
(2019) 4 R.A.J. 12 : (2019) 2 RLR 449 : (2019) 177 DRJ 241

Delhi High Court

Case No: Arbitration Petition No. 180 Of 2019

M/S NCR Developers

APPELLANT

Vs

University Of Delhi

RESPONDENT

Date of Decision: April 25, 2019

Acts Referred:

- Arbitration And Conciliation Act, 1996 - Section 11, 11(6), 11(6)(a), 12(5), 34
- Arbitration Act, 1940 - Section 8, 8(1)(a)

Citation: (2019) 4 R.A.J. 12 : (2019) 2 RLR 449 : (2019) 177 DRJ 241

Hon'ble Judges: Sanjeev Narula, J

Bench: Single Bench

Advocate: Nishit Kush, Mercy Hussain, Asma, Aakansha Kaul

Final Decision: Allowed

Judgement

Sanjeev Narula, J

1. The present petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (herein after referred to as the 'Act') seeks appointment of an independent Arbitrator.

Brief Facts

2. The Petitioner was awarded the contract for Recasting dilapidated/Broken RCC Chajjas, exterior wall painting plasteraluminum work and repair

works in the New Administrative Block, University of Delhi by the Respondent on 4th February 2015 for an amount of Rs. 47,39,140/- (forty seven

lacs thirty nine thousand one hundred forty only). A formal contract was executed between the Petitioner and the Respondent on 13th February 2015.

It is the case of the Petitioner that the work was successfully completed on 31st March 2016. Respondent issued a completion certificate dated 14th

December 2016. Petitioner wrote several letters to the Respondent calling upon them to release the payment for the completed work. The Respondent

called upon the Petitioner for negotiation and was informed by the Registrar, DU that the outstanding amount will not be released unless it is lowest in

terms of the excess expenditure. Having no alternative, Petitioner agreed to settle for an amount Rs. 62,75,716.19/- (Sixty Two Lacs Seventy Five

ThousandSeven Hundred Sixteen) as full and final settlement of its outstanding dues. Against the said amount, the Respondent released part

payment of Rs. 24,60,030/- (Twenty Four Lacs Sixty ThousandThirty). Petitioner contends that since the Respondent has failed to release the entire

amount of Rs. 62,75,716.19/- (Sixty Two Lacs Seventy Five ThousandSeven Hundred Sixteen), it is entitled to recover the actual cost/expenditure

incurred for completion of the work. Petitioner invoked the Arbitration Clause vide notice dated 14th September 2018 and called upon the Respondent

to appoint the Sole Arbitrator. Since the Respondent has failed to appoint an Arbitrator within a period of 30 days of the receipt of the notice, the

Petitioner has approached this Court by way of the present petition.

3. Respondent does not dispute the existence of the Arbitration clause or its invocation. However, relying on the condition contained in the clause to

the effect "It is also a term of this contract that no person other than a person appointed by V.C./Administrative V.C as aforesaid should act as

arbitrator and if for any reason that is not possible the matter is not to be referred to arbitration at all it is contended that Arbitration clause does not

survive.

Submission of the parties:

4. The Court has heard the learned counsels for the parties at considerable length. Mr. Nishit Kush learned counsel for the Petitioner argues that

notwithstanding the wording of the clause noted above, the Court is not denuded of its power to appoint an Arbitrator. The arbitration clause has

to be given a meaningful construction. There is no named Arbitrator and the clause provides for appointment by designation of the Appointing

Authority i.e VC, Delhi University or the administrative head of the Delhi University as the case may be. Since the Respondent has failed to appoint

an Arbitrator within a period of 30 days of the invocation notice, the Court has the power to appoint an independent Arbitrator under Section 11 (6) of

the Act. In support of his submission, the Petitioner has relied upon the following judgments of this Court as well as the Supreme Court:

I. Nandyal Coop. Spinning Mills Ltd. v. K.v. Mohan Rao (1993) 2 SCC 654

II. Nav Nirman Construction Company v. Executive Engineer CD-IX, Irrigation and Flood Control Department, GNCTD 2011 SCC Online Del 3948

III. Indian Oil Corporation Ltd. V. Raja Transport Private Ltd. (2009) 8 SCC 520

IV. M/s AnsalBuildwell Ltd. v. M/s Centre for Development of Telecom (Arb. Pet. No. 318/2008)

V. HCIL-Arsspl-Triveni(JV) v. Rites Ltd. (2009 SCC Online Del 2966)

VI. North Eastern Railways v. Tripple Engineering Works (AIR 2014 SC 5306)

5. The Respondent has not filed a reply and has instead filed brief note of submissions, which contains only legal objections/submissions. However,

during the arguments, Ms. Akansha Kaul learned Counsel for the Respondent objected to the appointment of the Arbitrator on the ground that the

Arbitration Clause does not survive any more. She highlights that the condition contained in the arbitration clause which stipulates that "no person

other than a person appointed by VC/Administrative VC as aforesaid should act as arbitrator and if for any reason, that is not possible the matter is

not to be referred to arbitration at all" and argues that the understanding between the parties is clear that an arbitrator can only be the person

appointed by the Vice Chancellor, Delhi University and if for any reason that is not possible, the matter is not to be referred to Arbitration. Since the

appointment has not been done by the Vice Chancellor of the Delhi University, irrespective of the reasons, the parties cannot be referred to

Arbitration at all. Learned counsel for the Respondent additionally argued that in case the Court were to exercise the power under Section 11 (6) of

the Act, the Court should at the first instance call upon the Respondent to make an appointment of the Arbitrator as per the said clause. In support of

her argument, the learned counsel for the Respondent has relied upon the following judgments:

I. Newton Engineering and Chemicals Ltd. v. Indian Oil Corporation Ltd. &Ors (2013) 4 SCC 44

II. Oriental Insurance Company Ltd. v. M/s Narbheram Power and Steel Pvt. Ltd. (Civil Appeal No. 2268/2018) judgment dated 2nd May 2018.

III. Union of India v. Mohan Aggarwal Construction Co. (Civil Appeal No. 1167 of 2015) order dated 22nd January 2015.

IV. M/s AnsalBuildwell Ltd. v. M/s Centre for Development of Telecom (Arb. Pet. No. 318/2008)

V. HCIL-Arsspl-Triveni(JV) v. Rites Ltd. (2009 SCC Online Del 2966)

VI. ACC Ltd. v. Global Cements Ltd. (2012) 7 SCC 71

VII. Union of India v. Parmar Construction Company (Civil Appeal No. 3303/2019) judgment dated 29th March 2019.

Analysis and Findings

6. The controversy in the present petition is centered around the wording of the Arbitration Clause. It would thus be apposite to first note the

Arbitration Clause which reads as under:

Settlement of Disputes & Arbitration

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Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and

instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right,

matter or thing whatsoever in anyway arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these

conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after

the cancellation, termination, completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the V.C,D.U. in

office, at the time or if there be no VC the administrative head of the Delhi University , at the time of such appointment that the arbitrator so

appointment. It will be no objection to any such appointment that the arbitrator so appointed is a University servant, that he had to deal with the matters

to which the contract relates and that in the course of his duties as a University servant he had expressed views on all or any of the matters in dispute of

difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, such

head as - aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as an arbitrator in accordance

with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It

is also a term of this contract that no person other than a person appointed by V.C./Administrative V.C as aforesaid should act as arbitrator and if for

any reason that is not possible the matter is not to be referred to arbitration at all. In all cases where the amount of the claim in dispute is Rs.

1,00,000.00 and above shall give the reasons for the award.

It is a term of the contract that the party invoking the arbitration shall specify the dispute or disputes to be referred to arbitration under this clause

together with the amounts claimed in respect of each such dispute.

It is also a term of this contract that no person other than a person appointed by Vice Chancellor, Delhi University or the administrative head of the

Delhi University, as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

xxx xxxxxx

Maintainability of the Petition under Section 11(6) of the Act.

7. The existence of an arbitration agreement is not in dispute. The question before the court is whether the arbitration agreement survives or not and

consequently whether the application under Section 11(6) of the Act is maintainable or not? If the answer to the question is in the affirmative, what

directions can be issued? The arbitration clause inter alia provides that all questions in dispute relating to the conditions or otherwise concerning the

works shall be referred to the sole arbitration of the person appointed by the VC, Delhi University. If there is no VC, the Administrative Head of the

Delhi University would have the power to make the appointment. In that context, it is further provided that it is also the term of the Contract that no

person other than the person appointed by the VC/Administrative VC should act as an Arbitrator and if for any reason that is not possible, the matter

is not to be referred to Arbitration at all.

8. There cannot be any dispute that the parties to the Contract specifically agreed that no person other than one appointed by the Vice Chancellor of

Delhi University could act as an Arbitrator. Petitioner has agreed to give the right of appointment to the Vice Chancellor of Delhi University and in his

absence to the Administrative Head of the Delhi University. The Respondent relying on the aforesaid Clause, has taken a stance that the Arbitration

Clause does not survive. It is not disputed that despite the invocation of the Arbitration, the Respondent has failed to exercise its right under the

Contract. It is also not the case of the Respondent that the Arbitrator could not be appointed due to some specific reason. Respondent argues that

since the appointment has not been made, irrespective of the reason, the Arbitration Clause does not survive.

9. The stand of the Respondent is not only unreasonable but is contrary to the intention of the parties as it emerges from the reading of the Clause.

The condition of the Clause which provides that no person other than the person appointed as Vice Chancellor, Delhi University should act as an

Arbitrator only reinforces that the Petitioner agreed to give the Respondent the right to make an appointment. The stipulation that "if for any reason

that is not possible, the matter shall not be referred to Arbitration at all"" reaffirms that the parties agreed to go for arbitration under a person appointed

by the Respondent. The arbitration clause here does not name an individual as an arbitrator. The appointment is by way of designation of the

appointing authority. The Respondent had the opportunity to make an appointment and having willfully neglected and failed to do so, it cannot rely on

its inaction to deprive the Petitioner to avail the remedy of alternative dispute resolution mechanism.

10. The Court cannot decipher the understanding between the parties in a manner the Respondent is canvassing. The arbitration clause has to be

given a meaningful construction. The clause gives the Respondent a right to make an appointment but not to extinguish or abandon the clause all

together. If the objection of the Respondent is sustained, it would mean that arbitration can be resorted to solely as per the choice of the Respondent.

The Respondent has the right to appoint an Arbitrator but not an exclusive right to decide whether to arbitrate or not. Respondent's interpretation

of the clause is not correct. Therefore, since the Respondent has failed to act as per the agreed procedure, Petitioner is well within its right to

approach this court under Section 11 (6) (a) of the Act and the power of the court, in the facts of the present case, is not impinged.

11. The Court's power to appoint an Arbitrator under Section 11 (6) of the Act, has been subject matter of several decisions of this Court and the

Supreme Court. In the case of Nandyal Coop. Spinning Mills Ltd (supra), relied upon by the Petitioner, a question arose with respect to the jurisdiction

of the Court to make an appointment under Section 8 (1) (a) of the Arbitration Act, 1940 in view of a para materia Arbitration Clause. This Court held

that an aggrieved party has the right to file an application under Section 8 of the Arbitration Act, 1940 Act, where the opposite party fails to appoint an

Arbitrator(s) as per the terms of the Contract. The judgment of the Division Bench of this Court, in Nav Nirman Construction Company Ltd.(supra)

also fortifies the aforementioned view. In the said case, the Single Judge while deciding objections to the award under section 34 of the Act arrived at

a conclusion that in view of the arbitration clause [containing a para materia condition] failure of the designated authority to appoint an arbitrator would

give a go bye to arbitration. Over turning the said decision, the Division Bench held that the failure of the designate authority to appoint an arbitrator

cannot be construed to denude the Chief Justice or his designate to appoint an Arbitrator. Respondent has placed reliance upon Newton Engineering

and Chemical Ltd. (supra) wherein the arbitration clause inter alia provided that no person other than ED(NR) or the person designated by the ED

(NR) should act as an arbitrator. The question arose that if the office of ED (NR) ceased to exist in the Corporation and the parties were unable to

reach at an agreed solution, whether the arbitration clause survives? The Court while interpreting the clause, expressed the view that in such a

situation, the Court has no power to appoint an arbitrator for resolution of the disputes. However, it is apposite to state that on a perusal of the

judgment, one cannot conclude whether the arbitration clause had a similar condition to the effect that in a certain event, there would be, ""no

arbitration at all"" and therefore the case is distinguishable on facts. The learned counsel for the Respondent has also placed reliance on a decision of

the Supreme Court in the case of ACC Ltd. (supra). A perusal of the judgment elucidates the facts in the said case are distinct and distinguishable and

therefore the Court is not persuaded to rely on the aforementioned case.

12. Thus, Respondent's interpretation of the clause is not correct. Since the Respondent has failed to act as per the agreed procedure, Petitioner is

well within its right to approach this court under section 11 (6) (a) of the Act and the power of the Court, in the facts of the present case has not

been encroached.

Whether an independent arbitrator can be appointed?

13. The mainstay of the Respondent's contention is that the procedure and mechanism provided under the Contract should be given effect to, as

closely as possible. There is no quarrel on this proposition. The Supreme court in Datar Switchgears Ltd v. Tata Finance Ltd (2000) 8 SCC 151 ;Union

of India v. Bharat Battery Manufacturing Co.(P)Ltd. (2007) 7 SCC 684 and Punj Lloyd Ltd. v. Petronet MHB Ltd. (2006) 2 SCC 638, while

discussing the Court's power to appoint an arbitrator under Section 11(6) of the Act, the Court deviated from the terms of the contract and appointed

an independent arbitrator.

It is noted that the Arbitration Clause (s) in Datar Switchgears Ltd. (supra) and Punj. Lloyd Ltd. (supra) do not stipulate a condition similar to the one

in the present case. However, in Bharat Battery Manufacturing Co. Ltd. (supra), though a similar condition in the Arbitration Clause exists, there has

been no dispute with regard to the survivability of Arbitration.

14. At the same time it is also noteworthy that in a recent decision of Supreme Court in Union of India v. Parmar Construction Company (supra),

while taking note of Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Limited (2008) 10 SCC 240 and

Union of India v. Singh Builders Syndicate has taken another approach. The Supreme Court in aforementioned cases has expressed the opinion that where

an application under Section 11(6) of the Act is filed, the procedure for appointment of an arbitrator prescribed in the agreement, be given effect to

and the Court ought not to appoint an independent arbitrator without resorting to the inbuilt mechanism as agreed between the parties.

15. There is no dispute that there is an unequivocal intention of the parties to go for arbitration for the adjudication of the disputes. The arbitration

clause when read as a whole, emphasizes for an arbitration under a person appointed by the Respondent. If the court were to appoint an independent

arbitrator in the present case, it would amount to rewriting the terms of the arbitration clause. The peculiar wording of the arbitration clause in the

present case, prevails upon this court to follow the ratio of the judgment in Union of India v. Parmar Construction Company (supra). It is pertinent to

note that the Court in the said case (supra), has noticed and discussed its earlier judgments of Datar Switchgears Ltd. (supra);

Union of India v. Bharat Battery Manufacturing Co.(P)Ltd (supra) and Punj Lloyd Ltd.(supra) held that the Chief Justice or his Designate, in exercise

of power under Section 11(6) of the Act cannot directly make an appointment of an independent arbitrator without, in the first instance, resorting to

ensure that the remedies provided under the arbitration agreement are exhausted. The relevant paragraphs of the aforementioned judgment read as

under:

42. The judgments in Datar Switchgears Ltd. case (supra); Punj Lloyd case (supra) and Union of India v. Bharat Battery Manufacturing Co. (P) Ltd.

case (supra) on which reliance has been placed by the learned counsel for the respondents/contractors may not be of assistance for the reason that

the question for consideration before this Court was that if one party demands the opposite party to appoint an arbitrator and the other party fails to

appoint an arbitrator within 30 days what will be its legal consequence and it was held in the cases (supra) that if one party demands the opposite

party to appoint an arbitrator and if the opposite party has failed to make an appointment within 30 days, the right to make appointment is not forfeited

but continues, but an appointment has to be made before the former makes an application under Section 11 seeking appointment of an arbitrator. In

the instant cases, the question for consideration is as to whether the Chief Justice or his Designate in exercise of power under Section 11(6) of the

Act should directly make an appointment of an independent arbitrator without, in the first instance, resorting to ensure that the remedies provided

under the arbitration agreement are exhausted.

43. In the present batch of appeals, independence and impartiality of the arbitrator has never been doubted but where the impartiality of the arbitrator

in terms of the arbitration agreement is in doubt or where the Arbitral Tribunal appointed in terms of the arbitration agreement has not functioned, or

has failed to conclude the proceedings or to pass an award without assigning any reason and it became necessary to make a fresh appointment, Chief

Justice or his designate in the given circumstances after assigning cogent reasons in appropriate cases may resort to an alternative arrangement to

give effect to the appointment of independent arbitrator under Section 11(6) of the Act. In *North Eastern Railway v. Tripple Engineering Works*

(supra), though the panel of arbitrators as per clause 64(3)(a)(ii) and (iii) of the general conditions of contract under GCC was appointed in the year

1996 but for two decades, the arbitrator failed to pass the award and no explanation came forward. In the given situation, this Court observed that

general conditions of the contract do not prescribe any specific qualification of the arbitrators to be appointed under the agreement except that they

should be railway officers further held that even if the arbitration agreement was to specifically provide for any particular qualification(s) of an

arbitrator the same would not denude the power of the Court acting under Section 11(6) to depart therefrom and accordingly, confirmed the

appointment of an independent arbitrator appointed by the High Court in exercise of Section 11(6) of the Act, 1996. Almost the same situation was

examined by this Court in *Union of India v. Uttar Pradesh State Bridge Corporation Ltd.* (supra) and after placing reliance on *North Eastern Railway*

v. Tripple Engineering works (supra) held that since Arbitral Tribunal has failed to perform and to conclude the proceedings, appointed an independent

arbitrator in exercise of power under Section 11(6) of the Act, 1996. In the given circumstances, it was the duty of the High Court to first resort to the

mechanism in appointment of an arbitrator as per the terms of contract as agreed by the parties and the default procedure was opened to be resorted

to if the arbitrator appointed in terms of the agreement failed to discharge its obligations or to arbitrate the dispute which was not the case set up by

either of the parties.

44. To conclude, in our considered view, the High Court was not justified in appointing an independent arbitrator without resorting to the procedure for

appointment of an arbitrator which has been prescribed under clause 64(3) of the contract under the inbuilt mechanism as agreed by the parties.

(emphasis supplied)

16. Pertinently, in Ansal Buildwell Limited case (supra), this court in a petition filed by the aggrieved party under Section 11(6) of the Act noticed the

Arbitration clause containing a similar condition upheld the right of the Respondent to appoint the arbitrator and declined to appoint an independent

Arbitrator holding as under:-

4. Learned counsel for the petitioner relied upon the text of Section 11 and a decision of the Bombay High Court in Satya Kailash chandraSahuvs.

M/s.Vidarbha Distillers, Nagpur, AIR 1998 BOMBAY 210. It was argued that when an arbitration agreement provides for appointment of a named

person or persons as Arbitrator and when they refuse to act, the procedure required to be follows is as provided in Section 11. It was argued

analogically, where the process containing the Agreement, envisions appointment by one of the parties and also provides for contingency, a similar

inference has to be drawn, that upon the happening of that contingency, the power to appoint an Arbitrator stands exhausted.

5. The Court is un-persuaded by the submission of the petitioner.The Arbitration Agreement, i.e. clause 67.1 is no doubt unusually worded. That does

not detract from its real effect. The contracting parties categorically agreed that no person other than one appointed by the Executive Director, C-

DOT, could act as Arbitrator and that if for any reason that was not possible, there could not be any reference for arbitration at all. In essence what

the condition says is that the foundation of the Arbitration Agreement itself is appointment by the Executive Director, in the manner contemplated. If

this condition which is fundamental to the Arbitration Agreement itself, were to be seen with the preceding terms, it would be apparent that the C-

DOT, (subject to other provisions of law such as Section 11, i.e. fixing time limits etc., as interpreted by the Supreme Court in Datar Switch Gear vs.

Tata Finance Ltd., 2002 (8) SCC 151), retained the right to appoint Arbitrator at all times. This condition is unlike the one which the Bombay High

Court had occasioned to deal with in Satya Kailashchandra's case (supra).

7. From the above discussion, it is apparent that the right of the C-DOT to appoint an Arbitrator in the manner contemplated in Clause 67.1.4 did not

get exhausted upon the named Arbitrator refusing to act further. Mr. J.C.Seth, learned Counsel appearing for C-DOT, submits that by an office order

dated 26.8.2008, Mr. P.S. Saran (Retd.), Secretary, Department of Telecom Services, and Member (Services) Telecom Commission, has been since

appointed as Arbitrator.

(emphasis supplied)

17. The decision of this Court in HCIL- Arsspl-Triveni (JV)(supra) is also relevant. The Court was dealing with a similar clause, has followed Ansal

Buildwell Limited (supra) and directed the Respondent to make an appointment of the arbitrator and did not appoint an independent arbitrator.

18. In this regard another significant decision of a coordinate Bench of this Court in the case of Ess Ess Constructions v. Union of India [Arb. P

801/2016] decided on 2nd February, 2017 requires to be mentioned. The court while deciding the petition for appointment of an independent arbitrator

on the basis of a clause containing a similar condition first made an attempt to appoint an arbitrator as per the terms of the contract.

In the said case, this Court has also distinguished the decision of Mohan Aggarwal Construction Company (supra) i.e. the judgment relied upon by the

Respondent on the ground that the earlier decision of a Bench of same strength in Nandyal Coop. Spinning Mills Ltd (supra) was not brought to the

notice of the Supreme Court while deciding Mohan Aggarwal Construction (supra).

The relevant paragraphs of the judgment read as under:-

9. xxx xxxxxx

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It is also a term of this contract that no person, other than a person appointed by such Chief Engineer CPWD or Additional Director General or

Director General of works, CPWD, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to

arbitration at all.....

13. In *Nandyal Coop. Spinning Mills Limited v. K.V. Mohan Rao* (supra), the Supreme Court interpreted the above clause as permitting the contractor

to approach the Court for the appointment of an Arbitrator in the event of the Respondent declining to appoint an Arbitrator. The specific contention

of the Appellant in that case was that if the administrative head of the Appellant rejected the prayer to appoint an Arbitrator, ""the only remedy open to

the contractor was to have recourse to civil court"" was ""without force"". In the present case, the Clause itself envisages that the arbitration will be

conducted in accordance with the provisions of the Act as amended from time to time.

14. It may also be noticed that the attention of the Supreme Court in *Union of India v. Mohan Aggarwal Construction Co.* (supra) does not appear to

have drawn to the afore mentioned earlier judgment in *Nandyal Coop. Spinning Mills Limited v. K.V. Mohan Rao* (supra) which has interpreted the

identical clause.

15. In the present case, it might still have been possible for the Chief Engineer to be asked to appoint an Arbitrator. However, learned counsel for the

Respondent states that it is practically impossible for the Chief Engineer to now appoint an Arbitrator as such person would not be qualified in terms of

the Act as amended from 23rd October, 2015. The clause in the present case envisages the applicability of the Act ""or any statutory modification or

re-enactment thereof."" Therefore, learned counsel for the Respondent was right in contending that under the amended Act it is not possible for the

Respondent to appoint an Arbitrator. When asked whether the Chief Engineer could appoint an independent person who may not be disqualified to act

as an arbitrator, learned counsel for the Respondent answered in the negative stating that the Chief Engineer would not be permitted to appoint

a person other than an employee of the government itself.

(emphasis supplied)

19. In Raja Transport Private Ltd.(supra) and Oriental Insurance Company Ltd. (supra) as well, the Court has held that endeavour shall be made to

give effect to the appointment procedure prescribed in the arbitration clause.

20. Before parting, it is also apposite to note that bare perusal of the scheme of Section 11 of the Act shows that the emphasis is on the terms of the

agreement being adhered to and/or given effect as closely as possible. In other words, the Court must ensure that the remedies provided for are

exhausted.

21. Having regard to the intention of the parties and the wordings of the Arbitration clause which provides that the foundation of the Arbitration is by

way of appointment by the Respondent, the court directs the Respondent to appoint an arbitrator in terms of Clause 25 of the Contract within four

weeks from today. Respondent while making an appointment is to take into consideration the mandate of Section 12(5) and Schedule VII of the Act

as amended by Arbitration and Conciliation (Amendment) Act, 2015.

22. Petition is allowed in above terms.