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

ARB.P. 247/2020 & I.A. 5884/2020, I.A. 5885/2020, I.A. 5886/2020

ODEON BUILDERS PVT LIMITED ..... Petitioner

Through: Mr. Vinay Kumar Garg, Sr. Adv. with Mr. Karunesh Tandon, Mr. Chandra Shekhar Goswami, Mr.Mayur Singhal, Mr. Pawas Kulshrestha and Mr. Parv Garg, Advs.

versus

ENGINEERS INDIA LIMITED ..... Respondent

Through: Mr. Navin Kumar, Ms. Rashmeet Kaur, Ms. Arpana Majumdar, Advs. with Mr. Sunny Priyadarshi, EIL

**CORAM:**
**HON'BLE MR. JUSTICE C. HARI SHANKAR**

**J U D G M E N T (O R A L)**

**% 01.10.2020**

(Video-Conferencing)

**1.** The petitioner seeks, by this petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act"), the appointment of an arbitrator, on behalf of the respondent Engineers India Ltd. (hereinafter referred to as "EIL").

**2.** Before proceeding to examine the issue, a chronological recapitulation of the facts, to the extent necessary, may be beneficial.

**3.** On 20th August, 2010, a contract was executed, between the National Institute of Immunology (NII) and EIL. The NII acted, in the said contract, on behalf of itself, the RCB and the Translational Health Science and Technology Institute (THSTI). The contract noted the fact that the NII owned a site, where, by a Memorandum of Understanding dated 7th July, 2010, between the NII, RCB and THSTI, it had been decided to establish a Biotech Science Cluster (BSC) Campus. It was also observed, in the said contract that NII had selected EIL to provide Project Management Consultancy (PMC) services, as specified in the contract.

**4.** Annexure I to the contract set out the scope of services of EIL and the obligations of the owner (i.e. NII) thereunder. Annexure I-2 thereunder, provided for the responsibilities of EIL. Mr. Navin Kumar has relied on sub-clause (f) of Clause 1 of the said Annexure, whereas Mr. Vinay Kumar Garg, learned Senior Counsel appearing for the petitioner, had placed reliance on Clauses (f), (g), (h) and (o) thereof. These clauses may be reproduced thus:

> "f. EIL shall sign agreements with Contractors on behalf of the OWNER.
>
> g. EIL shall give periodically (but not later than once in a quarter) copies of the expenditure certified by a representative of EIL on the project, for reimbursement of expenditure incurred from the funds advanced to EIL. On completion of the work, the accounts of the work shall be closed and a final statement shall be submitted for settlement, along with refund of excess deposit received, if any, audited by EIL's in-house Chartered Accountant. Owner reserves the right to get the work and payments made checked and audited by its own officers or an independent government private Agency.

h. The payments by the Owner shall be made by transfer of funds in a bank account to be opened in any of the Nationalized Banks/State Bank in the name of "EIL BSC account".

x x x

o. EIL shall be fully responsible to defend suits or arbitration cases arising out of the project in connection with their own work between EIL & Contractor(s). All such arbitrations shall be decided by a sole arbitrator appointed by the appropriate authority of EIL out of the names of the arbitrators approved by the OWNER. Provision for this arrangement shall be made in the Construction agreement stipulating that Arbitrator shall give reasons for his award if a claim of any party exceeds Rs. One Lakh."

**5.** In March, 2011, bids were invited, by EIL, for civil, structural, electrical and other developmental works for the construction of the campus of Phase 1 of the Bio-Tech Science Cluster at Faridabad. Clause 1.1 of the Notice Inviting Bid (NIB) stated that EIL had been appointed as the Project Management Consultant (PMC), on behalf of the Bio-Tech Science Cluster for the implementation of the work. *Vide* Clause 1.2, EIL, on behalf of RCB, invited bids for civil, structural, electrical and other developmental works for construction of the Campus of Bio-Tech Science Cluster at Faridabad. The general covenants of the NIB were contained in the various sub-clauses of Clause 7.0 thereof. EIL reserved, under Clause 7.2, the right to complete evaluation of the comparative evaluation of the bidders, based on the details in the bid without seeking any additional information. Clause 7.4 reserved, with EIL, the right to assess the bidders' capability and capacity to execute the work using inhouse information. Clause 7.5 stipulated that the complete bidding

document was available on the website of EIL as well as of RCB. Clause 7.6 stipulated that the bid document could be issued, in the form of hard copy, during working days from the Manager (Infrastructure), EIL, and that payment, there against, would have to be paid in the form of crossed demand draft in favour of EIL. Clauses 7.9, 7.10, 7.11 and 7.13 of the NIB read thus :

> "7.9 EIL shall allow purchase preference to Public Sector Undertaking/Enterprise as admissible under the existing policies of Government of India.
>
> 7.10 EIL shall not be responsible for any expense incurred by bidders in connection with the preparation & delivery of their bids, site visit and other expenses incurred during qualification process.
>
> 7.11 EIL reserves the right to reject any of all bids at their sole discretion without assigning any reason thereof.
>
> *****
>
> 7.13 EIL takes no responsibility for delay, loss or non-receipt of bid Document sent by post/courier."

The NIB was signed by the Senior Manager (C&B Infrastructure), EIL.

**6.** Annexed, to the NIB, were the Instructions to Bidders (hereinafter referred to as "ITB"). Clauses 1.1 and 1.1.1 of the ITB read as under:

> "**1.1 Introduction**
>
> Regional Centre for Biotechnology (RCB) herein after referred to as "Owner" have entrusted Engineers India Limited (EIL) the job of Construction of Campus (Phase-1) of the Bio-Tech Science Cluster at Faridabad, Haryana (herein after referred to as

PROJECT) and will act as Project Management Consultant and Engineer-in-charge on behalf of the Owner.

**1.1.1** EIL on behalf of RCB is inviting sealed bids, under single stage two bid systems to contract the works of Construction of campus of the Bio-Tech Science Cluster at Faridabad, Haryana."

**7.** Certain relevant clauses of the ITB may be set out thus:

(i) Clause 2.3.1 empowered the EIL to amend the ITB, during the bidding period or subsequent to receiving bids. Any such amendment would become part of the bidding documents. Clause 3.2.1 opened with the following recital:

"**3.2.1** The Bid, all correspondence and documents relating to the bid, between Bidder and EIL, shall be written in English language only."

(ii) Clauses 3.3.1, 3.3.2 and 3.4.1 read thus:

"**3.3.1** EIL expects Bidder's compliance to the requirements of Bidding Document without any deviation. Any Bid containing exceptions/deviations to the following stipulations/conditions shall be liable for rejection:

(a) Time Schedule
(b) Scope of work
(c) Scope of supply
(d) Twelve months period of liability from date of issue of Completion Certificate
(e) Security Deposit
(f) Suspension of works
(g) Force Majeure
(h) Arbitration
(i) Schedule of Rates/Schedule of Prices

**3.3.2** Deviation on other conditions, if unavoidable, should be furnished as per Format for Exceptions/Deviations included in this Section titled

Proposal Forms in the Bidding Document. EIL shall not take cognizance of any deviation stipulated else where in the bid. If no deviations are to be stipulated, then the same shall be confirmed as per Bid Compliance Statement included in the Section filled "Proposal Forms" in the Bidding Document. In case Bidder stipulates deviations and there are sufficient bids without any deviation, EIL shall have the right to reject such bid at its absolute discretion and without giving any opportunity to such Bidder to make good such deficiency.

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**3.4.1** Bidders are advised to quote as per terms and conditions of the Bidding Document and not to stipulate deviations/exceptions. Once quoted, the bidder shall not make any subsequent price changes whether resulting or arising out of any technical/commercial clarifications and details sought on any deviations, exceptions or stipulations mentioned in the bid unless any amendment for Bidding Document is issued by EIL. Similarly, no revision in quoted price shall be allowed should the deviations stipulated by him are not accepted by EIL and are required to be withdrawn by him in favour of stipulation of the Bidding Document. Any unsolicited proposed price change is to render the bid liable for rejection."

(iii) The bid validity period was stipulated in Clause 3.10, sub- clauses 3.10.1 and 3.10.2 whereof read thus:

"**3.10.1** Bid shall remain valid for acceptance for a period of 04(four) months from the due date of submission of the bid. The Bidder shall not be entitled during the said period to revoke or cancel his bid or to vary the bid except and to the extent required by EIL in writing. In case of withdrawal of the bid during the bid validity period, EMD of such bidder shall be forfeited by EIL.

**3.10.2** EIL may request the bidder for extension of the period of validity of bid. If the bidder agrees to the extension request, the validity of EMD/Bid Security shall also be suitably extended. Bidder may refuse the request of extension of bid validity without forfeiting his EMD/Bid Security. However, bidders lingering to the request for extension of validity of bid shall not be permitted to modify the bid because of extension, unless specifically advised to do so."

(iv) Clause 3.11 of the ITB dealt with providing of earnest money and the various sub-clauses thereunder read thus:

"**3.11.1** The bid must be accompanied by Earnest Money (interest free) for the amount indicated in Letter inviting Bid/notice inviting Tender in the form of bank demand draft in name of "Engineers India Limited-BSC" account payable at New Delhi or bank guarantee in the prescribed format from any scheduled bank. EMD shall be submitted in a separate envelope marked EARNEST MONEY DEPOSIT, with Part-1 of the Bid. Any bid not accompanied by EMD as stated above, will be rejected.

**3.11.2** If the Bidder, after submission, revokes his bid or modifies the terms and conditions thereof during the validity of his bid except where EIL has given opportunity to do so, the earnest money shall be liable to be forfeited. EIL may at any time cancel or withdraw the invitation to Bid without assigning any reason and in such cases the earnest money submitted by Bidder will be returned to him.

**3.11.3** The successful Bidder shall be required to submit Security Deposit to EIL in the manner and within the time period indicated in GCC/SCC. Should the successful Bidder fail or refuse to sign the agreement or furnish the Security Deposit within the specified period, the earnest money shall be forfeited without prejudice to his being liable to any further loss or damage incurred in consequence by EIL.

**3.11.4** EIL will return the Earnest Money to all unsuccessful bidders after establishment of the successful bidder. Earnest Money shall be returned to the successful bidder after he has furnished the Security Deposit to EIL."

(vi) Clause 5.9 reserved, with EIL, the right to accept or reject the bid.

(iv) Negotiations, between EIL and the successful bidder were contemplated by Clause 6.0 and, consequent thereto, award of work was to be under Clause 6.2. The relevant sub-clauses read thus;

"**6.0 NEGOTIATION AND AWARD OF WORK**

**6.1 Negotiation**

**6.1.1** In the opinion of EIL, if the total price or certain item rates quoted by the Lowest Bidder are considered high, EIL may invite the Lowest Bidder for price negotiation. Lowest Bidder shall attend such negotiation meetings and if required by EIL, bidder shall provide the analysis of rates/break-up of amount quoted by him for any or all items of Schedule of Rates to demonstrate the reasonability. As a result of negotiation, Bidder may offer rebate on his earlier quoted price.

**6.2 Award of Work**

**6.2.1** The Bidder, whose bid is accepted by EIL shall be issued Letter of Intent/Fax of Intent (LOI/FOI) by EIL prior to expiry of bid validity. Bidder shall confirm acceptance by returning a signed copy of the LOI/FOI.

**6.2.2** EIL shall not be obliged to furnish any information/clarification explanation to the unsuccessful bidders as regards non-acceptance of

> their bids. Except for refund of EMD to unsuccessful bidders. EIL shall correspond only with the successful bidder."

**8.** Bids were received, in response to the NIB, and the petitioner emerged as the successful bidder. Prior to grant of letter of award, to the petitioner, however, on 31st May, 2011, a Deed of Novation was executed, between the NII, EIL and RCB, whereby NII retained the ownership of the land, on which the Bio-Tech Science Cluster was to be established, but all other rights and obligations of NII, contained in the agreement dated 20th August, 2010 *(supra)* with EIL, stood transferred to RCB with effect from 31st May, 2011. As such, in the matter of the rights and obligations emerging from the agreement, RCB effectively stepped into the shoes of NII.

**9.** On 27th June, 2011, EIL sent a "Fax of Acceptance" (FOA) to the petitioner, which read thus:

> " Please refer to your offer no. obpt/eil/bse/2 dated 24.03.2011 and all correspondences exchanged with you till date for civil, structural, electrical & other development works (bidding document no. a091/t.36/10-11/bb/01) for construction of the biotech science cluster (phase-1) Faridabad Haryana of regional centre for biotechnology.
>
> We hereby issue fax of acceptance for the same at estimated contract value of rs.105,14,46,721/- (rupees one hundred five crore fourteen lakhs forty six thousand seven hundred and twenty one only).
>
> The above estimated contract value is inclusive of all taxes, duties, cess etc. including excise duty sales tax, custom duty, value added tax on works contract/works contract tax, octroi entry tax etc. except service tax the service tax @4.12% shall be payable extra under composite scheme on submission of documentary evidences.

the contract period for the subject work shall be 15 months to be reckoned from the date of issue of this FOA.

You are requested to furnish security deposit for an amount equal to 10% of the estimated contract value in the form of bank guarantee in line with clause no. 17.0 of general obligations (chapter-iii of GCC ) immediately.

Shri A.K. Sengupta, AGM (infrastructure), Engineers India ltd. R&D complex, Gurgaon, Haryana shall be the engineer-in-charge for the subject works. You are requested to contact him immediately for further instructions in this regard.

All other terms and conditions shall be as per bidding document.

Detailed letter of award shall follow.

Please acknowledge the receipt of this FOA."

The FOA was signed by Mr. P.K. Khurana, DGM (C&P) "on behalf of EIL as constituted attorney of RCB".

**10.** This was followed by a Detailed Letter of Acceptance (DLOA) dated 14th July, 2011, also issued by EIL to the petitioner. This letter was also signed by Mr. P.K. Khurana, DGM (C&P), EIL as constituted attorney of RCB.

**11.** Practically contemporaneously, on 11th July, 2011, a formal agreement was executed, between EIL and the petitioner. The opening covenant of the agreement stated that EIL and the petitioner would "also be individually referred to as "party" and collectively as "parties"." It is worthwhile to reproduce this entire agreement.

"AGREEMENT

This Agreement entered into this 11th day of July, 2011 (hereinafter shall be referred to as the "Agreement" which shall include it's subsequent Amendment(s), if any), having Contract Effective Date (CED) 27th June, 2011 is executed for CIVIL, STRUCTURAL, ELECTRICAL AND OTHER DEVELOPMENTAL WORKS FOR THE CONSTRUCTION OF CAMPUS OF THE BIOTECH SCIENCE CLUSTER (PHASE I), FARIDABAD, HARYANA (Bidding Document No. A091/T-36/10-11/BB/01)

BY AND BETWEEN

M/s ENGINEERS INDIA LTD. (EIL), a Government of India Company registered under the Companies Act, 1956 having its registered office at Engineers India Bhavan, 1, Bhikaji Cama Place, R.K. Puram, New Delhi-110 066 (hereinafter shall be referred to as the "Company", which expression unless repugnant to its meaning or context thereof, shall include its executors, administrations, successors and permitted assignees) as ONE PART.

AND

M/s Odeon Builders Pvt. Ltd., a company registered under Companies Act, 1956 having its registered office at N-49, 2nd Floor, Connaught Place, New Delhi-11001 (hereinafter shall be referred to as the "Contractor", which expression unless repugnant to its meaning or context thereof, shall include its executors, administrators, successors and permitted assignees) as OTHER PART.

The above named companies shall also be individually referred to "party" and collectively as "parties".

WHEREAS the Company desirous of carrying out the above mentioned subject work as per terms and conditions of the Contract through an experienced and competent agency with sound technical expertise and financial capability as per provisions of the Contract through competitive bidding process.

AND WHEREAS the Contractor, participated and responded to the bidding process successfully and represents. that it has experience, expertise and technical knowledge and financial strength to carry out the said work in a professional manner as per terms and conditions of the Company's Bidding and other documents in respect of the said work

AND WHEREAS pursuant to the above and discussions conducted/communications made with the Contractor during the bidding process, the Company has awarded the subject work to the Contractor vide Letter of Intent (LOI)/ Fax of Intent (FOI) dated 27th June, 2011 on the terms and conditions as agreed to by the parties as of the said date of notification/award of work and as outlined in this Agreement.

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:
1. In this Agreement words and expression have the same meaning as are respectively defined to them in the General Conditions of Contract, Special conditions of Contract and
In any other sections of the Contract document.

2. WORK TO BE PERFORMED: Except as specified elsewhere in this Contract, the Contractor shall faithfully perform the subject work in all respects in a professional manner as per detailed scope of work, scope of supply, various terms· and conditions, Schedule of Rates/Schedule of Lump sum Prices, Technical Specifications, Drawings, Standards etc. as defined in various sections of the Contract document and as per the best industry practices as required.

3. COMPENSATION: As full consideration for the satisfactory performance of this Contract including fulfilling of all obligations and liabilities under this Contract by the Contractor, the Company/Owner shall compensate the Contractor in accordance with the prices set forth in the Schedule of Rates/Schedule of Lump Sum Prices as per the payment provisions of this Contract.

4. CONTRACT: This Contract comprises:

i) Detailed Letter of Acceptance including all Annexures (like Schedule of Rates/Schedule of Lump sum Prices etc.)

ii) This Agreement

iii) Letter of intent/ Fax of Intent

iv) Bidding document comprising Special Conditions of Contract with all its Annexures including Scope of work, Scope of supply, Payment terms, Time Schedule, General Conditions of Contract, Technical Specifications, Drawings etc. as defined in the Detailed Letter of Acceptance and various sections of the Bidding document, including Addendum/Corrigendum, if any.

In the event of any ambiguity or conflict among the Contract document listed above, the order of precedence shall be the order in which they are listed in the Special Conditions of Contract.

5. The Contract constitutes the entire Agreement between the Company and the Contractor with respect to the subject matter of the Contract, and supersedes all communication, negotiations and Agreement (both written and oral) of the parties with respect thereto prior to date of Agreement.

IN WITNESS WHEREOF the parties have executed this Agreement in New Delhi, the day and year first above written."

As is apparent from the above, this agreement – which, as Mr. Naveen Kumar candidly acknowledges, was the only formal agreement executed between the parties – was signed by EIL, albeit as constituted attorney of RCB and by the petitioner. Mr. Naveen Kumar acknowledges the fact that no employee or officer of the RCB signed this agreement.

**12.** Consequent to the execution of the aforesaid agreement, work commenced, and as is nearly inevitable in such cases, disputes surfaced. The petitioner accuses EIL of delays in handing over of the

site, providing the revised drawings, providing the revised sewerage layouts, and delay in modification of the lift machine room, among other infractions. This, alleges the petitioner, resulted in huge losses having to be incurred by it, as a consequence of which the petitioner claims an amount of ₹ 17,53,20,589/- from EIL.

**13.** On 3rd October, 2019, the petitioner wrote to EIL, setting out its claims and requesting that the matter be amicably settled, as provided by Clause 83.1 of the GCC. For ready reference, Clauses 83, with its sub-clauses 83.1 and Clause 83.3 with its sub-clauses 83.3.1, 83.3.2 and 83.3.4, may be reproduced thus:

> "**83.0** SETTLEMENT OF DISPUTES BY ARBITRATION
>
> **83.1** All questions, disputes or differences arising under, out of or in connection with this Contract shall be mutually settled by and between EIL and the Contractor (Owner and by the Contractor for operation and maintenance work during O&M period) based on the provisions of Contract. In the event such disputes and differences can not be settled amicably between the parties as stated above, the matter shall be referred to and settled in accordance with the Arbitration procedure.
>
> **83.3** ARBITRATION
>
> **83.3.1** Except as otherwise provided elsewhere in the Contract, if during the execution of the Contract, any dispute, difference, question or disagreement arises between the parties with respect to the interpretation of Contract and/on any other issue(s) and/or breach thereof, the same shall be decided by an Arbitral Tribunal consisting of three Arbitrators. Each party shall appoint one Arbitrator within 30 days from the date of receipt notice to other party and the Arbitrator so appointed shall appoint the third Arbitrator who will act as Presiding Arbitrator.

**83.3.2** In case a party fails to appoint an arbitrator within 30 days from the date of receipt of request to do so by the other party, upon request of a party, the Chief Justice of High Court or any person or institution designation by him within whose jurisdiction the subject contract has been made, shall appoint the arbitrator/Presiding Arbitrator upon request of one of the parties.

**83.3.3** If any of the Arbitrators so appointed dies, resigns, incapacitated or withdraws for any reason from the proceedings, the concerned party/arbitrators shall appoint another person in his place in the same manner as aforesaid. Such person shall proceed with the reference from the stage where his predecessor had left if both parties consent for the same.

**83.3.4** It is mandatory for the party invoking arbitration shall specify all disputes to be referred to arbitration at the time of invocation of arbitration and not thereafter."

**14.** In the alternative, it was suggested that an arbitrator could be appointed to arbitrate on the disputes between the parties. EIL responded on 4th November, 2019. While, initially, refuting the claim of the petitioner, the response went on to state that the EIL was not a party to the agreement containing Clause 83 and had no authority to enter into any amicable settlement with the petitioner on behalf of the RCB. As such, the petitioner was advised to raise any claims, that it may have, with the RCB and to withdraw the notice issued to EIL.

**15.** It is in these circumstances that the present petition has been moved before this Court. The petitioner claims that, as more than 30 days have elapsed since the issuance of the Legal Notice dated 3rd October, 2019 and that the matter has neither been settled, nor has any arbitrator been appointed by the EIL, the task of appointing an

arbitrator, on behalf of EIL, devolves on this Court, under Section 11(6) of the 1996 Act. The petitioner has suggested the name of Hon'ble Mr. R.C. Chopra (Retd), a learned retired Judge of this Court, as the petitioner's arbitrator.

**16.** EIL has filed its reply to the petition. The reply contains a disclaimer, whereby EIL has sought to reserve its right to file a more detailed reply in the future. However, Mr. Navin Kumar, learned counsel for the EIL candidly states, during hearing, that he did not intend to file any further reply and that his entire objection, which was essentially regarding the maintainability of the petition against EIL, was captured in the reply already filed. The petitioner has also filed a rejoinder thereto.

**17.** I have heard Mr. Vinay Kumar Garg, learned Senior Counsel, instructed by Mr. Karunesh Tandon, on behalf of the petitioner and Mr. Navin Kumar, learned counsel for the respondent, at great length.

**18.** Mr. Navin Kumar, learned counsel for the EIL, submits, primarily, that there was no privity of contract between the petitioner and EIL. According to Mr. Navin Kumar, the contract was essentially between the petitioner and the Regional Centre for Biotechnology (RCB). He contends that, therefore, any arbitration would have to be between the petitioner and RCB, and not between the petitioner and EIL. This petition, therefore, according to Mr. Navin Kumar, is not even maintainable as RCB has not been impleaded as a party and EIL, according to him, cannot be a party to the arbitration proceedings.

**19.** I may note straightway, that the stand of Mr. Navin Kumar is liable to be rejected even on the basis of Clause 66.0 of the Special Conditions of Contract (hereinafter referred to as the "SCC"), governing the agreement between the petitioner and EIL. This Clause reads as under :

> "**66.0 Arbitration**
>
> The clause No. 83.0 in Chapter VIII (Arbitration) of GCC titled "Settlement of Disputes by Arbitration" shall stand modified and shall be superseded to the following extent.
>
> The Contractor fully understands that EIL is executing the subject work on behalf of the Client. *Any award passed by the Arbitral Tribunal shall be enforced against EIL* only on receipt of the amount so awarded by the Arbitral Tribunal from the Client as per the terms of the main Contract executed between EIL & the Client. Any specific performance of Contract so ordered by the Tribunal shall also be equally applicable and enforced against the Client and its legal successors or permitted assignees."

**20.** Sub-para of Clause 66.0 clearly states that any award, passed by the Arbitral Tribunal, *shall be enforced against EIL*. No doubt, the clause goes on to state that such enforcement would be consequent on the receipt of the awarded amount, from RCB; that however, does not, detract from the fact that Clause 66.0 specifically makes the award, which may be passed by the Arbitral Tribunal, enforceable against EIL. This, even by itself, indicates that EIL, and not RCB, would be the parties, to the arbitral proceedings. It would be completely incongruous to hold that the arbitral proceedings would be between the petitioner and RCB, but the award would be enforceable against EIL. The insertion of this clause, in the agreement between the

petitioner and EIL, makes it abundantly clear that EIL alone can contest the arbitral proceedings against the petitioner, and not RCB.

**21.** Mr. Navin Kumar, on being confronted with the above clause, had no satisfying answer. He sought to submit, rather ingeniously, that the above specification was inserted as the moneys were to be deposited in a joint account of EIL and RCB and that, therefore, if any payment was to be made from such an account, it would have to be with the consent of EIL. In my opinion, the answer completely begs the question. To reiterate, the stipulation, in the SCC, that the arbitral award would be enforceable against EIL, defeats, entirely, the submission of Mr. Navin Kumar, that the arbitration would be between RCB and the petitioner.

**22.** In order to press home his point, Mr. Navin Kumar sought to submit that, in the contract, RCB was the "Principal Contracting Party", whereas EIL was only acting as the constituted attorney/agent of the RCB. For this purpose, Mr. Navin Kumar drew my attention to the various communications, which preceded the agreement, dated 11th July, 2011, to highlight the fact that EIL, even while signing these communications, did so, as the attorney of the RCB. He points out that, even if there was no specific reference, in the LOA, dated 27th June, 2011, the DLOA dated 14th July, 2011, and the agreement dated 11th July, 2011, to the fact that EIL was a party, to these documents, only on behalf of the RCB, this fact was amply disclosed by the endorsement, below the signature of Mr. P.K. Khurana, at the foot of the LOA, dated 27th June, 2011, and the DLOA, dated 14th July, 2011,

to the effect that he was signing the documents as constituted attorney of RCB.

**23.** The DLOA, points out Mr. Navin Kumar, was incorporated, by reference, as a part of the agreement, dated 11th July, 2011 (*supra*) *vide* clause 4(iv) thereof. This agreement, too, points out Mr. Navin Kumar, was signed by EIL as the constituted attorney of RCB.

**24.** Mr. Navin Kumar also drew my attention to clause 1(f) in the enumerated "Responsibilities of EIL", as contained in Section Annexure I-2 to the contract dated 20th August, 2010 (*supra*), between NII and EIL, which specifically mentions that EIL would be signing the agreement, with the contractors, on behalf of the owner i.e. NII (later RCB).

**25.** Clause 66.0 of the SCC, governing the agreement between the petitioner and EIL, also, in the submission of Mr. Navin Kumar, states, clearly, that the contractor, i.e. the petitioner, fully understood that EIL was executing the subject work on behalf of its client i.e. RCB.

**26.** Mr. Navin Kumar also drew my attention to the definitions of "Owner" and "Project Manager" as contained in the GCC, which read thus:

> "The "Owner" shall mean National Institute of Immunology (NII) having its office at Aruna Asaf Ali Road, New Delhi and shall include its successor and assigns or Engineers India Ltd(EIL) on behalf of National Institute of Immunology.

> The "Project Manager" shall mean the project manager of EIL or his successor or authorized nominee."

**27.** Mr. Navin Kumar submits that it was, therefore, clear that EIL was transacting with the petitioner only as the constituted attorney of RCB, and not in its individual capacity. Mr. Navin Kumar, therefore , submits, EIL was not a party to the agreement, with the petitioner, which contained the arbitration clause. In fact, he would submit that there was no privity of contract, whatsoever, between EIL and the petitioner. The petitioner's contractual relationship, according to Mr. Navin Kumar, was entirely with RCB, and no petition, under Section 11 of the 1996 Act could, therefore, be maintained against EIL.

**28.** Mr. Navin Kumar also places reliance, in the above context, on Section 230 of the Indian Contract Act, 1872 (hereinafter referred to as the "Contract Act") which reads thus:

> **"230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal**. – In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.
>
> **Presumption of contract to contrary** – Such a contract shall be presumed to exist in the following cases :–
>
> (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;
>
> (2) where the agent does not disclose the name of his principal;
>
> (3) where the principal, though disclosed, cannot be sued."

**29.** The mandate of Section 230, in the submission of Mr. Navin Kumar, is clear and categorical. An agent cannot be made liable for the acts of his principal and cannot sue, or be sued, in that regard. As such, EIL being merely the agent of RCB, *qua* the relationship with the petitioner, the petitioner had seriously erred in impleading EIL as the respondent in these proceedings. The proceedings were, therefore, in the submission of Mr. Navin Kumar, not maintainable against EIL.

**30.** Mr. Navin Kumar places reliance on an order, dated 8th August, 2013, passed by a learned Single Judge of this Court in Arb. P. 45/2013 (***Shiv Naresh Sports Pvt. Ltd. vs. Engineers India Ltd***), as well as the judgment of the Supreme Court in ***Radhakrishna Sivadutta Rai v. Tayeballi Dawoodbhai***[1]**,** and of a Division Bench of this Court in ***Elof Hansson (I) Pvt. Ltd. v. Shree Acids & Chemicals Ltd.***[2]**.**

**31.** Answering the submissions of Mr. Navin Kumar, Mr. Vinay Kumar Garg, learned Senior Counsel appearing for the petitioner, draws my attention to the agreement, dated 11th July, 2011 – which, as already noted hereinabove, and as admitted by Mr. Navin Kumar, constituted the only agreement entered into with the petitioner – specifically to the definition of "parties", as contained therein. Mr. Garg submits that it is clear, from the said covenants, that the "parties" to the agreement were the petitioner and EIL, and not the petitioner and RCB.

[1] **(1962) Supp 1 SCR 81:AIR 1962 SC 538**
[2] **Manu/DE/0285/2012**

**32.** Mr. Garg has, thereafter, invited my attention to clause 83.0 of the GCC, which already stands reproduced in para 13 above. Mr. Garg points out that this clause settles the matter beyond any controversy, as it clearly stipulates that disputes and differences arising between the parties, relating to the operation and maintenance work during the O & M period, are to be settled between the owner of the contract, i.e. between RCB and petitioner, and whereas other disputes and differences, (which would relate to the period of execution of the work) would be settled between EIL and the petitioner. The disputes forming the subject matter of controversy in the present case, he points out, relate to the period of execution of the work by the petitioner, prior to the O & M period. Disputes relating to this former period, Mr. Garg submits, are a matter between EIL and the petitioner, and not between RCB and the petitioner.

**33.** Mr. Garg also points out that Clause 83.3.1 also refers to disputes and differences "between the parties" and requires "each party" to appoint one arbitrator .Clause 83.3.2 requires the High Court having to step in, in the event of default, by any "party" to appoint an arbitrator . This, Mr. Garg submits, would relate back to the definition of "parties", in the contract dated 11th July, 2011 (*supra*), which clearly designates the petitioner and EIL as the "parties" to the contract.

**34.** Mr. Garg also draws attention to clause 1(o) in Annexure I-2 to the contract dated 20th August, 2010, between NII and EIL, wherein EIL has been made fully responsible to defend suits and arbitration

cases arising out of the project in connection with their own work between EIL and the contractor, i.e. the petitioner. The Arbitrator is also required to be appointed by the appropriate authority of EIL.

**35.** These covenants, submits Mr. Garg, constitute a separate "contract", making EIL responsible, within the meaning of Section 230 of the Contract Act, which, accordingly, cannot influence the outcome of these proceedings. For this purpose, Mr. Garg places reliance on the judgement of the High Court of Karnataka in ***Rail India Technical and Economic Services Limited v. Ravi Constructions***[3]**.**

**36.** The position of the petitioner, vis-à-vis EIL is, submits Mr. Garg, that of an independent sub-contractor. For this purpose, Mr. Garg has placed reliance on clauses (1)(f), 1(g) and 1(h) of Annexure I-2 to the contract between NII and EIL, as well as clauses 28 and 29 of Annexure I-3of the same agreement, setting out the obligations of NII (later RCB), which already stand reproduced hereinabove.

**37.** Mr. Garg has also placed reliance on the judgment of the High Court of Patna in ***Orissa Textile Mills Ltd v Ganesh Das Ramkishun***[4]**.**

**38.** As I have already opined hereinabove, Clause 66.0 of the SCC, even by itself, discountenances the stand of Mr. Navin Kumar, which clearly provides that any award passed by the Arbitral Tribunal would

[3] **2002 (1) Kar LJ 419 DB**
[4] **AIR 1961 Pat 107**

be enforceable only against EIL. The 1996 Act does not envisage the enforcement of an award against a stranger to the arbitral proceedings. In fact, there is no covenant, in any of the documents executed between the parties, providing for enforcement of the arbitral award against RCB. No doubt, clause 66.0 does provide that the award would be enforceable against EIL only on receipt of the amount, by EIL, from RCB, and for the enforceability of any direction for specific performance of the contract, passed by the Arbitral Tribunal, equally against EIL and RCB. These covenants, however, merely conform to the rigour of Section 230 of the Contract Act. They do not detract from the fact that the award of the arbitrator/Arbitral Tribunal would be enforceable against EIL.

**39.** The submission of Mr. Navin Kumar, therefore, flies directly in the face of clause 66.0 of the SCC and cannot sustain.

**40.** Mr. Navin Kumar also acknowledges that the only agreement, involving the petitioner, is the agreement dated 11th July, 2011. This agreement, too, was between EIL and the petitioner, and not between RCB and the petitioner. The fact that EIL may have entered into the agreement that constituted an attorney of RCB – which, too, does not find mention in the agreement, but is only reflected by the endorsement below the signature of EIL's representative at the foot thereof – cannot convert the agreement into one between RCB and the petitioner. Mr. Garg correctly points out, in this regard, that the agreement specifically refers to EIL and the petitioner as the "parties" thereto.

**41.** The GCC has been incorporated, by reference, into the said agreement and constitutes part thereof. Clause 83.3 of the GCC, which provides for arbitration, specifically refers to disputes between *the parties* and requires *the parties* to appoint the arbitrators. The High Court is to step in, in the event of default of either *"party"* in doing so.

**42.** Clause 83.3 of the GCC read in juxtaposition with the agreement dated 11th July, 2011, clearly indicates that the "party" opposing the petitioner in the arbitral proceedings would be EIL, and not RCB.

**43.** Any ambiguity in this regard, stands set at rest by clause 66.0 of the SCC, as already noted hereinabove.

**44.** The reference, by Mr. Navin Kumar, to RCB being the "principal party" or "actual party", to the agreement with the petitioner, is completely foreign to the 1996 Act, which does not recognise any concept of a "principal party" or an "actual party".

**45.** Significantly, there is no reference, in the GCC, the SCC, or the contract dated 11th July, 2011, to the EIL entering into these agreements, on behalf of the RCB. Rather, the covenants of the agreements – as also of the NIT and the ITB – clearly set out the responsibility of EIL, vis-a-vis the petitioner, which were independent and distinct.

**46.** A holistic appreciation of all the documents, therefore, clearly indicates that RCB had conferred, on EIL, the authority, to act independently, albeit as its constituent attorney. PIL was conferred with the authority to act independently, in all respects. The petitioner transacted only with EIL and not with RCB, and the covenants extracted, in para 7 *supra*, make this clear beyond any shadow of doubt.

**47.** No occasion, therefore, arises for the petitioner to initiate proceedings against RCB. Any such proceedings would, in fact, fly in the face of clause 83.3 of the GCC.

**48.** The reliance on the definition of "owner", as contained in the GCC, by Mr. Navin Kumar, can be of no avail to him. In the first place, a definition clause, be it in a legislative, or under contractual, instrument, has no independent existence of its own. It merely defines expressions which find place in the covenants thereof. It acquires meaning only when applied to the phrase in the covenants in which the phrase finds place.

**49.** The mere fact that RCB has been defined as the "owner", in the GCC, cannot, therefore, make any difference to the case.

**50.** The submission of Mr. Navin Kumar is, moreover, contrary to the position, as it statutorily obtains. "Party" is defined in Section 2(h) of the 1996 Act as meaning "a party to an arbitration agreement". Section 7(1) of the 1996 Act defines arbitration agreement in the following terms:

"**7. Arbitration agreement**. – (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."

**51.** Section 7(4) goes on to clarify that an agreement is in writing if it is contained in, *inter alia*, "a document signed by the parties".

**52.** Sub-section (1) to (6) of Section 11 of the 1996 Act may be reproduced thus:

"**11. Appointment of arbitrators. –**

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and—
(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

> (5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.
>
> (6) Where, under an appointment procedure agreed upon by the parties,—
>
> (a) a party fails to act as required under that procedure; or
>
> (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
>
> (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

**53.** Juxtaposed with clause 83.3 of the GCC, and the definition of "parties", as contained in the agreement dated 11th July, 2011 (*supra*), it is clear that the party, who would act opposite the petitioner, for the purpose of Section 11, would be EIL and not RCB.

**54.** The nature of the present proceedings is also required to be borne in mind. The petitioner does not seek enforcement of any contractual covenant. These proceedings are not in the nature of a suit. They are exclusively limited to Section 11(6) of the 1996 Act,

and have, therefore, to be prosecuted and decided within the peripheries of the 1996 Act, specifically the said provision.

**55.** A conjoint reading of the definition of "parties" in the Agreement dated 11th July, 2011, with Clause 83.3 of the GCC, Clause 66.0 of the SCC and Section 11 of the 1996 Act, clearly discloses that the petitioner has correctly preferred the present petition against EIL. Had the petitioner preferred the petition against RCB, in fact, it would have been quite possible for RCB to come before Court and urge that it had been wrongly impleaded, as it was not even a "party" to the Agreement dated 11th July, 2011 – of which, in terms of Clause 4 thereof, the GCC has been made a part.

**56.** Mr. Garg has also correctly drawn attention, in this context, to Clause 83.1 of the GCC. This Clause clearly envisages amicable resolution of disputes, relating to the O & M period of the contract between the contractor and the owner, i.e. RCB, whereas disputes relating to other periods, specifically the period of the execution of the work, would have to be resolved between the petitioner and EIL. (In fact, the definition of "owner" in the GCC appears to have been provided to cater to clauses such as this). It is not in dispute that the claims of the petitioner, in the present case, relate to the period of execution of the contract, and not to the O & M period. They would necessarily have, therefore, to be preferred against EIL and not against RCB.

**57.** The decisions cited by Mr. Navin Kumar do not advance the cause of his client to any appreciable extent. The order, dated 8th August, 2013, of this Court in ***Shiv Naresh Sports Pvt. Ltd. (supra)***, is a brief order, which does not set out the covenants of the agreements and does not indicate that there were, in the agreements forming the subject matter of consideration in that case, clauses akin to the definition of "parties" as contained in the Agreement dated 11th July, 2011, or Clause 66.0 of the SCC in the present case. Moreover, the said order cannot be said to constitute an authority for the proposition that, in cases, such as the present, a proceeding under Section 11 would have to be maintained against EIL, rather than against RCB. Para 18 of the judgment in ***Radhakrishna Sivadutta Rai & Ors[1].*** on which Mr. Navin Kumar places reliance, is totally irrelevant. It reads thus:

> "18. In support of his argument that the signature of the appellant to its letter of January 3, 1951, and the use of the word "we" in the first paragraph of the letter indicate that the appellant was acting for itself. Mr. Pathak relies on a decision of the King's Bench Division in ***H.O. Brandt & Co. v. H.N. Morris & Co. Ltd. [1917] 2 K.B. 784***. In that case the plaintiffs who carried on business in Manchester gave to the defendants a bought note dated September 3, 1914. This note was addressed to the defendants and was headed "From Messrs. H.O. Brandt & Co., 63 Granby Row, Manchester, For and on behalf of Messrs. Sayles Bleacheries, Salesville, Rhode, Island, U.S.A.". The note stated "we have this day bought from you 60 tone pure anline oil" and it was signed "H.O. Brandt & Co.". The plaintiffs sued for non-delivery of the oil. Their claim was resisted on the ground that they had entered into the contract on behalf of a disclosed principal and therefore were not entitled to be sued. It was held by Viscount Reading, C.J., and Scranton, L.J., Neville, J., dissenting, that the plaintiffs were the contracting parties and were entitled to sue upon the contract. The majority decision was based on three grounds. The first ground was that the plaintiffs had

signed the note without describing themselves as acting on behalf of the principal and so it was held following the language used by Mellish, L.J., in the case of ***Gadd (1876) 1 Ex. D. 357*** that prima facie when a man signs a document in his own name and states therein "I have this day bought from you" he is the person liable on the contract. The second consideration was that the reference to the foreign principal was made in the note in order to declare the destination of the goods. There was evidence adduced in the case to show that during wartime the destination of goods intended for export had to be made known. Therefore the reference to the foreign principal was treated as having been made for the purpose of meeting the said requirement; and the third circumstance was that the plaintiff's statement at the head of the note that they were acting for and on behalf of a foreign principal could not get rid of the prima facie presumption that a person signing a contract in his own name is personally liable on it. It would thus be seen that the rule of construction which prescribes that if a person signs a contract prima facie he is the contracting party prevailed in that case because the reference to the disclosed principal was otherwise explained as serving another purpose altogether. The said rule of construction prevailed also for the additional reason that the plaintiffs were acting for a foreign principal. It would be remembered that s. 230 of the Indian Contract Act provides that in the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. There are, however, there cases specified in the section where such a contract would be presumed to exist; one of these cases is where a contract is made by an agent for sale or purchase of goods for a merchant resident abroad. In other words, under s. 230 if an agent enters into a contract for a disclosed foreign principal the main provision of s. 230 will not apply because there would be a presumption that there is a contract to the contrary under which the agent would be personally bound by the contract notwithstanding the fact that he has entered into it on behalf of a foreign principal. Therefore, we are not prepared to hold that the decision in the case of ***H.C. Brandt & Co.[1917] 2 K.B. 784*** lays down an unqualified rule of construction on which the appellant can rely. In fact, it may be pointed out that Neville, J., who dissented from the majority view, has significantly observed that "I rather gather that I should not have found myself in isolation on this point were it not for the

> fact that during the war there is an obligation to disclose the destination of the goods". This observation shows that reference to the disclosed principal was not given its full effect in considering the question about the liability of the agent because it was held by the majority decision that the said reference was primarily, if not exclusively, made for the purposes of disclosing the destination of the goods."

In the first place, the Supreme Court, in this case, was not concerned with any proceeding akin to the present proceeding under Section 11(6) of the 1996 Act. Moreover, in that case, the issue before the Supreme Court was whether, in case the reference to a disclosed foreign principal is not given its full effect, the presumption to the contrary under Section 230 of the Contract Act would apply, or not. No such issue arises for consideration in the present case.

**58.** Para 6 of the judgment of the Division Bench of this Court in ***Elof Hansson (I) Pvt. Ltd. & Ors.***[2], too, cannot help EIL. There is no gainsaying the proposition, set out in the said para, that Section 230 does not allow an agent, who acts on behalf of a principal, to be made personally liable for the act of the principal, in the absence of any contract to the contrary. It is apparently for this purpose that Clause 66.0 of the SCC provides that, even though the arbitral award would be enforceable against EIL, any such enforcement has to be preceded by the receipt of the amount awarded from RCB. This covenant clearly resonates with Section 230 of the Contract Act.

**59.** In fact, the present case may, conceivably, fall within the third example, in Section 230, which refers to a situation in which, though the principal is known, he cannot be sued. The conjoint operation of

the definition of "parties" in the agreement dated 11th July, 2011, Clause 83.3 of the GCC, Clause 66.0 of the SCC and Section 11 of the 1996 Act, render the EIL as the only party who can legally be "sued" under Section 11(6). Even if it were to be assumed that EIL was the agent of RCB, therefore, RCB cannot be "sued" in these proceedings under Section 11(6).

**60.** The petitioner was a stranger to the contract dated 20th August, 2010, between the NII and EIL, and the only contract, in which the petitioner was a party is the contract dated 11th July, 2011, in which, as per definition, the other party was EIL and not RCB. The present proceedings, as initiated by the petitioner against EIL are, therefore, entirely competent. The objections of Mr. Navin Kumar, to the contrary, are, in my view, completely devoid of merit.

**61.** For the foregoing reasons, I find no substance in the objections raised by Mr. Navin Kumar, learned Counsel appearing for the respondent to be maintainable. Clearly, arbitral disputes have arisen between the parties. A legal notice for an amicable settlement and in the alternative for the appointment of an arbitrator was issued by the petitioner to the respondent as far back as on 3rd October, 2019. The respondent, *vide* its reply dated 1st November, 2019, did not suggest the name of any arbitrator, but contested the claim of the petitioner, as already noticed hereinabove.

**62.** The petitioner has suggested the name of Hon'ble Mr. Justice R.C. Chopra, a learned retired Judge of this Court, as the petitioner's arbitrator.

**63.** Mr. Navin Kumar, learned Counsel for the respondent has left the choice of the respondent's arbitrator to this Court, albeit without prejudice to the submissions that have been advanced by him and recorded hereinabove in this judgment.

**64.** Accordingly, this Court appoints Mr. R.V. Easwar, a learned retired Judge of this Court, as the respondent's arbitrator.

**65.** The two learned Arbitrators would proceed to appoint the presiding arbitrator in accordance with Clause 83.3.1 of the GCC.

**66.** The terms of the appointment of Hon'ble Mr. Justice R.V. Easwar (Retd.) would be the same as those which govern the appointment of Hon'ble Mr. Justice R.C. Chopra.

**67.** With the aforesaid observations, this petition is allowed and disposed of.

**68.** I.A.s 5884/2020, 5885/2020 & 5886/2020 also stand disposed of accordingly.

**C. HARI SHANKAR, J.**

**OCTOBER 01, 2020**/*kr/rb/dsn*