REPORTABLE

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

ON THE 1st DAY OF APRIL, 2022

BEFORE

HON'BLE MR. JUSTICE MOHAMMAD RAFIQ,

CHIEF JUSTICE

ARBITRATION CASE No.61 of 2020

Between:-

**BACKEND BANGALORE PRIVATE LIMITED,
A COMPANY INCORPORATED UNDER THE
COMPANIES ACT, 1956, HAVING ITS
REGISTERED OFFICE AT NO.587, KPC LAYOUT
KASAVANAHALLI, BENGALURU-560035,
REPRESENTED BY ITS MANAGING
DIRECTOR, MR. GAUTAM HEGDE.**

……PETITIONER

(BY MR. DIWAN SINGH NEGI, ADVOCATE)

AND

**CHIEF ENGINEER-CUM-PROJECT
DIRECTOR, STATE ROADS PROJECT,
HIMACHAL PRADESH ROAD AND
INFRASTRUCTURE DEVELOPMENT
CORPORATION LIMITED (HPRIDC),
NIRMAN BHAVAN, NIGAM VIHAR,
SHIMLA-171002, HIMACHAL PRADESH.**

……RESPONDENT

**(BY MR. J.S. BHOGAL, SENIOR ADVOCATE
WITH MR. TARUNJEET SINGH BHOGAL, ADVOCATE)**

RESERVED ON: 25th MARCH, 2022

PRONOUNCED ON: 1st DAY OF APRIL, 2022

This petition coming on for hearing this day, the Court passed the following:

O R D E R

This petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, (for short 'the Act'), has been filed by M/s Backend Bangalore Private Limited, *inter alia,* praying for referring the dispute arising between the petitioner and the respondent-Chief Engineer-cum-Project Director, State Roads Project, Himachal Pradesh Road and Infrastructure Development Corporation Limited (for short 'HPRIDC') to arbitration by constitution of an independent Arbitral Tribunal to be presided over by the Sole Arbitrator.

2. Facts of the case as averred in the memo of petition are that the petitioner-Company in the year, 2014, undertook the works for the HPRIDC for the delivery of project management software or e-PMS to monitor HPRIDC works.

Being satisfied with the work, the respondent in the year, 2016, informed that it was interested in engaging the services of the petitioner-Company for the Himachal Pradesh Public Works Department (for short 'HPPWD') for the purpose of monitoring the works carried out by them. In furtherance to the said decision taken to extend the e-PMS software application to HPPWD, the respondent in the year, 2018, acting for and on behalf of the Governor of Himachal Pradesh, awarded the contract of Development Management Software to the petitioner-Company. The contract was entered into between the parties on 11.12.2018 for a lump-sum value of Rs.2,85,10,000/- exclusive of taxes. The term of the contract was for eighteen months ending on 10.06.2020. In terms of the contract, the petitioner-Company was to supply a web based Project Management System or e-PMS software by creating 100 user licenses, totaling a value of Rs.1,68,00,000/- exclusive of taxes. The said amount was to be paid by the respondent percentage-wise in three stages viz; three stages of 50%, 30% and 20%. The petitioner-Company was required to supply 100

Mobile applications, Laptops, Cloud Hosting Services, training services, customization and migration services. As per Clause 3.9 of the contract, the petitioner was to furnish a Performance Bank Guarantee in favour of the respondent constituting 10% of the total contract value in favour of the respondent. Accordingly, the petitioner-Company furnished the Bank Guarantee for a sum of Rs.24,16,000/- on 22.02.2019.

3. According to the petitioner-Company, it completed Stage-I of its deliberables, being the development and activation of the e-PMS software for 100 user licenses, which required the petitioner to release 50% payment of the aforesaid amount of Rs.1,68,00,000/-. Thereafter, the petitioner customized the software as per requirement of HPRIDC and the petitioner-Company had completed data initialization and held training programmes at all zonal levels by May, 2019, which further entitled the petitioner-Company to release 30% payments, leaving only 20% to be paid after completion of one year of implementation of the e-PMS software, which would have become payable by January, 2020. Further case of the

petitioner-Company is that the respondent periodically held review meetings and acknowledged the progress and completion of works, yet they defaulted in making payment as per agreed terms of the contract. The petitioner-Company raised three invoices. The first one was dated 05.02.2019 for Rs.99.12 lacs, against which the respondent paid only a sum of Rs. 50.00 lacs on 23.09.2019. It raised second invoice for a sum of Rs.3,77,000/- on 02.05.2019 for cloud hosting and training services, against which the respondent paid only Rs.2,18,000/-. The petitioner-Company also raised third invoice dated 01.07.2019 for Rs.59.47 Lacs, against which no payment was made by the respondent.

4. According to case set up in the memo of the petition, the petitioner-Company, repeatedly followed up with the respondent for payment of due amount, who continuously assured them that they would release payment and on these assurances, the petitioner-Company continued to render work under the contract including the submission of weekly reports by e-mail reflecting the implementation of e-PMS software.

Further case of the petitioner-Company is that respondent in the month of August, 2019, informed the petitioner-Company that the HPPWD was interested in further simplifying and digitizing data recording with respect to public works projects. The respondent called on the petitioner-Company to develop a software to replace the manual Measurement Book (MB) by way of an on-line MB (e-MB) to be utilized by Junior Engineers working at site levels to enable generation of on-line Running Account Bills. Since the petitioner-Company agreed to develop the software as requested, the petitioner-Company was called upon to develop and demonstrate the prototype of the software within two months. As the decision was recorded in the meeting held on 01.08.2019 it was agreed that since the e-MB works was not within the scope of the contract, a revised contract would be executed. Pursuant to the above development, the petitioner-Company developed the software by the end of September, 2019. But the respondent was not responsive to his repeated requests to host the demonstration. By this time period of one year was completed

since the implementation of the e-PMS software, which obligated the respondent to release the remaining 20% of the contract value. The petitioner-Company then followed up with the respondent for releasing the pending payment and finally the respondent called for a meeting on 03.12.2019 to discuss the implementation of the e-MB software and also to discuss the release of pending payments. In this meeting, the petitioner – Company demonstrated to the respondent and other Members of HPPWD, about the e-MB project. A decision was taken in the meeting held on 01.08.2019 that a revised agreement would be executed incorporating the e-MB software into the scope of work. The respondent in its meeting held on 03.12.2019 agreed to pay 100% advance for purchase of the tablets to install the e-MB and also directed to release the pending payments to the petitioner-Company for the work already carried out.

5. The petitioner-Company, on 05.12.2019, submitted a quotation for two tablets of similar specification to the respondent. The petitioner-Company on 19.12.2019 sent e-mail

to the respondent for releasing 100% payment for purchase of the tablets. But the respondent then informed that they required only 73 tablets. The petitioner-Company again sent a revised invoice by e-mail on 19.12.2019 for 73 tablets. The petitioner-Company after discussing the specifications and pricing of tablets proposed to be purchased, again submitted a revised invoice on 20.01.2020 by post and e-mail. Upon not receiving any response, the petitioner-Company sent another e-mail on 20.02.2020 once again attaching the invoice for purchase of 73 tablets. Thereafter, the respondent on 05.03.2020 instructed the petitioner-Company to issue a revised invoice citing certain GST issues with the previous invoice. The petitioner-Company, on the same day, submitted a revised invoice to the respondent and was awaiting for release of payment to purchase the tablets. However, the petitioner-Company was shocked to receive a notice dated 12.05.2020 issued by the respondent under Clause 2.6.1 of the contract for termination of the agreement, falsely alleging that the petitioner-Company had failed to execute the complete works

as agreed in the meeting held on 03.12.2019. The petitioner-Company was astonished by the allegations made in the notice of alleged non-completion of works, as the works referred to therein could not be completed without installation of the e-MB software in the tablets, which could be possible only on releasing 100% advance payment for procuring the tablets. The petitioner-Company had taken necessary steps to purchase of the tablets by submitting the invoice for 100% advance as agreed, but the respondent failed to pay for the same. The petitioner-Company sent a detailed reply to the notice dated 25.05.2020 addressing each of the issues raised by the respondent. Completely disregarding the reply, the respondent sent letter dated 26.06.2020 under Clause 2.6.1 of the contract reiterating the allegations made in the previous notice and unilaterally terminating the contract. The respondent, thereafter, proceeded arbitrarily to invoke the performance bank guarantee dated 22.02.2019 and encashed a sum of Rs.24,16,000/-.

6. Mr. Diwan Singh Negi, learned counsel for the

petitioner submitted that petitioner-Company has a claim of Rs.1.41 crores against the respondent. In view of the breaches committed by the respondent, the petitioner-Company is also entitled to recover compensation from them. It is contended that dispute resolution mechanism under the contract is found in Clause-8 of the General Conditions of Contract (GCC) read with Clause 8.2.4 of the Special Conditions of Contract (SCC). In terms of the said Clauses, all disputes are to be referred to an Adjudicator. On reference, the Adjudicator shall render a decision within 28 days. Either party aggrieved by the decision of the Adjudicator, may refer the decision to an Arbitrator within 28 days of the decision rendered by the Adjudicator. Clause 1.1(a) of the GCC provides that the Adjudicator shall be appointed by the petitioner-Company/respondent. However, the respondent did not consult the petitioner-Company and went ahead and appointed one Mr. Dharmesh Sharma as the Adjudicator. There are no details forthcoming from the contract either about the qualification or any other details of Mr. Dharmesh Sharma. The unilateral decision of the

respondent to appoint an Adjudicator without consulting the petitioner-Company is *prima-facie* contrary to Clause 1.1(a) of the contract, which specifically provides that the Adjudicator shall be appointed jointly by the petitioner-Company and the respondent. Clause 8.2.4 of the GCC provides that the arbitration shall be conducted in accordance with the arbitration procedure published by the Institution, named in the SCC, but this Clause is silent on the name of the Institution. On the other hand, Annexure B-2 to Clause 8.2.4 of the SCC provides for 'Remuneration of Arbitration Tribunal Members' and a detailed break-up of the arbitrator fees. On a conjoint reading of Clause 8.2.4 of the GCC and Clause 8.2.4 of the SCC and Annexure B-2 thereof, it would be evident that the same reflect that the respondent had already decided on the name of Arbitrator. However, the contract is completely vague and ambiguous as the arbitrator is not named.

7. Mr. Diwan Singh Negi, learned counsel for the petitioner-Company further argued that unilateral appointment of Adjudicator by the respondent is contrary to

the law laid down by the Supreme Court in case of ***Perkins Eastman Architects DPC and another Versus HSCC (India) Limited,*** reported in ***(2019 SCC online 1517),*** wherein, it was held that a party to a dispute cannot appoint an Arbitrator. Extending the ratio of the said decision, if a party to a dispute cannot appoint an Arbitrator, such party also cannot appoint an Adjudicator as well. It is argued that the petitioner-Company issued a notice dated 22.07.2020 demanding payment of outstanding dues of Rs.1.41 crores together with interest at the rate of 8% per annum. The petitioner-Company called upon the respondent to compensate the petitioner-Company for loss of profits, refund the performance bank guarantee and to compensate for costs incurred for developing the e-MB software. The petitioner-Company called upon the respondent to make payments within two weeks on receipt of the notice, failing which the petitioner-Company would treat non-compliance as a dispute in view of the law laid down by the Supreme Court in ***Perkins Eastman case.*** The petitioner-Company notified the respondent that though

Clause 8.2 of the contract provides for reference of disputes to the Adjudicator, but the said Clause is opposed to principles of law laid down by the Supreme Court. The petitioner-Company in its notice proposed the nomination of a Former Judge of this Court or a former Judge of any other High Court in India as a Sole Arbitrator.

8. In response to the said notice, respondent sent reply dated 11.08.2020 refusing to concur with the appointment of the Sole Arbitrator as proposed by the petitioner-Company. The respondent erroneously stated that the appointment of arbitrator is pre-mature, as the petitioner-Company had failed to comply with Clause 8.2.3 of the contract providing reference of disputes to an Adjudicator, as condition precedent to arbitration. It is argued that this stand of the respondent is completely baseless, untenable and unsustainable in law, as appointment of an Adjudicator by respondent cannot be said to be either impartial or independent. Any such appointment would result in a challenge to the neutrality, impartiality and independence of the Adjudicator and hit by Section 12(5) of

the Arbitration Act. Thus, while Clause 1.1(a) of the GCC reflects that the Adjudicator would be appointed by both the parties and unilateral appointment of Mr. Dharmesh Sharma has taken away the right of the petitioner-Company, who was never consulted. It is, thus, clear that no independent or impartial decision can be taken by the Adjudicator and there is a huge possibility of inherent bias on the part of the Adjudicator, unilaterally appointed by the respondent, being hit by principles of law laid down in ***Perkins Eastman case.*** It is argued that the entire scheme of a pre-arbitration adjudication is ill conceived and contrary to the scheme of Arbitration Act. As per contract, the Adjudicator has to render his decision within 28 days and such decision may be challenged in arbitration. But the contract does not provide the procedure for adjudication in terms of leading evidence etc. and then providing for a challenge procedure to arbitration under the Arbitration Act. This completely negates the object and purpose under the Arbitration Act.

9. The learned counsel for the petitioner-Company

relying on the judgments of Delhi High Court in ***Ravindra Kumar Verma Versus M/s. BPTP & Anr.,*** reported in ***2015(147) DRJ 175*** and ***Sarvesh Security Services Pvt. Ltd. Versus Managing Director, DSIIDC and the connected matter, Arb. P. No.181/2014 and the connected matter,*** decided on 16.03.2018 and submitted that the arbitration Clause providing that the dispute is to be referred firstly to the Adjudicator and then to the Arbitrator has to be taken as only directory and not mandatory. The prayer, is therefore, made to appoint the sole arbitrator.

10. The respondent has contested the petition by filing a detailed reply. It is contended that according to the respondent as per agreement between the parties for adjudicating the dispute, the petitioner-Company in the first invoice would be required to approach the Adjudicator appointed in terms of Clause 8.2.3, Section-II of SCC of the contract and only if any of the parties express dissatisfaction with the decision of the Adjudicator, it would be entitled to seek reference of the matter to arbitration. Therefore, the present petition, being premature, is not maintainable, as the petitioner-

Company has not approached the Adjudicator for securing his decision. It is contended that the petitioner-Company failed to perform its obligations, compelling the respondent to terminate the contract. The assertion of the petitioner-Company that it had completed data initialization, are not admitted, as the petitioner-Company could not provide certificates signed by Zonal Chief Engineers, depicting that it had initiated/ completed the application in their Zones, as required by the contractual provisions. The petitioner-Company also did not complete the training programmes as per the contractual provisions. The petitioner-Company has, thus, failed to perform its obligations under the contract. Various payments claimed by the petitioner-Company in different invoices were not found payable, as it failed to perform terms of the conditions of contract.

11. It is submitted that even though, the petitioner-Company submitted weekly reports by e-mail to reflect the implementation of e-PMS software, but whether these activities have been initiated or completed, could not be verified from

the certificates of Zonal Chief Engineers. The petitioner-Company never obtained such certificates and the petitioner-Company was not, thus, entitled to payment as per terms and conditions of the contract. While admitting in the Minutes of the Meeting held on 01.08.2019, it was decided that manual MB will be replaced with on-line e-MB and running/final bills will be system generated based on the on-line measurement. It was never agreed that developing e-MB was not in the scope of contract and revised contract will be signed for developing e-MB. In the subsequent meeting held on 03.12.2019, Mr. Gautam Hegde, MD of the petitioner-Company had accepted that e-MB is part of scope of their original contract only, they have withdrawn the variation of Rs.25.00 lacs for implementation of e-MB. However, the petitioner-Company was unable to develop e-MB software suitable for the work flow based automation of HPPWD starting from the Section JEs and capturing day-to-day activities of various offices of the Department and to demonstrate the same. It was also agreed in the meeting conducted on 03.12.2019 by the petitioner-

Company that same module will be demonstrated again on 04.12.2019 and 05.12.2019, but the respondent was not satisfied with e-MB software developed by the petitioner-Company and few observations were raised for customization of the software. The petitioner-Company, however, never customized the e-MB software as per the said observations raised by the officers/officials of the HPPWD.

12. It is further submitted that as per Memo of Minutes dated 03.12.2019, all illegal payments were released to the petitioner-Company, but the petitioner-Company failed to produce certificate of Zonal Heads about the initiation of the application. The respondent, therefore, was compelled to invoke Clause 2.6.1 of the contract and issued notice of termination of contract. It is argued that in the first instance the dispute is to be referred to the Adjudicator in terms of Clause 8.2.3 of the contract and decision of the Adjudicator is a condition precedent to arbitration. The petitioner-Company had signed the contract containing the name of Mr. Dharmesh Sharma to act as an Adjudicator and, therefore, it is wrong to

suggest that he did not consent for his appointment. It is submitted that while the Adjudicator is named in Clause 1.1(a) and 8.2.3 of the SCC, the arbitrator is not named. The law relied upon by the petitioner-Company in ***Perkins Eastman case*** and Section 12(5) of the Act only prohibits the unilateral appointment of an arbitrator by one party to the dispute, but does not prohibit the requirement of a decision by an Adjudicator, named in the contract, as a condition precedent to the appointment of Arbitrator. It is denied that the Disputes Redressal Mechanism provided in the contract is contrary to the scheme of the Arbitration and Conciliation Act. It is also denied that adjudication would be acting with bias and would not render independent and impartial decision as alleged by the petitioner-Company. The petitioner-Company failed to respond to the notice, issued to him on 12.05.2020 under Clause 2.6.1 of the GCC, for termination of the contract and failed to explain as to the action could not be taken within fifteen days for implementation, who was responsible for delay in implementation of web based application for establishment of

e-based Project Management System. The respondent terminated the agreement, after completion of forty-five days from the date of notice.

13. Mr. J.S. Bhogal, learned Senior Advocate for the respondent has relied on the judgment of this Court ***in Arb. Case No.51/2010, titled as M/s K.C. Sharma Versus The State of H.P. and others*, decided on 29.09.2011** and argued that in that case, it was held that according to Clause 24.1 of the agreement, the parties in the first instance were required to approach the competent authority for settlement of dispute, subject to review, whose decision shall be final, but each party thereafter has the right to file the appeal against the decision of the competent authority to the Standing Empowered Committee, if the amount appealed against is above Rs.1.00 lac. Constitution of Standing Empowered Committee is provided under Clause 24.3 of the agreement and the contractor and employer are entitled to present their respective cases, supported by documents, before the Standing Empowered Committee. The decision of the Standing

Empowered Committee has been made binding on the employer for payment of 5% of the initial contract price and the contractor can accept and receive payment after signing full and final settlement of the claims. It is only if the parties are not satisfied after exhausting such Dispute Redressal System that they can refer the dispute to the sole arbitration. This Court in that case set aside the appointment of Superintending Engineer as the sole arbitrator by requiring the parties to first take recourse to Clause 24 of the contract agreement entered into between them and held that the matter can be referred to arbitrator by exhausting the Redressal Dispute System, provided under Clause 24 of the contract agreement.

14. I have given my thoughtful consideration to rival submissions and perused the material on record. The question that is required to be decided in the present case is whether in view of the detailed procedure provided for by Clause 8 of the contract agreement entered into between the parties for settlement of dispute, the application for appointment of Arbitrator can be entertained even though the disputes have

not been first taken to the Adjudicator for his decision. In order to appreciate the rival submissions, it would be instructive to reproduce Clause 8 of the contract agreement hereunder:-

> ***"8. Settlement of Disputes***
>
> *The Parties shall use their best efforts to settle amicably all disputes rising out of or in connection with this Contract or its interpretation.*
>
> *8.2.1 If any dispute arises between the Employer and the Service Provider in connection with, or arising out of, the Contract or the provision of the Services, whether during carrying out the Services or after their completion, the matter shall be referred to the Adjudicator within 14 days of the notification of disagreement of one party to the other.*
>
> *8.2.2 The Adjudicator shall give a decision in writing within 28 days of receipt of a notification of a dispute.*
>
> *8.2.3 The Adjudicator shall be paid by the hour at the rate specified in the BDS and SCC, together with reimbursable expenses of the types specified in the SCC, and the cost shall be divided equally between the Employer and the Service Provider, whatever decision is reached by the Adjudicator. Either party may*

refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. It neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding.

8.2.4 The arbitration shall be conducted in accordance with the arbitration procedure published by the institution named and in the place shown in the SCC.

3.2.5 Should the Adjudicator resign or die, or should the Employer and the Service Provider agree that the Adjudicator is not functioning in accordance with the provisions of the Contract, a new Adjudicator will be jointly appointed by the Employer and the Service Provider. In case of disagreement between the LED TODA. Employer and the Service Provider, within 30 days, the Adjudicator shall be designated by the Appointing Authority designated in the SCC at the request of either party, within 14 days of receipt of such request."

15. It may be at the outset noted that Section 2 of SCC in Clause 8.2.3 has clearly mentioned the name of the

Mr. Dharmesh Sharma, as the Adjudicator, copy of which has been placed on record by the petitioner-Company itself. Therefore, the argument that the Adjudicator was unilaterally appointed by the respondent, may not be available to the petitioner-Company, but the seminal question to be examined is whether in the facts of the case, when the petitioner-Company had repeatedly raised the demand of payment of various claims and the respondent has not only not released such payments, but also did not invoke the adjudicatory clause, but served notice for termination of the contract. The petitioner-Company has responded to the same by sending detailed reply refuting the assertion made by the respondent and reiterating his claim. A perusal of the afore-extracted Clause 8.2.1 of the contract agreement indicate that if any dispute arises between the employer and the service provider, the matter shall be referred to the Adjudicator within fourteen days of the notice of disagreement of one party to the other. In the opinion of this Court, either of the parties could have taken the dispute to the Arbitrator. The Clause does not necessarily

require the petitioner-Company alone could approach the Adjudicator. The respondent as well upon receiving the repeated communications from the petitioner-Company and finding reply to the notice of termination of the contract not acceptable, could have referred the dispute to the Adjudicator within fourteen days of the notice of disagreement. Disagreement stood notified when the respondent declined to release the payment as claimed by the petitioner-Company. Even if, the nomination of Mr. Dharmesh Sharma as Adjudicator, was not unilaterally made by the respondent, the condition of referring the dispute first to the Adjudicator, cannot be taken as a bar for the petitioner-Company to raise the demand for referring the dispute to the Arbitrator, as in the facts of the case such a Clause can only be taken as directory. Even otherwise, reference of dispute to the Adjudicator cannot be taken as condition precedent for making a reference to the Arbitrator, for two reasons, firstly, that the respondent itself failed to refer the dispute to the Adjudicator, and secondly, it has strenuously contested the matter even before this Court, on merits, by filing

detailed reply to the petition, which has remained pending for more than 1½ years even if approached the Adjudicator would be required to give his decision within twenty-eight days of the reference to him, that phase passed a long time ago. No useful purpose, would therefore, be served by now relegating the parties to the remedy of adjudication.

16. In ***VISA International Limited Versus Continental Resources (USA) Limited,*** reported in ***(2009) 2 Supreme Court Cases 55,*** an application under Section 11(5) and 9 of the Arbitration Act, was filed before the Supreme Court with the prayer to appoint an Arbitrator in terms of the relevant Clause in the agreement entered into between the applicant and the respondent. A Memo of Understanding was entered into between the applicant and the respondent with the intention to make substantial investments to set up an integrated aluminium complex in Orissa with an alumina refinery to be catered by the bauxite deposits of Gandhamardan Mines. The respondent proposed to the applicant to set up said integrated aluminium complex in the joint venture with the applicant by

duly incorporating a special purpose vehicle for the purpose. The applicant relying on the assurance of the respondent had accepted the proposal for setting up of the said aluminium complex in joint venture with the respondent and Memo of Understanding was executed between them, defining their respective rights and obligations. Clause VI of the agreement dated 14.02.2005 provided that "Any dispute arising out of this agreement and which cannot be settled amicably shall be finally settled in accordance with the Arbitration and Conciliation Act, 1996." The respondent on 31.08.2006 addressed a letter to the applicant, *inter alia,* alleging that agreement entered into between them was not appropriate, as it does not address the changes in the OMC draft agreement itself and, therefore, the agreement has been rendered unworkable. The applicant asserted that the agreement dated 15.02.2005 entered into between them was valid and subsisting, whereas, the respondent contended that the agreement was unworkable. On 25.09.2006, the respondent informed the applicant that Memo of Understanding dated 14.02.2005 and

15.02.2005 stand discharged and CRL stands discharged of its obligations under this agreement. The applicant, vide letter dated 06.08.2007 informed the respondent that its action of unilaterally terminating the said Memo of Understanding and also the agreement was not acceptable. The applicant, therefore, invoked the arbitration Clause duly informing the respondent that the disputes, thus, having arising out of the said Memo of Understanding and agreement, are required to be resolved by the Arbitrator. The respondent, in turn, vide letter dated 03.04.2007 rejected the names suggested by the applicant to be appointed as Arbitrator for the reasons that (a) the arbitration will not be cost-effective; and (b) the arbitration is premature, because the agreement entered into between the parties provided for resolution of disputes through conciliation in accordance with the provisions of the Arbitration Act in case of failure to settle the disputes amicably between the parties. Rejecting the arguments, in paragraphs 24-26 and 41, the Supreme Court held as under:-

"24. Be it noted that at no stage the respondent took any plea that the dispute was required to be settled through conciliation in accordance with the Arbitration and Conciliation Act, 1996. It is evidently an afterthought. Shri Venugopal submitted that on a comparison with dispute resolution clause in the MOU entered into between the OMC and CRL with the settlement clause in the agreement dated February 15, 2005, it is apparent that there was no specific intention of the parties to refer the disputes to arbitration. It is true that the dispute resolution clause in MOU entered into between OMC and CRL is more specific in its terms but the said clause would not throw any light in construing clause VI in the agreement dated 15th February, 2005. One cannot take into consideration terms of other contracts especially when the contract is not between the same parties. Shri Venugopal, relied on that clause and submitted that in the absence of a similar clause in the present agreement the parties have made their intention expressly clear to resolve their disputes through conciliation in case of failure to settle the disputes amicably among themselves.

25. The submission is unsustainable for more than one reason. No party can be allowed to take advantage of inartistic drafting of arbitration clause

in any agreement as long as clear intention of parties to go for arbitration in case of any future disputes is evident from the agreement and material on record including surrounding circumstances.

26. What is required to be gathered is the intention of the parties from the surrounding circumstances including the conduct of the parties and the evidence such as exchange of correspondence between the parties. The respondent in none of its letters addressed to the applicant suggested that the dispute between the parties is required to be settled through conciliation and not by arbitration. In response to the applicant's letter invoking the arbitration clause the respondent merely objected to the names inter-alia contending the suggested arbitration would not be cost effective and the demand for arbitration itself was a premature one.

41. It is amply clear from the facts as pleaded and as well as from the exchange of correspondence between the parties that there has not been any satisfaction recorded by the parties with respect to their claims. There has been no mutual satisfaction arrived at between the parties as regards the dispute in hand. The claims are obviously not barred by any limitation. It is thus clear

that there is a live issue subsisting between the parties requiring its resolution."

17. The Delhi High Court in ***M/s Haldiram Manufacturing Company Pvt. Ltd. Versus M/s DLF Commercial Complexes Limited,*** reported in ***193 (2012) DLT 410***, was dealing with a case where an application under Section 8 of the Arbitration Act for reference of dispute to the Arbitrator was dismissed by the Civil Court on the ground that the applicant failed to comply with the pre-condition of entering into mutual discussion before invoking the arbitration Clause. Delhi High Court reversing the order of the Civil Court held that the defendant in the reply to the notice served by the plaintiff had neither called upon the plaintiff for such mutual discussions as envisaged in the relevant Clause of agreement nor had specifically reminded the plaintiff of the said Clause for adjudication of the disputes through arbitration. Vide paragraph 16 of the said judgment, it was held as under:-

"*16. On a holistic reading of the said arbitration clause, it is decipherable that the first option given*

by the defendant to the plaintiff is for settlement of the disputes through mutual discussion and the option of arbitration would come at the second stage. The defendant has admittedly not called upon the plaintiff for any mutual discussion and therefore, the defendant itself has ignored Clause-34 of the said application form and having ignored the said clause itself, this Court does not find the defendant has any right to move the present application to seek rejection of the present plaint based on the alleged arbitration agreement. The defendant cannot be allowed to rely on the said clause for invoking arbitration proceedings and at the same time ignore the course of action of `mutual discussion' contrived in the said clause. The conduct of the defendant clearly is contrary to the mandate of the said clause and thus the stage to invoke arbitration proceedings before exhausting the first stage of mutual discussion does not arise. However, at this stage the defendant cannot be allowed to take shelter under the said clause for invoking the arbitration proceedings when it has retracted from the same. The defendant cannot be allowed to approbate and reprobate and thus in the facts of the case at hand is not entitled to relief."

18. In the present case also, the analogy of above judgments can be applied, because despite service of notice of arbitration by the petitioner-Company dated 22.07.2020, the respondent relying on Clause 8.2.3 of the GCC and SCC in its reply to the notice dated 11.08.2020 instead of referring the dispute to the Adjudicator in terms of Clause 8.2.3 of the SCC, rather blamed the petitioner-Company that it failed to refer the dispute to adjudicator to obtain his decision in terms of the contract and, therefore, the notice invoking the arbitration Clause, was pre-mature. As discussed above, the wording of Clause 8.2.3 of the SCC does not require that it is only the applicant, who could have referred the dispute to the Adjudicator, but the respondent could also within fourteen days of the Notification of disagreement, refer the dispute to the Adjudicator. Rather than doing so, the respondent pre-emted the issues, by terminating the agreement, when it received the reply, dated 25.05.2000 sent by the petitioner-Company to the respondent in response to their notice dated 12.05.2020 to terminate the agreement. When the respondent did not agree

with the reply sent by the petitioner-Company, stage of disagreement was complete and stood notified. The respondent, could therefore, possibly not be allowed to argue that after their failure to avail the opportunity to refer the dispute to the Adjudicator, they would instead exercise the option of terminating the agreement and now the compulsion would be for the petitioner-Company to refer the dispute to the Adjudicator, before praying for appointment of Arbitrator.

19. Delhi High Court in ***Saraswati Construction Company Versus East Delhi Co-operative Group Housing Society Ltd.,*** reported in ***1995 (57) DLT 343*** was dealing with a case where arbitration Clause could only be invoked in the particular manner, by calling upon the Architect to refer the dispute to arbitration and since notice was not given through the Architect, it was argued that the arbitration Clause could not be invoked. The High Court held that prior requirement, as stated in arbitration Clause, even if, not complied with, the same cannot debar reference of dispute to arbitration, because such procedure/pre-condition has to be taken as only

directory and not mandatory requirement.

20. Similarly, Delhi High Court in ***Sikand Construction Co. Versus State Bank of India***, reported in ***ILR (1979) (1) 364*** also held that writing a letter to the Architect is directory provision in the arbitration Clause and that in the said case, despite no such letter being written by the party for invoking the arbitration Clause in the manner contemplated in the arbitration Clause, still what the Court in view of the arbitration Clause has to consider is whether the parties have entered into arbitration agreement and if so, whether there is any sufficient ground for not referring the dispute to the Arbitrator. If it is proved that there is an agreement, then the Court has to direct to appoint the Arbitrator in accordance with arbitration Clause.

21. Delhi High Court, in ***Ravindra Kumar Verma (supra),*** the judgment relied upon by the learned counsel for the petitioner-Company, in somewhat similar facts, referred to Section 77 of the Arbitration Act, which provided that parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is

subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights. It was held that existence of conciliation or mutual discussion procedure or other similar procedure or for any other legal proceeding required to be filed for preserving rights of the parties, cannot be held as a bar to entertain a petition, which is filed under Sections 11 and 8 of the Act. In ***Ravindra Kumar Verma (supra),*** since the reference was already made to the Arbitrator by the Civil Court by accepting the application under Section 8 of the Arbitration Act, the High Court after holding that such a condition was only directory in nature, required the parties to engage in mutual discussions within a reasonable period and if the same do not conclude successfully within three months, the arbitral proceedings should be further continued.

22. Delhi High Court in ***Sarvesh Security Services Pvt. Ltd. (supra)*** was dealing with somewhat similar issues, in which Clause 60 of the agreement provided that any dispute or

difference arising out or relating to the contract will be resolved through joint discussion of the authorities and representatives of the concerned parties and if the disputes are not resolved by discussion, then the matter shall be referred for adjudication to the sole Arbitrator. High Court held that even after filing of an application under Section 11(6) of the Act, the matter is pending for four years and even till date, the respondent has not attempted to appoint Arbitrator and they continued to oppose the application for appointment of Arbitrator and pleaded that first an attempt should have been made for joint discussion. The High Court rejected the argument by contending that the petitioner invited the respondent for joint discussion, to which they did not respond. Moreover, the said procedure cannot be said to be mandatory for the purpose of filing the present application under Section 11 of the Arbitration Act and, therefore, the respondent failed to perform their obligation under arbitration Clause of appointing the Arbitrator. The application was, therefore, allowed.

23. Rajasthan High Court in ***M/s JIL-Aquafil (JV) Versus***

Rajasthan Urban Infrastructure Development Project, reported in ***2016 SCC OnLine Raj 3814:AIR 2016 (NOC 671) 313*** was dealing with the same issue, where the arbitration Clause in the agreement between the parties similarly provided that the dispute shall be first referred to the Project Manager, who has jurisdiction over the work described in the contract as a reference, who shall, not later than twenty-eight days after receipt of the reference, give written notice of his decision to the employer and the contractor, which shall be final. If either of the parties is dissatisfied with such decision or if the Project Manager fails to give notice of decision on or before twenty-eight days he received reference, either party on or before twenty-eight days after the day on which it received a notice of such decision, may give notice to the other party, with copy to the Project Manager of his intention to commence the arbitration proceedings for settlement of dispute. In that case also, a show cause notice was served on the petitioner, who gave reply to the same and, therefore, the Court took the view that it should be taken substantial compliance of reference of

dispute to the Project Manager. Instead of acting on the reply submitted by the respondent, the Project Manager by detailed order terminated the contract and since the relevant Clause provided that decision of the Project Manager would be final, the remedy availed by the petitioner against the decision of the Project Manager by invoking the arbitration Clause, cannot be said to be premature held the Court. Vide paragraphs 19 and 20, it was held as under:-

> *"19. The order of termination of contract has to be in the facts of the case taken as decision of Project Manager in response to the demand raised by the applicant in its reply and that decision did not come about within 28 days, rather that decision came after 40 days on 23.10.2013. The decision being of termination of contract, the applicant contractor, as per conditions of Clause 24.1. was not required to proceed with remaining work but as per Clause 24.2, if the Contractor/Applicant was dissatisfied with the decision of the Project Manager, in either event, namely, if the Project Manager gives notice of the decision on or before 28 days after the date on which he received the reference or if he failed to do so, it was*

free to give notice to the employer of its intention to commence arbitration for settlement of disputes,

20. Argument of non-applicant/employer in the present case is that as per the sub-clause (2) of Clause 24, if the Contractor has failed to give written notice to commence arbitration on or before 28 days after the day on which he received notice as to such decision, the said decision becomes final and binding upon him, amounting to waiver of arbitration clause by the contractor. Then Clause 24.3 comes into play, which provides that where notice of intention to commence arbitration has been given in accordance with sub-clause 24.3, according to which the arbitration shall not commence unless an attempt has first been made by the parties to settle the dispute amicably. It provided that unless the parties otherwise agree, arbitration, may be commenced on or after fifty-sixth day, after the day on which the notice of intention to commence arbitration was given, whether or not any attempt at amicable settlement thereof has been made, Clause 24,3 thus makes it clear that requirement of making efforts to settle the disputes amicably, prior to commencement of arbitration is optional. Even if such efforts after notice of intention to commence arbitration are made and fail, remedy of arbitration is not lost. In fact, Clause 24.4 stipulates that

if any dispute in respect of which decision of Project Manager has not become final and binding pursuant to sub-clause 24.3, and amicable settlement has not boon reached within the period stated in sub-clause 24.5. dispute shall be finally resolved by the arbitration. It is on the basis of this clause that learned counsel for non-applicant would argue that since decision of the Project Manager has become final and binding pursuant to sub clause 24.3, the remedy of arbitration would not be available and dispute cannot be referred to the arbitration. I am not persuaded to uphold this argument for reasons to be stated herein little later."

24. In ***Rajiv Vyas Versus Johnwin s/o George Manavalan***, reported in ***2010 6 Mah LJ 483,*** the Bombay High Court was also dealing with similar case, wherein, the arbitration clause in the agreement provided for referring the dispute first to Conciliator and then to the Arbitrator and on that ground, the application for appointment of Arbitrator filed under Section 11 of the Arbitration Act, was opposed. The High Court allowed the application and referred the dispute to the Conciliator while simultaneously constituting Arbitral Tribunal, to which the

dispute would stand referred, in the event the conciliation failed. There is no justification for adopting such a course in the present matter, because herein even though the respondent had the option of referring the dispute to the Adjudicator after receiving reply of the petitioner-Company to the show cause proposing to terminate the agreement, they abruptly terminated the agreement. The judgment of this Court in ***M/s K.C. Sharma (supra)*** cited by the petitioner-Company, with respect, having not noticed any of the important decisions and law on the subject, cannot be said to be laying down good law and, therefore, cannot be followed.

25. In view of the above, the arbitration petition is allowed.

26. Accordingly, Justice Rajiv Sharma (Retd.), R/o House No.505, Sector 36-B, Chandigarh, is appointed as an Arbitrator, after his disclosure in writing is obtained in terms of Section 11(8) of the Act and only after receipt thereof, shall his appointment, as an Arbitrator, come into force.

27. On his giving consent to arbitrate the dispute

between the parties, as an Arbitrator, Justice Rajiv Sharma (Retd.), shall enter into reference and shall pass an award in accordance with law. Copy of this order be forwarded to the learned counsel for the parties, as also to the learned Arbitrator. The learned Arbitrator so appointed shall be entitled to fee as per stipulation contained in 4th Schedule appended to the Arbitration and Conciliation Act, 1996.

(Mohammad Rafiq)
Chief Justice

April 01, 2022
(Bhardwaj)