

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

% **Reserved on : 16<sup>th</sup> January, 2023**  
**Pronounced on: 24<sup>th</sup> February, 2023**

+ **ARB.P.1146/2022**

M/S KULDEEP KUMAR CONTRACTOR ..... Petitioner  
Through: Mr. Aditya Dhawan and Ms. Kiran  
Dhawan, Advocates

versus

HINDUSTAN PREFAB LIMITED .....Respondent  
Through: Mr.Varun Nischal, Mr.Vaibhav  
Mishra, Advocates with Mr.  
Mukesh Kumar (Legal In-charge).

**CORAM:**  
**HON'BLE MR. JUSTICE CHANDRA DHARI SINGH**

**J U D G M E N T**

**CHANDRA DHARI SINGH, J.**

1. The instant petition has been filed on behalf of the petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act, 1996”) seeking the appointment of a sole Arbitrator and *inter alia* praying as under:

*“a. appoint an independent and impartial Sole Arbitrator, in terms of the Dispute Resolution clause, as contained in the contract-Agreement and the provisions of the Arbitration and Conciliation Act, 1996; so as to adjudicate the disputes which have arisen between the parties to the present petition;*

*b. grant costs of this application; and/or*

*c. Pass such further order/directions as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case in favour of the petitioners and against the respondents."*

**Factual Matrix**

2. The petitioner is a partnership firm having its registered office at shop No. 452, 1<sup>st</sup> Floor, New Grain Market, Karnal, Haryana-132001. The petitioner is a listed Class-1/(A) 'Contractor', primarily dealing with civil construction works, with Government departments. The respondent is a company incorporated under the Companies Act, 1956, having its registered office at Jangpura, New Delhi-110014, functioning under the administrative control of the Ministry of Housing & Urban Affairs, Government of India.

3. On 22<sup>nd</sup> October, 2018, the respondent, issued a 'Letter of Award' to the petitioner *vis-a-vis* work related to "Construction of pre-fabricated shelter for homeless persons at different places in Haryana" for the revised/accepted rate of Rs. 16,37,69,289/-, inclusive of all taxes. The time period for completion of the work was fixed at two months. Pursuant to the Letter of Award, the petitioner furnished an irrevocable and unconditional Performance Bank Guarantee, amounting to Rs. 81,88,465/- to the respondent and thereafter, an Agreement was signed between the petitioner and the respondent on 16<sup>th</sup> November, 2018. The relevant terms and conditions of the Agreement are enlisted as follows:

- Article 1.1 delineates the scope of work.
- Article 2 sets out the 'Contract-Documents'.

- Article 5, thereof, postulates and declares that the agreement shall be governed by and be construed and interpreted in accordance with the laws of India and gives exclusive jurisdiction to Delhi court(s) only.

4. The work could not be completed within stipulated time period as envisaged in the Agreement. Thereafter, the petitioner had completed the entire work as per the terms and conditions of the Agreement and obtained the Completion Certificate dated 27<sup>th</sup> July, 2021. The petitioner made a claim, including final bill, Performance Bank Guarantees and security deposit in terms of the above said Agreement, however, the respondent denied the said claims entirely.

5. Being aggrieved by the acts of the respondent, the petitioner invoked the arbitration clause, i.e. Clause 26 of the Special Conditions of Contract (hereinafter referred to as 'the SCC') *vide* letter dated 19<sup>th</sup> February, 2022 under Section 21 of the Act, 1996, pertaining to "Settlement of Disputes and Arbitration". Along with this letter, the petitioner appended a Statement of Claims in respect of the amounts, which is reproduced hereunder:

1.	<i>Pending payment on account of Final Bill.</i>	<i>Rs. 70,74,195/-</i>
2.	<i>Security Amount.</i>	<i>Rs. 72,71,959/-</i>
3.	<i>Release of PBG</i>	<i>Rs. 5,71,800/-</i>
4.	<i>Interest on Security Amount.</i>	<i>Rs. 17,28,796/-</i>
5.	<i>Interest on Delay of Payments.</i>	<i>Rs. 39,65,028/-</i>

6.	<i>Additional Expenditure on Extension of PBG and Insurance for additional time involved in completion of work.</i>	<i>Rs. 2,09,569/-</i>
7.	<i>Revision of rates due to Prolongation</i>	<i>Rs. 3,27,53,857/-.</i>
8.	<i>Compensation on account of Loss of Profit &amp; Damages due to prolongation.</i>	<i>Rs. 22,27,26,233/-</i>
	<b><i>Total</i></b>	<b><i>Rs.27,63,01,437/-</i></b>

6. The respondent did not reply to the said notice dated 19<sup>th</sup> February, 2022 and/or act in accordance with the terms of Clause 26 of the SCC. Thereafter on 15<sup>th</sup> July, 2022, the petitioner filed a petition under Section 11 of the Act, 1996, before this Court bearing ARB.P. No.1032/2022 which was dismissed as withdrawn vide order dated 5<sup>th</sup> September, 2022 with liberty to file a fresh petition.

7. On 29<sup>th</sup> August, 2022, the petitioner issued an acknowledgement certificate *vis-a-vis* the security deposit amount of Rs. 72,71,959/- upon insistence by the respondent being a precondition for the release of the said security deposit. The respondent did not consider the acknowledgement certificate and instead insisted upon issuance of a 'No-Claim Certificate' as a pre-requisite for release of the security amount. Thus, the petitioner submitted the No-Claim Certificate for the purposes of release of the security deposit on 30<sup>th</sup> August, 2022.

8. In light of the facts stated above, the petitioner vide its letter dated 6<sup>th</sup> September, 2022 invoked the arbitration clause and sought the appointment of a sole arbitrator for adjudication and resolution of disputes between the parties.

9. In the reply to the said notice, the respondent, vide its letter dated 29<sup>th</sup> September 2022, denied all the claims made by the petitioner as well as the request for appointment of an arbitrator for adjudication of the disputes between the parties.

10. Hence, the petitioner has approached this Court by way of filing the instant petition seeking the aforesaid reliefs.

**Submissions on behalf of the petitioner**

11. Learned counsel appearing on behalf of the petitioner prayed that for appropriate adjudication of the arbitral proceedings between the parties, as per the Clause 26 of the SCC, a sole arbitrator may be appointed to adjudicate the disputes between the parties.

12. It is submitted that there exist disputes between the parties *qua* the payments of amounts in terms of letter dated 6<sup>th</sup> September, 2022 that was issued by the respondent to the petitioner. The respondent has failed to remit an amount of Rs.27,23,29,478/- or even appoint an arbitrator in terms of Clause 26 of the SCC. These disputes have not been amicably settled and require adjudication in accordance with Clause 26 of the SCC, by an arbitrator. It is further submitted that both parties could not come to a consensus and reach at a conclusion regarding the appointment of an independent sole arbitrator. Thus, the learned counsel appearing for the

petitioner prays that this Court may pass an appropriate order for the appointment of the arbitrator.

13. Learned counsel appearing on behalf of the petitioner further submitted that due to various lapses and failures on the part of the respondent, the work could not be completed within the stipulated time as envisaged in the Agreement. However, by putting in extra efforts and additional resources, the petitioner on 31<sup>st</sup> January, 2020 successfully and duly completed the entire work strictly in terms with the Agreement and to the satisfaction of the respondent which is evident from the Completion Certificate dated 27<sup>th</sup> July, 2021.

14. It is submitted that immediately after the completion of the work, the pre-fabricated night shelters were duly taken over by the respondent. However, the respondent denied all the legitimate payments of the dues of the petitioner in terms of the Agreement.

15. It is further submitted that the Agreement between the parties is not a tripartite agreement and was executed only between the petitioner and the respondent, and hence, in accordance with Clause 26 of the SCC, any dispute between the parties is required to be referred to arbitration. In this regard, the petitioner has placed reliance on Clause 25 of the General Conditions of Contract (hereinafter referred to as "GCC"), Article 2.1(a) of the Agreement and Clause 26 of the SCC to submit that a conjoint reading of the three clauses renders the procedure envisaged under Clause 25 of the GCC redundant and superseded by the procedure contemplated under Clause 26 of the SCC.

16. Learned counsel appearing on behalf of the petitioner submitted that the mandatory procedure, in terms of Clause 26 of the SCC, was duly complied with by the petitioner.

17. It is submitted that the non-payment of the dues cannot go on for an infinite period. The respondent capriciously taking subterfuge under the terms of the contract is nothing but an attempt to elude and escape its liability and cover its own lapses and delays.

18. It is further submitted on behalf of the petitioner that under the provisions of the Act, 1996, the Arbitral Tribunal is empowered and has competence to rule its own jurisdiction, including determining all jurisdictional issues and existence or validity of arbitration agreement. It is further submitted that all the issues and objections, as raised by the respondent, are to be adjudicated and decided by the Arbitral Tribunal itself.

19. It is submitted on behalf of the petitioner that Clause 26 of the SCC, specifically provides for invocation of arbitration at New Delhi, hence, this Court has jurisdiction to try and adjudicate the present application under Section 11 of the Act, 1996. Moreover, Article 5.1 of the Agreement dated 16<sup>th</sup> November, 2018 makes the entire Agreement subject to the jurisdiction of this Court. Therefore, this Court has the jurisdiction to adjudicate upon the dispute between the parties in the instant petition.

20. The learned counsel appearing on behalf of the petitioner submitted that in view of the facts and circumstances, an independent sole arbitrator may be appointed for the adjudication of the arbitral disputes between the parties.

**Submissions on behalf of the Respondent**

21. *Per contra*, learned counsel appearing for the respondent opposes the instant petition submitting to the effect that there is no disputed claim of the petitioner pending against the respondent. It is further submitted on behalf of the respondent that the petitioner has already received all the legal and genuine outstanding payments except one pending final bill. An Acknowledgement Certificate dated 29<sup>th</sup> August, 2022 has already been issued by the petitioner.

22. It is submitted that the petitioner has received the entire payments and, thereupon, issued a No-Claim Certificate dated 30<sup>th</sup> August, 2022, hence, there is no valid claim pending against the respondent. The principal owner/beneficiary of the project, i.e. State Urban Development Authority (hereinafter referred to as “SUDA”), Haryana, has already been informed about the pending final bill of the petitioner. The learned counsel appearing on behalf of the respondent submitted that there are no arbitral disputes between the parties that would need adjudication by an arbitrator or by this Court.

23. The learned counsel for the respondent further submitted that the present petition filed by the petitioner is contrary to the mandate of pre-arbitration procedure in accordance with the terms of Clause 25 of the GCC, which is *sine qua non* for invoking the said arbitration clause. In light of the settled principle of law, it has been submitted on behalf of the respondent that it is essential for the parties to exhaust the pre-arbitration mandate as provided under the contract in order to invoke the arbitration clause.



24. It is submitted that the said clause provided for the petitioner to follow the necessary pre-arbitration mandated under Clause 25 of the GCC, which he admittedly failed to follow. Therefore, the present petition being pre-mature is liable to be dismissed at threshold.

25. It is further submitted that as per the contract, the payment for completing the project has to be released by the client/beneficiary i.e. SUDA and hence, it is a necessary and proper party to the proceedings. The respondent herein is only a project management agency.

26. It is submitted on behalf of the respondent that in compliance of the terms of the NTT No. HPL/PM(C)/TC/NLUM/2018-19/61 dated 6<sup>th</sup> October, 2018 and the Agreement dated 16<sup>th</sup> November, 2018, it is evident that all orders/Letter of Award, agreements and documents, etc. would be signed/ issued by the executing agency, i.e. the respondent for and on behalf of the client/owner, i.e., SUDA. It is further submitted that upon bare perusal of the tender document, it is evident that the respondent had invited tender for and on behalf of the SUDA vide NTT No. HPL/PM(C)/TC/NLUM/2018-19/61 dated 6<sup>th</sup> October, 2018.

27. It is submitted that as per law, once the principal beneficiary is disclosed, the executing agency cannot be made liable and hence, the Agreement in the instant matter cannot be enforced against the respondent herein. The beneficiary is a necessary party for just and proper adjudication of the dispute between the parties, however, the petitioner has failed to make the beneficiary a party to the petition.

28. The learned counsel appearing for the respondent submitted that even as per the terms of Clause 27 of the SCC, the actual contractor would be entitled to any payment due only after the said payment is made by the

actual beneficiary, i.e., SUDA. The absolute liability of any payment due, lies with the owner, i.e., SUDA and the respondent cannot be held liable to make any payment whatsoever to the petitioner. Hence, the present petition is liable to be dismissed for being the reason of being not maintainable.

29. It is further submitted that there is no cause of action for filing the present petition and there is no existence of alleged arbitral dispute since no claims remain pending for payment to the petitioner by the respondent.

30. The learned counsel for the respondent submitted that in view of the contentions raised in the foregoing paragraphs, the instant petition being devoid of any merit should be dismissed.

31. Heard the learned counsel for parties and perused the record.

**Findings and Analysis**

32. This Court has given thoughtful consideration to the facts and circumstances of the case. In terms of the above, it is significant for this Court to bifurcate the controversy into the following issues for adjudication:-

- I. *Whether the arbitration proceedings can be invoked when the petitioner has itself given a No-Claims declaration?*
- II. *Whether the arbitration proceedings can be invoked when the parties have failed to comply with the pre-arbitration procedure?*

***Issue I: Whether the arbitration proceedings can be invoked when the petitioner has itself given a No-Claims declaration?***

33. It is the case of respondent that since petitioner has already issued a No-Claims Certificate, there are no disputes that are required to be adjudicated and that are arbitrable in nature. The respondent has

contended that since nothing remains in the Agreement to be performed, the petitioner is only entitled to receive the compensatory amount from the beneficiary, i.e., SUDA. The respondent has advanced his argument on the ground that pre-arbitration procedure as stipulated under Clause 25 of the GCC has not been complied with, and therefore, on the above said grounds, the petition is untenable in the eyes of law.

34. The contentions of the respondent draw the attention of this Court towards the doctrine of severability envisaged in Section 16 (1) of the Act. The relevant portion of the Act has been produced hereunder:

*"16. Competence of arbitral tribunal to rule on its jurisdiction.—*

*(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—*

*(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and*

*(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*

*(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.*

*(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.*

*(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.*

*(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.*

*(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34."*

*(emphasis supplied)*

### ***Doctrine of Severability***

35. Doctrine of Severability hails from the statutory provisions laid under Section 16(1) of the Act, 1996. The doctrine emphasizes on the principle that the arbitration clause in a contract is treated separately from the main contract and it continues to be in effect even if the main contract is invalidated, vitiated, or terminated for any reason. It is crystal clear that an arbitration clause is independent of the underlying contract. It makes sure that if one party alleges that the other breached the terms of the agreement, the agreement will remain in effect for the purposes of quantifying the claims arising from such breach.

36. The Hon'ble Supreme Court in ***National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Ltd., (2007) 5 SCC 692***, has upheld the Doctrine of Severability and held that an arbitration agreement is undoubtedly independent from the principal agreement. The relevant extract of the judgment is reproduced hereunder:-

*"6. The respondent contends that the contract was abrogated by mutual agreement; and when the contract came to an end, the arbitration agreement which forms part of the contract, also came to an end. Such a contention has*

*never been accepted in law. An arbitration clause is a collateral term in the contract, which relates to resolution disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. (Vide Heyman v. Darwins Ltd. [1942 AC 356 : (1942) 1 All ER 337 (HL)] , Union of India v. Kishorilal Gupta & Bros. [AIR 1959 SC 13] and Naihati Jute Mills Ltd. v. Khyaliram Jagannath [AIR 1968 SC 522] .) This position is now statutorily recognised. Sub-section (1) of Section 16 of the Act makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, an arbitration clause which forms part of the contract, has to be treated as an agreement independent of the other terms of the contract; and a decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause....”*

37. The law of severability is not alien to English Jurisprudence of Arbitration as well. It was first recognised by Lord Macmillan in the judgment titled as **Heyman v. Darwins Ltd 1942 AC 356** wherein it was observed that an arbitration agreement has to be seen as distinct from the agreement or contract itself. It was held as under:-

*“...an arbitration clause which forms part of a contract and which provides for arbitration under the rules shall be treated as an agreement independent of another term of the contract.”*

38. The Doctrine of Severability and the *Kompetenz-Kompetenz* principle form the part and parcel of Article 16(1) of the UNCITRAL Model Laws on International Commercial Arbitration, 1985 and therefore, both the principles are settled rules of law in arbitration

proceedings worldwide. It is pertinent to mention that an arbitration clause is envisaged in a contract or agreement as an Alternative Dispute Resolution mechanism in case of any discrepancy arising out such contract or agreement. The sole purpose of the arbitration/dispute resolution clause is to enable the parties to address their grievances and protect their rights arising out of the contract. The Rule of Severability ensures the validity and enforceability of the arbitration clause in a contract even when the primary contract becomes invalid or is frustrated.

39. In the instant matter, the primary contention of the respondent while objecting to invocation of arbitration proceedings and appointing an arbitrator, is that the petitioner had issued a No-Claim Certificate, however, the discussion as aforesaid, which settles the principle of Doctrine of Severability by the interpretation of the Hon'ble Supreme Court, clarifies that the arbitration clause and agreement dare not vitiated because of the same. In view of the foregoing discussions, this Court while adjudicating the Issue No.I finds that if a No-Claim Declaration has been given by a party it would not render the entire arbitration agreement void on the basis of Doctrine of Severability.

***Issue II : Whether the arbitration proceedings can be invoked when the parties have failed to comply with the pre-arbitration procedure?***

40. For a better understanding of the case at hand, it is pertinent to refer to the relevant provisions of the respective contracts which are relied upon by the parties pertaining to the arbitration clause:

***Article 2.1 of the Agreement***

***“2.1 The contract shall be performed strictly as per the terms and conditions stipulated herein and in the following***

*documents attached herewith (hereinafter referred to as "Contract Documents").*

*(a) HPL Notice Inviting Tender vide NIT No. HPL/PM-C/TC/NLUM-Haryana/2018-19/61 Dated: 06.10.2018 and HPL's tender documents consisting of:*

*(i) General Conditions of Contract (GCC) along with amendments/errata to GCC (if any) issued.*

*(ii) Special conditions of Contract including Appendices & Annexures,*

*(iii) Bill of Quantities along with amendments/corrigendum of schedule items, if any*

*(b) M/s Kuldeep Kumar Contractor, letter proposal and their subsequent communication.*

*(i) Letter of Acceptance of Tender Conditions dated 11-10-2018 submitted along with tender on 11-10-2018.*

*(ii) Letter of acceptance by M/s Kuldeep Kumar Contractor, vide letter dated 16-11-2018 for Letter of Intent No. HPL/PM (C)/TC/Award/2018-19/41/1074 dt 22-10-2018."*

**Clause 26 of the SCC**

**"26. Settlement of Disputes and Arbitration:**

*In the event of any dispute of whatever nature howsoever arising under or out of or in relation to this Agreement that cannot be mutually resolved by the parties within 30 (thirty) days of service of written notice by one part to the other clearly setting out the dispute in question, the same shall be settled by way of arbitration proceedings to be conducted by a sole Arbitrator to be appointed by the Chairman and Managing Director, HPL in accordance with the Arbitration and Conciliation Act, 1996, or any subsequent enactment or amendment thereto. Award of the sole Arbitrator shall be final and binding on both the parties. The venue of the Arbitration shall be at New Delhi. The language of the arbitration and award shall be English. Subject to foregoing, the parties agree to subject themselves to the jurisdiction of competent courts at New Delhi alone to try and adjudicate upon any matter concerning this Agreement. However, any*

*award passed in pursuance of the arbitration proceedings may be executed by any court of competent jurisdiction anywhere.”*

**Clause 25 of the GCC**

**“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 the 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 period 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 the decision of the Chief Engineer, the contractor may within 30 days from the receipt of the Chief Engineer decision, appeal before the Dispute Redressal Committee (DRC) along with a list of disputes with amounts claimed in respect of each such dispute and giving reference to the rejection of his disputes by the Chief Engineer. The Dispute Redressal Committee (DRC) shall give his decision within a period of 90 days from the receipt of Contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F'. If the Dispute Redressal Committee (DRC) fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC) then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Chief - Engineer for appointment of arbitrator on prescribed proforma as per Appendix XV, failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.*

*It is a term of contract that each party invoking arbitration must exhaust the aforesaid mechanism of settlement of claims/disputes prior to invoking arbitration.*

*(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, CPWD. If the arbitrator so appointed is unable or unwilling to actor 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 along with 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 Additional Director General or Director General, CPWD, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.*

*It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment the claim of the contractor shall be deemed to have been waived and absolutely barred and the 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 modifications or re-enactment thereof and the rules made there under and for the time being in 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.”*

41. In the present petition, the parties do not contest the existence of arbitration clause, however, have placed their reliance on two different clauses of SCC and GCC. It is submitted that Article 2.1 of the agreement dated 18<sup>th</sup> November 2018 provides that the contract shall be performed in accordance with the terms and conditions of all the documents executed between the parties including GCC and SCC. Since all the agreements executed between the parties are to be construed harmoniously, the invocation of arbitration proceedings cannot be rendered void due to mere discrepancy arising out of these two respective clauses. The present issue invites the attention of this Court to discuss the applicability of *Kompetenz-Kompetenz* principle.

***Kompetenz-Kompetenz Principle***

42. According to *the Kompetenz-Kompetenz* principle provided under Section 16(1) of the Act, 1996, an arbitral tribunal has the authority and the competence to decide all questions related to its own jurisdiction and objections including whether an arbitration agreement is valid or not. This doctrine is founded on the idea that the arbitration agreement is distinct from the substantive underlying contract or agreement in which it is incorporated and its validity and veracity can only be tested by the Tribunal regardless of the fact whether the main contract or agreement is valid or not.

43. The Law Commission of India, in its 246<sup>th</sup> Report, furthered the scope of this doctrine and recommended that judicial intervention under Section 11 of the Act, 1996 while appointing an arbitrator must be limited to a confirmation as to subsistence of an arbitration agreement alone. The parliament, with a resonating intent, brought in an amendment in 2015 in Section 11 of the Act, 1996 by insertion of Clause 6A which upholds the essence of said doctrine. Section 11(6A) has been reproduced hereunder for the reference:

*“(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.”*

44. The amendment essentially aims to limit judicial intervention in the merits of the case before the Court of law. The rule pertaining to competence of an arbitral tribunal to rule out the validity of an arbitration

clause is no longer *res integra* in the Indian Jurisprudence of Alternative Dispute Resolution.

45. The Hon'ble Supreme Court in the case of *Vidya Drolia and Others v. Durga Trading Corporation*, (2021) 2 SCC 1 upheld the legislative intent of 2015 Amendment and stated that it is the arbitral tribunal which should be the primary authority to adjudicate the questions pertaining to arbitral nature of a dispute. Moreover, the power of the Court is restricted to the extent that it shall ensure the existence of an arbitration clause/agreement. The Court in this case held as under:-

*“154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.*

*244.3. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.*

*244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. “when in doubt, do refer”.*

*244.5. The scope of the court to examine the prima facie validity of an arbitration agreement includes only:*

244.5.1. *Whether the arbitration agreement was in writing? Or*

244.5.2. *Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?*

244.5.3. *Whether the core contractual ingredients qua the arbitration agreement were fulfilled?*

244.5.4. *On rare occasions, whether the subject-matter of dispute is arbitrable?"*

46. Further, the Hon'ble Supreme Court in ***Uttarakhand PurvSainik Kalyan Nigam Limited vs. Northern Coal Field Limited, (2020) 2 SCC 455***, has held as under:-

*"7.11. The doctrine of "kompetenz-kompetenz", also referred to as "compétence-compétence", or "compétence de la recognized", implies that the Arbitral Tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimise judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties. The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified [Dresser Rand S.A. v. Bindal Agro Chem Ltd., (2006) 1 SCC 751. See also BSNL v. Telephone Cables Ltd., (2010) 5 SCC 213 : (2010) 2 SCC (Civ) 352. Refer to PSA Mumbai Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust, (2018) 10 SCC 525 : (2019) 1 SCC (Civ) 1]. If an arbitration*

*agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement. Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement “is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”.*

47. A conjoint reading of Section 11(6A) and Section 16(1) of the Act, 1996 alongwith the foregoing precedents discussed above reflect the legislative intent of the parliament to construct the doctrine of *Kompetenz-Kompetenz* in arbitration law of India in accordance with Article 16 of the UNCITRAL Model Laws on International Commercial Arbitration, 1985. The primary objective behind institution of arbitration as a dispute resolution mechanism is to lessen the burden on Courts and inevitably, *Kompetenz-Kompetenz* is a significant component in the efficiency and effectiveness of arbitral proceedings. It is crucial that these principles, which protect the hallmarks of the procedure, be upheld given the expanding use of arbitration as the preferred conflict settlement option.

48. In the instant petition, the foremost question that this Court has to determine is the existence of an arbitration clause and the same is answered in affirmative. The parties have not objected to the existence of arbitration agreement but have placed their reliance on two different clauses of SCC and GCC. The Clause 25 in GCC begins with the phrase: “*Except as otherwise provided in the contract.....*” whereas Article 2.1 of

the agreement dated 18<sup>th</sup> November 2018 provides that the contract shall be performed as per the terms and conditions of all the documents including GCC and SCC. There is no doubt that arbitration clauses exist in both these agreements and as stipulated in GCC, a pre-arbitration procedure had to be followed but the same is not a mandate under SCC. Since both the agreements are to be construed harmoniously, the invocation of arbitration proceedings cannot be rendered void due to mere discrepancy arising out of these two respective clauses. The competence principle confers power upon the tribunal to adjudicate on all the issues and objections, inclusive of those arising out of jurisdiction as well as the validity of the arbitration clause. This Court is inclined to re-iterate the principle that a Section 11 petition ought to be allowed if the following trifold test is satisfied:

- a) There exists an arbitration agreement/clause in the agreement between the parties.
- b) The core ingredients *qua* the invocation of arbitration proceedings are fulfilled.
- c) The subject matter of dispute is arbitrable.

49. In the case at hand, the petitioner has relied upon the clause 26 of the SCC, which provides for the invocation of arbitration proceedings in case the dispute is not amicably settled between the parties within thirty days of service of written notice from the aggrieved party. The clause provides that arbitration proceedings will take place at New Delhi after due compliance of the procedure established by the Act, 1996. On perusal of the record, this Court is of the view that the petitioner has complied



with the procedure as stipulated in Clause 26 of SCC enabling him to file the instant petition before this Court.

50. The respondent has placed reliance upon Clause 25 of the GCC which also provides for the invocation of arbitration proceedings. Since, the parties are in conflict with two different clauses of two separate agreements, this Court is of the view that the same requires interpretation of the said clauses to figure out the prevalence of one clause over another. Thus, this Court without adjudicating upon the interpretation finds it imperative to refer the same to an arbitrator in light of the precedent settled by the Hon'ble Supreme Court in *Vidya Drolia (supra)*.

**Conclusion**

51. In view of the facts, circumstances of the instant case and the position of law as discussed in the foregoing paragraphs, this Court is of the view that No-Claim Declaration given by the petitioner, would not extinguish its remedy to seek legal recourse as prescribed under the arbitration clauses in the agreement. The questions whether there is a non-joinder of the parties, and in what circumstances the earlier petition by the petitioner was withdrawn and the No-Claim Declaration was given, are the questions of fact which this Court shall not delve into under while exercising its jurisdiction under Section 11 of the Act, 1996.

52. This Court without going into the merits of the case, is *prima facie* of the view that there is an arbitrable dispute between the parties and the same must be adjudicated by the Arbitral Tribunal which would be the competent authority as per the *Kompetenz-Kompetenz* principle inclusive of the issues pertaining to non-joinder of beneficiary and to the dispute

whether No Claim Declaration was obtained under economic duress or not.

53. This Court further holds forth that if there exists an arbitration clause between the parties in SCC which is sought to be overridden by another provision existing in GCC by the respondent, it requires interpretation of both the clauses to figure out the prevalence of one clause over the other. The settled rule of law in accordance with *Vidya Drolia (supra)* is “when in doubt, do refer”. Therefore, the interpretation of the above-mentioned clauses pertaining to Arbitration can be adjudicated by the Arbitral Tribunal in exercise of its own competence and jurisdiction.

54. Hence, in light of the foregoing discussion and analysis, this Court is inclined to refer the disputes between the parties in the instant matter to arbitration holding forth the spirit of the Act, 1996 as well as the two key doctrines discussed above.

55. In view of the submissions made by the parties and to resolve the dispute arising out of the contract/agreement, the parties are referred to arbitration before the Sole Arbitrator appointed by this Court. Hence, the following Order.

**ORDER**

- (i) Justice T.S. Thakur, Former Chief Justice of India is appointed as sole arbitrator to adjudicate upon the disputes arising between the parties;
- (ii) The learned sole arbitrator, before entering the arbitration reference, shall ensure the compliance of Section 12(1) of the Arbitration and Conciliation Act, 1996;

- (iii) The learned sole arbitrator shall be paid fees as prescribed under the Delhi International Arbitration Centre (DIAC) (Administrative Cost and Arbitrators Fees) Rules, 2018 as amended on 15<sup>th</sup> November, 2022;
- (iv) At the first instance, the parties shall appear before the learned sole arbitrator within 10 days from today on a date which may be mutually fixed by the learned sole arbitrator;
- (v) All contentions of the parties are expressly kept open;
- (vi) A copy of the order be forwarded to the learned sole arbitrator on the following address:

Justice T.S. Thakur, Former Chief Justice of India,  
A-160, New Friends Colony, New Delhi-110025  
Contact No. +91 8800309969

56. The petition is disposed of in the aforesaid terms along with pending applications, if any.

57. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)  
JUDGE

**FEBRUARY 24, 2023**  
SV/UG

नित्यमेव जयते