IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

RESERVED ON: 22.04.2026
DELIVERED ON: 08.05.2026

PRESENT:
THE HON'BLE MR. JUSTICE GAURANG KANTH

AP-COM 61 OF 2025

M/S. MALATHY CONSTRUCTIONS
VERSUS
BRIDGE AND ROOF CO. INDIA LTD.

Appearance:

Mr. Anubhav Sinha, Adv.
Mr. Shirsho Banerjee, Adv.
..... for the petitioner

Mr. Sanjib Dawn, Adv.
..... for the respondent

JUDGMENT

Gaurang Kanth, J.:-

1. The Petitioner has preferred the present petition under Section 11 of the Arbitration and Conciliation Act, 1996, seeking appointment of a sole arbitrator to adjudicate the disputes arising between the parties.

2. The facts leading to the present Petition are as follows:

3. The Respondent is a multi-disciplinary engineering company primarily engaged in infrastructure projects. The Petitioner is a partnership firm engaged in civil works and has provided services to various construction companies in connection with civil projects.

4. The Respondent floated a tender, pursuant whereto the Petitioner emerged as the successful bidder. Accordingly, the Respondent awarded a subcontract to the Petitioner vide tender document bearing No. B&R/51108/ARIYALUR/TD/PCC, RCC, FORM WORK dated 16.12.2017, for execution of PCC, RCC, and shuttering works on a subcontract basis in

connection with the execution and handing over of civil works yard and buildings (excluding gravel spreading and compound wall) of the 756/400 KV Substation at Ariyalur, Tamil Nadu.

5. In furtherance of the said subcontract, the Petitioner carried out excavation, disposal, and refilling works under the following work orders issued by the Respondent: (i) Work Order No. B&R/51108/ARIYALUR/LOI/Earthwork Excavation dated 08.01.2018; (ii) Work Order No. B&R/51108/ARIYALUR/LOI/PCC, RCC & Shuttering/01 dated 08.01.2018; (iii) Work Order No. B&R/51108/ARIYALUR/LOI/Open and Covered Stores dated 30.01.2018; (iv) Work Order No. B&R/51108/ARIYALUR/LOI/PCC, RCC & Shuttering/01/C dated 11.05.2018.

6. The Respondent issued a certificate of completion dated 06.08.2019 certifying completion of part works in respect of the aforesaid work orders.

7. The Petitioner contends that the Respondent, while making payments against the executed works, withheld 5% of the payment amounts as security deposit under the aforesaid letters of intent and work orders. The Petitioner further contends that the Respondent's officials directed the Petitioner to excavate foundations beyond a depth of 2 metres, whereas excavation up to 2 metres only was within the Petitioner's contractual scope. The Petitioner contends that the Respondent's officials assured that payment for such additional excavation work would be released as and when the principal employer released the corresponding payment. However, the invoices raised by the Petitioner in respect of such additional work were not paid by the Respondent. The Petitioner further contends that, on account of disputes between the Respondent and the principal employer,

certain portions of the work executed by the Petitioner were not certified by the principal employer. As a consequence, thereof, the Petitioner was required to retain manpower and machinery at the site for an extended period, resulting in additional expenditure being incurred by the Petitioner.

8. The Petitioner raised its last invoice on 12.03.2019 for an amount of Rs. 37,94,998/-. Against the said invoice, the Respondent released a sum of Rs. 5,13,965/- on 11.04.2019, leaving a substantial amount outstanding and unpaid.

9. The Petitioner addressed emails to the Respondent on 07.10.2019, 02.01.2020, and 21.03.2020 calling upon the Respondent to release the outstanding dues. However, the Respondent failed to make the payment of the said amount.

10. The Petitioner thereafter issued a legal notice dated 29.05.2020 demanding release of the total outstanding sum of Rs. 1,72,62,327/-. The Respondent, by electronic mail dated 01.06.2020, denied all claims of the Petitioner and indicated that any disputes between the parties would be resolved through arbitration.

11. The Petitioner subsequently invoked the arbitration clause, being Clause 26 of Annexure II to the General Conditions of the tender document dated 16.12.2017, vide letter dated 30.06.2022. The Respondent neither responded to the said invocation notice nor took any steps for constitution of the arbitral tribunal.

12. In the aforesaid circumstances, the Petitioner has preferred the present petition under Section 11 of the Arbitration and Conciliation Act, 1996, seeking appointment of an independent arbitrator to adjudicate the disputes between the parties.

Submission on behalf of the Petitioner

13. Mr. Anubhav Sinha, learned counsel for the Petitioner submits that a valid and binding arbitration agreement exists between the parties in the form of Clause 26 of Annexure II to the General Conditions of the tender document dated 16.12.2017 and that all disputes arising out of non-payment of contractual dues, retention of security deposit, non-certification of extra work, and losses incurred on account of prolonged site presence fall squarely within the scope of that clause. Upon the Petitioner's invocation of the arbitration clause vide letter dated 30.06.2022, the Respondent failed and neglected to respond or to participate in the appointment process. In this precise situation, the Delhi High Court in ***ABB ABL Ltd. v. Cement Corporation of India*** reported as ***[1999 (49) DRJ 131]*** held that where a party fails to appoint an arbitrator despite notices and requests and shows no inclination to cooperate in constituting the tribunal, the Court's jurisdiction under Section 11(6) of the Arbitration and Conciliation Act, 1996 is properly and necessarily invoked, as the only recourse available to the aggrieved party in such circumstances is to approach the Court for appointment. The present petition is therefore fully maintainable.

14. On the question relating to the scope of inquiry at this stage, the Petitioner relies upon the judgment of the Hon'ble Supreme Court in ***Schlumberger Asia Services Ltd. v. Oil and Natural Gas Corporation Ltd.*** reported as ***[2013 (7) SCC 562]***, wherein it was categorically held that while the Court or the designated authority under Section 11 may decide whether a claim is patently dead or long time barred by limitation, it is not imperative to do so at the threshold. It is further held that where disputed questions arise, whether as to limitation, receipt of notices, or the validity of claims, such

issues are matters of evidence and are therefore required to be left to the Arbitral Tribunal. Similarly, the Division Bench of the Delhi High Court in ***Oval Investment Pvt. Ltd. v. Indiabulls Financial Services Pvt. Ltd.*** reported as ***[2009 (113) DRJ (504) (DB)]*** affirmed that the statutory scheme of the Arbitration and Conciliation Act, 1996 is a self-contained code, and any challenge relating to the existence or invocation of an arbitration agreement must be addressed within that framework. It is further held that it is not open to a party to circumvent or frustrate the arbitral process by inaction or by raising disputes outside the Act's framework. The Bombay High Court in ***Singhai & Brothers v. MTNL*** reported as ***[(2005) 3 Mh.L.J. 951]*** further reinforced this position by holding that where the parties have continued to correspond and the cause of action is of a continuing nature, delay in approaching the Court for appointment of an arbitrator under Section 11 does not extinguish the arbitrable claims, and any contention as to limitation remains a matter exclusively within the domain of the Arbitral Tribunal to determine on evidence.

15. In light of the foregoing, it is the submission of the learned counsel for the Petitioner that at this stage, this Court is not called upon to examine the merits of the Petitioner's claims or any objections which the Respondent may seek to raise, all of which fall within the exclusive adjudicatory domain of the Arbitral Tribunal. The Court's task is confined to satisfying itself of the existence of a valid arbitration agreement, which is undisputed and the breakdown of the appointment mechanism which is evident from the Respondent's failure to respond to the invocation notice. In view thereof, the Petitioner prays for the appointment of a sole independent arbitrator to

adjudicate the disputes between the parties, in terms of Section 11 of the Arbitration and Conciliation Act, 1996.

Submission on behalf of the Respondent

16. Mr. Sanjib Dawn, learned counsel for the Respondent submits that while the subcontract work was indeed allotted to the Petitioner, the Petitioner consistently failed to perform its obligations under the contract. The progress of work remained unsatisfactory throughout, and the Petitioner failed to effectively dispose of hard rock generated from blasting and surplus soil, leading to an accumulation of debris at the site, which impeded the execution of the project. On account of the Petitioner's failure to perform, the principal employer BHEL was constrained to engage another agency to carry out the very work allotted to the Petitioner, at the risk and cost of the Petitioner. The Respondent has specifically denied the Petitioner's contention that its men and machinery were required to be stationed at site at the Respondent's behest. The Respondent never directed the Petitioner to retain men or machinery at site. It was the Petitioner who, of its own volition and in anticipation of future work that never materialised, refused to demobilise from the site. The discontinuation of work was entirely attributable to vendor related issues on the part of the Petitioner, and not due to any act or omission of the Respondent. The last payment made to the Petitioner was on 19.06.2019, and after that date, the Petitioner took no effective steps within the period of limitation to pursue its claims through the contractually prescribed mechanism.

17. The Respondent further submits that the present petition is liable to be dismissed on several independent and compelling legal grounds. First, the petition is hopelessly barred by limitation. The last payment by the

Respondent was made on 19.06.2019, and the cause of action, if any, crystallised on or around the said date. The alleged arbitration invocation notice was issued only on 30.06.2022, well beyond three years from the date on which the Petitioner's cause of action alleged to have arisen. The Petitioner's intermittent emails in 2019 and 2020 do not constitute any acknowledgment of liability by the Respondent and cannot operate to extend or refresh the period of limitation. Second, no valid notice under Section 21 of the Arbitration and Conciliation Act, 1996 was ever received by the Respondent. The only communication received by the Respondent from the Petitioner was in the nature of a notice under Section 80 of the Code of Civil Procedure, 1908, which is a precursor to civil litigation and cannot be treated as a request for reference of disputes to arbitration within the meaning of Section 21 of the Act. In the absence of receipt of a valid Section 21 notice, the arbitration proceedings cannot be deemed to have commenced and the present petition is premature and misconceived in law. Third, the Petitioner has not placed on record the agreement forming part of the transaction sought to be referred to arbitration. The work orders relied upon by the Petitioner do not form part of the tender document bearing No. B&R/51108/ARIYALUR/TD/PCC, RCC, FORM WORK dated 16.12.2017, the very document in which the arbitration clause is embedded. In the absence of any demonstrated nexus between the work orders and the said tender document, the disputes alleged to have arisen from those work orders cannot be said to be covered by or referable to the arbitration clause contained therein.

18. Learned Counsel for the Respondent accordingly submits that the present petition suffers from a confluence of fatal infirmities: the claims are time

barred and arise from long standing inaction on the part of the Petitioner; that no valid Section 21 notice has ever been received by the Respondent so as to constitute the commencement of arbitration proceedings that the foundational agreement containing the arbitration clause has not been placed on record; and the work orders sought to be agitated have not been shown to form part of the tender document containing the arbitration clause. Each of these grounds, individually and collectively, disentitles the Petitioner from obtaining the reliefs claimed. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 is therefore liable to be dismissed with costs.

Legal Analysis

19. This Court has carefully considered the submissions advanced by the learned counsel for both parties, examined the documents placed on record, and perused the judgments cited at the Bar.

20. The present petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996, seeking appointment of a sole arbitrator. The Petitioner has invoked arbitration under Clause 26 of Annexure II to the General Conditions of Contract forming part of the tender document bearing No. B&R/51108/ARIYALUR/TD/PCC, RCC, FORM WORK dated 16.12.2017.

21. Before proceeding to consider the appointment of an arbitrator, it is necessary for this Court to examine two threshold questions that go to the root of the maintainability of this present petition: first, whether the disputes alleged by the Petitioner arise out of and are referable to the arbitration clause relied upon; and second, whether a valid notice under Section 21 of the Act was issued and received by the Respondent so as to

constitute a valid commencement of arbitration proceedings. It is well settled that these two requirements are jurisdictional in nature and must be satisfied before this Court can exercise its power of appointment under Section 11 of the Act.

22. On the first threshold question, this Court is called upon to determine whether the work orders under which the Petitioner claims its alleged dues arise out of the tender document bearing No. B&R/51108/ARIYALUR/TD/PCC, RCC, FORM WORK dated 16.12.2017, or whether they arise out of an altogether different document, namely tender document bearing No. B&R/51108/ARIYALUR/TD/Form Work dated 08.01.2018. The answer to this question is decisive, for it is only if the work orders are traceable to the tender document dated 16.12.2017 that the arbitration clause embedded in Clause 26 of Annexure II thereto can be invoked in respect of disputes arising out of such work orders.

23. An examination of the record reveals a fundamental and material inconsistency in the Petitioner's own case. In the present petition, the Petitioner contends that the work orders were issued in pursuance of the tender document dated 16.12.2017, and on that basis invokes Clause 26 of Annexure II to the General Conditions of Contract forming part of that document. However, the notice dated 30.06.2022, whereby the Petitioner purported to invoke arbitration, projects a materially different and contradictory case. In that notice, the Petitioner categorically states that it had participated in a tender process initiated by the Respondent vide tender document bearing No. B&R/51108/ARIYALUR/TD/Form Work dated 08.01.2018, for execution of earthworks on a subcontract basis in connection with the execution and handing over of Civil Works Yard and

Buildings at the TNEB Ariyalur Project, and that upon being the successful bidder, the subcontract work relating to excavation, disposal, and refilling works was allotted to it thereunder. The petition and the arbitration invocation notice thus project inconsistent and irreconcilable cases as to the very tender document out of which the work orders and the consequent disputes are stated to arise. It is a well-established principle that a party cannot be permitted to approbate and reprobate simultaneously, that is to say, a party cannot blow hot and cold by adopting one position when it suits its purpose and an inconsistent position when that suits better. A party is bound by the position adopted in its own documents and cannot be permitted to resile therefrom while relying upon the same documents before a Court. In the present case, the Petitioner's invocation notice dated 30.06.2022 is the Petitioner's own document and the Petitioner cannot distance itself from the case projected therein while simultaneously relying upon that very notice as the foundation of the present petition. The Petitioner's inconsistency in this regard is not a peripheral irregularity, it strikes at the foundational premise of the present petition.

24. The Respondent has strenuously contended that the work orders relied upon by the Petitioner do not arise out of the tender document dated 16.12.2017 and that, therefore, the disputes alleged to have arisen from those work orders are neither referable to nor covered by Clause 26 of Annexure II to that document. This contention has not been rebutted by the Petitioner by placing any cogent documentary material on record.

25. This Court finds that the inconsistency between the case projected in the petition and the case projected in the arbitration invocation notice is not a mere procedural irregularity, it strikes at the foundation of the invocation

itself. Where the Petitioner is unable to project a consistent and unambiguous case as to which tender document governs the work orders in question, there can be no clarity as to which arbitration clause is applicable, and consequently, no valid invocation of arbitration can be said to have been made in respect of the disputes alleged.

26. It is a well settled principle of arbitration law that the jurisdiction of an arbitral tribunal is derived from and is co-extensive with the arbitration agreement between the parties. An arbitration clause contained in one document does not automatically extend to disputes arising from independent instruments unless it is clearly established that such instruments were issued in pursuance of, or expressly incorporate by reference, the terms of the parent document containing the arbitration clause. In the present case, the Petitioner has failed to place on record any cogent material, whether by way of clauses of incorporation in the work orders themselves, cross references to the tender document dated 16.12.2017, any covering communication linking the work orders to that tender document, or any other contemporaneous documentary evidence, that establishes the requisite nexus. The Respondent's denial of this connection has not been rebutted. In the absence of any demonstrated nexus between the work orders and the tender document dated 16.12.2017, this Court is unable to conclude that the disputes arising out of the said work orders are governed by or referable to Clause 26 of Annexure II to that document. The burden of establishing this nexus lay squarely upon the Petitioner, and that burden has not been discharged. In this regard, this Court also notes that the judgments relied upon by the Petitioner, including ***Schlumberger Asia Services Ltd.*** *(supra),* ***Oval***

Investment Pvt. Ltd. *(supra),* ***Singhai & Brothers*** *(supra),* and ***ABB ABL Ltd.*** *(supra)* all proceed on the premise that a valid and identifiable arbitration agreement exists between the parties and that the disputes sought to be referred to arbitration fall within the scope of that agreement. None of these judgments assist the Petitioner at the threshold stage where the very agreement governing the work orders and the applicable arbitration clause remain unestablished on the record. These judgments would become relevant only once the foundational jurisdictional requirements are duly satisfied.

27. The second threshold issue concerns the validity of the notice purportedly issued under Section 21 of the Arbitration and Conciliation Act, 1996. Section 21 of the Act provides that, unless otherwise agreed by the parties, arbitral proceedings in respect of a particular dispute shall be deemed to have commenced on the date on which a request for the dispute to be referred to arbitration is received by the Respondent. The Section 21 notice is not a mere procedural formality, rather it is a jurisdictional prerequisite that marks the very commencement of arbitration proceedings. For a notice to constitute a valid Section 21 notice, it must satisfy the following essential requirements: it must clearly communicate the claimant's intention to invoke arbitration in respect of the specific disputes between the parties; it must identify the agreement or contract under which arbitration is sought to be invoked and, in particular, the arbitration clause being relied upon; it must contain or reasonably indicate the nature and particulars of the disputes sought to be referred to arbitration; and it must be addressed to and actually received by the other party. A notice that is vague, ambiguous, or fails to identify the arbitration agreement or clause

sought to be invoked, or a notice that does not clearly indicate that arbitration is being invoked as the dispute resolution mechanism under the Act, does not satisfy the requirements of Section 21 and cannot be treated as constituting a valid commencement of arbitration proceedings.

28. Examining the facts of the present case against the requirements set out above, this Court finds that the Respondent's objection to the validity of the Section 21 notice of the Act must be upheld on two independent and self-sufficient grounds, either of which is sufficient to vitiate the invocation. The first ground is non-receipt of the notice. The Respondent has categorically denied receipt of the notice dated 30.06.2022, and the Petitioner has not placed on record any postal acknowledgment, courier proof of delivery, or any other evidence of actual receipt of the said notice by the Respondent. Since Section 21 of the Act makes receipt of the notice by the Respondent the operative event for commencement of arbitration, the absence of proof of receipt is itself a fatal deficiency. The second and independent ground relates to the defective contents of the notice. Even proceeding on the assumption that the said notice was sent, an examination of its contents reveals multiple infirmities: it does not expressly state that it is issued under or in terms of Section 21 of the Arbitration and Conciliation Act, 1996; further, it does not clearly identify the specific arbitration clause under which arbitration is sought to be invoked. The particulars of the claims sought to be referred to arbitration are also not set out with any clarity or specificity. Moreover, as noted above, the notice refers to a different tender document altogether, tender document No. B&R/51108/ARIYALUR/TD/Form Work dated 08.01.2018, rather than the tender document dated 16.12.2017 under which Clause 26 is sought to be

invoked in the petition. This further compounds the infirmity, as the invocation notice and the petition are themselves inconsistent with each other on the foundational question as to which document governs the disputes. Both grounds are independent of each other, and the finding regarding invalidity of the Section 21 notice rests on each of them separately and on both of them cumulatively.

29. In contrast, the only notice admittedly received by the Respondent was the legal notice dated 29.05.2020. By its own character, that notice is a demand notice and a precursor to civil litigation, and not an invocation of arbitration under the Arbitration and Conciliation Act, 1996. A demand notice of that nature and a Section 21 notice under the Arbitration Act are instruments of entirely different character, purpose, and legal consequence. The former is a statutory prerequisite to the filing of a civil suit against certain parties; the latter is a jurisdictional act that marks the commencement of arbitral proceedings. One cannot be read as or substituted for the other. The receipt of a demand notice by the Respondent cannot, in law, be equated with the receipt of a request for arbitration so as to satisfy the requirement of Section 21 of the Act.

30. This Court further notes that the Respondent, in its email dated 01.06.2020, while denying the Petitioner's claims, made a specific reference to Clauses 14 and 15 of Annexure II of the General Conditions of Contract as being the relevant clauses governing dispute resolution between the parties. The Petitioner, on the other hand, has preferred the present petition by invoking arbitration under Clause 26 of the same Annexure II of the tender document dated 16.12.2017. This divergence is significant in two respects. First, it establishes that both parties acknowledge the

existence of an arbitration mechanism under the General Conditions of Contract, and therefore the arbitrability of the underlying disputes is, in principle, not in question. The Respondent is bound by its own acknowledgment in the email dated 01.06.2020 to the extent that it conceded the arbitral route as the appropriate forum for resolution of disputes. Second, and more importantly, the disagreement as to the applicable clause and tender document, further reinforces the finding that the invocation as made in the notice dated 30.06.2022 lacks the necessary clarity and precision that a valid Section 21 notice demands. The Petitioner, having been put on notice by the Respondent's email of 01.06.2020 that the Respondent understood the applicable dispute resolution clauses to be different from those subsequently invoked, was obliged to address this discrepancy and establish the correct applicable clause, either at the stage of the invocation notice or in the petition. It has done neither. The complete text of Annexure II to the General Conditions of Contract has also not been placed before this Court, thereby preventing any examination of whether Clause 26 and Clauses 14 and 15 operate independently, in overlap, or in conflict with each other.

31. To summarise, this Court finds that the Petitioner has failed to establish two essential jurisdictional prerequisites for the exercise of power under Section 11 of the Act. First, the Petitioner has not established that the work orders from which the alleged disputes arise form part of or are governed by the tender document dated 16.12.2017 containing the arbitration clause invoked, and the inconsistency between the petition and the invocation notice on this foundational question is irreconcilable on the present record. Second, the notice dated 30.06.2022 does not fulfil the requirements of a

valid Section 21 notice inasmuch as it does not expressly invoke arbitration under the Act, does not identify the correct arbitration clause, refers to a different tender document from the one relied upon in the petition, and is not demonstrated to have been received by the Respondent. The only notice admittedly received by the Respondent is a demand notice which is legally insufficient to constitute a commencement of arbitration under Section 21 of the Act. These two threshold infirmities are not isolated, they are mutually reinforcing, and together paint a picture of a fundamentally defective invocation that cannot sustain the exercise of jurisdiction under Section 11 of the Act.

32. In view of the foregoing, the present petition stands dismissed. However, in light of the fact that both parties have, in their respective communications, acknowledged that the disputes inter se are liable to be resolved through arbitration in terms of the General Conditions of Contract, such dismissal shall not preclude the Petitioner from initiating fresh arbitral proceedings in accordance with law. It is clarified that, in the event the Petitioner issues a notice invoking arbitration under Section 21 of the Act, the question of limitation shall be considered and decided independently, in accordance with law, at the appropriate stage.

33. The present petition is accordingly dismissed in the aforesaid terms. All pending applications, if any, shall also stand dismissed.

(GAURANG KANTH, J.)

SAKIL AMED P.A.