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

% **Date of decision: 01.09.2026**

CNR No. DLHC010066052026

\+ ARB.P. 340/2026, I.A. 4840/2026 & I.A. 4841/2026

M.P KHAITAN .....Petitioner

Through: Mr. Rajat Joneja and Mr. Anmol Kumar, Advs.

versus

ENGINEERING PROJECTS (INDIA) LIMITED & ANR. .....Respondents

Through: Ms. Preeti Dubey, Adv. for R-1. Dr. Amit George, Mr. Rajeev Kumar, Ms. Alka Srivastava, Mr. Vaibhav Gandhi and Ms. Tanushree Gupta, Advs. for R-2.

CORAM:
HON'BLE MR. JUSTICE AVNEESH JHINGAN

AVNEESH JHINGAN, J. (ORAL)

1. This petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') seeking appointment of an arbitrator.

2. The brief facts are that on 12.04.2014, respondent no.1/Engineering Projects (India) Limited (hereinafter referred to as 'EPI') issued a Notice Inviting Tender (for short 'NIT') on behalf of respondent no.2/Tripura University (hereinafter referred to as 'the University') for carrying out construction of various buildings and

allied development works at the Tripura University Campus, Suryamaninagar, Tripura (West) on a turnkey basis.

2.1 The petitioner was the successful bidder and the Letter of Intent (LOI) was issued on 03.05.2014. The agreement between the petitioner and EPI was executed on 19.05.2014. The work was completed on 28.12.2018. The final bill was raised on 20.12.2021 which included escalation charges and release of the security deposit. On 28.12.2021, EPI claimed the enhanced rate from the University. Despite the Committee of the University accepting by its report dated 17.01.2023 the liability for the escalation bill, the University failed to clear the dues. The attempts between EPI and the University to resolve the dispute failed and arbitration was invoked by EPI.

2.2 Aggrieved by the non-receipt of the payment due, the petitioner invoked arbitration under Clause 76 of the General Conditions of Contract (for short 'GCC') by issuing notice dated 11.07.2023 and hence the present petition.

3. Clause 76 of the GCC is reproduced below:

> 76.0 ARBITRATION
> 76.1 Before resorting to arbitration as per the cause given below, the parties if they so agree may explore the possibility of conciliation as per the provisions of Part-III of the Arbitration and Conciliation Act. 1996. When such conciliation has failed, the parties shall adopt the following procedure for arbitration:
> i) Except where otherwise, provided for in the contract, any disputes and differences relating to the meaning of the Specifications, Design, Drawings and Instructions therein before mentioned and as to the quality of

workmanship or materials used in 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, 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 completion or abandonment thereof shall be referred to the Sole Arbitration of the Chairman and Managing Director (CMD) of Engineering Projects (India) Limited (EPI), or any other person discharging the functions of CMD of EPI and if CMD or such person discharging the functions of CMD of EPI is unable to act, to the sole Arbitration of some other person appointed by CMD of EPI or such other person discharging the functions of CMD of EPI. There will be no objection the arbitrator so appointed is an employee of Engineering Projects (1) Ltd. However, such an employee shall not have directly dealt with the said Contract or the works there under on behalf of EPI. Such Arbitrator shall be appointed within 30 days of the receipt of letter of invocation of arbitration duly satisfying the requirements of this clause.

(ii) If the arbitrator so appointed resigns or is unable or unwilling to act due to any reason whatsoever, or dies, the Chairman & Managing Director aforesaid or in his absence the person discharging the duties of the CMD of EPI may appoint a new arbitrator in accordance with these terms and conditions of the contract, to act in his place and the new arbitrator so appointed may proceed from the stage at which it was left by his predecessor.

(iii) It is a term of the contract that the party invoking the arbitration shall specify the dispute/differences or questions to be referred to the Arbitrator under this clause together with the amounts aimed in respect of each dispute.
iv) The Arbitrator may proceed with the arbitration ex-parte, if either party, in spite of a notice from the arbitrator, fails to take part in the proceedings.
v) The work under the contract shall continue as directed by the Engineer-in- Charge, during the arbitration proceedings.
vi) Unless otherwise agreed, the venue of arbitration proceedings shall be at the venue given in the "Memorandum' to the 'Form of Tender'.
vii) The award of the Arbitrator shall be final, conclusive and binding on both the parties.
viii) Subject to the aforesaid, the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modifications or re-enactment thereof and the Rules made there under and for the time being in force shall apply to the arbitration proceedings and Arbitrator shall publish his Award accordingly.

NOTE
NOTWITHSTANDING ANYTHING CONTAINED HEREINABOVE, THIS CLAUSE SHALL NOT BE APPLICABLE WHERE THE DISPUTE IS BETWEEN EPI AND ANOTHER CENTRAL PUBLIC SECTOR ENTERPRISE OR GOVT. OF INDIA DEPARTMENT, FOR WHICH A SEPARATE ARBITRATION CLAUSE IS PROVIDED VIDE CLAUSE NO. 76.2 GIVEN BELOW:

76.2 ARBITRATION BETWEEN CENTRAL

PUBLIC SECTOR ENTERPRISES INTER SE/GOVERNMENT OF INDIA DEPARTMENTS/MINISTRIES

i) In the event of any dispute or difference relating to the Interpretation and application of the provisions of the contract, such dispute or difference shall be referred by either party to the arbitration as per the instructions (Office Memorandums/Circulars) issued by Govt. of India from time to time with regard to arbitration between one Government Department and another, one Government Department and a Public Sector Enterprise and Public Sector Enterprise inter se.

ii). Subject to any amendment that may be carried out by the Government of India from to time, the procedure to be followed in the arbitration shall be as is contained in D.O. No. DPE/4(10)/2001-PMA-GL-I dated 22.01.2004 of Department of Public Enterprises, Ministry of Heavy Industries and Public Enterprise, Government of India or any modification issued in this regard.

4. Learned counsel for the University on instructions, vehemently contends that the University is not a signatory to the work allotted to the petitioner and is not a necessary party. Reliance is placed upon the decision of the Supreme Court in ***Hindustan Petroleum Corporation Ltd. v. BCL Secure Premises Pvt. Ltd.***, 2025 SCC OnLine SC 2746 to contend that this Court has to decide at the stage of Section 11(6) of the Act as to whether the non-signatory is a veritable party. Further reliance is on the decision of this Court in ***Ramacivil India Construction Pvt. Ltd. v. Central Public Works Department***, 2026 SCC OnLine Del 4674 to buttress the contention that the co-ordinate

bench has taken a view in similar circumstances that the principal party on whose behalf the NIT is issued is not a veritable party and impleading such party shall create a chaos.

5. Learned counsel for the EPI relies upon Clause 37.3 of the GCC to contend that University is to make payment to the EPI and after having received the payment, it is to be released to the petitioner and the University is a necessary party. The submission is that in respect of this very dispute, an arbitration is pending between EPI and the University.

6. Clause 37.3 of the GCC is reproduced below:

> "It is clearly agreed and understood by the Contractor that notwithstanding anything to the contrary that may be stated in the agreement between EPI and the Contractor, the Con tractor shall become entitled to payment only after EPI has received the corresponding payment(s)- from the Client/ Owner for the work done by the Contractor. Any delay in the release of payment by the Client/ Owner to EPI leading to delay in the release of the corresponding payment by EPI to the Contractor shall not entitle the Contractor to any compensation/ interest from EPI."

7. Learned counsel for the petitioner submits that a valid arbitration clause exists in the agreement and there is a dispute between the petitioner and EPI with regard to payment of the amount due. The submission is that the arbitrator can decide all the issues including the impleadment of the University. The reliance is on the Minutes of Meeting of the Committee of the University dated 17.01.2023 (for short 'Minutes of Meeting') to contend that not only the work is to be approved by the University but the payment is also to

be made by the University.

8. The scope of the reference court under Section 11(6) of the Act is well defined. The existence of an arbitration clause and a *prima facie* dispute is to be seen.

9. The arbitration clause is not in dispute. There is a dispute between the petitioner and EPI with regard to the release of the amount for the work executed. Clause 76 provides for the arbitration by the Chairman and Managing Director of EPI (for short 'CMD') or by an arbitrator appointed by the CMD.

10. After the incorporation of Section 12(5) of the Act, the law is well settled that an official of a party to the dispute can neither be appointed as an arbitrator nor can appoint an arbitrator. The portion of Clause 76 of the GCC which is in violation of Section 12(5) of the Act is void and does not dent the substantive agreement to arbitrate dispute between the parties.

11. The Supreme Court in ***Hindustan Construction Company Ltd. v. Bihar Rajya Pul Nirman Nigam Ltd. and Ors.***, 2025 SCC OnLine SC 2578 dealt with an arbitration clause providing that no person other than a person appointed by the Managing Director or administrative head of the Nigam should act as arbitrator and if such appointment is not possible then the matter is not arbitrable. It was held that the exclusive power with the contractee to appoint arbitrator is unenforceable and should be severed but the agreement of arbitration survives. The portion of the clause that for any reason the arbitration by the arbitrator appointed by the contractee is not possible the matter shall not be referred to arbitration at all violates Section 18

of the Act. The relevant paragraphs of the judgment are reproduced below:

> "61. Accordingly, the portion of Clause 25 that vests exclusive appointment power in one party and forecloses arbitration in default of such appointment must be severed as void and unenforceable. However, the substantive agreement to arbitrate survives by virtue of the doctrine of severability.
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> *** *** ***
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> 63. The present contract, being a public-private contract, must withstand not only conventional contractual scrutiny but also constitutional scrutiny. As held in CORE Il, arbitral appointments in public contracts must satisfy the requirements of fairness, equality, and non-arbitrariness under Article 14.
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> 64. The sub-clause in Clause 25 which provides that "if for any reason the matter shall not be referred to arbitration" is vague, uncertain, and arbitrary. The expression "for any reason" confers an unguided and absolute veto, particularly objectionable in a public contract. Such a clause fails the test of manifest arbitrariness and violates Section 18 of the Act, which mandates equal treatment of parties.
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> 65. In light of the above discussion, the following propositions emerge:
> (i) The parties' conduct clearly demonstrates their intention to arbitrate, satisfying the requirement of Section 7(4)(c);
> (ii) Clause 25, in its substantive form, constitutes a valid arbitration agreement;
> (iii) The unilateral and exclusionary appointment mechanism is void and severable;

and
(iv) This Court is empowered under Section 11(6) to cure the defect and appoint an independent arbitrator.

66. Accordingly, it is held that a valid and subsisting arbitration agreement exists between the parties. Clause 25, when read in its entirety and construed in accordance with the doctrine of severability, satisfies the statutory requirements of an arbitration clause under Section 7 of the Act. The contrary finding of the High Court is unsustainable in law and is liable to be set aside."

12. There exist a valid arbitration clause and a *prima facie* dispute between the petitioner and EPI, an arbitrator has to be appointed. A specific query raised as to whether the University is a veritable party to the arbitration can be dealt with by the arbitrator and any observations made by this Court may have a bearing on the proceedings. Learned counsel for the University, on instructions, emphatically insists that the issue be dealt with by this Court. It is on the insistence of learned counsel that the observations below are being made.

13. The Supreme Court in ***Ajay Madhusudan Patel & Ors. v. Jyotrindra S. Patel & Ors.***, (2025) 2 SCC 147 held:

> "76.7. *Cox & Kings* specifically dealt with the scope of inquiry under Section 11 when it comes to impleading the non-signatories in the arbitration proceedings. While saying that the referral court would be required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory party is a veritable party to the

> arbitration agreement, it also said that in view of the complexity in such a determination, the Arbitral Tribunal would be the proper forum. It was further stated that the issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the Arbitral Tribunal and can be decided under its jurisdiction under Section 16."
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> (Emphasis supplied)

14. The Supreme Court in ***Hindustan Petroleum Corporation Ltd.*** (supra) held that upon arriving at a *prima facie* satisfaction that a non-signatory is a veritable party, the arbitral tribunal is not denuded of its jurisdiction to decide on the basis of the factual evidence with regard to the relevance of the party to be impleaded in the proceedings.

15. This Court on the basis of the undisputed Minutes of the Meeting showing the authority of the University in approving the work, releasing the payment and escalation charges; Clause 37.3 of the GCC showing the dependency of EPI and the petitioner on the University for payment; the issue with regard to payment of dues is already pending in arbitration between EPI and the University; and the stand of EPI that the University is a veritable party, is *prima facie* of the opinion that the University is a veritable party.

16. The decision of this Court in ***Ramacivil India Construction Pvt. Ltd.*** (supra) was stated to be on similar facts. However, there was no clause in that case stipulating that the work was to be approved by the principal employer on whose behalf the NIT was issued, the payment was to be made by the principal employer and that the

payment itself was in dispute between the principal employer and the agency issuing the NIT. The decision is not applicable to the present case.

17. Needless to say, no observations made in this order shall be construed as an expression of opinion on the merits of the dispute between the parties and shall not influence the arbitral proceedings.

18. Accordingly, the petition is allowed by appointing Justice Mr.Sunil Gaur (Retd.) (Mobile No. 9971000718) as the sole arbitrator for adjudication of the disputes which have arisen between the parties.

19. Arbitral proceedings will be held under the aegis of Delhi International Arbitration Centre (DIAC). Fee of the Arbitrator shall be fixed as per fee schedule.

20. Before entering upon reference, the learned Arbitrator will comply with Section 12 of the Act.

21. It is made clear that since this Court has not expressed any opinion on the merits of the rival claims of the parties and it will be open for the parties to file their respective claims/counter claims before the learned Arbitrator which will be considered in accordance with law.

22. All pending applications stand disposed of.

23. A copy of this order be forwarded to the learned Arbitrator for information.

AVNEESH JHINGAN, J

SEPTEMBER 1, 2026/Pa

Reportable: **Yes**