

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

%

Judgment delivered on: 12.07.2021

+ **ARB.P. 275/2021 & I.A. No. 2725/2021**

**M/S JYOTI SARUP MITTAL**

..... Petitioner

versus

**THE EXECUTIVE ENGINEER-XXIII, SOUTH  
DELHI MUNICIPAL CORPORATION**

..... Respondent

**Advocates who appeared in this case:**

For the Petitioner : Mr Aayushmaan Vatsyayana  
For the Respondent : Mr Sandeep Bajaj with Ms Aakanksha and  
Mr Asav Rajan, Advocates.

**CORAM**

**HON'BLE MR JUSTICE VIBHU BAKHRU**

**JUDGMENT**

**VIBHU BAKHRU, J**

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act'), *inter alia*, praying that an arbitrator be appointed to adjudicate the disputes that have arisen between the parties in connection with the agreement dated 21.11.2006 (hereinafter 'the Agreement') entered into by the petitioner with the respondent (hereinafter 'SDMC') for executing the works relating to "Improvement to Drainage System and Roads Ready Mix Concrete in Ward No. C-47 & 48 in the West Zone"

falling under the Executive Engineer-XXIII, MC Primary School, 10 Block, Subhash Nagar, New Delhi-110027.

2. In terms of the Agreement, SDMC awarded the contract for execution of the works in question to the petitioner at a contract price of ₹25,30,28,517/- In terms of the tender conditions, SDMC called upon the petitioner to deposit the performance security in the form of a Bank Guarantee for an amount of ₹1,02,00,000/-, which is equivalent to 5% of the contract price. The Agreement stipulated 06.12.2006 as the commencement date and 05.12.2008 as the date of completion of the works.

3. The petitioner completed the works on 31.05.2010, however, it claims that the execution of the improvement work was hampered due to various reasons attributable to the respondent including dismal condition of the approach roads; frequent shutdown of the RMC Plant; heavy rains; over hanging high tension line rendering it unsafe to deploy JCP Machine/RMC Batch Mix Truck; and daily intervention of rural village representatives. Notwithstanding the said hindrances, the petitioner completed the works on 31.05.2010 and SDMC issued the completion certificate on 27.01.2012.

4. The petitioner states that due to delay in the execution of works caused due to various hindrances, it was entitled to 1371 days of additional time for completion of the contract. The petitioner applied for an extension of time for completion of the contract to the concerned authority by an application dated 16.09.2010. However, the Executive

Engineer claims that the said application was submitted by the petitioner on 14.11.2011. However, it is not disputed that the said request remained pending.

5. On 16.08.2011, the petitioner submitted its 24<sup>th</sup> and Final Bill for verification and payment. However, despite several requests, the same was not processed till March, 2017.

6. The petitioner claims that despite repeated requests to the concerned Executive Engineer, SDMC for payment of dues, the same was not cleared. The petitioner claims that it sent a notice to the concerned Executive Engineer, SDMC pursuant to which, a hearing was conducted on 11.08.2016.

7. The petitioner has also placed a letter dated 11.08.2016 issued by the Executive Engineer, SDMC on record. The said letter indicates that a meeting was held on that date (11.08.2016) and the Representatives of the petitioner had been heard in response to “*the notice for litigation/arbitration*” issued by the petitioner. The Executive Engineer had raised queries regarding delay and finalization of the contract and the letter indicates that he had been informed by the staff of SDMC that the delay was on account of various formalities that were to be completed by the petitioner and misplacement of record due to long illness and demise of the concerned Joint Engineer. According to the SDMC, the payment was pending for various reasons including non-finalization of extra items and substitute items and non-finalization of the petitioner’s request for extension of time. The said letter indicates

that the petitioner was requested not to file any litigation/arbitration case and SDMC would finalize the contract within a period of three months.

8. The petitioner's Final Bill was cleared on 01.03.2017, pursuant to which, ₹1,50,16,762/- was paid by SDMC to the petitioner.

9. The petitioner claims that the Final Bill as cleared did not include several items and had also not considered the petitioner's claim for extension of time. And, he continued to pursue with the Executive Engineer, SDMC for finalization of the pending issues. The petitioner claims that he was informed that the Executive Engineer had sent the extension of time case with recommendation from the competent authority to extend the time without levy of compensation to the Standing Committee of the Executive Engineers, where the matter was pending for a long time. The petitioner also sent a letter dated 15.02.2018 informing the Executive Engineer that the case for extension of time had been considered favorably and accordingly, claimed that a balance payment of ₹2,58,32,744/- was also due and payable by SDMC. It also provided the details thereof. The petitioner claims that his efforts for release of the balance payment was in vain.

10. Finally, the petitioner issued a notice dated 12.05.2020 invoking the Disputes Resolution Clause and requested the Executive Engineer, SDMC to settle its claims. But it did not receive any response to the said notice dated 12.05.2020. Thereafter, it sent a notice dated 13.07.2020

to the Chief Engineer, SDMC but the said notice also failed to illicit any response. The petitioner escalated the matter to the Engineer-in-Chief, SDMC by his letter dated 18.08.2020, however, the disputes remained unresolved. The petitioner in its notice dated 18.08.2020 requested the Engineer-in-Chief, SDMC to appoint an arbitrator to adjudicate its claims. However, the petitioner did not receive any response to the said notice as well.

11. Thereafter, by a letter dated 23.09.2020 the petitioner requested the Commissioner, SDMC to appoint a Sole Arbitrator to adjudicate its claims but received no response to the said notice as well.

12. Consequently, by a letter dated 23.09.2020, the petitioner requested the Commissioner, SDMC, New Delhi to appoint a Sole Arbitrator and proposed the names of five arbitrators from the list of the empaneled arbitrators approved by CPWD, MOUD. However, it did not receive a response to its letter dated 23.09.2020.

13. The following claims were raised in the aforementioned notices served by the petitioner to the Executive Engineer, SDMC:

S.No.	Description	Notice dated 12.05.2020 to Executive Engineer	Notice dated 13.07.2020 to Chief Engineer	Notice dated 18.08.2020 to Engineer in Chief	Notice dated 23.09.2020 to the Commissioner	Present Petition dated 21.11.2020
1.	Amount of part rates kept in 24 <sup>th</sup> RA Bill	7,03,521/-	7,03,521/-	7,03,521/-	7,03,521/-	7,03,521/-
2.	Escalation	2,10,10,389/-	2,10,10,389/-	2,10,10,389/-	2,10,10,389/-	2,10,10,389/-

3.	Amount withheld in the 24 <sup>th</sup> RA Bill	1,50,000/-	1,50,000/-	1,50,000/-	1,50,000/-	1,50,000/-
4.	Damages and losses due to prolongation	34,37,906/-	34,37,906/-	34,37,906/-	34,37,906/-	34,37,906/-
5.	Security Deposit	10,54,957/-	10,54,957/-	10,54,957/-	10,54,957/-	10,54,957/-
6.	Loss of profit, losses and damages due to prolongation of contract	-	1,03,13,718/-	1,03,13,718/-	1,03,13,718/-	1,03,13,718/-
7.	Land rent for RMC Plant on rented land and shifting at other location during currency of contract	-	40,00,000/-	30,00,000/-	30,00,000/-	30,00,000/-
8.	Interest at 12% per annum up to actual date of realization	Claimed from 01.12.2010 To be calculated	Claimed from 01.03.2010 To be calculated	Claimed from 01.03.2010 To be calculated	Claimed from 01.03.2010 To be calculated	Claimed from 01.03.2010 To be calculated
9.	Interest on delayed payment of INR 1,50,16,762/- from 01.03.2017 till 01.12.2020	1,12,41,589/-	-	-	-	-
Total		3,74,48,362/-	4,06,21,029/-	5,13,49,018/-	5,13,49,018/-	4,01,21,029/-

14. Since, the arbitrator was not appointed, the petitioner has filed the present petition.

### ***Submissions***

15. Mr. Sandeep Bajaj, learned Standing Counsel for SDMC, submitted that the petition should be dismissed on, essentially, four grounds. First, he submitted that an agreement to refer the disputes to arbitration does not exist between SDMC and the petitioner, as the parties have not signed the General Conditions of the Contract (GCC), which contains the Arbitration Clause.

16. Second, he contended that Clause 25 of the Agreement provides for a dispute resolution process, where recourse to arbitration is contingent on the Commissioner, SDMC appointing an arbitrator. In this regard, he relied on the decision of the Supreme Court in ***Oriental Insurance Company Ltd v. Narbheram Power and Steel Pvt Ltd.:*** (2018) 6 SCC 534.

17. Third, he contended that the invocation of arbitration by the petitioner was barred by limitation. He submitted that the work was completed on 31.05.2010. The petitioner had submitted an application dated 16.09.2010 for extension of time. And, the Completion Certificate was issued on 27.01.2012. The petitioner had submitted the Final Bill on 16.08.2011. The same was passed on 01.03.2017 and a sum of ₹1,50,16,762/- was paid to the petitioner. Clause 9 of the Tender Conditions requires the concerned Executive Engineer (EE) to finalise

the bill and clear its dues within a period of six months, which expired on 30.11.2010. Mr Bajaj contended that in the given facts, the petitioner's claim is, *ex facie*, time barred in the absence of any averment as to any acknowledgement, which could have extended the period of limitation. Though certain letters were issued by the petitioner, they present a half-hearted attempt but do not amount to revival of a time barred debt. He submitted that since the petitioner's claim is a money claim, it is barred by limitation as it has been raised after a decade. Since the claim was first raised either on 16.08.2011 or 27.01.2012, the period of limitation expired in the year 2014. In this regard, he relied upon the decision of the Supreme Court in ***Bharat Sanchar Nigam Limited & Anr. v. Nortel Networks India Pvt Ltd.***: ***C.A. No. 843-844 of 2021 decided on 10.03.2021.***

18. Fourth, he contended that the petitioner had not complied with the pre-arbitration procedures as set out in the agreement between the parties. He stated that recourse to arbitration can be taken after the aggrieved party has exhausted its remedy of approaching the Superintending Engineer and subsequently, the Chief Engineer. In this regard, he relied upon the decision of the Supreme Court in ***United India Insurance Co Ltd & Anr. v. Hyundai Engineering and Construction Co Ltd & Ors.***: (2018) 17 SCC 607, and stated that arbitration clauses must be construed strictly and therefore, require completion of pre-arbitration procedures. He submitted that the letters dated 12.05.2020, 13.07.2020, 18.08.2020 and 23.09.2020 cannot be



construed as discharge of the procedure prescribed under the arbitration agreement between the parties.

### ***Reasons and Conclusion***

19. At the outset, it would be relevant to refer to Clause 25 of the GCC. The said Clause is set out below:

#### **“Settlement of Dispute & Arbitration**

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 as 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:

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 of 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 contractors appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Commissioner MCD for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

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 a sole arbitrator appointed by the Commissioner MCD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a terms 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 Commissioner MCD 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 MCD 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 thereunder 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 exceed 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 direction. The fees, if any, of the arbitration 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.”

20. Although it was feebly argued that there is no agreement to refer the disputes to arbitration since the GCC has not been signed by the parties and a signed copy of the GCC or the agreement has not been produced, however, it is not in dispute that the GCC includes Clause 25 as set out above and the GCC forms an integral part of the agreement between the parties. Thus, the contention that there is no agreement between the parties to refer the disputes to arbitration is not merited.

21. The principal controversy involved in the present petition, essentially, revolves around the import of the provision that the Sole Arbitrator would be appointed by “*The Commissioner, MCD*” and “*no person other than a person appointed by such Commissioner, MCD as aforesaid should act as arbitrator and if for any reason that is not possible, the matter should not be referred to arbitration at all.*”

22. Concededly, in view of the decisions delivered by the Supreme Court in ***TRF Ltd. v. Energo Engineering Projects Ltd.: (2017) 8 SCC 377*** and ***Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.: Arbitration Application No. 32/2019, decided on 26.11.2019***, it is no longer permissible for the Commissioner, MCD (Commissioner SDMC) to appoint an arbitrator unless the petitioner agrees for such appointment in writing after the disputes have arisen.

23. It is important to note that the said decisions were rendered in the context of Sub-section (5) of Section 12 of the A&C Act, which was introduced by virtue of the Arbitration and Conciliation (Amendment) Act, 2015. The said Act was enacted pursuant to the recommendations made by the Law Commission of India in its Report No. 246. The Law Commission of India had, *inter alia*, highlighted the necessity to introduce provisions for ensuring neutrality and independence of arbitrators. The Commission had drawn heavily from the “IBA Guidelines on Conflicts of Interest in International Arbitration” and had indicated the circumstances which would give rise to justifiable doubts as to independence and impartiality of arbitrators. The Fifth and the Seventh Schedule, which were introduced in the A&C Act, were in turn based on the Orange and the Red Lists under the aforementioned IBA Guidelines. Independence and impartiality of an arbitral tribunal is the foundation on which the efficacy of the arbitration as an alternate dispute resolution mechanism rest. The importance of independence and impartiality of arbitrators cannot be overstated. Considering that the legislative amendments under Section 12(5) of the A&C Act were introduced to strengthen arbitration as a dispute resolution mechanism and the expansive interpretation of the said provision by the Supreme Court in the cases of ***TRF Ltd. v. Energo Engineering Projects Ltd*** (*supra*) and ***Perkins Eastman Architects DPC and Anr.*** (*supra*); the SDMC’s contention that the arbitrator be appointed by the Commissioner, MCD or not at all, cannot be accepted. The import of the said contention is that either the arbitral proceedings be conducted in a manner which can no longer be considered as impartial or free from

likelihood of bias, or not be conducted at all. This Court is unable to accept the same.

24. As noted above, in view of Sub-section (5) of Section 12 as introduced in the A&C Act and the decisions of the Supreme Court in ***TRF Ltd. v. Energo Engineering Projects Ltd*** (*supra*) and ***Perkins Eastman Architects DPC and Anr.*** (*supra*), it is no longer permissible for the Officer of SDMC to appoint an arbitrator if the other party does not expressly consent to the same in writing, after the disputes have arisen. However, the key question to be addressed is whether in such circumstances, the entire agreement between the parties to refer the disputes to arbitration is rendered void or non-existent.

25. The Sub-clause that no person other than the person appointed by the Commissioner, MCD should act as an arbitrator and if that is not possible, the matter should not be referred to arbitration, must be read as an integral part of the scheme which entitled the Commissioner, MCD to appoint an arbitrator. It emphasized that no person other than the one appointed by Commissioner, MCD *should* act as an arbitrator. The latter part of the Clause which provides that in case it was not possible for the person to act as an arbitrator, the matter should not be referred to arbitration, is for the sole purpose of emphasizing that only the person appointed by the Commissioner, MCD should act as an arbitrator. However, in view of the expansive reading of Section 12(5) of the A&C Act by the Supreme Court in ***TRF Ltd. v. Energo Engineering Projects Ltd*** (*supra*) and ***Perkins Eastman Architects DPC and Anr.*** (*supra*), it is no longer permissible that only the

Commissioner, MCD can appoint an arbitrator to adjudicate the disputes between the parties. In view of the said decisions, the entire scheme, which is premised on the Commissioner, MCD appointing an arbitrator, must perish. The provision that the matter should not be referred to arbitration at all in case it is not possible for the person appointed by Commissioner, MCD to act as an arbitrator, is premised on the basis that the Commissioner, MCD is empowered to appoint such an arbitrator. In such cases where it is not possible for a person appointed by him to act as an arbitrator, the latter part of the Clause that emphasizes that the matter would not be referred to arbitration – which as stated earlier, is only for the purposes of emphasizing that the person appointed by the appointing authority should act as an arbitrator – may have some applicability. However, the said limb of Clause 25 of the GCC must be read in a very restrictive manner and cannot be read to mean that by virtue of the legislative amendments that require the disputes to be referred to an independent and impartial arbitrator, the agreement to refer the disputes to arbitration is rendered ineffective. In view of the legislative amendment introduced by the Arbitration and Conciliation (Amendment) Act, 2015, the scheme which empowered the Commissioner, MCD to unilaterally appoint an arbitrator perishes and with it, the attendant clause that no other person other than the one appointed by the Commissioner, MCD should act as an arbitrator is ineffective.

26. The key question to be addressed is whether the entire Arbitration Clause must fail, if the mechanism for appointment of an arbitrator by

the Commissioner, MCD is no longer permissible. This Court is of the view that the said question must be answered in the negative. Clause 25 of the GCC embodies an agreement between the parties to refer the disputes to arbitration. It is implicit in the said agreement that the arbitration must be conducted in a fair and objective manner, by an impartial and independent arbitrator. And, this forms an essence of the agreement between the parties; that is, to resolve the disputes by referring the same to an independent and impartial arbitrator and to accept his decision as final and binding. This Court is of the view that this fundamental agreement between the parties would not perish even if it is no longer permissible to follow the mechanism of appointment of an arbitrator. Considered in the context of the agreement to refer the disputes to arbitration, the said Clause can, at best, be said to be ancillary to the agreement to refer the disputes to arbitration and the same may be considered severable. Thus, even though the mechanism for appointment of the arbitrator can no longer be followed, the agreement between the parties to refer the disputes to arbitration would still survive.

27. In ***Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc. & Ors.*** (2013) 1 SCC 641, the Supreme Court had emphasized that it is the legislative object and the intent of the framers of the statute to encourage arbitration. The Court had further observed that it is “*required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration ....*” Thus, so far as possible, the courts must



endeavour to ensure that the agreement between the parties to refer the disputes to arbitration is sustained.

28. This Court had also considered the aforesaid issue in a recent decision in ***T.K. Engineering Consortium Pvt. Ltd. v. The Director (Projects) Rites and Ors.: Arb. P. 553/2020, decided on 08.03.2021.*** The said decision covers the question raised in the present petition as well.

29. It is also relevant to note that the respondent had not taken any steps for appointment of an arbitrator, despite the petitioner requesting it to do so.

30. The Supreme Court in ***Indian Oil Corporation Ltd. and Ors. v. M/s. Raja Transport (P) Ltd.: (2009) 8 SCC 520*** had held that the condition that required only the designated authority to nominate the arbitrator would interfere with the power of the Chief Justice under Section 11(8) of the A&C Act and, therefore, the said portion of the arbitration clause was required to be ignored. Thus, in any view of the matter, since the concerned authority has failed to act on the request of the petitioner, it would be necessary for this Court to appoint an arbitrator and the Clause that no person other than the one appointed by the Commissioner, MCD should act as an arbitrator, cannot be read to interfere with the power concerning the jurisdiction of this Court to appoint an arbitrator.

31. The reliance placed by the petitioner on the decision of the Supreme Court in ***Oriental Insurance Company Limited v. Narbheram***

***Power and Steel Pvt. Ltd.*** (*supra*), is misplaced. In the said case, the Supreme Court had considered the question of reference of disputes to arbitration where it was plainly evident that the disputes were outside the scope of the Arbitration Clause. The Court had found that in cases where the appellant Insurance Company had disputed its liability under a policy, the dispute was outside the scope of the arbitration clause. The Court found that the parties had clearly agreed and understood that if the Insurance Company disputed or had not accepted the liability, the dispute was not arbitrable. In facts of that case, it was evident that the appellant Insurance Company had disputed its liability under the policy. The disputes were not related to the quantum of the claim payable but occasioned by a complete denial of any liability under the policy. The said disputes were outside the scope of the arbitration clause. In the present case, it is not SDMC's contention that the disputes raised are not arbitrable.

32. The next issue raised by SDMC is that the claims raised by the petitioner are barred by limitation. The petitioner disputes the same. It is the petitioner's case that he had issued a notice to refer the disputes to arbitration and on receipt of the said notice, the Executive Engineer, SDMC had convened a meeting. The Executive Engineer had examined the reasons for delay in finalization of the bill submitted by the petitioner. He had, *inter alia*, noted that the finalization had been delayed for various reasons including that the extra items and substitute items had not been finalized. Further, the case for extension of time had not been finalized. After noting the various reasons, the Executive

Engineer, SDMC had directed other officers to take all necessary action to finalize the bill for the aforesaid work.

33. It is important to note that the petitioner was requested not to file any litigation/arbitration case as the Department would finalize the contract within a period of three months. The Department had determined that a sum of ₹1.55 crores was payable and had also cleared the said bill in March 2017. It is, however, the petitioner's case that the extension of time was not considered. The petitioner claims that the concerned officials had recommended its case for extension of time, but the same had not been considered. It had, accordingly, sent a letter dated 15.02.2018 claiming that an amount of ₹2,58,32,744/- was due and payable as the extension of time for completion of the contract had been recommended and, according to the petitioner, he was entitled to such extension. The petitioner claims that it had pursued SDMC for clearing the amounts as due to it. It was contended on behalf of the petitioner that having requested the petitioner to not initiate any action and assuring the petitioner that the entire matter would be finalized, it is not open for the SDMC to now state that the petitioner's claims are barred by limitation.

34. It is well settled that this Court is not required to examine any other contentious issues regarding the disputes between the parties at the stage of referring the parties to arbitration. The examination under Section 11 of the A&C Act is confined to examining the existence of an arbitration agreement between the parties.

35. The Supreme Court has held that where it is *ex facie* apparent that the claims raised are beyond limitation, the party's application under Section 11 of the A&C Act may be rejected (See: ***Vidya Drolia v. Durga Trading Corporation: (2021) 2 SCC 1***). But in cases where it is a contentious issue, the same would be beyond the scope of examination under Section 11 of the A&C Act. Plainly, in this case, the question of limitation is a contentious one and beyond the standards of examination under Section 11 of the A&C Act.

36. The contention that the petitioner has not followed the pre-reference procedure is also erroneous. It is apparent from the record that the petitioner had sought resolution of its claims before the Executive Engineer, SDMC. Since the same were not resolved, the petitioner had also sent a letter to the Superintendent Engineer and thereafter, escalated it to the Chief Engineer. Thus, the petitioner had exhausted all avenues for resolution of the disputes before seeking a reference of the disputes to arbitration.

37. In view of the above, this Court considers it apposite to allow the present petition. The pending application is disposed of.

38. SDMC had suggested names of two former Chief Justices of the J&K High Court "for being appointed as an arbitrator". In view of the above, this Court proposes to appoint Justice Gita Mittal, former Chief Justice of the J&K High Court (one of the names as suggested by SDMC) to be appointed as a Sole Arbitrator to adjudicate the disputes between the parties.

39. The parties are at liberty to approach the learned Sole Arbitrator for eliciting her consent and the disclosure as required under Section 12(1) of the A&C Act. Let the same be furnished before the next date of hearing.

40. List on 22.07.2021.

**JULY 12, 2021**  
**RK**

**VIBHU BAKHRU, J**