IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

MISC. CIVIL APPLICATION NO.543/2022

APPLICANT : Shri Sunil Kumar Jindal,
Sole Proprietor of Reliance Electric
Work, Class A Electrical & Civil
Contractor, through power of attorney
Shri Vivek Kumar s/o Late Shri Omprakash,
Corporate Office, 410, 1st Floor, Sector 1, Vaishali
Ghaziabad 201010, UP

...VERSUS...

RESPONDENTS : (NON-APPLICANTS)

1. Union of India,
through its Executive Engineer (E)
NCED, CPWD, B-Block, 3rd Floor
CGO Building, Seminary Hills,
Nagpur, 440 006.

2. Superintending Engineer (E)
NCED, CPWD, B-Block, 3rd Floor
CGO Building, Seminary Hills,
Nagpur, 440 006.

3. Chief Engineer (E)
CGO Building,, A-Block, 3rd Floor
CPWD, Seminary Hills, Nagpur, 440 006.

WITH

MISC. CIVIL APPLICATION NO. 11/2022

APPLICANT : M/s Sadbhav Engineering Limited,
Through its duly constituted attorney
and authorized person Shri Dharmendrakumar
Prajapati, Sadbhav House, Opp. Law Garden
Police Chowki, Ellis Bridge, Ahmedabad-380006.

…VERSUS…

NON-APPLICANT : M/s. Western Coalfields Limited,
Through its General Manager (CMC)
WCL HQ, Nagpur, Coal Estate
Civil Lines, Nagpur – 440001.

WITH

MISC. CIVIL APPLICATION NO.10/2022

APPLICANT : M/s Sadbhav Engineering Limited,
Through its duly constituted attorney
and authorized person Shri Dharmendrakumar
Prajapati, Sadbhav House, Opp. Law Garden
Police Chowki, Ellis Bridge, Ahmedabad-380006.

…VERSUS…

NON-APPLICANTS : 1. M/s Western Coalfields Limited,
Through its General Manager (CMC)
WCL HQ, Nagpur, Coal Estate
Civil Lines, Nagpur.

2. M/s Western Coalfields Limited,
Through its Area Manager, Wani Area,
Urjagram, Dist : Chandrapur-442406.

Shri Y.D.Shukla, Advocate for the applicant in MCA No.543/2022
Shri M.U.Dastane, Advocate for applicant in MCA Nos.10/2022 & 11/2022
Shri N.G.Moharir, Advocate for respondent in MCA Nos.10/2022 & 11/2022

CORAM : AVINASH G. GHAROTE, J.

Order reserved on : 28/04/2023
Order pronounced on : 04/05/2023

O R D E R :

1. As the arbitration clauses in all the three matters, are similar, which are required to be interpreted, they are being decided together.

2. On 21/4/2023, the following position was recorded :-

> *"Misc. Civil Application Nos.10/2022 and 11/2022.*
>
> *The applications seek appointment of an Arbitrator. There is no dispute between the parties regarding the execution of the agreement dated 27.04.2018 in M.C.A. No. 10/2022 and agreement dated 20.11.2017 in M.C.A. No. 11/2022, both of which contain an Arbitration Clause. The bone of contention, is the language of the Arbitration Clause, inasmuch as, it is contended by Mr. Dastane, learned counsel for the applicant, that inspite of Clause 13A (b) the later of which mandates, that in case if for any reason what is contemplated by the first part is not permissible, the matter is not to be referred to arbitration at all, on account of the applicability of the doctrine of severability, the said clause can be severed from the arbitration clause and taking into consideration the intent to arbitrate it is permissible for an Arbitrator to be appointed. In support of his contention, he relies upon* ***Shin Satellite Public Co. Ltd. Vs. Jain Studios Ltd., (2006) 2 SCC 628*** *and specifically para 26 and 27, which is on the doctrine of severability ;* ***Enercon (India) Limited And Others Vs. Enercon GMBH And Another, (2014) 5 SCC 1*** *(para 87), which holds that it is the duty of the Court to make the clause workable. He also relies upon the judgment of this Court in* ***M/s. Shri Khatu Shyam Traders Vs. Western Coalfield Limited, Misc. Civil Application (ARBN) No. 90/2022*** *decided on 07.01.2023.*
>
> *2. Mr. Moharir, learned counsel for the non-applicant submits, that Clause 13A (b) itself is severable into two parts, the former part being admittedly hit by the amendment of the year 2015 in the Arbitration and Conciliation Act, 1996 and by the judgment of the Hon'ble Apex Court in* ***Perkins Eastman Architects DPC and Another Vs. HSCC (India) Limited, (2020) 20 SCC 760****. He however submits, that the later part of this Clause which mandates that in case the former part is not*

possible then the parties would not go to arbitration at all, would continue to govern the field, and therefore, the matter cannot be referred to arbitration. Reliance is placed by him on ***Perkins Eastman Architects DPC and Another (supra) as well as Ellora Paper Mills Ltd. Vs. State of Madhya Pradesh, (2022) 3 SCC 1*** *and* ***Jagdish Chander Vs. Ramesh Chander And Others, (2007) 5 SCC 719*** *(para 8 (iii)).*

3. In Misc. Civil Application No. 543/2022, upon a similar Clause Mr. Shukla, learned counsel for the applicant, relies upon the decision of the Full bench of the Delhi High Court in ***Ved Prakash Mitthal Vs. Union of India and others, AIR 1984 DELHI 325*** *and to contend that the Arbitration Clause has to be enforced. In his case, already an Arbitrator was appointed on earlier two occasions and in the present situation the proceedings have been adjourned sine die by the Arbitrator on account of objections being raised under Section 12 (5) read with VIIth Schedule of the Arbitration and Conciliation Act, 1996, on account of which, it is contended, that the Arbitrator appointed has become ineligible to act, and therefore, needs to be replaced by an independent Arbitrator."*

3. In Misc Civil Application Nos.10/2022 and 11/2022 the dispute resolution clauses, as quoted in the applications, are identical and are quoted as under :-

*"**13. SETTLEMENT OF DISPUTES** :-*

It is incumbent upon the contractor to avoid litigation and disputes during the course of execution. However, if such disputes take place between the contractor and the department, effort shall be made first to settle the disputes at the company level.

The contractor should make request in writing to the Engineer-In-charge for settlement of such disputes / claims within 30 (thirty) days of arising of the cause of dispute / claim failing which no disputes / claims of the contractor shall be entertained by the company.

Effort shall be made to resolve the dispute in two stages :-

In first stage dispute shall be referred to Area CGM, GM. If difference-still persist the dispute shall be referred to a committee constituted by the owner. The committee shall have one member of the rank of Director of the company who shall be chairman of the company.

If differences still persist, the settlement of the dispute shall be resolved in the following manner.

Disputes relating to the commercial contracts with Central Public Sector Enterprises/Govt. Departments (except Railways, Income Tax, Customs & excise duties) / State Public Sector Enterprises shall be referred by either party for Arbitration to the PMA (Permanent Machinery-of Arbitration) in the department of Public Enterprises.

In case of parties other than Govt. Agencies, the rederessal of the dispute may be sought through Arbitration (THE ARBITRATION AND CONCILIATION ACT, 1996 as amended by Amendment Act of 2015).

***13 (A) : Settlement of Disputes through Arbitration** :*

If the parties fall to resolve the disputes/differences by In house mechanism, then, depending on the position of the case, either the employer/Owner-or the contractor shall give notice to other party to refer the matter to arbitration instead of directly approaching Court "The contractor shall, however, be entitled to invoke arbitration clause only after exhausting the remedy available under the clause 13:.

In case of parties other than Govt. agencies, the redressal of disputes/differences shall be sought through Sole Arbitration as under :-

Sole Arbitration :-

In the event of any question, dispute or difference arising under these terms & conditions or any condition contained in this contract or interpretation of the terms of, or in connection with this Contract (except as to any matter the, decision of which is specially provided for by these conditions) the same shall be referred to the sole arbitration of a person, appointed to be the arbitrator by the Competent Authority of CIL/CMD of Subsidiary Company (as the case may be). The award of the arbitrator shall be final and binding on the parties of this contract.

a) In the event of the Arbitrator dying, neglecting or refusing to act, resigning or being unable to act for any

reason, or his/her award being set aside by the court for any reason, it shall be lawful for the Competent Authority of CIL/ CMD of Subsidiary Company (as the case may be) to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.

(b) It is further a term of this contract that no person other than the person appointed by the Competent Authority of CIL/CMD of Subsidiary Company (as the case may be) as aforesaid should act as arbitrator and that, if for any reason that is not possible, the matter is not to be referred to Arbitration at all.

Subject as aforesaid, Arbitration and Conciliation Act, 1996 as amended by Amended Act of 2015 and the rules thereunder and any statutory modification thereof for the time being in force shall be deemed to apply to the Arbitration proceedings under this clause.

The venue of arbitration shall be the place from which the contract is issued.

***Applicable law** : The contracts shall be interpreted in accordance with the laws of the Union of India."*

4. The existence of the aforesaid clauses and their invocation is not disputed by Mr. Dastane, learned counsel for the applicant and Mr. Moharir for the non-applicants in Misc Civil Application Nos.10/2022 and 11/2022.

5. In Misc. Civil Application No.543/2022 the arbitration clause - 25 (pg.86) reads as under :-

*" **CLAUSE 25**. Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these*

conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter :-

(i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with his decision, the contractor shall within a period of 30 days from receipt of the decision give notice to the Chief Engineer for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

(ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Director General of Works, CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute alongwith the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person, other than a person appointed by such Chief Engineer CPWD or the administrative head of the CPWD, as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitrator at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs.1,00,000/- the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in

what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid."

6. The bone of contention is regarding clause 13 -A (b) in Misc Civil Application Nos.10/2022 and 11/2022 and clause 25 (ii) sub para 3 in Misc. Civil Application No.543/2021, which provide that it is a term of the contract that no person other than the person appointed by the competent authority of CIL/CMD of subsidiary company should act as an arbitrator, and that if for any reason that is not possible, the matter is not to be referred to arbitration at all. In Misc. Civil Application No.543/2021, arbitrator has already been appointed, however, since the appointment is hit by Section 12 (5) r/w Schedule -VII of the A and C Act, the plea is for appointment of an independent arbitrator.

7. Learned counsels for the applicants place reliance on ***Ved Prakash Mithal Plaintiff Vs. The Union of India and others Defendants AIR 1984 DELHI 325; Perkins Eastman Architects DPC and another Vs. HSCC (India) Ltd. AIR 2020 SC 59*** and ***TRF Ltd. Vs. Energo Engineering Projects Ltd. AIR 2017 SC 3889***.

8. What constitutes an arbitration clause has been elucidated by the Hon'ble Apex Court in ***Jagdish Chander*** (supra) in the following terms :-

"8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in K. K. Modi v. K. N. Modi [1998 (3) SCC 573], Bharat Bhushan Bansal Vs. U.P. Small Industries Corporation Ltd. [1999 (2) SCC 166] and Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd. [2003 (7) SCC 418]. In State of Orissa v. Damodar Das [1996 (2) SCC 216], this Court held that a clause in a contract can be construed as an "arbitration agreement" only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well-settled principles in regard to what constitutes an arbitration agreement :

(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words "arbitration" and "Arbitral Tribunal (or arbitrator)" are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are : (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed

that the decision of the private tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word "arbitration" or "arbitrator" in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes

> *arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future."*

9. In ***Babanrao Rajaram Pund Vs. Samarth Builders and Developers and another (2022) 9 SCC 691*** the Hon'ble Apex Court after considering ***Encon Builders (I) (P) Ltd.*** and ***Jagdish Chander*** (supra) has held that when the concerned term discloses the intention and obligation of the parties to be bound by decision of the Tribunal and it can be gleaned from other parts of the arbitration agreement that the intention of the parties was surely to refer the dispute to arbitration, the said intention ought to be given effect to.

10. By insertion of Section 12 (5) and VII th Schedule to the Arbitration and Conciliation Act, 1996 (for short, "A and C Act", hereinafter) the independence and impartiality of the arbitrators have been ensured by way of a statutory provision which was earlier absent. Independence and impartiality of an arbitrator are the hallmarks of a successful arbitration mechanism and have to be ensured in any arbitration between the parties. Considering this position, when there exists an arbitration clause between the parties,

the same is required to be made workable (see : ***Shin Satellite Public Co. Ltd. Vs. Jain Studios Ltd. (2006) 2 SCC 628***)

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 :-

> *"Clause 25. ……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 be referred to arbitration at all.*
>
> *21. 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 earlier. 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 (ILR (1974) 2 Delhi 637). 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 the 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.

22. 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.

23. One of us (Avadh Behari J.) protested against the reasoning of the Division Bench sitting singly in Alkarma v. Delhi Development Authority, AIR 1981 Delhi 230. 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 appointer became the destroyer of the 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.

29. It will appear from this discussion that the Chief Engineer, "the chosen appointer," to use a phrase of Russell is a third party. (Russell- Arbitration, 18th Edition, page 108, Mustill and Boyd, p. (sic). 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 S.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: M/s. D. Gobindram v. Shamji Kalidas and Co., AIR 1961 SC 1285 (1294)).

30. 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.

31. That the Chief Engineer is a third party is borne out by the fact that he nowhere appears as a central figure in the arena. He is not the real contestant. He is the appointer. The Union of

India is the real defendant. It can oppose the filing of the arbitration agreement on all the grounds open to it. Once the objections have been dealt with by the Court the judicial battle is over. Only the ministerial function remains to be discharged by the third party. Viewed in this light the legal puzzle, as the Division Bench described it, becomes easy to answer.

33. 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 the Chief Engineer refuses the clause goes. They hold that if the appointer 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 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.

34. 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."

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.

14. In that view of the matter, it is clearly apparent that the intention to arbitrate exists between the parties in view of which clause 13 -A is clearly severable, from clause 13 -A (b) in Misc Civil

Application Nos.10/2022 and 11/2022 and on account of such severability, the parties can always be referred to arbitration.

15. In Misc Civil Application No.543/2022 also since the clause is severable and the intention to arbitrate is manifest and the appointment of Shri K.K. Peshin is affected by clause -1 of VII th Schedule under Section 12 (5) of the A and C Act, in view of what has been held by the Hon'ble Apex Court in ***Perkins Eastman Architects DPC*** (supra) it would be necessary to appoint an independent arbitrator.

16. In the result, all the misc. civil applications are allowed. Shri V.M. Deshpande, Former Judge of this Court is hereby appointed as an arbitrator to arbitrate between the parties in all the three matters. The parties shall appear before the learned Arbitrator on 08/05/2023. The processing charges shall be paid before that.

17. No order as to costs.

(AVINASH G. GHAROTE, J.)

Wadkar