramanujan, Mr. Lzafeer Ahmed, Mr. Skanda Shekhar and Mr. Rajdeep Saral, Advs.

versus

BHARAT HEAVY ELECTRICALS LTD
..... Respondents

Through: Mr. Himanshu Gupta, Mr. P. Sharma and Mr. Aditya Sikka, Advs.

\+ **ARB.P. 738/2023**

S K ENGINEERING AND CONSTRUCTION COMPANY INDIA
..... Petitioners

Through: Mr. Adarsh Ramanujan, Mr. Lzafeer Ahmed, Mr. Skanda Shekhar and Mr. Rajdeep Saral, Advs.

versus

BHARAT HEAVY ELECTRICALS LTD
..... Respondents

Through: Mr. Himanshu Gupta, Mr. P. Sharma and Mr. Aditya Sikka, Advs.

\+ **ARB.P. 740/2023**

S K ENGINEERING AND CONSTRUCTION COMPANY INDIA
..... Petitioners

Through: Mr. Adarsh Ramanujan, Mr. Lzafeer Ahmed, Mr. Skanda Shekhar and Mr. Rajdeep Saral, Advs.

versus

BHARAT HEAVY ELECTRICALS LTD .
.... Respondents

Through: Mr. Himanshu Gupta, Mr. P. Sharma

and Mr. Aditya Sikka, Advs.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. These petitions under Section 11(6) of the Arbitration and Conciliation Act, 1996 have been filed seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties.

2. The disputes between the parties in ARB.P. 740/2023 have arisen in the context of a Contract between the petitioner and the respondent for work relating to "*Execution and Handing over of Civil Works for 400 Kv Bay Extension At Karaikudi In Tamil Nadu".* The said work was awarded to the petitioner by the respondent and a Work Order bearing Ref. No. TBSM/KARAIKUDI/CIVIL/W0/52/13-14 dated 06.01.2014 was issued by the respondent. The said Work Order fructified into a duly stamped Contract Agreement dated 21.04.2014.

3. The disputes between the parties in ARB.P. 738/2023 have arisen in the context of a Contract between the petitioner and the respondent for work relating to "*Execution and Handing Over of Civil Works for Land Development and Boundary work for 400/110 KV Switchyard at Thappagundu in Tamil Nadu"*. The said work was awarded to the petitioner by the respondent and a Work Order bearing Ref. No. TBSM/ THAPPAGUNDU/CIVIL/LANDDEVELOPMENT/W0/72/13-14 dated 01.03.2014 was issued by the respondent. The said Work Order fructified into a duly stamped Contract Agreement dated 16.05.2014.

4. The disputes between the parties in ARB.P. 737/2023 have arisen in the context of a Contract between the petitioner and the respondent for work

relating to "*Execution and Handing over of Balance Civil Works of 400/11 OKV Switchyard at Thappagundu in Tamil Nadu"*. The said work was awarded to the petitioner by the respondent and a Work Order bearing Ref. No.TBSM/THAPPAGUNDU/BAL-CIVIL/YARD/W0/23/16-17 dated 26.09.2016 was issued by the respondent. The Work Order fructified into a duly stamped Contract Agreement dated 25.10.2016

5. The aforesaid Work Order(s) contain an arbitration clause in the following terms:

> *"26.0* ***ARBITRATION****:*
>
> *Except where otherwise provided for in the contract all questions & disputes relating to the meaning of the specification designs, drawings and instruction 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 of these conditions or otherwise concerning the works, of the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the Head TBG BHEL, New Delhi and if the Head TBG is unable or unwilling to act, to the sole arbitration of some other person appointed by the Head TBG willing to act as such arbitrator. There will be no objection if the arbitrator so appointed is an employee of BHEL, and that he had to deal with the matters to which the contract relates and that in the course of his duties as such he had expressed views on all or any of the matters in dispute of difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason such Head TBG as aforesaid at the time of such transfer vacation of office or inability to act shall appoint (see note) another person to act as arbitrator in accordance with the terms of the contract such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by such Head TBG as aforesaid should act as arbitrator and if for any reason that is not possible the matter is not to be referred to arbitration at all, in all cases where the amount of the claim dispute is Rs.50,000/- (Rupees fifty thousand) and above the arbitrator shall give reasons for the award.*
> *Subject as aforesaid the provisions of the arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made there*

under and the time being in force shall apply to the arbitration proceeding under this clause.
It is a term of the contract that the party involving arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amounts claimed in respect of each dispute.
The arbitrator(s) may from time to time with consent of the parties enlarge the time for making and publishing the award.
The work under the contract shall, if reasonably possible, continue during the arbitration proceedings and no payment due or payable to the contractor shall be withheld on account of such proceedings.
The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties fixing the date of the first hearing.
The Arbitrator shall give a separate award in respect of each dispute or difference referred to him.
The Venue of arbitration shall be such place as may be fixed by the Arbitrator in his sole discretion.
The award of the arbitrator shall be final, conclusive and binding all parties to this contract.
Laws governing the Contract:

SK Engineering and Construction Company

The contract shall be governed by the Indians Laws for the time being in force.

NOTE:- The Authority appointing the arbitrator should not be lower in rank than the Authority accepting the Agreement."

6. Disputes having arisen between the parties, the petitioner has sent letter(s) invoking the aforesaid arbitration clause to the respondent, in respect of each of the aforesaid contracts, and sought appointment of an independent sole arbitrator stating that provision for arbitration by the head of respondent or an employee of the respondent, was contrary to law. However, no reply thereto is stated to have been sent by the respondent.

Submissions of the parties

7. The only objection taken by learned counsel for the respondent is that the parties have expressly agreed "not" to refer the dispute to arbitration if

the respondent owing to any disability (legal or otherwise) is unable to appoint the arbitrator. In this regard attention has been drawn to the following stipulation in the arbitration clause:

> "*It is also a term of this contract that no person other than a person appointed by such Head TBG as aforesaid should act as arbitrator and if for any reason that is not possible the matter is not to be referred to arbitration at all"*

8. It is submitted that the parties have agreed to a conditional arbitration clause and that on occurrence of the contingency mentioned in the arbitration clause there is a withdrawal of consent to arbitration. It is thus submitted that there is no valid arbitration agreement in terms of Section 7 of the A&C Act. It is submitted that since in law it is impermissible for the respondent to appoint an arbitrator, the present disputes cannot be referred to arbitration at all. It is submitted that the aforesaid stipulation in the arbitration clause is not illegal or invalid or ineffective and is not to be severed from the arbitration clause as held by this Court in ***M/s Vindhya Vasini Construction Co. v. M/s Bharat Heavy Electricals Ltd.,*** 2023: DHC:3338. To support this contention reliance has also been placed on a decision of the Supreme Court in ***Newton Engg. & Chemicals Ltd. v. Indian Oil Corpn. Ltd.,*** (2013) 4 SCC 44.

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 & Anr. 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 incurium* since it failed to consider the said cited decisions.

Analysis And Conclusion

10. Having perused the record and having heard learned counsel for the parties, no merit is found in the objections raised by learned counsel for the respondent.

11. In the context of a similar arbitration clause, a Co-ordinate Bench of this Court in ***Ram Kripal Singh*** (supra)**,** noted that the consistent view taken by at least three different Co-ordinate Benches of this Court, dealing with a similar arbitration clause, namely in ***T.K. Engineering*** (supra)**,** ***ARSS Infrastructure*** (supra) and ***NIIT Technologies*** (supra), is that just because the procedure for appointment of an arbitrator has been rendered invalid or unenforceable by reason of the amendment to the A&C Act, by insertion of Section 12(5) and by the subsequent decisions of the Supreme Court in ***TRF Ltd***.(supra) and ***Perkins Eastman*** (supra), would not imply that the entire arbitration clause is rendered invalid or void. It was held that the procedure for appointment of an arbitrator is clearly distinct and separable from

the agreement to refer disputes to arbitration, even if these are contained in the same arbitration clause. The relevant extracts of the said decision are as under:

> *"17. Upon a conspectus of the averments contained in the petition and the reply, as also the submissions made by counsel, and on a reading of the judicial precedents cited, the following inferences arise:*
>
> *17.1. The respondent does not dispute the existence of the arbitration agreement between the parties, except to say, that since a certain procedure for appointment of an arbitrator was embedded in the arbitration clause, which procedure has now become illegal, invalid and unenforceable, the entire arbitration agreement perishes along therewith. The respondent's contention is that it was expressly agreed between the parties that if an arbitrator could not be appointed as per that agreed procedure, there would be no arbitration at all;*
>
> *17.2. Now, clauses that are same or similar to clause 56 of the GCCs, which contains the arbitration agreement in the present case, have been dealt with by at least three different Co-ordinate Benches of this court; and the consistent view taken is that just because the procedure for appointment of an arbitrator has been rendered invalid or unenforceable by reason of the amendment to the A&C Act, by insertion of section 12(5) and by the subsequent decisions of the Supreme Court in TRF Ltd. and Perkins Eastman (supra), that does not mean that the entire arbitration clause is rendered invalid or void. Such arbitration clauses have been held to be valid and enforceable. Reference in this regard may be made to TK Engineering(supra), ARSS Infrastructure(supra) as also to NIIT Technologies Ltd. v. Directorate General, Border Security Force;*
>
> *17.3. Expatiating upon the aforesaid consistent view, in the opinion of this court, an 'arbitration agreement' may narrate and include several other aspects relating to arbitration - such as the procedure for appointment of arbitrator(s); seat or venue of arbitration proceedings; the substantive and procedural law that would govern arbitral proceedings; specifics of disputes that are 'excepted' from the purview of arbitration; liability of costs for arbitral proceedings and such-like other matters - so as to detail-out the arbitral mechanism and to make the arbitration agreement more comprehensive. Even if embedded in the self-same arbitration clause, these aspects relate to different strands of the agreed arbitral mechanism and are distinct and separable from the core arbitration agreement itself, viz. the primary consent of parties to refer their inter-se disputes arising from a given contract or transaction to arbitration;*

17.4. The procedure for appointment of an arbitrator is clearly distinct and separable from the agreement to refer disputes to arbitration, even if these are contained in the same arbitration clause. If therefore, by reason of amendment, re-statement or reinterpretation of the law, as has happened in the present case by insertion of section 12(5) in the A&C Act and the verdicts of the Supreme Court in TRF Ltd. and Perkins Eastman (supra), the procedure for appointment of arbitrator at the hands of one of the parties becomes legally invalid, void and unenforceable, that does not mean that the core agreement between the parties to refer their inter-se disputes to arbitration itself perishes. In the opinion of this court - this "my way or the highway" approach - is not tenable in law; and in such circumstances, that part of the arbitration agreement which has been rendered invalid, void and enforceable is to be severed or excised from the arbitration clause, while preserving the rest of the arbitration agreement;

17.5. Accordingly, this court is of the view, that there is a valid and subsisting arbitration agreement between the parties, though the procedure for appointment of the arbitrator at the hands of the CMD, NTPC is no longer valid, and must therefore be severed from the remaining arbitration clause;

17.6. The aforesaid view taken by this court is also in consonance with the extant legislative and judicial policy that arbitration agreements are not to be readily invalidated unless there is compelling basis to do so; and arbitration is to be encouraged as an alternative mode of disputes adjudication (cf. Chloro Controls India Pvt. Ltd. v. Severn Trent Purification Inc.)

12. The Supreme Court in ***Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.***, (2009) 8 SCC 520, has held as under:

"46. This takes us to the effect of the condition in the arbitration agreement that "it is also a term of this contract that no person other than the Director, Marketing or a person nominated by such Director, Marketing of the Corporation as aforesaid shall act as the arbitrator". Such a condition interferes with the power of the Chief Justice and his designate under Section 11(8) of the Act to appoint a suitable person as arbitrator in appropriate cases. ***Therefore, the said portion of the arbitration clause is liable to be ignored as being contrary to the Act."***

13. The Supreme Court in ***Nandyal Coop. Spinning Mills Ltd. v. K.V. Mohan Rao,*** (1993) 2 SCC 654, has held as under:

> ***"11.*** *It would thus be clear that if no arbitrator had been appointed in terms of the contract within 15 days from the date of receipt of the notice, the administrative head of the appellant had abdicated himself of the power to appoint arbitrator under the contract. The court gets jurisdiction to appoint an arbitrator in place of the contract by operation of Section 8(1)(a). The contention of Shri Rao, therefore, that since the agreement postulated preference to arbitrator appointed by the administrative head of the appellant and if he neglects to appoint, the only remedy open to the contractor was to have recourse to civil suit is without force. It is seen that under the contract the respondent contracted out from adjudication of his claim by a civil court. Had the contract provided for appointment of a named arbitrator and the named person was not appointed, certainly the only remedy left to the contracting party was the right to suit. That is not the case on hand. The contract did not expressly provide for the appointment of a named arbitrator. Instead power has been given to the administrative head of the appellant to appoint sole arbitrator. When he failed to do so within the stipulated period of 15 days enjoined under Section 8(1)(a), then the respondent has been given right under Clause 65.2 to avail the remedy under Section 8(1)(a) and request the court to appoint an arbitrator. <u>If the contention of Shri Rao is given acceptance, it would amount to putting a premium on inaction depriving the contractor of the remedy of arbitration frustrating the contract itself</u>."*

14. In ***T.K. Engineering*** (supra), a Co-ordinate Bench of this Court has held as under:

> *"20. The next aspect of the matter is whether the disability of the appointing authority to appoint an arbitrator would frustrate the arbitration agreement.*
>
> *xxx xxx xxx*
>
> *22. The Appointing Authority is an Executive Director of RITES and in view of the decisions of the Supreme Court in TRF Ltd. (supra) and Perkins (supra), the Appointing Authority cannot appoint an arbitrator, without the written consent of TKE after disputes have arisen. However, this Court is of the view that the same does not mean that the arbitration clause itself stands nullified. The term that no person other than the person appointed by Appointing Authority should act as an arbitrator, is no longer valid, in view of the aforementioned decisions of*

the Supreme Court. ***The next limb of the said term that in case it is not possible for such person to act as an arbitrator, the matter would not be referred to arbitration is intended to ensure that the arbitration is conducted only by an arbitrator appointed by the Appointing Authority. This term cannot be read as a standalone term but must be read in conjunction with the term of the contract requiring the Appointing Authority to appoint an arbitrator. However, since the said term has been rendered inoperative by virtue of the amendments introduced in Section 12 of the A&C Act by the Arbitration and Conciliation (Amendment) Act, 2015 as interpreted by the Supreme Court in TRF Ltd. (supra) and Perkins (supra), the said term must also considered as rendered inoperative rather than as a term that invalidates the arbitration agreement.***

xxx *xxx* *xxx*

30. Considered in the light of the aforesaid object of introducing the amendments under Section 12(5) of the A&C Act, the contention that the Arbitration Clause must be construed to either exist in derogation of the legislative intent or not at all, must be rejected. Considering that RITES had agreed that the subject disputes are required to be referred to arbitration, it could not be heard to contend that the said arbitration would either be conducted in a manner which may compromise the fundamental requirement of an independent and an impartial process or not at all. ***While the plain language of the arbitration clause does read to mean that if it is impossible for the arbitrator appointed by the Appointing Authority to act as such, the disputes would not be referred to arbitration but considering in the context of the entire clause, this term has to be construed as only adjunct to the procedure that requires the Appointing Authority to appoint an arbitrator. It must, therefore, perish if the said procedure is contrary to law. Once it is held that the Appointing Authority is ineligible to appoint an arbitrator, the adjunct to that clause that no other person should act as an arbitrator and the arbitration must not be held without such person acting as an arbitrator, must also be held to be invalid.***

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."

15. The Co-ordinate Bench in ***T.K. Engineering*** (supra), also noted the decision of the Supreme Court in ***Indian Oil Corporation Ltd.*** **v.** ***Raja Transport (P) Ltd.*** (supra), and has held as under:

> *"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."

16. In ***ARSS Infrastructure*** (supra)**,** a Co-ordinate Bench of this Court has held as under:

> ***"17.*** *A coordinate bench of this Court of Vibhu Bakhru, J. has considered an identical clause, and similar arguments, in T.K. Engineering Consortium Pvt. Ltd. v. Director (Projects) Rites Ltd. The court has taken the view, in the said case, that the mere fact that, by operation of Perkins Eastman, and its succeeding judgments, the person named as the arbitrator in the agreement could not act as arbitrator, would not render the dispute non-arbitrable.*
>
> ***18.*** *The second part of the covenant, to the effect that the matter is not to be referred to the arbitration at all, according to Bakhru, J., would perish with the first part, as it is a consequence to the first part which itself has become incapable of implementation because of Perkins Eastmanand Section 12(5). Where the premise becomes incapable of implementation, in other words, Bakhru, J. has held that the consequence must equally to be incapable of implementation. It is not, according to Bakhru, J., therefore, permissible to implement one part of the covenant and ignore the other. Para 22 of the report in T.K. Engineering, which lucidly exposits this legal position, reads as under:...*
>
> *xxx xxx xxx*
>
> ***19.*** *I express my respectful and complete concurrence with the view expressed by Bakhru, J. in T.K. Engineering."*

17. In ***Satish Builders v. Union of India***, 2018 SCC OnLine Del 9026, it has been held as under:

> *"10. Clause 25 of the GCC is in two parts; the first part is an Agreement between the parties to have the disputes adjudicated through the mechanism of arbitration, the second part is the procedure of the appointment of an Arbitrator. Merely because the respondent has failed to appoint an Arbitrator it cannot frustrate the Arbitration Agreement between the parties."*

18. In ***Sam (India) Buildwell Pvt. Ltd. v. Coslight Indian Telecom Pvt. Ltd.,*** 2018 SCC OnLine Del 8703, it has been held as under:

> *"10. The second objection raised by the respondent to the maintainability of the present petition is by relying upon clause 25(ii) of the Special Condition of Contract which inter alia provides that the Arbitrator shall be appointed by the Managing Director of the respondent and that no person other than the person appointed by the Administrative Head of the respondent should act as an Arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.*
>
> *11. Counsel for the respondent, relying upon the above term of the SCC, submits that the arbitrator can be appointed only by the Managing Director of the respondent and not by this Court. He further submits that no other person can act as an Arbitrator and in failure thereof the arbitration clause itself would not be enforceable.*
>
> *12. I am unable to agree with the above submission of the counsel for the respondent. The Arbitration Agreement between the parties is contained in the first part of clause 25 of the SCC which states that all questions and disputes relating to the meaning of the specifications, design drawings and instructions etc., whether arising during the progress of the work or after cancellation or completion thereof shall be referred for adjudication through arbitration. The second part of Clause 25 prescribes that such Arbitrator is to be appointed by the Managing Director of the respondent. However, this second part is only a procedure of the appointment and incase the Managing Director of the respondent fails to appoint an Arbitrator the petitioner cannot be denied recourse to Section 11 of the Act for seeking appointment of an Arbitrator. In fact, this Court will have the power to appoint an Arbitrator under Section 11(6)(a) only where the respondent fails to act as required under the appointment procedure. The respondent having lost its right to appoint an arbitrator in terms of the Arbitration Agreement, cannot plead discharge of the Arbitration Agreement for its own default."*

19. A full bench of this Court in ***Ved Prakash Mithal v. Union of India***, ILR (1984) 2 Del 159, dealing with a similar stipulation in an arbitration agreement has held as under:

> *"...It is also a term of this contract that no person other than a person appointed by such Chief Engineer or administrative head of the C.P.W.D.,*

as aforesaid should act as arbitrator and if for any reason, that is not possible, the matter is not to he referred to arbitration at all...."

xxx *xxx* *xxx*

13. Counsel laid a great deal of stress on these words and submitted that if the Chief Engineer does not appoint the arbitrator for one reason or the other then the court is powerless and the party remedyless. At least under the Act. The only course open to the party may be to file a civil suit, he submitted. The Arbitration Act has no remedy for such an eventuality. He maintained that the view of the learned judges of the division bench in Kishan Chand's case on this aspect was right and we should not differ from them. We regret we cannot concur in the reasoning of the division bench when they say that the Court is power less to appoint the arbitrator under Section 20(4) and the clause is destroyed.

xxx *xxx* *xxx*

17. The clause which the division bench thought was an "absolute" stipulation uses two critical words: "reason" and "Possible". These are strong words. The Chief Engineer's action must be dictated by reason. Reason is used in contradistinction to caprice. The word "possible" means that it is within the realm of the practical. If it is within the range of possibility the Chief Engineer must do his duty. It may be impossible to appoint an arbitrator where the office of the Chief Engineer is abolished and there is no administrative head of the department either. In that case it may well be argued that the matter is not to be referred to arbitration at all. We can conceive of those cases where the nominator of the arbitrator is not in existence. But so long as the office of the Chief Engineer exists we cannot conceive that there can be an "insuperable obstacle" to the appointment of the arbitrator by the Court, as the division bench thought in Kishan Chand's case. Section 20(4) shows that the refusal by the Chief Engineer is capable of being surmounted. There is nothing new or novel in the clause which says that no person other than a person appointed by Chief Engineer shall act as the arbitrator and if, for any reason, that is not possible the matter is not to be referred to arbitration at all.

18. The clause shows that the Chief Engineer is accountable to the Court. He cannot say that he is not answerable to any one, as was argued before us on behalf of the Union of India. He is amenable to our jurisdiction under section 20(4). He is not above the law. Nor is he a law unto himself. ***The contract which contains the arbitration clause is a business document. We must give it business efficacy so as to effectuate the intention of the parties. We will be doing great injustice to the contractor if we tell him that the Chief Engineer has destroyed the clause and we are powerless to redress his grievance.***

19. One of us (Avadh Behari, J.) protested against the reasoning of the division bench sitting singly in Alkarma v. Delhi Development Authority, A.I.R. 1981 Delhi 230 (4). In the full bench we should now overrule Kishan Chand. It was a suicidal argument which the division bench accepted, it had disastrous consequence for the contractor. It meant the death of the clause and the abrogation of judicial power. The appointor became the destroyer of this clause. The judges in the division bench made him the master of the show, leaving the contractor at his mercy. They denuded the court of its jurisdiction. This was against all canons of construction. Such was the unfortunate effect of their decision.

xxx xxx xxx

25. It will appear from this discussion that the Chief Engineer, "the chosen appointor", to use a phrase of Russell, is a third party. (Russell — Arbitration, 18th Edition, page 108; Mustill and Boyd, p. 142). The parties to the dispute are the contractor on the one hand, and the Union of India on the other. The arbitrator has to be nominated by a person designated in the agreement. This is the contractual mechanism for appointment of the arbitrator. Two important consequences follow from it. First, the function of this third party is ministerial and not judicial. As the Privy Council has said:

> *"It is very common in England to invest responsible public officials with the duty of appointing arbitrators under given circumstances. Such appointment should be made with integrity and impartiality, but it is new to their Lordships to hear them called judicial acts."*

(Palgrave Gold Mining Co. v. McMillan, (1892) AC 460 (470) per Lord Hobhouse).

The Supreme Court has said:

> *"The powers and duties of the Court under section 20(4) are of two distinct kinds. The first is the judicial function to consider whether the arbitration agreement should be filed or not. This may involve dealing with objections to the existence and validity of the agreement itself. Once that is done the Court has decided that the agreement must be filed, the first part of its powers and duties is over. Then follows a ministerial act of reference to arbitrator or arbitrators appointed by the parties." (Per Hidayatullah J. in Re: Gobind Ram v. Shamji and Co., A.I.R. 1961 S.C. 1285 (8) (1294).*

The second consequence is that a ministerial functionary cannot destroy the arbitration agreement. He cannot defeat the agreement. The law gives him no such power nor the arbitration agreement. The Supreme Court, calls the matter of appointment by the Court or third party a "ministerial" act. The power to appoint is placed by the parties in the

hands of the Chief Engineer. But the power to destroy the clause is not placed in his hands.

xxx *xxx* *xxx*

28. The dominant theme of the division bench in Kishan Chand is that power to appoint the arbitrator is in the Chief Engineer. There was no power in the court, they thought. On their reasoning it is the Chief Engineer's prerogative to appoint or refuse and no one could question his decision. The moment Chief Engineer refuses the clause goes. They hold that if the appointor refused to appoint it was impossible to arbitrate. Such is the line of their reasoning. This is a fallacious reasoning, in our respectful opinion. Such absolute power as they give to the Chief Engineer is unknown to law whatever be the field — contract or administrative law. The Chief Engineer has a ministerial act to perform. He is a third party. It is a confusion of thought to identify him with the party to the litigation. It is another thing that the disputes relate to his department and he is the Government's own man. But his role is secondary. He cannot be given a place of primacy. He cannot be allowed to destroy the clause. It is for the Union of India to raise objection to the filing of the agreement and to give reasons for not going to arbitration. That reason is subject to the scrutiny of the court. The Chief Engineer's role is passive. The Union of India plays the active role in the legal battle.

29. The truth is that the division bench did not differentiate between a judicial act and a ministerial act. As opposed to a judicial act a ministerial act is an act or duty which involves the exercise of administrative powers. If the Chief Engineer refuses to appoint he refuses to do his duty. This is administrative nihilism, if we may call it. He stultifies himself. But the clause he cannot destroy."

20. The Bombay High Court in ***Sunil Kumar Jindal v. Union of India,*** 2023 SCC OnLine Bom 1691, has also held as under:

11. The non-applicants, once having agreed for resolution of the dispute, by way of an arbitration, as a dispute resolution mechanism between them cannot be permitted, to wriggle out of the same on the plea that the clause required arbitration by certain officer of the non-applicant or not at all, as it will have to be held that the entire clause, in that regard, was capable of being severed in furtherance of the intention to arbitrate as specifically spelt out from clause 13-A and clause 25 (ii) sub para 3, as all the essential elements which constitute a binding arbitration agreement, between the parties, were satisfied by the above referred clauses.

12. It is worthwhile to note what the learned Full Bench of the Delhi High Court in Ved Prakash Mithal (supra) has held while considering a similar term as occurring in clause 25 of the agreement therein, which was as under:—

...

13. It is, thus, apparent that when the intention to arbitrate is manifest from the terms of the clause, the parties cannot be permitted to digress from the same on any ground as that is the chosen forum agreed by the parties and they should be relegated to such forum. The choice of getting the dispute resolved by arbitration is one thing and the choice of a specific arbitrator, is another thing and both are severable from each other. In case the choice to get the arbitration proceeding decided by specific person/arbitrator falls through for any reasons whatsoever, as in this case on account of the introduction of Section 12 (5) r/w VII th Schedule of A and C Act, that by itself would not mean that the intention to arbitrate has been wiped out as what is affected by Section 12 (5) r/w VII th Schedule is the choice of the arbitrator, and nothing else. The intention to arbitrate still remains. Such intention to arbitrate cannot be permitted to be done away by such clauses as clause 13-A (b) or clause 25 (ii) sub para 3, as that would defeat the very purpose of ensuring independence and impartiality of an arbitrator in the arbitration proceeding, as a party cannot be forced to arbitrate, before an arbitrator, of the choice of the other side."

21. The law is also well settled that while construing an arbitration agreement, the Court must lean in favor of giving effect to the arbitration agreement between the parties. In ***Sunita Garg v. Scraft Product (P) Ltd.,*** (2023) 297 DLT 717, this Court has held as under:

"21. Regarding the ostensible dichotomy between Clauses 25 and 27, it is well settled that if there is any contractual stipulation which undermines the scope of arbitration clause contained in any contract, the same will be accorded an interpretation which gives full effect to the arbitration agreement between the parties. In this regard, it has been observed by the Supreme Court in the case of Chloro Controls India Private Limited v. Severn Trent Water Purification Inc., (2013) 1 SCC 641, 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 causes of action, parties and prayers."

22. Also, in MTNL v. Canara Bank, (2020) 12 SCC 767, it was observed as under:

> *"9.5. A commercial document has to be interpreted in such a manner so as to give effect to the agreement, rather than to invalidate it. An "arbitration agreement" is a commercial document inter partes, and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities."*

23. In A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386, Dr. D.Y. Chandrachud, J. in his separate opinion observed that:

> *"53. The Arbitration and Conciliation Act, 1996, should in my view be interpreted so as to bring in line the principles underlying its interpretation in a manner that is consistent with prevailing approaches in the common law world. Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for resolving all their claims is but part of that evolution. Minimising the intervention of courts is again a recognition of the same principle."*

24. In Govind Rubber Ltd. v. Louids Dreyfus Commodities Asia (P) Ltd., (2015) 13 SCC 477, it has been held as under:—

> *"17. We are also of the opinion that a commercial document having an arbitration clause has to be interpreted in such a manner as to give effect to the agreement rather than invalidate it. On the principle of construction of a commercial agreement, Scrutton on Charter Parties (17th Edn., Sweet & Maxwell, London, 1964) explained that a commercial agreement has to be construed, according to the sense and meaning as collected in the first place from the terms used and understood in the plain, ordinary and popular sense (see Article 6 at p. 16). The learned author also said that the agreement has to be interpreted "in order to effectuate the immediate intention of the parties". Similarly, Russell on Arbitration (21st Edn.) opined, relying on Astro VencedorCompaniaNaviera S.A. v. Mabanaft GmbH [((1970) 2 Lloyd's Rep 267], that the court should, if the circumstances allow, lean in favour of giving effect to the arbitration clause to which the parties have agreed. The learned author has also referred to another judgment in Paul Smith Ltd. v. H and S International Holdings Inc. [(1991) 2 Lloyd's Rep 127] in order to emphasise that in construing an arbitration*

agreement the court should seek to "give effect to the intentions of the parties".

25. The same approach to interpretation of arbitration agreements has been followed across jurisdictions. For instance, the United States Supreme Court in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 US 614 (1985), 626 (U.S. S.Ct. 1985), has affirmed as under:—

> *"... The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."*

26. Similarly, in the United Kingdom, in Premium Nafta Products Ltd. v. Fili Shipping Company Ltd., [2007] UKHL 40 (House of Lords), it was held as under:—

> *"The proposition that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed promotes legal certainty. It serves to underline the golden rule that if the parties wish to face issues as to the validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressively. Otherwise, they will be taken to have agreed on a single tribunal for the resolution of all such disputes."*

27. With regard to the view taken in some older authorities to the effect that the arbitration clauses must be interpreted restrictively, it is stated by Gary B. Born in International Arbitration : Law and Practice, Third Edition as under:

> *"The "restrictive" presumption is generally explained on the grounds that arbitration is a derogation from otherwise available access to civil justice and the "natural judge" of the contract, and that such derogations must be construed narrowly. Thus, in an older decision, a French appellate court declared that "[t]he arbitration agreement must be strictly interpreted as it departs from the norm - and in particular from the usual rules as to the jurisdiction of the courts." 'This restrictive interpretative presumption is archaic and out of step with the ordinary intentions of commercial parties; it is generally not applied in contemporary decisions.'"*

22. As such, there is no merit in the contention raised by learned counsel for the respondent that the present disputes cannot be referred to arbitration

at all. The arbitration clause insofar as it stipulates that only the respondent can act or appoint an arbitrator must severed from rest of the arbitration clause in view of the judgment of the Supreme Court in ***TRF Ltd.*** (supra) and ***Perkins*** (supra). The later part of the arbitration clause, that if for any reason the person appointed by the respondent cannot act as arbitrator the matter is not to be referred to arbitration at all, must also be severed, as the same is also a part of the same stipulation, which is in utter contravention of ***TRF Ltd.*** (supra) and ***Perkins*** (supra).

23. The judgment of the Supreme Court in the case ***Newton Engineering*** (supra), relied upon by the respondent has been specifically distinguished in both ***T.K. Engineering*** (supra) and ***ARSS Infrastructure*** (supra). In ***T.K. Engineering*** (supra), it has been *inter-alia* held as under:

> *"52. The decision in the case of Newton Engineering and Chemicals Limited (supra) is also of little assistance to the respondents. In that case, the parties had agreed to refer the disputes to ED (NR) of the respondent corporation. When the disputes arose between the parties, the office of the respondent corporation (Indian Oil Corporation) had been reorganized and a post of ED (NR) did not exist. Indian Oil Corporation offered that the disputes be referred to the Director (Marketing), however, that was not acceptable to the appellant therein. It is in the aforesaid context that the Supreme Court held that the disputes could not be referred to arbitration. It is material to note that the said decision was rendered before enactment of the Arbitration and Conciliation (Amendment) Act, 2015. The Supreme Court in TRF Ltd. (supra) referred to the aforesaid decision and observed as under:*
>
> > *"The aforesaid decision clearly lays down that it is not open to either of the parties to unilaterally appoint an arbitrator for resolution of the disputes in a situation that had arisen in the said case."*
>
> *53. As per law prevailing on the date of the said decision, there was no impediment for the parties to agree that an employee of one of the parties be appointed as an arbitrator. Thus, the agreement that disputes be referred to arbitration of an officer holding the designation of ED (NR) was valid and enforceable. But as that office had ceased to exist, it was necessary for the parties to arrive at an alternative arrangement, which*

they were unable to do so."

In ***ARSS Infrastructure*** (supra), it has been *inter-alia* held as under:

> *"14. Newton Engineeringwas a decision rendered prior to the enactment of Section 12(5) of the 1996 Act and prior to the enunciation of the law by the Supreme Court in Perkins Eastman Architects DPC, and the decisions which followed Perkins. It pertained to a regime in which arbitration, by the Executive Director of one of the parties to the contract was permissible. In such a scenario, the Supreme Court held that, where the agreement between the parties specifically envisaged arbitration by the ED or by his nominee, and by no one else, and the parties were not agreeable, ad idem, to arbitration either by the ED or by his nominee, no arbitration could take place.*
>
> *15. Since then, however, the law has changed. Perkins Eastmanand its sequelae are, today, the ruling legal dispensation. Where the arbitration clause requires one of the parties to the agreement to be the arbitrator or empowers one of the parties to the agreement to appoint the arbitrator, the Supreme Court has held that the clause would be unworkable and, in such a situation, the court could appoint the arbitrator. This is the law as it emerges from a long line of authorities starting from Perkins Eastman Architects DPCand Bharat Broadband Network Ltd. This is also the statutory position which emanates from Section 12(5) of the 1996 Act read with the Seventh Schedule thereto."*

24. The judgment of a Co-ordinate Bench of this Court in ***Vindhya Vasini Construction*** (supra), relied upon by the respondent, did not take note of the position laid down in prior decisions of this Court in ***Ram Kripal Singh*** (supra)***, T.K. Engineering*** (supra), ***ARSS Infrastructure*** (supra), ***NIIT Technologies*** (supra), ***Satish Builders*** (supra), ***Sam (India) Buildwell*** (supra) and full bench of this court in ***Ved Prakash Mithal*** (supra) and the judgment of the Supreme Court in ***Indian Oil Corporation*** (supra) and ***Nandyal*** (supra). As such, the same must be read to be confined to the peculiar facts and circumstances and in the context of the submissions advanced in that case.

25. In view of the aforesaid, there is no impediment in appointing an independent sole arbitrator to adjudicate the dispute between the parties.

26. Accordingly, Mr. Justice (Retd.) Shantanu Kemkar, Former Judge, Bombay High Court (Mob. No.: 7678080789), is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

27. It is made clear that the reference in each of these petitions shall be independent even though the Arbitrator shall be entitled to hold common hearing/s for the sake of convenience.

28. The respondent shall be entitled to raise preliminary objections as regards jurisdiction/arbitrability, which shall be decided by the learned arbitrator, in accordance with law.

29. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under Section 12 of the A&C Act.

30. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

31. The parties shall share the arbitrator's fee and arbitral costs, equally.

32. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.

33. Needless to say, nothing in this order shall be construed as an expression of this court on the merits of the case.

34. The present petitions stand disposed of in the above terms.

DECEMBER 01, 2023/hg **SACHIN DATTA, J**