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

% ***Reserved on: 22nd September, 2022***
Pronounced on:15th December, 2022

\+ **ARB.P. 790/2020, IA 12493/2020, IA 3888/2021**

BRILLTECH ENGINEERS PRIVATE LIMITED
R/o A-94, Lohia Nagar,
Ghaziabad-201001 ....Petitioner

Through: Mr. Ankur Singhal, Advocate

versus

SHAPOORJI PALLONJI AND COMPANY PRIVATE LIMITED

R/o 70, Nagindas Master Road,
Fort, Mumbai-400032 ..... Respondent

Through: Mr. Manik Dogra, Mr. Haiyesh Bakshshi, Mr. Ravi Tyagi, Mr. Gaurav Mishra, Ms. Mayuri Shukla, Mr. Daman Popli and Ms. Neetu Devrani, Advocates.

\+ **O.M.P. (I) (COMM) NO. 324/2020**

BRILLTECH ENGINEERS PRIVATE LIMITED
R/o A-94, Lohia Nagar,
Ghaziabad-201001 ..... Petitioner

Through: Mr. Ankur Singhal, Advocate

versus

1. SHAPOORJI PALLONJI AND COMPANY PRIVATE LIMITED& ANOTHER

R/o 70, Nagindas Master Road,
Fort, Mumbai-400032

2. **ARMY WELFARE HOUSING ORGANISATION**
South Hutments, Kashmir House,
Rajaji Marg, New Delhi-110011 ..... Respondents
Through: Mr. Manik Dogra, Mr. Haiyesh Bakshshi, Mr. Ravi Tyagi, Mr. Gaurav Mishra, Ms. Mayuri Shukla, Mr. Daman Popli and Ms. Neetu Devrani, Advocates.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G E M E N T

NEENA BANSAL KRISHNA, J

1. A Petition Arb. P. NO. 790/2020 under Section 11(6) of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as the Act)* has been filed for appointment of a sole Arbitrator. A separate petition No.OMP(I)(Comm) 324/2020 under Section 9 of the Act has been filed against the respondent as well as against Army Welfare Housing Organization (*hereinafter referred to as AWHO)* for attachment of amount of Rs. 2,58,03,143/- lying in the hands of AWHO who is indebted to pay the amount in order to enable the respondent to release the amount in favour of the petitioner.

2. The facts in brief, are that AWHO had awarded the work of construction of Twin Tower residential accommodation at Greater Noida, to the respondent vide CA No. AWHO/G.Noida/16/2010 dated 11.03.2011(*hereinafter referred to as Project)*. AWHO vide its Letter no. E/03002/CA16-2010/GND-PH-IV/597/AWHO dated 16.11.2011 approved

the petitioner as "Specialist Firm" for carrying out electrification works in the said Project.

3. The respondent had awarded the Work Order for electrical works in the said Project exclusively to the petitioner vide Letter No. SPCL/AWHO/WO_ELE/08 dated 19.12.2011. The entire electrical work was solely executed by the Petitioner. The mechanism for executing the Work Order agreed between the parties was that the petitioner shall issue the running account bills (RA Bills) in respect of the work done which would be approved and confirmed by the respondent on the basis of joint inspection conducted by the AWHO and the Architect. Thereafter, the petitioner shall generate the Tax invoices after accepting the verification and certification, which the respondent shall receive and accept by making an endorsement and would make the payment on back-to-back basis.

4. The petitioner submitted the running account bill no. 40 dated 29.10.2018 for the sum of Rs. 37,34,229/- in respect of the work done which was duly approved and confirmed by the respondent. The respondent made certain deductions on account of which Rs. 20,87,437/- are still due and payable against Bill no. 40. Thereafter, the petitioner raised another running account bill no. 41 dated 01.03.2019 for the sum of Rs. 41,44,500/- which was duly approved and confirmed by the respondent.

5. It is further asserted that a security @ 5% i.e., Rs. 30,15,468/- was to be paid after the virtual completion of the Project in the month of May, 2018 as the AWHO had started handing over/allotting the flats in the month of May, 2018. The respondent is liable to pay the security amount along with interest @ 24% per annum on the said security amount w.e.f. 01.06.2018.

6. It is submitted that the Project was successfully completed vide Completion Certificate dated 25.03.2019 and a Letter of Appreciation dated 12.03.2019 was issued by AWHO in favour of the petitioner. It is asserted that as per the Ledger Account, an outstanding amount of Rs. 59,76,574/- on which interest @ 24% per annum was payable.

7. A Demand Notice dated 19.04.2019 was served upon the respondent but they concocted a false and frivolous story vide its reply dated 08.05.2019 wherein it was claimed that the respondent was obligated to pay to the petitioner for the work done only upon the receipt of corresponding amount from AWHO. It is claimed that the respondent had been receiving the corresponding payment from the AWHO but it failed to make payments on back-to-back basis to the petitioner; rather the payments were made after the period of 6-8months. The disputes have thus, arisen between the parties.

8. The petitioner also submitted an application with MSME SAMADHAAN but no steps were initiated by the latter and the proceedings became *void ab initio* because of the statutory limit prescribed thereunder.

9. Consequently, C.P.(IB) No. 2734/2019 under Section 9 of the Insolvency and Bankruptcy Code (IBC) was filed by the petitioner against the respondent in NCLT, Mumbai for initiating corporate insolvency resolution process. The NCLT, Mumbai opined that the claim of the petitioner is valid and genuine and the respondent was asked to settle the matter. However, officials of the respondent were not willing to settle the matter and have been making fictitious and self-contradictory statements.

10. The petitioner filed the petition under Section 9 of the Act on 05.10.2020 wherein again the respondent had asserted that they are desirous

of amicable resolution of disputes but again adopted an adamant and illogical approach and all the efforts to amicable settlement failed.

11. The petitioner has asserted that a sum of Rs. 2,58,03,143/- is to be recovered from the respondent. In terms of Clause 13 of the Work Order dated 19.12.2011, the resolution of disputes is through arbitration. Hence, the present petition has been filed under Section 11 of the Act for appointment of the Arbitrator. A petition under Section 9 of the Act has also been filed for attachment of amount of Rs. 2,58,03,143/- lying in the hands of AWHO who is indebted to pay the amount in order to enable the respondent to release the amount in favour of the petitioner.

12. The **respondent in its Reply** has taken preliminary objection that the matter has already been submitted before the NCLT, Mumbai under Section 9 of the Insolvency and Bankruptcy Code, 2016(*hereinafter referred to as Code)* as an Operational Creditor. It is a trite law that proceedings under Section 9 of the Code can be initiated only when the disputes between the parties are non-arbitrable. Hence, the petitioner has expressly rejected any remedy available under the Arbitration Agreement.

13. Further, the petitioner in its rejoinder had specifically stated that there are absolutely no disputes between the parties but the respondent (Corporate Debtor) has delayed the release of payments to the petitioner. There is a clear admission on behalf of the petitioner that that there are no disputes between the parties for arbitration and therefore, the present petition is not maintainable.

14. It is further asserted that according to Clause 13 of the Work Order which contains the mechanism for dispute resolution, the first step was mutual discussion and thereafter the matter was to be referred to the

Regional Head and incase the disputes were still not resolved, the matter could be referred to the arbitration. The petitioner had failed to follow the pre-conditions for referral of disputes to the Arbitration and therefore, the petition is not maintainable.

15. The respondent has further asserted that the mandatory Notice under Section 21 of the Act invoking the arbitration has not been served upon the respondent till date. Only a Demand Notice dated 19.04.2019 under Rule 5 of the Code, 2016 had been served upon the respondents expressing its intent for initiating corporate insolvency resolution process. It has chosen to approach the NCLT. The petitioner has not specified the date on which arbitration was invoked as per the provisions of the Act which is in contravention of the law as laid down by the Courts. In the absence of the Notice of Invocation of Arbitration, the present petition is liable to be dismissed.

16. The respondent has further asserted that incorrect statements have been made by the petitioner in this petition.

17. **On merits**, it is admitted that respondent had entered into a Contract of Construction of Twin Tower residential accommodation at Greater Noida which for the convenience has been named as the main Contract. It is again not disputed that the electrical work was awarded to the petitioner vide Work Order dated 19.12.2011. It is submitted that several running bills had been raised by the petitioner for a period of 7 years and RA Bills No. 1 to 39 had been duly paid by the respondent on back-to-back basis.

18. It is explained that Work Order dated 19.12.2011 was amended by the respondent on 16.10.2017 due to introduction of GST and due to change in tax regime in 2017, which was accepted by the petitioner but all other terms

and conditions as stated in the Work Order dated 19.12.2011 remained the same. The respondent had made payments from time to time aggregating to Rs.5,12,02,735/- towards the bills raised under the amended Work Order in respect of RA Bill No. 40 dated 29.10.2018 and the corresponding Tax invoices dated 30.10.2018 for a sum of Rs. 37,44,229/-The BOQ along with the amended Work Order clearly mentioned that up to June, 2017, an amount of Rs. 5,21,13,743/- had been paid. It is claimed that after making all the adjustments of deductions and recovery, balance payment of Rs. 2.50 lakhs was made to the petitioner. Thereafter, no further payment remains to be paid to the petitioner.

19. The petitioner was required to approach the respondent for re-conciliation of accounts but the petitioner till date has not submitted the Final Bill and any reference to it in the present petition, is denied.

20. It is further asserted that the petitioner has been continuously resorting to various Demand Notices to respondent and Letters to AWHO before various Courts and has been filing petitions before various forums of law submitting the claims indifferent amount. It is a clear indication that the petitioner is resorting to forum shopping and his acts are mala fide.

21. It is re-asserted that there is no arbitrable dispute and the present petition is liable to be dismissed.

22. **Submissions heard.**

23. It is an admitted case that AWHO had awarded a Contract dated 11.03.2011 for construction of Twin Tower residential accommodation at Greater Noida**.** It is also not in dispute that the respondent vide Work Order dated 19.12.2011 awarded the electrical work to the petitioner. The petitioner has asserted that as per its Ledger Account, a sum of Rs.

59,76,574/- along with interest @ 24% is liable to be paid by the respondent and in terms of the Clause 13 of the Work Order dated 19.12.2011, the matter be referred to the arbitration**.**

A. Existence of Arbitrable Disputes:

24. The first objection taken on behalf of the respondent is that there are no arbitrable disputes between the parties. A reference has been made to the rejoinder filed by the petitioner in its petition before the NCLT wherein it was asserted that there are no arbitrable disputes and had claimed that the debt amount was liable to be paid by the respondent.

25. Learned counsel on behalf of the respondent has argued that a petition before the NCLT is maintainable only in cases of disputes in respect of determined undisputed amounts as debts. Since, the petitioner itself has chosen to invoke the jurisdiction of NCLT, it is quite evident that there are no arbitrable disputes and the present petition is not maintainable.

26. It is a settled proposition of law that jurisdiction of NCLT can be invoked only in respect of determined debts. However, merely because a petition has been filed by the petitioner asserting that a definite amount is payable by the respondent, would not imply that the claimed amount has been admitted by the respondent but is only expressing its inability to be able to pay the claimed amount. The Respondent has consistently taken a stand in its Reply dated 08.05.2019 to the Demand Notice and in the other proceedings including Section 9 petition as well as in the reply to the present petition that the amounts have been claimed by the petitioner wrongly and the same are not due and payable by the respondent.

27. In *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited* (2018) 1 Supreme Court Cases 353,it was explained that under

Section 9 (5) (ii) (d) of Insolvency and Bankruptcy Code (IBC), the adjudicating authority must reject an application if a notice of dispute is received by the Operational Creditor or there is record of the dispute in the information utility as state under Section 9 (5) (ii) (d). If it is brought to the notice of the adjudicator that there is existence of a dispute or that a suit or arbitration proceedings relating to the dispute is pending, the application has to be rejected. It has categorically been laid down that IBC is not intended to be a substitute to recovery forum and whenever there is an existence of real disputes, IBC provisions cannot be invoked.

28. In the present case, though a proceeding may have been initiated by the petitioner before the NCLT asserting that there is an admitted debt as has been pointed out by the respondent, but a mere assertion would not make it into an admitted liability especially when the respondent has been refuting it at every forum and in every proceeding.

29. It is quite evident that there is consistent stand of the respondent challenging the amounts claimed by the petitioner. Clearly, there are arbitrable disputes in regard to the claimed amounts and the objection taken by the respondent in regard to non-existence of arbitrable disputes, is not tenable.

B. Forum Shopping:

30. The respondent has further claimed that different amounts have been claimed by the petitioner in different proceedings. The claim before the MSME forum was of Rs.20.87 lakhs while under Section 8 of IBC it was Rs. 99 lakhs. In the present case, the claim has been made for Rs. 2.50 crores. It is quite evident from the fluctuating amounts that nothing is due and it is only forum shopping which is being indulged into by the petitioner.

31. It can be seen from the various proceedings which have been initiated by the petitioner that different amounts had become due and payable at different times and also interest component which was being claimed, was a variable. The petitioner has given explanation for claiming the amounts before various forums depending upon when it had approached that particular forum. Merely because the petitioner has approached different forums for redressal of its claims, cannot be said to be a ground to hold that this is a case of forum shopping.Each of the provision invoked by the petitioner has its own individual scope and it cannot be said that resort to one has the effect of ousting the other forums or that it is a case of forum shopping.

32. The doctrine of election was discussed in *A. P. State Financial Corporation Vs. Gar Re-Rolling Mills* (1994) 2 SCC 647wherein it was explained that when two remedies are available for the same relief, the party has an option to elect either of them but that doctrine would not apply where the ambit and scope of the two remedies is essentially different. In *National Insurance Company Ltd. Vs. Mastan* (2006) 2 SCC 641**,** the Apex Court explained that the doctrine of election is a branch of rule of estoppel in as much as a person may be precluded by his actions or conduct or silence when it has duty to speak, from asserting a right which he otherwise would have had. This test was endorsed by the Hon'ble Supreme Court in the case of *Ireo Grace Realtech Private Limited Vs. Abhishek Khanna and Others (2021)* 3 Supreme Court Cases 241.

33. In *Union of India and Others Vs. Cipla Limited and Another* (2017) 5SCC 262, the Supreme Court explained that a classic example of Forum Shopping is when a litigant approaches one Court for relief but does not get

the desired relief and then approaches another Court for the same relief. Examples were given of cases pertaining to child custody, successive bail applications and of filing repeat applications with a slight change in the prayer clause of the petition. The functional test to determine Forum Shopping was explained as *whether there is any functional similarity in the proceedings between one Court and another or whether there is some sort of subterfuge on the part of a litigant.*

34. In the present case, the scope of enquiry in the proceedings before the NCLT and before the Arbitrator is absolutely distinct. Merely because the petitioner approached NCLT before seeking appointment of Arbitration, it cannot be said that he was indulging in Forum Shopping.

C. Notice of Invocation under Section 21 of the Act:

35. The next objection taken on behalf of the respondent is that there is no valid Notice of Invocation under Section 21 of the Act. Learned counsel for the respondent has placed reliance on *Bharat Sanchar Nigam Limited & Anr Vs. Nortel Networks India Private Limited* (2021) 5 SCC 738wherein the significance of Notice under Section 21 before in filing a petition under Section 11 was considered in the context of limitation.

36. Learned counsel for the respondent has also placed on reliance upon *Concept Infracon Pvt. Ltd. Vs. Himalaya Press Power Ltd.,* ARB.P 373/2016SCC OnLine 518to argue that the parties must strictly observe the procedure for invoking the arbitration as provided in the Agreement. In the said Judgment, a reference was made to *Municipal Corporation Jabalpur Vs. Rajesh Construction, 2007 (2) Arb. LR 65 (SC)*and it was observed that any function entrusted to a person/institution, party to the Agreement must

follow the procedure of appointment as may be contained in the Agreement. It was observed that from the legislative scheme of Section 11, it was clear that if the parties have agreed for appointing arbitrator or arbitrators as contemplated by Sub Section (2), then the disputes between the parties have to be decided in accordance with the procedure and the recourse to the Chief Justice or his designate cannot be taken straightaway.

37. In the present case, Clause 13 of the Arbitration Agreement reads as under:

> *"13.* ***Resolution of Disputes****: All disputes or differences of opinions, on account of interpretation of clauses, technical specifications etc. shall be resolved through direct and mutual discussions at site level. In case difference of opinion still persisting, then the matter shall be referred to Regional Head, at respective region. However, in case parties fail to reach amicable settlement, the matter shall be referred to arbitration. The arbitration shall be governed as per Indian Arbitration and Conciliation Act 1996 and shall be held in New Delhi"*

38. According to this Clause all disputes or difference of opinion on account of interpretation of clauses, technical specifications, etc. were to be first resolved through direct and mutual discussions at site level. In case difference of opinion still persisted, the matter was to be referred to Regional Head and even if thereafter the parties failed to reach the amicable settlement, the matter was to be referred to Arbitration. It may be observed that the mutual discussions and referral to Regional Head essentially pertained to difference/dispute in regard to interpretation of clauses, technical specifications, etc. The dispute between the parties arose in regard to the payments and not in respect of any technical specifications. Moreover, petitioner had also approached MSME Samadhan for resolution of disputes.

Therefore, it cannot be said that the procedure as prescribed under Clause 13 of terms of Contract was not followed by the petitioner.

39. In *Nirman Sindia Vs. Indal Electromelts Ltd., Coimbatore and others AIR 1999 Ker 440*, a detailed procedure for resolution of disputes in regard to payments was envisaged whereby the disputes were first required to be settled through Superintendent Engineer and if not satisfied with the decision of the Engineer, it was required to be referred to the adjudicator. Non-referral of disputes in regard to the disputes pertaining to payment, execution, work, etc. where it could have been settled without having the need to go to arbitration, was considered as an obstruction by the petitioner in not following the procedure as envisaged in the Contract and the request for arbitration was held to be premature. The facts involved in the present case are clearly distinguishable.

40. The petitioner had served a Notice of Demand dated 19.04.2019 wherein after giving the entire background of the disputes, it was asserted that Rs. 99,87,763/- was due.

> ***The relevant Clauses of the Demand Notice*** read as under:
>
> 3. *If you dispute the existence or amount of unpaid operational debt (in default) please provide the undersigned, within ten days of the receipt of this letter, of the pendency of the suit or arbitration proceedings in relation to such dispute filed before the receipt of this letter/notice.*
>
> *4. If you believe that the debt has been repaid before the receipt of this letter, please demonstrate such repayment*

by sending to us, within ten days of receipt of this letter, the following:

(a) An attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(b) an attested copy of any record that operational creditor has received the payment.

5. The undersigned, hereby, attaches a certificate from an information utility confirming that no record of a dispute raised in relation to the relevant operational debt has been filed by any person at any information utility. (If applicable)

Not Applicable

6. The undersigned request you to unconditionally repay the unpaid operational debt (in default) in full within ten days from the receipt of this letter failing which we Shall initiate a corporate insolvency resolution process in respect of Shapoorji Pallonji & Company Private Limited.

41. The respondent vide its reply dated 08.05.2019 disputed the claim of the petitioner and asserted that there were pre-existing disputes and differences between the respondent and the petitioner with respect to the work and the quality of work as well as non-performance by the petitioner and in respect of several deductions and debits to be made from the bills of the petitioner. It was also claimed that respondent had caused severe losses and damages which have already been communicated to the petitioner.

Relevant Clauses of the Reply read as under:

3. SPCPL states that, there serious and bonafide disputes between BEPL and SPCPL with respect to the said claim, which are existing even prior to the issuance of the Demand Notice. The Demand Notice is, therefore, nothing but a malafide tactic adopted by BEPL to pressurize SPCPL to pay an alleged debt which is not due or payable by SPCPL to pay an alleged debt which is not due or payable by SPCPL, either contractually or legally or otherwise. No action under the Code is therefore maintainable against SPCPL, as alleged or at all.

.....

9. Without prejudice to the above, the alleged claim under the Demand Notice is disputed and denied and the same is not due or payable by SPCPL on the following grounds, each of which is without prejudice and in the alternative to the other.

10. SPCPL states that the Demand Notice has not been issued in accordance with the provisions of the Code and the rules made thereunder. Therefore, SPCPL disputes the validity and propriety of the Demand Notice and denies any liability towards BEPL.

....

13. In the light of the above facts and circumstances, we, SPCPL hereby call upon you (BEPL) to forthwith withdraw

the Demand Notice and confirm the same to us/SPCPL. In the event you initiate any legal action against SPCL, as threatened or otherwise, the same will be defended by SPCPL, at your risk as to cost and consequences.

42. In *Alupro Building Systems Pvt. Ltd. Vs. Ozone Overseas Pvt. Ltd 2017 SCC Online Del 7228*, the purpose of giving a Notice was explained. It was observed that without the Notice under Section 21 of the Act, a party seeking reference of disputes to arbitration would be unable to demonstrate that there was a failure by one party to adhere to the procedure and accede to the request for the appointment of an Arbitrator. The trigger for the Court's jurisdiction under Section 11 of the Act is such failure by one party to respond.

43. In *Badri Singh Vinimay Private Limited v. MMTC Limited2020 SCC OnLine DEL 106*, this Court had explained that Section 21 of the Act requires a party to send a request to the counter-party for the dispute to be referred to arbitration, which should indicate the facts leading to the dispute, and the nature of the claim be made clear. It also must clearly indicate the legal recourse intended to be undertaken if its claim is not satisfied. The initiation of arbitration proceedings in such a situation must be expressly contemplated.

44. In *M/s Anacon Process Control Private Limited v. Gammon India Limited* 2016 SCC OnLine Bom 10076, Bombay High Court observed that in order to invoke arbitration, notice under Section 21 of the Act is a *sine qua non* for commencement of arbitration proceedings. Hon'ble Supreme Court in *State of Goa versus Praveen Enterprises*2011 SCC OnLine SC

860had observed that Section 8 of the Act does not provide for appointment of the Arbitrator but merely requires the Judicial Authority before whom an action is brought in a matter in regard to which there is an Arbitration Agreement, to refer the parties to arbitration.

45. In the light of above-mentionedjudgments, it needs to be considered if the petitioner has met the prerequisite requirement of service of Notice under S.21 of the Act. First and foremost, the intention of approaching the appropriate forum for recovery of its claims had been indicated in the Demand Notice itself. It was also stated that in case the claims of the petitioner are not satisfied, it would be compelled to approach the NCLT. In response thereto, the respondent had clearly indicated that there was no ground to approach the arbitration or NCLT. It is quite evident that from the Notice and the Reply thereto, the intention of invoking the legal proceedings which included arbitration, was expressly conveyed. The sole purpose of Section 21 is to put a party to notice about the intention of approaching the arbitration which was sufficiently conveyed through Demand Notice and the reply of the respondent.

46. It is significant to refer to the Order dated 21.10.2020 in OMP(I) (COMM) 324/2020 under Section 9 wherein it was submitted on behalf of the respondent that though the parties were unable to arrive at any settlement, it would be appropriate if the pending disputes are referred to arbitration subject to the petitioner withdrawing proceedings from other forums. Respondent no. 1 further agreed to maintain a balance of Rs. 99,87, 763 towards the amount claimed by the petitioner in its Demand Notice dated 19.04.2019.

47. Even if for the sake of arguments, it is accepted that the Demand Notice failed to meet the requisite requirements of Section 21 of the Act, it cannot be overlooked that in the proceedings under Section 9 vide Order dated 21.10.2020, the respondent had agreed to referral of the disputes between the parties to arbitration. The petition under Section 9 of the Act and the willingness of the respondent to resort to arbitration for resolution of disputes is sufficient compliance of Section 21 of the Act.

48. The objection now being taken on behalf of the respondent of there being no proper Notice under Section 21of the Act, loses its significance in view of the proceedings that have transpired between the parties.

49. The Calcutta High Court in *Universal Consortium of Engineers Pvt. Ltd. Vs. Kanak Mitra and Another*, AIR 2021 Calcutta 127, followed the decision of the Apex Court in the *State of Goaversus Praveen Enterprises (Supra)* wherein it was observed that the application under Section 11 of the Act is itself a request by the petitioner for arbitration to conclude that mere non-service of Notice under Section 21 of the Act on the respondents, would not have the effect of making an application under Section 11 non-maintainable.

50. In *Bhupender Lal Ghai Vs. Crown Buildtech Private Limited,ARB. P. 470/2009 and* ARB. P. 471/2009, decided on 14.07.2011, Co-ordinate Bench of this Court considered a similar objection about non-service of Notice under Section 21 of the Act before filing the petition under Section 11 of the Arbitration and Conciliation Act was taken, which was overturned by making a reference to the observations made to the case of *Haldiram Manufacturing Co. Ltd Vs. SRF International,* 139 (2007) DLT 142that where no specific procedure is prescribed for constitution of Arbitral

Tribunal, a party may approach the Court by filing an application under Section 11 even without invoking Arbitration Agreement. The reasoning in giving this observation was that the Notice of the Petition under Section 11 of the Act, when served upon the respondents, itself constitutes the notice invoking arbitration and if the parties have to agree, there is nothing prevents them even after the filing of the petition, to mutually agree on an Arbitrator. Similar Observations were made in *M/s Civtech Engineers Pvt. Ltd. Vs. M/s. M. N. Securities Private Ltd. and Another*, ARB. P. 93/2010 decided on 01.09.2010.

51. Prima facie, it has been shown that there are arbitral disputes between the parties and in terms of the Clause 13 of the Work Order dated 19.12.2011, the disputes between the parties are referable to Arbitration.

52. In light of the facts and submissions made, Ms. R. Kiran Nath, District & Sessions Judge (Retd.), (Mobile No. 9910384659) is hereby appointed as the independent Arbitrator to adjudicate the disputes between the parties.

53. The parties are at liberty to raise their respective objections before the Arbitrator.

54. The fees of the learned Arbitrator would be fixed in accordance with the IV Schedule to A&C Act, 1996 or as consented by the parties.

55. This is subject to the Arbitrator making necessary disclosure as under Section 12(1) of A&C Act, 1996 and not being ineligible under Section 12(5) of the A&C Act, 1996.

56. Accordingly, petition under Section 11 of the Act is allowed.

57. Learned counsels for the parties are directed to contact the learned Arbitrator within one week of being communicated a copy of this Order to

them by the Registry of this Court. The copy of this order be also sent to the learned Arbitrator for information.

Petition No.O.M.P. (l) (COMM) NO. 324 OF 2020 Under Section 9 of the Act:

58. The respondent in his statement under 21.10.2020 had agreed to maintain a balance of Rs.99,87,760 which was claimed in Demand Notice dated 19.04.2019. Considering the disputes, the respondent is directed to maintain a balance of Rs. 99,87,760 in its account till the adjudication of the disputes, though either party may seek modification of this Order by moving an appropriate application before the learned Arbitrator. Accordingly, petition under Section 9 of the Act is allowed.

(NEENA BANSAL KRISHNA)
JUDGE

DECEMBER 15, 2022/PA