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

% *Date of Decision: 9th July, 2025*

\+ ARB.P. 2020/2024

PRISM JOHNSON LTD .....Petitioner

Through: Mr. Abhimanyu Mahajan, Mr. Victor Das, Mr. Vipul Singh, Mr. Yash Jain, Ms. Anubha Goel and Mr. Mayank Joshi, Advocates.

versus

DOOSAN POWER SYSTEMS INDIA PVT LTD .....Respondent

Through: Mr. Nitin Ray, Senior Advocate with Mr. Deepak K., Mr. Abhishek Bansal and Ms. Ankita, Advocates.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

1. This petition is filed on behalf of the Petitioner under Section 11(4)(a) and (6) of the Arbitration and Conciliation Act, 1996 ('1996 Act') for appointment of nominee Arbitrator of the Respondent Company to adjudicate the *inter se* disputes between the parties.

2. To the extent relevant, case of the Petitioner is that in the year 2017, Respondent approached the Petitioner for procuring ready-mix concrete for a Thermal Power Project *'Obra C Extension Thermal Power Station'* in Uttar Pradesh. Petitioner and Respondent entered into a Sub-Contract dated 08.07.2017 for the said project, under which Petitioner agreed to carry out works for consideration and on the terms and conditions specified therein.

Respondent issued a Purchase Order dated 25.07.2017, as per which Petitioner was required to supply 2,68,798 cum of ready-mix concrete to the Respondent. During the contract period, apart from agreed quantity of 2,68,798 cum, Petitioner on demand from the Respondent from time to time, supplied additional quantities also, in respect of which revised Purchase Order was issued on 07.07.2020. Revised purchase order was, however, not acceptable to the Petitioner and thus, it was mutually agreed that the concrete will be supplied as per terms of the original sub-contract.

3. It is averred that for the first time, vide its letter dated 16.09.2021, Respondent raised frivolous claims towards penalties, interest, liquidated damages, extra material etc., which were refuted by the Petitioner vide letter dated 17.09.2021. At the same time, Petitioner sent a demand notice dated 30.12.2021 to the Respondent for payment of unpaid operational debt under Section 8 of Insolvency and Bankruptcy Code, 2016 ('IBC'). By letter dated 28.02.2022, Respondent admitted that as on 31.12.2021, a sum of Rs.9,23,99,780.71/- towards running accounts and Rs.81,25,299/- towards retention monies was due and payable to the Petitioner. Petitioner filed a petition under Section 9 of IBC, being Company Petition (IB)-474(ND)2022 before NCLT, Delhi against the Respondent, which was dismissed on 03.03.2023, against which Petitioner approached NCLAT in Company Appeal (AT)(INS) No.570/2023, which is stated to be pending for final hearing.

4. It is further averred that the contract between the parties contains Arbitration Clause 25 in the General Terms of Conditions ('GTC') and since disputes had arisen, Petitioner sent a notice dated 13.09.2024 to the Respondent under Section 21 of 1996 Act invoking the arbitration

agreement. By a subsequent letter dated 08.10.2024, Petitioner nominated its Arbitrator and intimated the same to the Respondent, however, vide letter dated 11.10.2024, Respondent refused to nominate its nominee Arbitrator stating that the invocation notice by the Petitioner was contrary to Clause 25(b) of GTC as amended by Special Terms and Conditions ('STC'), providing that disputes shall be settled by arbitration in accordance with Rules of Domestic Commercial Arbitration of the Indian Council of Arbitration ('ICA Rules') and was therefore *non-est* with no legal consequence. Since period of 30 days passed without the Respondent nominating its Arbitrator or in the alternative amicably resolving the disputes by conciliation, Petitioner approached this Court for appointment of nominee Arbitrator of the Respondent in terms of the Arbitration Clause which envisages constitution of three-member Arbitral Tribunal.

5. Respondent filed its reply refuting the case of the Petitioner on merits and without prejudice thereto, raising preliminary objection to the maintainability of the petition having been filed in breach of the Arbitration Agreement between the parties and the ICA Rules.

6. Learned Senior Counsel for the Respondent argued that the invocation notice dated 13.09.2024 was itself invalid as there was no commencement of arbitration by the Petitioner in accordance with the procedure agreed between the parties. Parties to the *lis* had expressly agreed that arbitration will be commenced by a formal notice under ICA Rules. Invocation notice was non-compliant with the ICA Rules and Petitioner also failed to intimate the ICA of the purported commencement of arbitration. Present petition has been filed by the Petitioner on the strength of Clause 25(g) of GTC glossing over the fact that sub-Clauses (a) and (b) of Clause 25 itself envisage a

three-step procedure for appointment of the Arbitrator, whereby parties have to first try and settle their disputes amicably and should they fail, the disputes shall be settled in accordance with the procedure laid down in the ICA Rules. Rule 15 of ICA Rules prescribes the manner in which arbitration is to be commenced and postulates that a notice in writing is to be given to the Registrar, ICA, requesting for arbitration, accompanied by details/documents provided under Rule 15(ii). Simultaneously, notice is required to be sent to the Respondent. The fact that parties agreed to follow ICA Rules not only for the conduct of arbitral proceedings but also for commencement of arbitration is evident from the 'subject' of the notice dated 13.09.2024, which reads '*Notice for invocation of arbitration under Section 21 of the Arbitration and Conciliation Act, 1996 read with Rules of Arbitration of the Indian Council of Arbitration'.* The argument was that ICA Rules encompass a complete mechanism for initiating and conducting arbitration, wherein Rule 15 prescribes the manner in which arbitration is to be commenced and Rule 18 provides that upon receipt of the application along with Claim Statement, Registrar shall send to the Respondent copy of the Claim Statement and documents etc. to file its Defence Statement within the prescribed time. Pertinently, in terms of Rule 23(b) where reference is to three Arbitrators, Registrar in the first instance is required to call upon the parties to nominate one Arbitrator each from the panel of Arbitrators of ICA, by notice in writing to them.

7. It was contended that a petition under Section 11(6) of 1996 Act is maintainable only if the party which is recipient of the invocation notice fails to act in accordance with the procedure of appointment agreed upon between the parties. There is an obvious presumption in the provision that

party seeking appointment has itself followed the agreed procedure of appointment of Arbitrator and thus where the party itself does not follow the agreed procedure, it would have no *locus standi* to approach the Court and seek appointment under Section 11(6) of 1996 Act. Recourse to Section 11(4) can be taken only where parties have not agreed on a procedure for appointment of an Arbitrator. To support this plea, reliance was placed on the judgment of the Supreme Court in ***Iron & Steel Co. Ltd. v. Tiwari Road Lines, (2007) 5 SCC 703***, wherein the Supreme Court held that if the parties agree on a procedure for appointing Arbitrator(s), sub-Sections (3) and (5) of Section 11 have no application. Similarly, under sub-Section (6) of Section 11, an application can be made to the High Court or an institution designated to take necessary measures, only if conditions enumerated in Clauses (a) or (b) or (c) of this sub-Section are satisfied i.e., where the parties have agreed on a procedure for appointment of an Arbitrator but: (a) party fails to act as required under that procedure; or (b) 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 under that procedure. In the facts of the case, Supreme Court held that there being an agreed procedure for resolution of disputes by arbitration in accordance with ICA Rules, sub-Sections (3), (4) and (5) of Section 11 will not apply and without invoking the procedure, the application under Section 11 filed by the Respondent before the designated authority i.e., City Civil Court, Hyderabad was not maintainable.

8. It was next contended that Petitioner has placed heavy reliance on Clause 25(g) of GTC, which provides that Arbitral Tribunal shall consist of three Arbitrators and no later than 30 days after submission of dispute to

arbitration, the contractor and the sub-contractor shall each appoint one Arbitrator and the appointed Arbitrators shall jointly appoint the third Arbitrator in no later than 15 days from their appointment. This reliance is misplaced. In the absence of a valid invocation/commencement of arbitration by the Petitioner in terms of Clause 25(c), there was no occasion for the parties to have appointed Arbitrators under Clause 25(g) for the reason that valid commencement of the arbitration under the contractual clauses read with ICA Rules was a pre-requisite to trigger the process of appointment under Clause 25(g). Present petition under Section 11(6) of 1996 Act seeking appointment of the Respondent's nominee Arbitrator, for its alleged failure to act as per agreed procedure, is therefore not maintainable and liable to be dismissed.

9. Learned Senior Counsel placed reliance on an order dated 11.03.2025 passed by Co-ordinate Bench of this Court in ARB.P. 440/2025 titled ***Neo Structo Construction Pvt Ltd v. Doosan Power Systems India Pvt Ltd***, wherein the Court while dealing with an identical Arbitration Clause, was of the view that petition under Section 11(6) of 1996 Act was not maintainable for failure of the Petitioner to commence arbitration in accordance with Rule 15 of ICA Rules and faced with this, Petitioner had withdrawn the petition, with liberty to approach ICA for appointment of an Arbitrator and stressed that Petitioner was bound to commence arbitration in accordance with ICA Rules as mandated under Clause 25(c) of GTC and cannot be permitted to take recourse to appointment of an Arbitrator contrary to the agreed procedure.

10. *Per contra,* learned counsel for the Petitioner argued that there is no merit in the preliminary objection that the present petition is filed in breach

of Clause 25 of GTC and/or ICA Rules. Main plank of the argument of the Respondent that Clause 25(b) of GTC as amended by STC and Clause 25(c) mandate that the invocation notice must be in terms of Rule 15 of ICA Rules and since Petitioner had not invoked/commenced arbitration as per the agreed procedure, the invocation is *non-est* and consequently, there is no failure on the part of the Respondent to act so as to give jurisdiction to this Court to appoint Respondent's nominee Arbitrator, is completely fallacious as there was no obligation on the parties to follow the ICA Rules for invocation of arbitration and/or appointment of Arbitrators. Arbitration Clause 25(g) provides a mechanism for constitution of the Arbitral Tribunal, which is inconsistent with the mechanism provided under Rule 23(b) of ICA Rules. As per Clause 25(g), Petitioner and Respondent have to nominate one Arbitrator each and the appointed Arbitrators are to appoint the third Arbitrator, to constitute the Arbitral Tribunal. Contrary thereto, Rule 23(b) of ICA Rules *inter alia* provides that Registrar shall call upon the parties to nominate one Arbitrator each from the panel of Arbitrators of ICA and Presiding Arbitrator shall be appointed by the Registrar. Once the parties have agreed on a mechanism of appointment under Clause 25(g), which substantially differs from one contemplated under ICA Rules, the Council is not bound to process the case unless both parties agree to follow the entire procedure or Arbitration Rules of the Council. This position clearly flows from Rule 4(c) of ICA Rules and this very issue stands decided by the Supreme Court in ***C.M.C. Ltd. v. Unit Trust of India and Others, (2007) 10 SCC 751***. It was emphasized that Petitioner was not obliged to undertake the procedure under Rule 23(b) of ICA Rules for constitution of Arbitral Tribunal since the appointment procedure was prescribed in Clause 25(g) of

GTC. In this context, reliance was placed on the judgment of the Supreme Court in ***Delta Mechcons (India) Ltd. v. Marubeni Corporation, (2008) 15 SCC 772***, wherein it was held that it is open to the parties, while entering into an arbitration agreement, to provide as to how the Arbitral Tribunal should be constituted as also to provide the Rules to be followed for conduct of arbitration. It was observed that the agreement to follow Rules for conduct of arbitration proceedings is different from an agreement regarding constitution of the Arbitral Tribunal and one cannot be confused with the other.

11. It was further argued that reliance by the Respondent on Clause 25(c) of GTC is misplaced as the same is otiose in view of Clause 25(b) of the Arbitration Agreement which provides for applicability of ICA Rules. In fact, even in the absence of Clause 25(c), arbitration agreement provides for application of ICA Rules. Respondent, however, misses the crucial point that procedure for constitution of Arbitral Tribunal agreed to between the parties by virtue of Clause 25(g), substantially differs from the appointment procedure under ICA Rules and Petitioner is thus not bound to invoke arbitration as per Rule 15 of ICA Rules, to put in motion the effective machinery for arbitration. Had the Petitioner sent a notice invoking arbitration in accordance with Rule 15, then the entire ICA Rules would have been applicable on the parties in terms of Rule 4(c) and Petitioner could not have nominated its Arbitrator in accordance with Clause 25(g) of GTC and would have had to await intimation from the Registrar to nominate its Arbitrator from the ICA panel in accordance with Rule 23(b) of ICA Rules. In such a situation, even the Presiding Arbitrator would be appointed by the Registrar and the entire procedure would be contrary to Clause 25(g)

i.e. the procedure agreed upon by the parties and thus Respondent cannot insist on invocation of arbitration under the ICA Rules.

12. It was urged that the Supreme Court in ***C.M.C. Ltd. (supra),*** while deciding a similar objection raised therein with regard to invocation notice not being in accordance with Rule 15 of ICA Rules, held that even though ICA Rules were applicable, in view of the procedure for appointment of Arbitrator being different in ICA Rules and the arbitration agreement in the contract between the parties, party invoking arbitration was not bound to invoke arbitration as per ICA Rules, to put in motion an effective machinery for arbitration. Without prejudice to this argument, it was further urged that in view of the judgment in ***C.M.C. Ltd. (supra)***, Clause 25(c) of the Arbitration Agreement be read down and/or ignored and effect be given to Clause 25(g) and in this context, reliance was placed on the judgment of the Co-ordinate Bench in ***Intech Brinechem Limited v. DE Dietrich Process Systems India Pvt. Ltd. 2023 SCC OnLine Del 1873***. With reference to the order in ***Neo Structo (supra)***, relied upon by the Respondent, it was submitted that in the said case, there was no reference to or discussion on a clause identical or similar to Clause 25(g), as in the instant case and moreover, judgments of the Supreme Court in ***C.M.C. Ltd. (supra)*** and ***Delta Mechcons (supra)***, have not been taken note of by the Court for the obvious reason that neither party relied on them.

13. In light of the aforesaid arguments, it was submitted on behalf of the Petitioner that since Respondent has failed to nominate its Arbitrator under Clause 25(g) of GTC, this Court may appoint Respondent's nominee Arbitrator so that both the Arbitrators can appoint the Presiding Arbitrator and constitute the Arbitral Tribunal envisaged in the said Clause.

14. In rejoinder, learned Senior Counsel for the Respondent emphasised that the procedure envisaged in Clause 25(c) cannot be overlooked as that was the agreed course of action between the parties to commence the arbitration. It was asserted that if the interpretation proposed by the Petitioner was to be accepted, it would not only render Clause 25(c) otiose but would convert an institutional arbitration to *ad hoc* arbitration, which was not the intent of the parties. Even otherwise, the submission of the Petitioner that if it was to commence arbitration as per Clause 25(c) read with Rule 15 of ICA Rules, it would have no right to appoint an Arbitrator of its choice *de hors* the panel of ICA Arbitrators, is without any basis. In order to commence arbitration under Clause 25(c) of GTC read with ICA Rules, there was nothing which prevented the Petitioner from appointing an Arbitrator within 30 days of commencement of arbitration and in the event, the ICA did not accept its nominee Arbitrator, Petitioner was well within its right to approach the Court under Section 11(6) of 1996 Act for appointment of an Arbitrator for failure of the institution to perform its functions. Alternatively, for failure of ICA to act in terms of the procedure for appointment of the Arbitrator and/or for failure to register the case in accordance with Rule 4 of ICA Rules, Petitioner could request the constituted Arbitral Tribunal for an *ad hoc* arbitration. However, the Petitioner cannot, under the garb of Clause 25(g) of GTC, be permitted to by-pass the procedure agreed between the parties. Section 21 of 1996 Act commences with the words *'Unless otherwise agreed between the parties…'* and in the instant case, there is a specific and unequivocal agreement between the parties in the form of Clause 25(c) GTC, whereby parties specifically agreed to take recourse to ICA Rules for appointment of the

Arbitrator. Since the invocation notice is not in consonance with Section 21 of 1996 Act, it is an invalid notice of invocation and no arbitration can be commenced in furtherance of the said notice and Petitioner cannot insist on the Respondent nominating its Arbitrator and/or seek Court's assistance for appointment of Respondent's nominee.

15. It was pointed out that in view of the claims of the Respondent arising out of the Contract in question and upon failure of the Petitioner to commence arbitration as per agreed procedure, Respondent has vide notice dated 28.02.2025 commenced arbitration in accordance with Clause 25(c) of GTC and Rule 15 of ICA Rules and has nominated a retired Judge of this Court as its nominee Arbitrator. ICA registered the request of the Respondent under Case No. AC-2471, after receiving Petitioner's reply and it is open to the Petitioner to join the proceedings as Counter Claimant and appoint an Arbitrator as per the agreed procedure.

16. Heard learned counsel for the Petitioner and learned Senior Counsel for the Respondent.

17. By this petition, Petitioner seeks appointment of Respondent's Arbitrator alleging failure of the Respondent to act in terms of the arbitration Clause 25(g) of GTC. Respondent opposes the petition on the ground that in the absence of valid invocation/commencement of the arbitration, there is no failure on the part of the Respondent and hence, the jurisdiction of this Court to appoint the nominee Arbitrator of the Respondent under Section 11 of 1996 Act is not attracted. Broadly understood, Respondent predicates its case on Clause 25(c) of GTC to argue that as per agreed procedure, Petitioner was bound to take recourse to ICA Rules, more particularly, Rule 15 thereof to invoke the arbitral mechanism and recourse to Clause

25(g), contrary to this mechanism is untenable in law. Petitioner, on the other hand, strenuously urges that parties agreed to a specific mechanism for constitution of the Arbitral Tribunal comprising of three-member Arbitral Tribunal retaining the autonomy of constitution and hence, there was no obligation on the Petitioner to take recourse to Clause 25(c) of GTC. Before proceeding further, it is imperative to examine the relevant clauses which are the bone of contention between the parties. Clause 25 of GTC pertaining to '*Disputes and Arbitration'* is extracted hereunder:-

> ***"25 DISPUTES AND ARBITRATION***
>
> *a) All disputes, controversies, or differences, which may arise between the Contractor and the Subcontractor, out of or in relation to or in connection with this Subcontract, or for any breach thereof, shall be amicably settled by mutual conciliation between the Parties thereto.*
>
> *b) Should the Parties hereto fail to settle such disputes, controversies, or differences ('Dispute') amicably within thirty (30) days, such Dispute shall be finally settled by arbitration in accordance with the following rule and place, the award of which shall be final binding upon the Parties hereto.*
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> *(a) Place: London, United Kingdom*
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> *(b) Rule: Commercial Arbitration Rules of the United Kingdom Commercial Arbitration Board (**the 'Arbitration Rules').***
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> *c) Formal notification of request for arbitration proceedings must be given to the other Party no later than thirty (30) days, in accordance with the provisions of subject rule.*
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> *d) The arbitration shall be conducted in the English or Korea Language and all documents submitted in connection with such proceeding shall be in the English or Korean Language or, if in another language, accompanied by a certified English or Korean translation.*
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> *e) Each Party shall bear its own expenses with respect to any arbitration and the compensation and expenses of the arbitrators shall*

be borne in such a manner as may be specified in the decision of the arbitrators.

f) In any such arbitration, any Party shall be entitled to present positions and rely upon information supplemental to or different from those relied upon for purpose of any attempted Dispute resolution. Should any Party submit a request to the arbitrators to determine whether and when the termination of this Subcontract had occurred, each Party's obligations and rights under this Subcontract shall be continuing and in full force during the term of the arbitration proceedings until an award stating the occurrence and timing of termination of this Subcontract has been rendered. Any award rendered hereunder shall be governed by the New York Convention on Recognition and Enforcement of Arbitral Awards, June 10, 1958, as amended.

g) Number of arbitrators. The arbitral tribunal shall consist of three (3) arbitrators. No later than thirty (30) days after the submission of the Dispute to arbitration, the Contractor and the Subcontractor shall each appoint one (1) arbitrator. The arbitrators appointed by the Contractor and the Subcontractor shall jointly appoint the third arbitrator no later than fifteen (15) days- after their appointments. provided that if the arbitrators appointed by the Contractor and the Subcontractor cannot agree on the identify of the third arbitrator within such fifteen (15) days period, the third arbitrator shall be appointed in accordance with the Arbitration Rules. The Third Arbitrator shall be the chairperson of the arbitral tribunal. The Parties agree that the appointment of the arbitrators shall not terminate within a specified time and the mandate of the arbitrators shall remain in effect until a final arbitral award has issued. The award rendered shall apportion the costs of the arbitration. The Parties agree that the arbitral tribunal need not be bound by strict rules of law where they consider the application thereof to particular matters to be inconsistent with the spirit of this Subcontract and the underlying intent of the Parties, and as to such matters their conclusions shall reflect their judgment of the correct interpretation of all relevant terms hereof and the correct and just enforcement of this Subcontract in accordance with such terms.

h) Finality and enforcement of award. Any decision of award of the arbitral tribunal shall be final and binding upon the Parties. The

Parties hereby waive any rights to appeal or to review of such award by any court or tribunal. An arbitral award may be enforced by either Party against the other Party and its assets wherever located and before any court that jurisdiction, and judgment on any award may be entered in any court of competent jurisdiction. Neither of the Parties shall be entitled to commence or maintain any action in a court of law upon any Dispute except an action to recognize or enforce an arbitral award granted.

i) Pending final resolution of any Dispute, each of the Parties shall continue to perform its respective obligations hereunder to the extent such obligations are not being disputed in good faith. Upon resolution of any Dispute requiring the payment of money by one Party to another Party, any such payment shall include interest from the date such amount was due up to the date of such payment."

18. Clause 25(b) of GTC was amended and substituted by STC and reads as follows:-

*"**25 DISPUTES AND ARBITRATION***

Replace the text of Clause 25 (b) with:

Place : Delhi, India

Rule : Rules of Arbitration of the Indian Council of Arbitration ('the Arbitration Rules')"

19. From a conjoint reading of the aforesaid clauses, it is clear that parties agreed to follow the ICA Rules for conduct of the arbitral proceedings and to that extent the Respondent is correct in its submission. However, it is equally evident that parties retained with themselves the right to nominate their respective Arbitrators, who in turn were empowered to appoint a Presiding Arbitrator, to constitute the Arbitral Tribunal. This position is palpably clear from reading Clause 25(g) of GTC. Power to appoint respective nominee Arbitrators was not ceded to ICA *albeit* no doubt parties were *ad idem* that once the Arbitral Tribunal was constituted, the proceedings were to be conducted in accordance with ICA Rules. Any other

interpretation would render Clause 25(g) otiose and would be contrary to the clear intent and agreement between the parties with respect to the mechanism for constitution of the Arbitral Tribunal by incorporating Clause 25(g), retaining the autonomy to constitute the Arbitral Tribunal.

20. As rightly flagged by counsel for the Petitioner, this case is squarely covered by the judgment of the Supreme Court in ***C.M.C. Ltd. (supra).*** In the said case, the arbitration clause provided that in the event of any dispute or difference arising between the parties in relation to the contract in question, the same shall be settled by arbitration. The clause further provided that each party shall appoint an Arbitrator and the Arbitrators so appointed shall appoint an umpire. This clause further provided that the arbitral proceedings shall be conducted in accordance with ICA Rules. Upon an application being filed by Respondent No.1 therein before the High Court under Section 11(6) of 1996 Act, Appellant before the Supreme Court, who was the Respondent before the High Court, resisted the application *inter alia* on the ground that the arbitration clause had not been properly invoked as the procedure laid down in the ICA Rules was not followed.

21. On a construction of Arbitration Clause 20, High Court concluded that the right to appoint respective Arbitrators rested with the parties and resort to ICA Rules was envisaged only for the purpose of procedure for conduct of arbitral proceedings. Respondent before the High Court challenged the judgment before the Supreme Court. A similar contention, as in this case, was raised before the Supreme Court by the Appellant. It was urged that the arbitration agreement specified that arbitration proceedings shall be conducted in accordance with ICA Rules, which would mean that procedure for invocation of arbitration and appointment of an Arbitrator as

also raising claims, must be in terms of ICA Rules. Rule 15 of ICA Rules was relied upon, providing that if any party wishes to commence arbitration under the ICA Rules, a notice was required to be given to the Registrar of ICA and to the opposite party and therefore, notice in any other form directly to the Appellant was of no consequence, as this would not be proper invocation of the arbitration agreement and consequently, there will be no failure of the opposite party to follow the procedure of appointment, resulting in conferment of jurisdiction on the Court under Section 11(6) of 1996 Act.

22. The Supreme Court negated the contention of the Appellant and held that even going by ICA Rules, it was clear that parties were not precluded from adopting a different procedure for appointment of their nominee Arbitrators. It was observed that the ICA Rules, in fact, at the very inception, suggest incorporation by the parties of an arbitration clause in writing in their contracts. Specifically referring to Rule 4(c) of ICA Rules, the Supreme Court held that in case the parties provide a different procedure for appointment of an Arbitrator, Council is not bound to process the case unless both parties agreed to follow the entire procedure or arbitration rules of the Council. It was observed that the provision that proceedings shall be conducted in accordance with ICA Rules does not in any manner militate against retention of the power by the parties to appoint the Arbitrator or constitute an Arbitral Tribunal.

23. In the facts of that case and examining the clause in question, which in my view, is similar to Clause 25(g) of GTC, the Supreme Court held that it was clear from comparison of the arbitration agreement suggested by the Council and the agreement between the parties, that the arbitration

agreement between the parties substantially differed from the one suggested by ICA and therefore, in light of Rule 4(c) of ICA Rules, Council was not bound to process the case unless both parties agreed to follow the entire procedure. It was observed that parties having retained the right to appoint their respective Arbitrators, even if one was to apply the ICA Rules, it was difficult to accept the argument of the Appellant that Respondent No.1 was bound to invoke ICA Rules to put in motion an effective machinery for arbitration *albeit* once the Arbitral Tribunal was constituted, parties may have to follow the ICA Rules. Relevant paragraphs of the judgment are as under:-

> ***"2.*** *The appellant and Respondent 1 entered into an agreement dated 23-10-1992 for a Technology Upgrade Project of the latter. The said agreement contained an arbitration clause. The same reads:*
>
> > *"20. In the event of any dispute or difference relating to the interpretation or application of any of the provision of this agreement or as to the performance of any obligation by either party shall be settled by arbitration. Each party shall appoint an arbitrator and the arbitrators so appointed shall appoint an umpire to whom the matter on which the arbitrators disagree will be referred. The decision of the arbitrators and in the event of there being disagreement between the arbitrators, the decision of the umpire shall be final, conclusive and binding on the parties with respect to the matter referred to arbitration. The decision of the arbitrators or the umpire as the case may be shall constitute arbitrators award for the purpose of the Arbitration Act, 1940. The arbitration proceedings shall be conducted in accordance with the rules prescribed by the Indian Council of Arbitration."*
>
> *xxx* *xxx* *xxx*
>
> ***4.*** *Respondent 1 thereupon moved the Chief Justice of the High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996. Respondent 1 contended that the appellant had failed to act in terms of the procedure for appointment of an arbitrator and hence the Chief Justice or his Judge designate may appoint an arbitrator to act along with the arbitrator named by Respondent 1 and direct the two arbitrators to appoint the third, a presiding arbitrator, within the time fixed and to refer all disputes and differences between Respondent 1 and the appellant*

arising out of or in connection with the Technology Upgrade Agreement as per the provisions of the Act. The appellant resisted the application essentially pleading that the rules of the Indian Council of Arbitration and the mandate thereof had not been complied with by the applicant before the Chief Justice and that the arbitration clause had not been properly invoked and there is no failure on the part of the appellant herein to act in accordance with the procedure accepted by the parties. No occasion had therefore arisen for the Chief Justice to appoint an arbitrator in terms of Section 11(6) of the Act. It is said that the appellant as directed by the Court had named an arbitrator without prejudice to its contentions and it is common ground before us that the said two arbitrators have also named the presiding arbitrator and an Arbitral Tribunal had come into existence, but subject to the decision in this appeal filed by the appellant.

5. *The learned designated Judge of the High Court held that on a true construction of Clause 20 of the agreement which is the arbitration agreement, the right or duty to appoint or name an arbitrator each, rested with the parties to the contract and what was provided for in the arbitration agreement was only regarding the following of the procedure of the rules of the Indian Council of Arbitration. The arbitration agreement did not contemplate the appointment of the arbitrator to be as per the rules of the Indian Council of Arbitration or only from the panel of arbitrators maintained by the Council. Thus, on a construction of the arbitration agreement in the light of the decisions brought to his notice, the designated Judge, noticing that the appellant had also named an arbitrator without prejudice to its contentions and that the two arbitrators had nominated a presiding arbitrator and that Tribunal can proceed to arbitrate on the dispute, allowed the application and constituted the Tribunal as chosen by the parties. The designated Judge also noticed that the question about the jurisdiction of the Arbitral Tribunal could be decided by the Tribunal itself.*

xxx *xxx* *xxx*

7. *It is settled that getting resolution of a dispute by arbitration is a matter of contract between the parties. So long as the contract does not militate against the provisions of the Arbitration Act, nothing in law prevents the arbitration agreement between the parties being given effect to in full. What is contended by learned counsel for the appellant is that the arbitration agreement clearly specifies that "the arbitration proceedings shall be conducted in accordance with the rules prescribed by the Indian Council of Arbitration" and this would mean that the procedure for appointment of an arbitrator and making a claim for arbitration must all be in terms of the rules of the Indian Council of Arbitration. Learned counsel points out that under Rule 15 any party wishing to commence arbitration proceedings under the rules of the Council had to give a notice of the request for arbitration to the Registrar of the Indian Council of*

Arbitration and to the opposite party and had to follow the procedure laid down in those rules. Learned counsel submits that the rules of the Indian Council of Arbitration had been incorporated in the arbitration agreement by the parties and any mode of exercise of right for invoking an arbitration clause other than the one prescribed by the rules of the Council would be futile. Therefore, the notice issued on behalf of Respondent 1 intimating the appellant of the appointment of an arbitrator and calling upon the appellant to appoint an arbitrator, would not amount to a proper invocation of the arbitration agreement and there is no failure on the part of the appellant to follow the procedure agreed to between the parties for appointment of an arbitrator resulting in conferment of jurisdiction on the Chief Justice to appoint an arbitrator in terms of Section 11(6) of the Act. In this context, we may specifically record that the learned counsel for the appellant agreed that the arbitration was governed by the Arbitration and Conciliation Act, 1996. Respondent 1 had, of course, invoked that very Act.

8. *Even going by the rules of arbitration of the Indian Council of Arbitration, it is seen that the parties are not precluded from having a different procedure for appointment of an arbitrator. The rules, even at the inception, suggest the incorporation by the parties of an arbitration clause in writing in their contracts in the following terms:*

> *"Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the rules of arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties."*

Rule 4(c) which is relevant reads:

> *"In case the parties have provided a different procedure for appointment of arbitrator or schedule of cost including the arbitrator's fee, the Council shall not be bound to process the case unless both the parties agree to follow entire procedure or arbitration under rules of arbitration of the Council."*

9. *It is clear from the comparison of the arbitration agreement suggested by the Council and the arbitration agreement between the parties, that the arbitration agreement between the parties substantially differs from the one suggested by the Indian Council of Arbitration. Secondly, Rule 4(c) is specific that in case the parties had provided a different procedure for appointment of an arbitrator, the Council was not bound to process the case unless both the parties agreed to follow the entire procedure or arbitration rules of the Council. Obviously, a different procedure for appointment of an arbitrator or arbitrators had been agreed to by the parties and Respondent 1 had obviously not agreed to follow the*

entire procedure or have an arbitration under the rules of the Council. Therefore, even if one were to apply the rules, it is difficult to accept the argument that Respondent 1 was bound to invoke the rules of the Council to put in motion an effective machinery for arbitration.

xxx *xxx* *xxx*

11. *The argument that there is an incorporation of the rules of the Council in the arbitration agreement and hence those rules must be given effect to fully, does not take the appellant far in this case. On a true construction of the arbitration agreement, what we find is that the parties retained in themselves the right to name an arbitrator of their own, who in turn had to name a presiding arbitrator so as to constitute an Arbitral Tribunal. The power to appoint has not been ceded to the Indian Council of Arbitration. Once the appointments are made and the Arbitral Tribunals are constituted, the parties have also agreed that the arbitration proceedings shall be conducted in accordance with the rules prescribed by the Indian Council of Arbitration. The provision that the proceedings shall be conducted in accordance with the rules prescribed by the Indian Council of Arbitration does not in any manner militate against the retention of the power by the parties of appointing an arbitrator or constituting an Arbitral Tribunal. Only if there exists any inconsistency between the two provisions we would be called upon to undertake the existence (sic exercise) of reading down one or ignoring one as ineffective or inconsistent and giving effect to the other. Here in this case, there is no difficulty in reconciling both the clauses in the arbitration agreement."*

24. A similar issue came up before the Supreme Court in ***Delta Mechcons (supra)***. The arbitration Clause 22.1 therein provided that any dispute which could not be resolved between the parties shall be settled exclusively by arbitration conducted in accordance with Rules of Conciliation and Arbitration of the International Chamber of Commerce ('ICC'). It further provided that the contractor and sub-contractor shall each appoint one Arbitrator and the two Arbitrators thus appointed shall jointly agree upon the third Arbitrator. If such agreement, was not reached within 30 days, the third Arbitrator shall be appointed by ICC. When the named Arbitrators failed to nominate the Presiding Arbitrator, Petitioner approached ICC to appoint the Presiding Arbitrator but ICC declined to appoint the Chairman of the

Arbitral Tribunal, leading to the Petitioner filing a petition before the Supreme Court under Section 11 of 1996 Act. Respondent opposed the petition *inter alia* on the ground that Petitioner had not complied with procedure set down by ICC before calling upon the ICC to name the Presiding Arbitrator and unless parties surrender their rights of creating the Arbitral Tribunal to ICC in toto, ICC would be justified in refusing to nominate the Presiding Arbitrator.

25. Negating this contention, the Supreme Court held that it is open to the parties while entering into an arbitration agreement to provide as to how the Arbitral Tribunal should be constituted and it is also open to them to provide the rules to be followed. The arbitration agreement as read, reserved the rights of the parties to nominate their Arbitrators, stipulating further that the two Arbitrators would appoint the third Arbitrator to act as the Chairman. It was also agreed that arbitration will be conducted in accordance with the ICC Rules. The Supreme Court held that in light of this arbitration agreement, there was no obligation on the parties to undertake before ICC, to have the arbitration in accordance with its procedure and Rules including the constitution of the Arbitral Tribunal, for ICC to appoint the Chairman of the Arbitral Tribunal. It was observed that the process of settlement of disputes through arbitration is a process of settlement *extra cursum curiae* and the parties are at liberty to choose their judge and in the case on hand, parties had provided the manner of constituting the Arbitral Tribunal. It was further held that once the procedure agreed upon by the parties to constitute the Arbitral Tribunal had broken down, Petitioner was justified in approaching the Court for appointment of the Presiding Arbitrator. Relevant passages from the judgment are as follows:-

*"**8.** This argument is controverted by the respondent, in addition to pleading on the merits that there was no subsisting claim for the petitioner and that the arbitration is barred by limitation, by contending that the petitioner had not complied with the procedure set down by ICC before calling upon ICC to name the presiding arbitrator and in that context the jurisdiction of the Chief Justice of India under Section 11 of the Act is not attracted. It was also contended that there were four sub-contracts and a single application for the appointment of a presiding arbitrator in respect of the disputes relating to four different contracts was not maintainable. It was for the petitioner to have agreed to follow the ICC Rules and to comply with those Rules so as to get an arbitrator appointed by ICC in terms of their Rules and the petitioner having failed to do so, the application filed by the petitioner had only to be rejected. The arbitration agreement clearly provides that disputes between the parties are to be settled exclusively by an arbitration conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. It is hence submitted that the petitioner not having adhered to the said Rules, ICC was not (sic) justified in refusing to act.*

***9.** It is true that there is a clause that the arbitration is to be conducted in terms of the Conciliation and Arbitration Rules of ICC. But it also provides that the Arbitral Tribunal shall consist of three arbitrators. The contractor and the sub-contractor had to each appoint one arbitrator and the two arbitrators thus appointed, should jointly agree upon the third arbitrator as Chairman. If such agreement be not reached within the time provided, the third arbitrator shall be appointed by ICC. The Chairman was not to be of the same nationality of either party to the sub-contract. The arbitration agreement has to be read as a whole to know its purport.*

***10.** It is open to the parties while entering into an arbitration agreement to provide as to how the Arbitral Tribunal should be constituted. It is also open to them to provide for the rules to be followed. As I read the arbitration agreement, I find that the parties had reserved unto themselves the right to nominate an arbitrator each stipulating that the two arbitrators so nominated, should agree upon the third arbitrator to act as the Chairman. In other words, the parties by their agreement have left it to the two arbitrators to appoint a third arbitrator to act as the Chairman. They have also agreed that in case of failure of the two arbitrators to appoint the third arbitrator, the third arbitrator was to be appointed by ICC. The parties had also provided that the arbitration should be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce.*

***11.** It was the contention of learned Senior Counsel for the respondent that once the machinery contemplated by the parties failed, the petitioner could only go by way of the Rules of Conciliation and Arbitration of the International Chamber of Commerce and the petitioner not having*

proceeded in terms of the said Rules, ICC was justified in not appointing a presiding arbitrator and in that context no cause of action has arisen for the petitioner for approaching this Court.

12. *As I read the arbitration agreement it consists of two parts. Firstly, the parties have agreed that the arbitration should be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. Having agreed to that, the parties also have agreed on the mode of creating the Arbitral Tribunal. This is by the parties nominating one arbitrator each and the nominated arbitrators appointing the Chairman of the Tribunal or the presiding arbitrator. They have contemplated the failure of the nominee arbitrators to name the Chairman or the presiding arbitrator and they have provided the means for supplying that omission. They have agreed that in that case, the presiding arbitrator should be got appointed by ICC. According to me, the agreement to follow the Rules of ICC in the conduct of arbitration proceedings is different from the agreement regarding appointment of the Arbitral Tribunal. There is no obligation on the parties to undertake before ICC, to have the arbitration in accordance with its procedure and Rules including even the constitution of the Arbitral Tribunal, for ICC to act to appoint the Chairman of the Arbitral Tribunal. In fact, except stating that it refuses to appoint a presiding arbitrator, ICC has not given any specific reason for refusing to do so.*

13. *Nor am I in agreement with the submission of learned Senior Counsel for the respondent that unless the parties surrender their rights of creating the Arbitral Tribunal to ICC in toto, ICC would be justified in refusing to name the presiding arbitrator. After all, the process of settlement of disputes through arbitration is a process of settlement extra cursum curiae and the parties are at liberty to choose their judge and in the case on hand, the parties have provided the manner of constituting the Tribunal. Therefore, no invalidity is attached to their agreement. They had agreed to approach ICC in case the nominated arbitrators failed to name the Chairman. One of the parties had moved ICC to supply the omission in terms of the arbitration agreement. ICC for its own reasons has failed to act.*

14. *I have, therefore, come to the conclusion that the named arbitrators have failed to nominate a presiding arbitrator in terms of the agreement and in that respect ICC has not supplied the vacancy approached in terms of the agreement. In that context the procedure agreed upon by the parties to constitute the Arbitration Tribunal has broken down justifying the approach of the petitioner to the Chief Justice of India for the appointment of a Chairman for the Arbitral Tribunal or the presiding arbitrator."*

26. Counsel for the Petitioner has also rightly relied on the judgment of Coordinate Bench of this Court in ***Intech Brinechem Limited (supra)*** wherein the relevant arbitration Clause 13 provided reference of disputes arising from the contract through arbitration, if no settlement could be arrived at. It was further provided that each party will nominate one Arbitrator and Presiding Arbitrator shall be appointed as per ICA Rules, since parties also agreed that arbitration will be in accordance with the said Rules. Referring to Rule 4(c) of ICA Rules and the judgment of the Supreme Court in ***C.M.C. Ltd. (supra),*** the Court held that since parties had agreed on a procedure substantially different from the procedure envisaged in the ICA Rules for constitution of the Arbitral Tribunal, there was no requirement of invoking/commencing arbitration in terms of ICA Rules and the notice sent by the Petitioner to the Respondent under Section 21 of 1996 Act would be valid invocation and Respondent could not insist that the Petitioner should take recourse to ICA Rules to invoke arbitration.

27. Coming home to the facts of the present case, Clause 25(g) of GTC provides a mechanism for constitution of the Arbitral Tribunal by which parties clearly retained the authority and autonomy to appoint their respective nominee Arbitrators, who were to in turn empowered to appoint the Presiding Arbitrator. This mechanism is substantially and materially different from the mechanism envisaged in Rule 23(b) of ICA Rules, which *inter alia* provides that Registrar, ICA shall call upon the parties to nominate one Arbitrator each from the panel of Arbitrators of ICA and the Presiding Arbitrator is to be appointed by the Registrar. As held by the Supreme Court in ***C.M.C. Ltd. (supra)***, ICA Rules do not preclude the parties from having a different procedure for appointment of an Arbitrator and Rule 4(c) provides

that in case parties have provided a different procedure, Council shall not be bound to process the case, unless both parties agree to follow the entire procedure of arbitration under ICA Rules. Further, in ***Delta Mechcons (supra)***, the Supreme Court reiterated that it is open to the parties, when entering into an arbitration agreement, to separately agree to a mechanism for constituting the Arbitral Tribunal and to follow Rules of the concerned institution for conduct of the arbitral proceedings. The procedure envisaged in the present case under Clause 25(g) clearly indicates that parties had not ceded the power to appoint the nominee Arbitrators to the ICA and therefore, Petitioner is right in its submission that there was no mandate or obligation to take recourse to Rule 15 or Rule 23(b) of ICA Rules with regard to constitution of the Arbitral Tribunal *albeit* once the Arbitral Tribunal is constituted, the arbitral proceedings may be conducted as per the ICA Rules.

28. In light of the judgment of the Supreme Court in ***C.M.C. Ltd. (supra)*** and ***Delta Mechcons (supra)***, there is also no merit in the contention of the Respondent that in light of Clause 25(c) of GTC, Petitioner was bound to formally notify a request for appointment of an Arbitrator as per ICA Rules, failing which the invocation is *non est.* If the parties had the autonomy to agree to a different procedure for constituting the Arbitral Tribunal, Clause 25(c) will have no relevance. In fact, accepting this contention of the Respondent would amount to imposing on the Petitioner an obligation to accept the ICA Rules in entirety as also imposing on the Council an obligation to process the case for constituting the Arbitral Tribunal, which will be in the teeth of Rule 4(c) of the ICA Rules and the judgment of the Supreme Court in ***C.M.C. Ltd. (supra)***.

29. Reliance by the learned Senior counsel for the Respondent on the judgment of the Supreme Court in ***Iron & Steel Co. Ltd. (supra)*** is misplaced. In the said case, agreement between the parties contained an arbitration Clause 13.1, which provided for reference of the disputes and differences to arbitration for adjudication in accordance with ICA Rules. The Supreme Court examined the arbitration clause and observed that the clause was in accordance with Section 11(2) of 1996 Act and there being an agreed procedure for resolution of disputes, in accordance with ICA Rules, sub-Sections (3), (4) and (5) will have no application. It was observed that recourse to sub-Section (6) of Section 11 can be had only where parties have agreed on a procedure for appointment of an Arbitrator but: (a) party fails to act as required under that procedure; or (b) where 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 under that procedure and therefore, once the Respondent had not made any effort to have the disputes settled by arbitration in accordance with ICA Rules, there was no failure by the Petitioner and the petition under Section 11 of 1996 Act filed before the City Civil Court at Hyderabad was pre-mature. Clearly in the said case, parties had agreed to follow the procedure of constituting the Arbitral Tribunal as per ICA Rules and were bound to follow the mechanism for appointment of Arbitrator thereunder. There was no other Clause providing for a substantially different mechanism as in the present case in the form of Clause 25(g). In these facts, the Supreme Court allowed the appeal and set aside the impugned order appointing the Arbitrator observing that if the parties have agreed on a procedure for appointing the Arbitrator, as

contemplated by Section 11(2) of 1996 Act, then the disputes between the parties have to be decided in accordance with the said procedure and recourse cannot be taken to the Chief Justice or his designate straightway. A party can approach the Court under Section 11 of 1996 Act for appointing the Arbitrator only if the parties have not agreed upon a procedure or various contingencies provided under Section 11(6) of 1996 Act have arisen. It was observed that in matter of settlement of dispute by arbitration, agreement executed by the parties has to be given great importance and an agreed procedure for appointment of Arbitrator has been placed on high pedestal and has to be given preference to any other mode for securing appointment. As evident from a reading of the judgment, parties had agreed to follow the procedure of ICA Rules for appointment of the Arbitrator and there was no other mechanism envisaged and therefore, as rightly flagged by the Petitioner Rule 4(c) did not come into play and the judgment is inapplicable on the facts of this case.

30. Insofar as the order in ***Neo Structo Construction (supra),*** heavily relied upon by the Respondent is concerned, counsel for the Petitioner rightly urged that in the said order, there is no discussion on a clause akin to Clause 25(g), as in the present case and/or the judgments of the Supreme Court in ***C.M.C. Ltd. (supra)*** and ***Delta Mechcons (supra)***. Moreover, a plain reading of the order shows that Petitioner therein had in fact sent a notice invoking arbitration to ICA, unlike in the present case, which the Court found was not compliant with Rule 15(1) of ICA Rules and faced with this, Petitioner had withdrawn the petition, with liberty to approach ICA for appointment of an Arbitrator. It is not understood how this order even remotely aids the Respondent. Contention of the Respondent that accepting

the plea of the Petitioner would convert an institutional arbitration to *ad hoc* arbitration is neither here nor there. Parties had agreed to a procedure for constituting the Arbitral Tribunal by incorporating Clause 25(g) and at that stage, the mechanism of constituting the Arbitral Tribunal was thus known to the parties. Once the Supreme Court has ruled that parties are free to devise their mechanism for appointment of the Arbitrators and process of settlement of disputes through arbitration is *extra cursum curiae*, it is too late in the day for the Respondent to take a plea that the arbitration will be *ad hoc* and on this basis, seek dismissal of this petition.

31. In light of the aforesaid discussion and judgments of the Supreme Court, it is held that there was no requirement for the Petitioner to resort to Clause 25(c) of GTC to formally notify the ICA for appointment of the Arbitrator and the notice sent by the Petitioner to the Respondent on 13.09.2024, invoking arbitration agreement under Section 21 of 1996 Act is valid invocation. Existence of the arbitration agreement is not disputed by the Respondent. Respondent has clearly failed to nominate its Arbitrator in response to the notice of invocation and this confers jurisdiction on this Court to appoint the nominee Arbitrator of the Respondent.

32. Accordingly, this petition is allowed. Petitioner has nominated Mr. Justice Krishna Murari, former Judge of the Supreme Court as a nominee Arbitrator. Mr. Justice Manmohan Singh, former Judge of this Court (Mobile No.9717495001), is appointed as nominee Arbitrator of the Respondent. Both the Arbitrators will appoint the Presiding Arbitrator. Learned Arbitrators shall give a disclosure under Section 12 of 1996 Act.

33. The arbitral proceedings shall be conducted as per ICA Rules and fee of the Arbitrators shall be fixed in consonance with the said Rules.

34. It is made clear that this Court has not expressed any opinion on the merits of the case and all rights and contentions of the parties are left open.

35. Petition is disposed of in the aforesaid terms.

JYOTI SINGH, J

JULY 09 , 2025/*Shivam/S.Sharma*