
(2019) 07 UK CK 0249

In the Uttarakhand High Court

Case No : Arbitration Application No. 19, 20 Of 2016

M/s Kuldip Singh Sethi & Gagan Goyal & Others

APPELLANT

Vs

Ecole Globale International Girls School & Others

RESPONDENT

Date of Decision : 30-07-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 2(a), 7, 7(4), 11, 11(4), 11(6), 11(6A), 12, 12(5), 21

Citation : (2019) 07 UK CK 0249

Hon'ble Judges : Ramesh Ranganathan, CJ

Bench : Single Bench

Advocate : Arvind Vashisth, Rajat Mittal, T.S. Bindra

Final Decision : Dismissed

Judgement

Ramesh Ranganathan, CJ

1. This application is filed, under Section 11(4) & (6) of the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act") seeking appointment of an arbitrator for settlement of the disputes between the parties, or to designate any person or institution for appointment, as per Section 11(6) of the 1996 Act.

2. The applicant, a partnership firm engaged in the business of civil construction, is empanelled with the Uttarakhand State Infrastructure Development Corporation Limited as a Class-II contractor. It is the applicant's case that M/s Tarunjot Singh and others had approached them for developing and constructing a residential school in the name of Ecole Global International Girls School at Horawalla village, Dehradun; an agreement was executed between them on 22.01.2011; the school management had, thereafter, awarded them the work of lay-out, basic infrastructure and landscaping, etc for which an agreement was executed on 10.08.2011; and the said agreement dated 10.08.2011 required the work to be completed before 09.08.2012.

3. There is a dispute between the parties regarding the change in the drawings

and specifications. The respondent is said to have started running the school at the site from April, 2012, and to have commenced the admission process. In terms of Clause 14 of the Agreement, the applicant was required, on completion of the work, to raise a final bill on the respondent. It is the applicant's case that they completed the construction work in late 2014; despite raising running bills regularly, the respondent did not clear their bills on time, and failed to make payment as per the agreed terms between the parties; they raised their final bill on 02.02.2016 for Rs. 2,61,67,423/-; as the respondent failed to make payment, they issued two reminders on 1st March, 2016 and 26th March, 2016 requesting the respondent to clear the final bill raised by them; a legal notice was sent calling upon the respondent to make payment of Rs. 1,05,88,163/- after adjusting the part payment made by the respondent and, on failure to make payment, to agree to the appointment of an arbitrator in terms of the dispute resolution mechanism in accordance with the arbitration clause of the agreement dated 22.01.2011, and under Section 21 of the 1996 Act; the Architect, appointed by the respondent, was required to act as an arbitrator, and his decision was final and binding between the parties; in terms of the 2015 amendment to the 1996 Act, appointment of the Architect as an arbitrator is restricted; the applicant was not willing to give their consent for appointment of the architect as an arbitrator; they had, therefore, requested the respondent to give their consent for the appointment of Sri O.P.Bhatia, a retired Assistant Director General, CPWD as an arbitrator to resolve the disputes between the parties; they had strong objections to the appointment of the Architect as an arbitrator; he was regularly working with the respondent on various projects, and was also under the direct control of the respondent; while the 30 days' notice period expired on 08.06.2016, the respondent had sent a reply, to the legal notice dated 31.05.2016, contending that the claim of the applicant was an afterthought; they claimed compensation for the delay in construction; and, since the respondent did not agree to the appointment of an arbitrator, the applicant was constrained to invoke the jurisdiction of this Court by way of the present application.

4. In the counter affidavit, filed by the respondent, it is stated that the arbitration application, for appointment of an arbitrator, was misconceived and was not maintainable; there was no arbitration clause in the agreement executed between the parties; the architect was connected with the execution of the work, and the drawings for the execution of the work was to be supplied by him; Clause 31 of the Contract specifically provided that, in case any variation from the contract drawings or contract bill was necessitated, the contractor should give notice to the Architect for instructions regarding matters specified therein; the agreement provided that, in the event of any dispute arising out of, or in any way connected, with the work, the architect shall be the final authority; there was no arbitration clause in the agreement as was being misconstrued by the applicant; and the arbitration application was not maintainable.

5. The counter affidavit, thereafter, details the stand of the respondent on

merits. It is, however, unnecessary for us to refer to them in detail, and it would suffice to note the stand of the respondent that the applicant had not raised any final bill on 02.02.2016 for a sum of Rs. 2,61,67,423/-; the said document dated 02.02.2016 was unilaterally prepared by the applicant as an afterthought; Clause 14 of the agreement stipulated that the final bill had to be prepared within seven days from the completion of the work; no amount was payable to the applicant; there was no question of the respondent either making any such payment or to give its consent for appointment of an arbitrator; no dues are payable to the applicant by the respondent; there was only a provision for resolution of the dispute through the architect; in the present case the architect had already given his decision on 15.07.2016; there was no arbitration clause in the agreement; Sri O.P. Bhatia is associated with the applicant, and it was for this reason that the applicant had nominated him as an arbitrator; since there is no arbitration clause, the appointment of Sri O.P.Bhatia was neither warranted nor feasible; the Architect was in no way connected with them; he was an independent professional and was not subordinate or under the influence of the respondent; even if the said clause is considered to be an arbitration agreement, since the Architect is named in the Contract, the disputes can only be referred to the arbitrator named in the agreement; the claims of the applicant were stale, and were also not arbitrable; they are malafide and an afterthought; since there is no arbitration clause in the agreement, the applicant was at liberty to approach the appropriate court for adjudication of their claims questioning the decision of the architect dated 15.07.2016; and the respondent seeks dismissal of the application.

6. Elaborate submissions, both oral and written, were made by Mr. Arvind Vashistha, learned Senior Counsel appearing on behalf of the applicant, and Mr. T.S. Bindra, learned counsel for the respondent. It is convenient to examine the rival submissions, urged on either side, under different heads.

I. IS THE CLAUSE, AFTER CLAUSE 31 OF THE AGREEMENT, AN ARBITRATION CLAUSE?

7. Mr. Arvind Vashist, learned Senior Counsel appearing on behalf of the applicant, would submit that clause 14 of the agreement stipulates that the disputed amount, due under the contract, should be dealt with in terms of the agreement; the only clause, dealing with disputes, is the unnumbered Clause after Clause 31 which provides the following (a) a Private Tribunal to decide the disputes, (b) the decision of the Private Tribunal being final and binding upon the parties, and (c) parties being "consensus ad-idem"; the applicant invoked the unnumbered clause after Clause 31 seeking appointment of an arbitrator vide notice dated 06.05.2016; the respondent failed to appoint an arbitrator; the unnumbered clause, after clause 31 of the agreement, satisfies the requirement of an arbitration clause; there is no specific form and manner of an arbitration clause, the parties are free to choose the manner and procedure for the same; when Clause 14 is read with the unnumbered clause after clause 31 of the

agreement, the agreement contemplates an element of reference; and the named arbitrator is required to act on the basis of the reference of the dispute, which emerges out of clause 14, after hearing the parties.

8. On the other hand Mr. T.S. Bindra, learned counsel for the respondent, would submit that the subject clause limits the role of an architect only to disputes relating to the work, and is not an all encompassing clause covering all disputes (past, present or future) arising out of the contract; this limited sphere is also a pointer to the fact that, since the Architect was engaged only to supervise the work, his instructions/decisions relating thereto were contemplated; at best it can be said that the architect was a person chosen by the parties as an in-house or departmental dispute resolution mechanism, for sorting out problems relating to the execution of work; the subject clause does not provide for a reference of the disputes; it does not require the architect to decide the disputes by way of a judicial/adjudicatory process after taking evidence or by providing an opportunity to the parties to put up their case; this fact is clear from the decisions of the architect which are on record; there ought to be a provision for reference to arbitration, for being construed as an arbitration clause; parties should contemplate a judicial determination / opportunity of hearing and not ministerial work; and there should be consensus ad-idem regarding referring the disputes to arbitration.

9. It is useful at the outset to take note of the attributes of an arbitration agreement. Section 2(a) of the 1996 Act defines 'arbitration agreement' to mean 'a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not'. Arbitration is a process by which a dispute is resolved by an arbitrator chosen or acceptable to both sides under an arbitration agreement between the two parties. (South Delhi Municipal Corporation vs. SMS AAMW Tollways Private Ltd 2018 (15) SCALE 123). A clause in a contract can be construed as an "arbitration agreement" only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. (Jagdish Chander v. Ramesh Chander (2007) 5 SCC 719; State of Orissa v. Damodar Das 1996 (2) SCC 216). Section 7 of the 1996 Act makes it clear that unless an arbitration agreement stipulates that the parties agree to submit all or certain disputes which have arisen or which may arise in respect of defined legal relationship, whether contractual or not, there cannot be a reference to an arbitrator. To elaborate, it conveys that there must be an intention, expressing the consensual acceptance, to refer the disputes to an arbitrator. In the absence of an arbitration clause in an agreement, as defined under sub-section (4) of Section 7, the dispute/disputes arising between the parties cannot be referred to the arbitral tribunal for adjudication of the disputes. (Karnataka Power Transmission Corpn. Ltd. Vs. Deepak Cables (India) Ltd (2014) 11 SCC 148).

10. The arbitration agreement must expressly, or by necessary implication, spell out that there is an agreement to refer any dispute or difference for an

arbitration, and the Clause in the contract must contain such an agreement. In its absence, it is difficult to spell out a reference to arbitration to resolve the dispute or difference between the parties. (South Delhi Municipal Corporation 2018 (15) SCALE 123; Damodar Das 1996 (2) SCC 216). The existence of an arbitration agreement, as defined under Section 7 of the 1996 Act, is a condition precedent for the exercise of power to appoint an arbitrator/Arbitral Tribunal under Section 11 of the Act. It is not permissible to appoint an arbitrator to adjudicate disputes between the parties in the absence of an arbitration agreement or without mutual consent. (Jagdish Chander (2007) 5 SCC 719).

11. The term 'arbitration' is not required to be specifically mentioned for it to be construed as an arbitration agreement. (Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd (2003) 7SCC 418 and Punjab State v. Dina Nath (2007) 5 SCC 28). Even if the words "arbitration" and "Arbitral Tribunal (or arbitrator)" are not used, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are: (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them; and (e) the parties must be ad-idem. (Jagdish Chander (2007) 5 SCC 719; Mallikarjun v. Gulbarga University (2004) 1 SCC 372; Encon Builders (I) (P) Ltd (2003) 7SCC 418). If the main attribute, of an arbitration agreement namely, consensus ad idem to refer the disputes to arbitration, is missing it is not an arbitration agreement, as defined under Section 7 of the 1996 Act (Jagdish Chander (2007) 5 SCC 719).

12. Mustill and Boyd, in their book on Commercial Arbitration, 2nd Edn., have listed some of the attributes which must be present for an agreement to be considered as an arbitration agreement, though these attributes in themselves may not be sufficient. They have also listed certain other considerations which are relevant to this question, although not conclusive on the point. Among the attributes which must be present for an agreement to be considered an arbitration agreement are: (1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement, (2) the jurisdiction of the tribunal to decide the rights of parties must be derived either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration, (3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal, (4) the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides, (5) the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law, and (6) the agreement must contemplate that the tribunal

will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal. The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law. (K.K. Modi v. K.N. Modi (1998) 3 SCC 573; Dina Nath (2007) 5 SCC 28).

13. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. (Dina Nath (2007) 5 SCC 28; Jagdish Chander (2007) 5 SCC 719). Where the clause, relating to settlement of disputes, contains words which specifically exclude any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. (Dina Nath (2007) 5 SCC 28).

14. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it one such. (Jagdish Chander (2007) 5 SCC 719). For the purpose of constituting a valid arbitration agreement, it is not necessary that the conditions as regards adduction of evidence by the parties or giving an opportunity of hearing to them must be specifically mentioned therein. Such conditions are implicit in the decision-making process in the arbitration proceedings. Compliance with principles of natural justice inheres in an arbitration process. An arbitration clause does not necessitate spelling out of a duty on the part of the arbitrator to hear both parties before deciding the question before him. The expression "decision" subsumes adjudication of the dispute. (Mallikarjun (2004) 1 SCC 372). Where there is no provision either for reference of disputes to a private forum, or for a fair and judicious enquiry, or for a decision which is final and binding on the parties to the dispute, there is no arbitration agreement. (P. Dasaratharama Reddy Complex v. Govt. of Karnataka (2014) 2 SCC 201; Mysore Construction Co. v. Karnataka Power Corpn. Ltd 2001 (2) Kar LJ 411; Russell on Arbitration (19th Edn., p. 59); K.K. Modi (1998) 3 SCC 573; Chief Conservator of Forests v. Ratan Singh Hans AIR 1967 SC 166; Rukmanibai Gupta v. Collector (1980) 4 SCC 556; State of U.P. v. Tipper Chand (1980) 2 SCC 341; Damodar Das 1996 (2) SCC 216 and Bharat Bhushan Bansal v. U.P. Small Industries Corpn. Ltd (1999) 2 SCC 166).

15. Since the respondent claims that the subject clause is not an arbitration clause and only provides for "expert determination", it is necessary to understand what these words "expert determination" mean. Unlike arbitration, the idea of expert determination is that the person does all things necessary during the implementation of the contract between the parties to see that the contract gets successfully completed. (Shyam Sunder Agarwal v. P. Narotham

Rao (2018) 8 SCC 230). If the wording of the agreement is inconsistent with the view that the agreement intended that disputes be decided by arbitration (Shyam Sunder Agarwal (2018) 8 SCC 230), the clause does not contain any express arbitration agreement, nor can such an agreement be spelt out from its terms by implication, there being no mention in it of any dispute, much less of a reference thereof, it would be a provision for expert determination. (Tipper Chand (1980) 2 SCC 341; P. Dasaratharama Reddy Complex (2014) 2 SCC 201).

16. Bearing these principles in mind, the contents of clauses 14 and 31 and the clause thereafter, under the agreement entered into between the parties on 10.08.2011, must be noted as reliance is placed thereupon, on behalf of the applicant, to contend that the clause after clause 31 is the arbitration agreement. The said agreement records that the owner (respondent herein) had appointed M/s Architect Studio represented by Sri Amardeep Singh, as the architect of the project; and the architect was required to furnish detailed drawings as and when required for the proper completion of the work. The above referred clauses of the Agreement dated 10.08.2011 read as under:

"(14) The final bill shall be submitted by the contractor within one week of virtual completion of works. No further claims shall be made by the contractor after submission of the final bill and these shall be deemed to have been waived and extinguished. Payments of those items of bill in respect of which there is no dispute and of items of dispute, for quantities and the rates as approved by the Architects shall be made within period of six weeks reckoned from the date of receipt of the bill by the contractor. After payment of the amount of the final bill, payables as aforesaid has been made, the contractor may, if he desires, reconsider his position in respect of the disputed portion of the bill (final) and if he fails to do so within 90 days his disputed claim shall be dealt with as provided in the contract.

(31) Statutory obligations, notices.-The contractor shall comply with and give all notices required by any government authority, and instrument, rule or order made under any Act of parliament or any regulation or Bye-law of any local authority relating to the work or with whose system the same is or will be connected. The contractor before making any variation from the contract drawings or contract bill necessitated by such compliance shall give to the architects a written notice specifying and giving the said written notice the contractor does not receive any instructions in regard to the matters therein specified, he shall proceed with the work confirming to act of parliament, instrument, rule, order, regulations or Bye-law in questioned any variation there by necessitated shall be deemed to be a variation required by the architect.

In the event of any dispute arising out or in any way connected with the work, the Architect shall be final authority to decide and whose decision shall be final and binding to both parties."

17. While the clause below Clause 31 is contended by the applicant to be an

arbitration clause, the respondent would contend that this clause, when read with others, provides only for "expert determination", and not for arbitration. In examining whether the subject clause is an arbitration agreement or is a provision for expert determination, the relevant clauses of the agreement must be read-together as a whole, for that would make the role assigned to the Architect, under the agreement, clear. Clause (1) of the agreement dated 22.01.2011 reserves, among others, the right to alter the drawings and the nature of the work, and of adding or omitting any part of the work, totally or otherwise, on the architect. Clause (4) not only requires all material and workmanship to be in accordance with the Architect's instructions, but also requires the contractor, at the request of the Architect, to furnish him with all invoices, accounts, receipts and other vouchers to prove that the materials comply therewith. Clause (4) further requires the contractor, at his own cost, to arrange for and/or carry out tests of any material which the Architect may require/decide.

18. Clause (7) of the subject agreement requires the contractor to give, not less than seven days', notice in writing to the Architect before covering up, or otherwise placing beyond the reach of measurements, any work in order that the same may be measured and the correct dimensions taken. Clause (7) enables the Architect to inspect the work and confers power on him, in case he is satisfied that certain works have been covered without notice to him, to uncover the same at the contractor's expenses. Clause (8) confers power on the Architect, during the progress of the works, to order, in writing, the removal from the work of any material which, in the opinion of the Architect, are not in accordance with the specifications or his instructions; for the substitution of proper materials; and for the removal and proper re-election of any work executed with material or workmanship not in accordance with the drawings and specifications or instructions. In case of default on the part of the contractor, Clause (8) confers power on the Architect to have the owner employ other persons to carry out the same, and for all expenses, consequent thereto as certified by the Architect, to be borne by the contractor.

19. Clause (10) of the agreement requires the contractor to indemnify the Architect against all claims which may be made against him by any member of the public, or other third party, in respect of anything which may arise in respect of the work. Clause (13) stipulates that 75% of the amount specified by the Architect shall be paid by the owner within seven days from the date of submission of the Bill, and the remaining 25% within three weeks of submission of the Bill. Clause (14), on which great emphasis is placed by Mr. Arvind Vashist, learned Senior Counsel appearing for the applicant, requires the final bill to be submitted by the contractor within one week of virtual completion of the work. The said clause further stipulates that no further claims shall be made by the contractor after submission of the final bill, and these (i.e. claims) shall be deemed to have been waived and extinguished. Payment of those items of the bill in respect of which there is no dispute, and of items of dispute for quantities

and the rates as approved by the Architect, shall be made within six weeks from the date of receipt of the bill from the contractor.

20. In terms of Clause (14) of the agreement, where there is no dispute with respect to any of the items of the final bill, payment is required to be made within six weeks. For such of those items in dispute, if the quantities and the rates are approved by the Architect, payment of such items should also be made within the six weeks' period. A 90 days' grace period is given, after the payment of the amount of the final bill, for the contractor to reconsider his position in respect of the disputed portion of the bill. It is only if he fails to do so within 90 days', is his disputed claim required to be dealt with as provided under the contract.

21. Clause (31) of the agreement relates to statutory obligations and notices and, in terms thereof, the contractor shall, before making any variation from the contract drawings or contract bill necessitated by the compliance of any statutory notice, give the Architect a written notice, and if contractor does not receive any instructions in this regard, he is entitled to proceed with the work confirming to the Rule or bye-law in question. The clause below Clause (31) only stipulates that the Architect shall be final authority to decide any dispute arising out of, or in any way connected with, the work and his decision shall be final and binding on both the parties.

22. A conjoint reading of Clause (14) with the clause below Clause (31) of the agreement, would make it clear that, with regards the disputed portion of the Bill, for which the contractor has not reconsidered his position, his claim is required to be decided by the Architect again, and nothing more. The decision of the Architect, with respect to those disputed portions of the Bill, is given finality. As a result, if the Architect does not agree with the contractor's reiteration of the disputed claim, the aforesaid conditions of the agreement do not provide for any further remedy, and in such an event the contractor can only avail his common law remedy of a Suit before a Civil Court of competent jurisdiction.

23. The words "Final and Binding on both the parties", in the clause below Clause 31, does not make the Architect an arbitrator. All that the said clause does is to confer power on the Architect to determine once again the disputed claim regarding the final bill of the contractor. Indisputably, there is no recital in the above clause of the contract to refer any dispute or difference, present or future, to arbitration. The clause does not reflect the consensus ad-idem between the applicant and the respondent to refer the dispute to arbitration. It does not also require the architect to determine the rights of the parties in an impartial and judicial manner owing an equal fairness to both sides. Nor does it provide for the decision of the architect to be enforceable in law. There is no specific provision in the said clause for the architect to receive evidence from both sides, hear their contention or to give the parties an opportunity to put them forward. None of the attributes of a valid arbitration agreement are to be found in the clause below Clause 31 of the agreement.

24. A clause in the contract cannot be split into two parts so as to consider one part to give rise to difference or dispute and another part relating to execution of the work, its workmanship, etc. A clause in the contract must be read as a whole. (Damodar Das 1996 (2) SCC 216; P. Dasaratharama Reddy Complex (2014) 2 SCC 201). A reading of the agreement as a whole leaves no manner of doubt that it only invests the Architect with the powers to smoothly implement the work mentioned in the agreement, and not to decide the disputes between the parties as an arbitrator. (Shyam Sunder Agarwal (2018) 8 SCC 230).

II. DISTINCTION BETWEEN ARBITRATION AND EXPERT DETERMINATION:

25. Mr. Arvind Vashist, learned Senior Counsel appearing on behalf of the applicant, would submit that the Architect, as contemplated in the Agreement, has a dual role; the first one comes to an end on completion of the work as per the drawings given by the Architect, and further to quantify the rates and quantities for variations in the execution of the work, from the contemplated work, under the contract; thereafter, as per the completed work, the Applicant (Contractor) is required to raise the final bill, which would then be considered by the respondent; the respondent, on its own assessment, is then required to quantify the final Bill and clear the same to the extent it is deemed admitted; the balance, if any, is required to be decided by the Arbitrator (Architect) whose decision shall be final and binding on the parties; the role of the architect as an expert comes to an end when the work is completed as per the drawings provided by the Architect; the dues are required to be cleared by the respondent, independent of the Architect; any dispute, thereafter, between the applicant and the respondent must be decided by the Architect in a judicious and independent manner; and this duly satisfies the requirement of a valid and binding Arbitration Agreement.

26. On the other hand Mr. T.S. Bindra, learned counsel for the respondent, would submit that the subject clause is not an Arbitration clause, but is a clause for "Expert Determination" for the following reasons i.e. (a) the Architect was specifically engaged as an Expert, and had a supervisory role in the execution of the works; (b) a distinction needs to be drawn between such cases and those where an Engineer, though an employee of the Government (one of the parties to the contract) but has not supervised or dealt with the work, may yet be construed to be an arbitrator, since it cannot be inferred that he would be biased, as he has not dealt with the work; (c) the paragraph just preceding the Clause, which is the subject matter of interpretation, is relevant; this clause provides that, before making any variation from the contract drawings or contract bill, the Contractor was bound to give a written notice to the architect; this makes it clear that the Architect was engaged as an Expert; the other clauses of the Agreement make it clear that the Architect was engaged to supervise the work, he was assigned a supervisory role relating to the execution of the work, like issuance of detailed drawings, measurement of work, instruct removal of material not in accordance with the specifications, substitution of proper material, removal and

proper re-erection of work etc; and a conjoint reading of various clauses of the agreement makes it clear that the Architect was an expert who was assigned a supervisory role in the contract; he was expected to give his decision, from time to time, during various stages of the work as an Expert, and not as a Judge; a clause, empowering one of the party's supervisor overseeing and having jurisdiction over the work, cannot be held to be an Arbitration clause; and there can be no arbitration clause if the person referred to has dealt with the work.

27. In support of their contention that the agreement provides only for expert determination, reliance is placed on behalf of the respondents on the e-mails dated 02.05.2012 and 15.05.2012. The Architect informed the applicant, vide e-mail dated 02.05.2012, that the work entrusted to them last year was far from completion; the work was supposed to be handed over completely, in all respects, on 31.12.2011; various jobs for which they had furnished all details had been delayed, like the dining halls, hostels, the academic block and the administrative block; the purpose of the letter was not to repeat what had been orally stated, for the last nine months, which was to increase manpower and to increase speed to complete the work for which details were with the contractor; the time taken for completing the structures was far too much, leaving very little time to perform the finishing works; the purpose of the letter was that, for about four months after the due completion date, nothing was completed to the expected standards of workmanship, be it the floor tiling, the toilet finishing, the paint quality, the external paving, the flush doors or the windows; the list was never ending; nothing had been finished to the required standards; and he was unable to recommend to the owners that the project had been handed over (not even partially) to their satisfaction. The applicant was informed that, since the school holidays were from 15th May to 15th June, they should mobilize all their teams to complete the work in all respects; and, thereafter, the same would be inspected by him or by his sub-architects.

28. In reply thereto, the applicant, by their e-mail dated 15.05.2012, informed the Architect that they had received structural details of the quoted buildings as late as in November, 2011, and the stipulated material for structural works as late as in December, 2011; the latest drawings of the dining hall was received by them just a week ago; in such circumstances, it was illogical to lay the blame on them; they had communicated their requirement of drawings, details, decisions, materials and payment, numerous times in the past year, both verbally as well as through emails; procurement and delivery, of client supplied material on site, was extremely tardy; the work was held up or slowed down due to unavailability of the stipulated materials as per their requirement; and the client was responsible for the supply of requisite quantity of water for construction and labour on site, but they had worked on the project under severe shortage of water since the arrangements for water supply were inadequate.

29. After highlighting several other deficiencies, the applicant further informed the Architect that they were working as per contractual requirements, and had

never stopped work on the project; they had, as on date, adequate staff, manpower and plant and machinery at the site to carry on the work; the finishing deadlines were not solely their responsibility, and they needed the Architect's co-operation with respect to some of the points, if the project had to be completed to the satisfaction of all the parties involved; of primary importance was the clearing of all buildings for final finish, and complete unrestricted access to all areas requiring work; all other sub-contractors should vacate the buildings so that their work can proceed unhindered; any damage, resulting from other activities that were not under their purview, would not be their responsibility; payment should be made to them immediately; drawings, material and decisions required at the site should be made available at the site well in advance; they had been denied access to many areas of the school, since the school was still in session; and completion of the work by them would depend on how quickly they were given unrestricted access to the buildings after that date. The applicant assured the Architect of their best co-operation. The correspondence between the applicant and the architect reveals the latter exercising supervision over the work, and the applicant acknowledging, albeit tacitly, the architect's supervisory role.

30. On the distinction between an expert determination and arbitration, Russell on Arbitration, 21st Edn., states that the question whether a contract's chosen form of dispute resolution is expert determination or arbitration is a matter of construction of the contract, which involves an objective enquiry into the intention of the parties. First, there are the express words of the disputes clause. If specific words such as 'arbitrator', 'arbitral tribunal', 'arbitration' or the formula 'as an expert and not as an arbitrator' are used to describe the manner in which the dispute resolver is to act, they are likely to be persuasive although not always conclusive. Where there is no express wording, the court will refer to certain guidelines. Of these, the most important used to be whether there was an 'issue' between the parties such as the value of an asset on which they had not taken defined positions, in which case the procedure was held to be expert determination; or a 'formulated dispute' between the parties where defined positions had been taken, in which case the procedure was held to be an arbitration. This imprecise concept is still being relied on. It is unsatisfactory because some parties to the contract deliberately choose expert determination for dispute resolution. The next guideline is the judicial function of an arbitral tribunal as opposed to the expertise of the expert. An arbitral tribunal arrives at its decision on the evidence and submissions of the parties and must apply the law or, if the parties agree, on other consideration. An expert, unless it is agreed otherwise, makes his own enquiries, applies his own expertise and decides on his own expert opinion. (Dina Nath (2007) 5 SCC 28). Where the clause, relating to settlement of disputes, contains words which specifically exclude any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. (Jagdish Chander (2007) 5 SCC 719).

31. In Hudson's Building and Engineering Contracts, 11th Edn., Vol. 1, in para 6.065, while drawing a distinction between a certifier and an arbitrator in a building contract, it has been emphasised that, essentially, the certifier in a construction contract will often be performing an administrative rather than a judicial function and, when doing so, there may often be no formulated dispute before him at all. He has been described as a "preventer of disputes" in contradistinction to an arbitrator whose function can only arise once a dispute is in existence. He is not under the same obligation to afford the parties or their representatives a full hearing and receive evidence from them. Thus each contractual provision may need to be carefully scrutinised to see into which category the person named falls.

32. It is also useful, in understanding whether the clause in the agreement constitutes a valid and binding arbitration agreement or a provision for expert determination, to refer to the judgments and texts relied upon by learned counsel on either side. Clause 22 of the agreement, in *Tipper Chand* (1980) 2 SCC 341, read thus:

'Except where otherwise specified in the contract the decision of the Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, design, drawing and instructions hereinbefore mentioned. The decision of such Engineer as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or things whatsoever, in any way arising out of or relating to the contract, designs, drawing 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 completion or abandonment of the contract by the contractor, shall also be final, conclusive and binding on the contractor.'

33. In interpreting this clause, a three Judge Bench of the Supreme Court held that, admittedly, the clause did not contain any express arbitration agreement, nor could such an agreement be spelt out from its terms by implication, there being no mention in it of any dispute, much less of a reference thereof; and on the other hand, the purpose of the clause appeared to be to vest the Superintending Engineer with supervision of the execution of the work, and administrative control over it, from time to time.

34. In *State of Maharashtra Vs. Ranjeet Construction* AIR 1986 Bom 76, a Division Bench of the Bombay High Court, while interpreting a similar clause in the agreement entered into between the parties, relied on the judgment of the Supreme Court, in *Tipper Chand* (1980) 2 SCC 341, and held that the subject clause could not be relied upon for seeking a reference to an arbitrator of any dispute arising under the contract.

35. In *Bharat Bhushan Bansal* (1999) 2 SCC 166, the scope of two clauses of the

agreement was in issue. They read as under :

"Decision of the Executive Engineer of the UPSIC to be final on certain matters:

Except where otherwise specified in the contract, the decision of the Executive Engineer shall be final, conclusive and binding on both the parties to the contract on all questions relating to the meaning, the specification, design, drawings and instructions hereinbefore mentioned, and as to the quality of workmanship or materials used on the work or as to any other question whatsoever in any way arising out of or relating to the designs, drawings, specifications, estimates, instructions, orders or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work, or after the completion thereof or abandonment of the contract by the contractor shall be final and conclusive and binding on the contractor.

Decision of the MD of the UPSIC on all other matters shall be final Except as provided in clause 23 hereof, the decision of the Managing Director of the UPSIC shall be final, conclusive and binding on both the parties to the contract upon all questions relating to any claim, right, matter or thing in any way arising out of or relating to the contract or these conditions or concerning abandonment of the contract by the contractor and in respect of all other matters arising out of this contract and not specifically mentioned herein."

36. The Supreme Court held that these clauses did not spell out any intention to refer any disputes and differences between the parties to arbitration; the clause did not contain an arbitration agreement either expressly or by implication; the intention was to vest the Engineer with supervision and administrative control over the work; the Managing Director was more in the category of an expert who would decide claims, rights, or matters in any way pertaining to the contract; and the intention appeared more to avoid disputes than to decide formulated disputes in a quasi-judicial manner.

37. In *Mallikarjun* (2004) 1 SCC 372, the Superintending Engineer, PWD, Gulbarga Circle was entrusted with the task of deciding the disputes. The parties filed their respective claims before the Superintending Engineer. He considered the same and passed an award. On his competence to pass an award, the Supreme Court held that the Superintending Engineer, Gulbarga Circle was an officer of the Public Works Department in the Government of Karnataka. He was not an officer of the University; he did not have any authority or jurisdiction under the agreement or otherwise either to supervise the construction work or issue any direction(s) to the contractor in relation to the contract job; he may be an ex-officio member of the Building Committee, but thereby, or by reason thereof, he could neither have been given, nor in fact had been given, the authority to supervise the contract job or for that matter issue any direction to the contractor as regards performance of the contract; and the clause was an arbitration agreement.

38. The question that arose for consideration in *Dina Nath* (2007) 5 SCC 28 was

whether clause 4 of the Work Order No. 114 dated 16-5-1985 (in short "the Work Order") was an arbitration agreement. Clause 4 read thus:-

"Any dispute arising between the department and the contractor/society shall be referred to the Superintending Engineer, Anandpur Sahib, Hydrel Circle No. 1, Chandigarh for orders and his decision will be final and acceptable/binding on both the parties".

39. The Supreme Court held that a bare perusal of the definition of the arbitration agreement [Section 2(a)] showed that an arbitration agreement was not required to be in any particular form; what was required to be ascertained was whether the parties had agreed that, if any dispute arises between them in respect of the subject-matter of the contract, such dispute shall then be referred to arbitration; such an agreement would spell out an arbitration agreement (Refer: Rukmanibai Gupta (1980) 4 SCC 556); to interpret the agreement as an "arbitration agreement" one had to ascertain the intention of the parties, and also treatment of the decision as final; if the parties had desired and intended that a dispute must be referred to arbitration for decision, and they undertook to abide by that decision, it must be held that the intention of the parties was to have an arbitration agreement, that is to say, an arbitration agreement immediately came into existence; clause 4 of the Work Order, between the parties, could be interpreted to be an arbitration agreement even though the term "arbitration" was not expressly mentioned in the agreement; the test was of "dispute" and "reference", and an arbitration agreement must contain broad consensus between the parties that the disputes and differences should be referred to a domestic tribunal.

40. In Vishnu vs. State of Maharashtra (2014) 1 SCC 516, the relevant clauses of the B-1 Agreement, entered into between the parties, read as under :

"All works to be executed under the contract shall be executed under the direction and subject to the approval in all respects of the Superintending Engineer of the Circle for the time being, who shall be entitled to direct at what point or points and in what manner they are to be commenced, and from time to time carried on.

Except where otherwise specified in the contract and subject to the powers delegated to him by the Government under the Code Rules then in force the decision of the Superintending Engineer of the Circle for the time being shall be final, conclusive, and binding on all parties to the contract upon all questions, relating to the meaning of the specifications, designs, drawings, and instructions hereinbefore 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, if any way 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 completion or

abandonment thereof."

41. While examining the scope of these clauses, the Supreme Court held that a conjoint reading of both the clauses of the B-1 Agreement, entered into between the parties, showed that the appellant had to execute all works subject to the approval, in all respects, of the Superintending Engineer of the Circle, who could issue directions from time to time about the manner in which the work was to commence and be executed; by virtue of Clause 30, the decision of the Superintending Engineer of the Circle was made final, conclusive and binding on all the parties in respect of all questions relating to the meaning of the specifications, designs, drawings, quality of workmanship or materials used on the work or any other question relating to a claim, right, matter or thing arising out of or relating to the contract designs, drawings, specifications, estimates, instructions, orders, etc; these two clauses, by which the Superintending Engineer was given overall supervisory control, were incorporated for smooth execution of the works in accordance with the approved designs and specifications, and also to ensure that the quality of the work was not compromised; the power conferred upon the Superintending Engineer of the Circle was in the nature of a departmental dispute resolution mechanism, and was meant for expeditious sorting out of problems which could crop up during execution of the work; since the Superintending Engineer was made overall in-charge of all works to be executed under the contract, he was considered by the parties to be the best person who could provide immediate resolution of any controversy relating to specifications, designs, drawings, quality of workmanship or material used, etc; it was felt that, if all this was left to be decided by the regular civil courts, the object of expeditious execution of the work of the project would be frustrated; this was the primary reason why the Superintending Engineer of the Circle was entrusted with the task of taking decisions on various matters; and there was nothing in the language of the clause from which it could be inferred that the parties had agreed to confer the role of an arbitrator upon the Superintending Engineer of the Circle.

42. In *P. Dasaratharama Reddy Complex* (2014) 2 SCC 201, Clause 29(a) of the Agreement stipulated that:-

"any dispute or difference irrespective of its nomenclature in matters relating to specifications, designs, drawings, quality of workmanship or material used or any question relating to claim, right in any way arising out of or relating to the contract designs, drawings, etc. or failure on the contractor's part to execute the work, whether arising during the progress of the work or after its completion, termination or abandonment has to be first referred to the Chief Engineer or the Designated Officer of the Department."

43. While interpreting this clause, the Supreme Court held that the Chief Engineer or the Designated Officer was not an independent authority or person, who had no connection or control over the work; as a matter of fact, he was having over all supervision and charge of the execution of the work; he was not

required to hear the parties or to take evidence, oral or documentary. He was not invested with the power to adjudicate upon the rights of the parties to the dispute or difference, and his decision was subject to the right of the aggrieved party to seek relief in a court of law; the decision of the Chief Engineer or the Designated Officer was treated as binding on the contractor subject to his right to avail his remedy before an appropriate court; the use of the expression "in the first place" unmistakably showed that the non-adjudicatory decision of the Chief Engineer was subject to the right of the aggrieved party to seek remedy; and, therefore, the subject clause could not be treated as an arbitration clause.

44. The relevant clauses, in Karnataka Power Transmission Corpn. Ltd (2014) 11 SCC 148, read as follows:

"48.0 Settlement of disputes:

48.1 Any dispute(s) or difference(s) arising out of or in connection with the contract shall, to the extent possible, be settled amicably between the parties.

48.2 If any dispute or difference of any kind whatsoever shall arise between the owner and the contractor, arising out of the contract for the performance of the works whether during the progress of the works or after its completion or whether before or after the termination, abandonment or breach of the contract, it shall, in the first place, be referred to and settled by the Engineer, who, within a period of thirty (30) days after being requested by either party to do so, shall give written notice of his decision to the owner and the contractor.

48.3 Save as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the parties until the completion of the works and shall forthwith be given effect to by the contractor who shall proceed with the works with all the due diligence.

48.4 During settlement of disputes and court proceedings, both parties shall be obliged to carry out their respective obligations under the contract."

45. While interpreting these clauses, the Supreme Court observed that, on a careful reading thereof, it was demonstrable that it provided for the parties to amicably settle any disputes or differences arising in connection with the contract; this was the first part; the second part, as was perceptible, was that when disputes or differences of any kind arose between the parties to the contract, relating to the performance of the works, during the progress of the works or after its completion or before or after termination, abandonment or breach of the contract, it was to be referred to and settled by the engineer who, on being requested by either party, shall give notice of his decision within thirty days to the owner and the contractor; there was also a stipulation that his decision, in respect of every matter so referred to, shall be final and binding upon the parties until the completion of works, and was required to be given effect to by the contractor who should proceed with the works with due diligence; to understand the intention of the parties, this part of the clause was important;

on a studied scrutiny of this postulate, it was clear that it did not provide any procedure which would remotely indicate that the engineer concerned was required to act judicially as an adjudicator by following principles of natural justice or to consider the submissions of both the parties; that apart, the decision of the engineer was only binding until the completion of the works; it only cast a burden on the contractor who was required to proceed with the works with due diligence; besides the aforesaid, during the settlement of disputes and the court proceedings, both the parties were obliged to carry out their obligation under the contract; the said clause had been engrafted to avoid delay and stoppage of work, and for the purpose of smooth carrying on of the works; the burden was on the contractor to carry out the works with due diligence after getting the decision from the engineer until completion of the works; emphasis was on the performance of the contract; the language employed in the clause did not spell out the intention of the parties to get the disputes adjudicated through arbitration; and it did not really provide for the resolution of disputes.

46. In *International Amusement Ltd. Vs. India Trade Promotion Organisation* (2015) 12 SCC 677, Clauses 27 and 28 of the agreement read as under:

"27. The licensed premises are public premises as defined in the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and fall within the jurisdiction of the Estate Officer, Pragati Maidan.

28. In case of any dispute arising out of or in connection with this agreement the disputes shall be referred to the sole arbitration of the Chairman, India Trade Promotion Organisation or his nominee whose decision/award shall be final, conclusive and binding on the parties. Application for reference to arbitration shall be made by either party within two months of arising of the dispute."

47. The Supreme Court, following the law laid down in *P.Dasaratharama Reddy Complex* (2014) 2 SCC 201, held that Clause 28 in the agreement was not an arbitration clause; and appointment of an arbitrator by the nominee of the Chief Justice has been rightly set aside by the Division Bench of the Delhi High Court.

48. In para 18.067 of Vol. 2 of *Hudson on Building and Engineering Contracts*, Illustration (8) deals with a case where, by the terms of a contract, it was provided that the engineer "shall be the exclusive judge upon all matters relating to the construction, incidents and the consequences of these presents, and of the tender, specifications, schedule and drawings of the contract, and in regard to the execution of the works or otherwise arising out of or in connection with the contract, and also as regards all matters of account, including the final balance payable to the contractor, and the certificate of the engineer for the time being, given under his hand, shall be binding and conclusive on both parties".

49. It was held that this clause was not an arbitration clause and that the duties of the Engineer were administrative and not judicial.

50. Just as in the present case where the Architect has been entrusted with the

supervision of the work, a similar clause in *Tipper Chand* (1980) 2 SCC 341 was interpreted as vesting the Superintending Engineer with supervision of the work and administrative control over it from time to time, and it was held that no arbitration agreement could be spelt out, from its terms, by implication. Similarly in *Bharat Bhushan Bansal* (1999) 2 SCC 166, where the Executive Engineer and the Managing Director of the U.P. Small Industries Corporation were entrusted with certain functions under the agreement, the Supreme Court held that the intention was to vest the Engineer with the supervision and administrative control of the work; the Managing Director was more in the category of an expert who would decide claims, rights, or matters in any way pertaining to the contract; and the intention appeared more to avoid disputes than to decide formulated disputes in a quasi-judicial manner.

51. In *Vishnu* (2014) 1 SCC 516, the Supreme Court held that the Superintending Engineer was given over-all supervisory control; the clauses were incorporated for smooth execution of the work, and to ensure that the quality of the work was not compromised; the power conferred on the Superintending Engineer was in the nature of a departmental dispute resolution mechanism, and was meant for expeditious sorting out of problems, which could crop-up during the execution of the work; since the Superintending Engineer was made over-all in-charge, he was considered by the parties to be the best person to provide immediate resolution of any controversy relating to the work; and there was nothing in the language of the clause, from which it could be inferred that the parties had agreed to confer the role of an arbitrator upon the Superintending Engineer. Again in *P.Dasaratharama Reddy Complex* (2014) 2 SCC 201, the Supreme Court held that the Chief Engineer was not an independent authority, or a person who had no connection or control over the work; he was having over-all supervision and charge of the execution of the work; he was not required to hear parties by taking evidence oral or documentary; and he was not invested with the power to adjudicate upon the rights of the parties to the dispute.

52. Just as in the present case, the relevant clause, in *Karnataka Power Transmission Corpn* (2014) 11 SCC 148, was in two parts, and the Supreme Court held that the said clauses did not provide any procedure, which required the Engineer to act judicially as an adjudicator by following principles of natural justice, or to consider submissions of both the parties; emphasis was on the performance of the contract; the language employed in the clause did not spell out the intention of the parties to get the disputes adjudicated through arbitration; and it did not provide for the resolution of disputes. In all the aforesaid cases, the relevant clause was construed more as providing for expert determination, and not for arbitration.

53. The Superintending Engineer was held to be an arbitrator in *Mallikarjun* (2004) 1 SCC 372, since he was an officer of the Public Works Department, and was unconnected with the supervision of the construction work in the University (which was a party to the arbitration agreement), nor could he issue any

direction to the contractor in relation to the construction work; and he was not given any authority to supervise the contract, or to regulate the parties of the contract. It was because the Superintending Engineer was found not to be connected with the supervision of the work, was he held to be an arbitrator. In the present case, various clauses of the agreement, as noted hereinabove, clearly show that the Architect was involved at different stages of the execution of the work, and was entrusted with the task of supervision of the work. He is not a person unconnected with the work and, in such circumstances, it is difficult to hold that the subject clause is an arbitration agreement, and not of expert determination.

54. In *Indian Oil Corporation Limited and others vs. Raja Transport Private Ltd* (2009) 8 SCC 520, on which reliance is placed on behalf of the applicant to contend that the architect plays a dual role, the Supreme Court held that no party can say he will be bound by only one part of the agreement, and not the other part, unless such other part is impossible of performance, or is void being contrary to the provisions of the Act, or such part is severable from the remaining part of the agreement; the arbitration clause is a package which may provide for what disputes are arbitrable, at what stage the disputes are arbitrable, who should be the arbitrator, what should be the venue, what law would govern the parties etc; and a party to the contract cannot claim the benefit of arbitration under the arbitration clause, but ignore the appointment procedure relating to the named Arbitrator contained in the arbitration clause.

55. The law laid down in *Raja Transport Pvt. Ltd* (2009) 8 SCC 520 is that one part of the clause cannot be read out of context, ignoring the other part, unless the other part is impossible of performance. A harmonious reading of the clause below Clause 31, with the other relevant clauses of the contract (including Clause 14), makes it clear that the authority given to the Architect, to resolve disputes in connection with the execution of the work, is as an expert and not as an Arbitrator. The mere fact that finality is given to the decisions of the Architect, in connection with the work, does not make it an arbitration clause for there are other clauses of the agreement which clearly define his role, in the supervision of the work under execution, in terms of the agreement.

56. Admittedly the subject clause does not contain an express arbitration agreement. Nor can such an agreement be spelt out from its terms by implication, there being no mention in it of any reference of the disputes. On the other hand, the purpose of the clause clearly appears to be to vest the Architect with supervision of the execution of the work and administrative control over it from time to time. (*Karnataka Power Transmission Corpn. Ltd* (2014) 11 SCC 148; *Tipper Chand* (1980) 2 SCC 341). The Architect has over all supervision and charge of the execution of the work. He is not required to hear the parties or to take evidence, oral or documentary. He is not invested with the power to adjudicate upon the rights of the parties to the dispute or difference. The decision of the Architect is treated as binding on the contractor.

(P.Dasaratharama Reddy Complex (2014) 2 SCC 201). The subject clause does not require the architect to arrive at his decision on the evidence and submission of the parties. The said clause, evidently, requires the architect to make on his own inquiry, and apply his own expertise in deciding the question on his expert opinion. The said clause does not also obligate the architect to afford both the parties a full hearing and receive evidence from them. The Architect, who was made overall in-charge of all works to be executed under the contract, was, evidently, considered by the parties to be the best person to provide immediate resolution of any controversy relating to specifications, designs, drawings, quality of workmanship or material used, etc. This is the primary reason why the Architect was entrusted with the task of taking decision on various matters. However, there is nothing in the language of the clause from which it can be inferred that the parties had agreed to confer the role of arbitrator upon the Architect. (Vishnu (2014) 1 SCC 516).

III. IS THE CLAIM OF THE APPLICANT, OF THE AGREEMENT CONTAINING AN ARBITRATION CLAUSE, AN AFTER-THOUGHT?

57. Mr. Arvind Vashisth, learned Senior Counsel for the applicant, would submit that it is a clear mandate of the law that the parties may choose any person, to act as an arbitrator, with mutual consent; the Respondent has admitted, in its counter-affidavit, that the work was completed in late 2014; they had, however, stated the date of completion of the work, in its reply to the Notice (Ann. 10), as June 2013; there is no dispute about limitation, since the final Bill as well as the notice, for invoking Arbitration, was issued within three years from the admitted date of completion of the Works; the contention of the respondent regarding the named Arbitrator (Architect) being involved in the agreement, their apprehension of his being biased, is unfounded; it is the respondent which has appointed the Architect, which was agreed upon by the Applicant, to decide the disputes; bias will not arise in cases where the parties have agreed upon the named arbitrator; in case the Court is of the view that there is a possibility of bias, it may appoint an independent arbitrator; the objection raised by the respondent is, therefore, not valid; further the amendment in Section 12 (5) of the Act, in the year 2015, has taken away the element of bias, as well as the fact that the named authority may not act as an Arbitrator if he is connected with the Contract or the parties thereto, with the exception that the parties are free to waive the requirement of independence; the respondent cannot, therefore, be allowed to approbate and reprobate at their own convenience; and a mere allegation of bias will not render the Arbitration Agreement a nullity.

58. On the other hand Mr. T.S. Bindra, learned counsel for the respondent, would submit that the plea of Arbitration is an after-thought as is evident from the applicant's letter dated 04.05.2016; the Architect had given his decisions earlier, but as an expert and not as a Judge; the Supreme Court, in Shyam Sunder Agarwal (2018) 8 SCC 230, has held that the future conduct of the parties is also relevant; the e-mails dated 1/3/2016 and 26/3/2016 are relevant; the work was

awarded on 10/8/11, and the date of completion of the work was 9/8/12; while the applicant claims to have completed the work in the latter part of the year 2014; the work was, in fact, completed virtually on 1/4/13, and only minor rectification works were carried on till May 2013; Clause No. 14 of the agreement requires the final bill to be submitted by the contractor within one week of virtual completion of the work, and no further claims shall be made by the contractor after submission of the final bill, and for these claims to be deemed to have been waived and extinguished; the requests, of the applicant for payment, were also forwarded to the architect in the year 2016; the cause of action can be said to have arisen either in May, 2013 or in the year 2014 when the work was admittedly completed even as per the version of the applicant; accordingly, the alleged cause of action, if any, had arisen prior to the enforcement of the 2015 amendment to the 1996 Act; it is apparent, from the sequence of events, that the alleged final bill was raised mala fide, and as an after-thought; the plea, of an Arbitration Clause, has been taken with a pre-planned strategy after the 1996 Act was amended; even if it is assumed, without admitting, that hypothetically the Architect was an Arbitrator, the Applicant can then be said to have already sent / referred the matter to the Architect; and he cannot now challenge his jurisdiction by invoking the provisions of Section 12 of the Act.

59. The 1996 Act was amended by Act No. 03 of 2016 with retrospective effect from 23.10.2015 and Clause 5 was inserted whereby, notwithstanding any prior agreement to the contrary, any person, whose relationship with the parties or the counsel or the subject matter of the dispute falls in any of the categories mentioned in the Seventh Schedule, shall be ineligible to be appointed as an Arbitrator. Under the proviso thereto the parties may, subsequent to the disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing. The Seventh Schedule gives instances of an arbitrator's relationship with the parties or the counsel which would render him ineligible to be appointed as an Arbitrator. Entry 1 is where an Arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

60. In the present case, the so called arbitration clause (the clause after Clause 31) refers to the Architect who, in terms of Entry 1 of the Seventh Schedule read with Section 12(5) of the Act, is ineligible to be appointed as an Arbitrator. While it is no doubt true that, under the proviso to Section 12(5) of the Act, this embargo can be waived by a specific agreement in writing between the parties, it is evident from the legal notice dated 04.05.2016, issued by the applicant to the respondent, (details of which shall be referred to hereinafter), that the applicant had made it clear that it was impermissible for the Architect to be appointed as an Arbitrator.

61. Act No. 03 of 2016 was notified in the Gazette of India on 01.01.2016. The very fact that the applicant raised a final bill thereafter, and had subsequently sought reference to arbitration, lends credence to the submission, urged on

behalf of the respondent by Mr. T.S. Bindra, learned counsel, that it is only after the amendment, by Act No. 03 of 2016, that this ruse was adopted by the applicant to somehow have the disputes between the parties referred to Arbitration, (even in the absence of an Arbitration agreement between the parties), while at the same time avoid arbitration by the Architect.

62. An arbitration agreement must contain the broad consensus between the parties that the disputes and differences should be referred to a domestic tribunal. The said domestic tribunal must be an impartial one. A person cannot be a judge of his own cause as justice should not only be done but must be manifestly seen to be done. (Bihar State Mineral Development Corpn (2003) 7SCC 418). In Raja Transport (P) Ltd (2009) 8 SCC 520, the Supreme Court held that, where the named arbitrator, a senior officer of the Government/statutory body/government company, had nothing to do with the execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Even before the 1996 Act was amended by Act No. 3 of 2016 w.e.f. 23.10.2015, while a named arbitrator unconnected with the work could be appointed as the arbitrator, a person connected with the work could not, since the said person would not be perceived as being impartial. It is difficult for us, therefore, to accept the submission, urged on behalf of the applicant, that, notwithstanding the deep involvement of the Architect in the execution of the work, both the parties intended that he resolve the disputes, arising under the contract, as an independent arbitrator.

63. The applicant sent an e-mail on 01.03.2016 to the respondent, marking a copy thereof to the Architect, informing that they had submitted their final bill of the work of construction of the building on 03.02.2016; and payment against the same be released at the earliest. Again, by letter dated 26.03.2016, the applicant informed the respondent, marking a copy of the said letter to the Architect, that six weeks had elapsed from the date, the copy of the final bill dated 03.02.2016 had been served; a reminder was also sent on 01.03.2016; and they had not received payment. While requesting the respondent to process the payment, the applicant informed them that they would be constrained to initiate legal proceedings if payment was not made. What is of relevance, in these two e-mails, is that copies thereof were marked to the Architect also.

64. In the legal notice, issued on behalf of the applicant on 04.05.2016, it is stated that, though the work was completed and handed over, the entire payment were not received, and a final bill dated 02.02.2016 for Rs. 5,95,29,514/- was sent to the respondent by email dated 03.02.2016; despite receiving the said final bill, no payment had been made against the applicant's claim; reminders were sent on 01.03.2016 and 12.04.2016 despite which payment of the final bill was not made; as per the terms of the agreement, the disputes were to be resolved by way of arbitration with a named Arbitrator in the agreement; however due to the 1996 Act, as amended by the 2015 Amendment Act, the named Arbitrator in the agreement could not function as an Arbitrator;

the applicant does not consent to his appointment as an Arbitrator; and in terms of Clause 32 of the agreement dated 22.01.2011, they had nominated an Arbitrator to resolve the matter by arbitration, and as an Arbitrator to adjudicate the disputes that had arisen inter se. The respondent was called upon to pay Rs. 5,60,28,472/- along with interest at 18% p.a. from the date of the final bill till its payment, or on failure thereof, to consent to the name of the person they proposed to act as an Arbitrator to adjudicate the dispute between the parties within 30 days of receipt of the notice. The respondent was informed that, in case of their failure to consent for appointment of an Arbitrator under the agreement, the applicant would approach the Court for appointment of an Arbitrator.

65. In reply thereto, a legal notice dated 24.05.2016 was sent on behalf of the respondent stating that, prior to the notice dated 04.05.2016, no letter of demand was ever made by the applicant; it was apparent on the face of the record that the so called claims of the applicant was stale and hopelessly barred by time; it was purely a result of an after-thought; there was no arbitration clause in the agreement executed between the respondent and the applicant; the clause, after Clause 31, could not be construed as an arbitration clause; in any eventuality, the applicant should have raised the dispute before the architect, who was the architect during execution of the works; no amount was payable by the respondent to the applicant; and, on the contrary, it was the respondent who had sustained losses on account of defects and delay in the execution of the works.

66. In *Shyam Sunder Agarwal* (2018) 8 SCC 230, the clause which the applicant claimed was the arbitration agreement read as under:

"It is further agreed that any decision to be taken by the said Mediators/ Arbitrators during the period of entire transaction in the event of any breach committed by either of the parties shall be final and binding on all the parties hereinabove."

67. While construing this clause, the Supreme Court observed that the very fact that the clause referred to "Mediators/Arbitrators" would show that the language used was loose; the idea really was that the two named persons did all things necessary, during implementation of the transaction between the parties, to ensure that the transaction is successfully completed; this clause should be read in the light of the other clauses of the agreement; the expression 'decision' in Clause-12 was only a pro-term decision i.e. the decision was taken only during the period of transaction, and not thereafter; they were "functus officio" after the transactions were completed; and a reading of the agreement as a whole left no manner of doubt that it only invested the two gentlemen named therein with powers to smoothly implement the transaction mentioned in the MOU, and not even remotely to decide the disputes between the parties as Arbitrators; the wording of the agreement was clearly inconsistent with the view that the agreement intended the dispute to be decided by arbitration; a clause in an

Agreement, inserted for the purpose of prevention of a dispute, would not be an arbitration agreement; the idea, in the present case, was to prevent disputes from occurring, and to ensure smooth implementation of the agreement; and the object was not to adjudicate disputes, but to prevent them.

68. The Supreme Court, in *Shyam Sunder Agarwal* (2018) 8 SCC 230, also examined the conduct of the applicant, and observed that his conduct left much to be desired; there was no reason why the Section 11 Application was delayed for a period of two and a half years, after a notice was issued for arbitration; and his conduct, even during the pendency of the Section 11 petition, also left much to be desired.

69. The contention that the respondent had admitted in the counter affidavit, that the work was completed only in late 2014, is not tenable. On the contrary, the respondent has categorically denied that the work was finally completed in late 2014 (refer paragraph no. 10 of the counter affidavit). While the question of limitation cannot be examined, in an application filed under Section 11, in view of the mandate of Section 11(6-A) which requires the Court to confine its examination only to the existence of an arbitration agreement, the fact remains that it is only after Act 3 of 2016 came into force, and a person involved in the execution of the work was disabled by legislation from acting as the arbitrator, did the applicant claim that the clause below clause 31 of the agreement was an arbitration clause for, if they had sought arbitration earlier, they ran the risk of the matter being resolved by the architect himself. The bonafides of the applicant is suspect. It is unnecessary for us, however, to dwell on this aspect any further as we have already held that the clause below clause 31 provides only for expert determination, and there is no arbitration agreement between the parties.

IV. CONCLUSION:

70. In the absence of an arbitration agreement the present applications, seeking appointment of an arbitrator, must fail. The applications are, accordingly, dismissed. No costs.