

GAHC010133112024



undefined

**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : Arb.P./27/2024**

EKTA SHAKTI FOUNDATION,  
REPRESENTED THROUGH AUTHORIZED REPRESENTATIVE/ PROJECT  
DIRECTOR MR. ANIL KUMAR AGGARWAL, HAVING ITS OFFICE A-20,  
BASEMENT AND UPPER GROUND FLOOR, NEW KRISHNA PARK, VIKAS  
PURI, NEW DELHI-110018.

VERSUS

THE STATE OF ASSAM AND ANR  
THROUGH THE COMMISSIONER AND SECRETARY TO THE GOVERNMENT  
OF ASSAM, EDUCATION (ELEMENTARY DEPARTMENT), DISPUR,  
GUWAHATI.

2:THE OFFICE OF THE STATE NODAL OFFICER  
REPRESENTED THROUGH THE MISSION DIRECTOR  
SAMAGRA SHIKSHA AND STATE NODAL OFFICER  
MID-DAY-MEAL SCHEME  
SSA CAMPUS  
KAHILIPARA  
GUWAHATI-781019  
ASSA

**- B E F O R E -**  
**HON'BLE MR. JUSTICE SOUMITRA SAIKIA**

Advocate for the petitioner :Mr. S Sancheti, Advocate

Advocate for the respondents :Mr. P Nayak, Addl. Advocate General, Assam

Date of Order: : **06.04.2026**

**ORDER**

The petitioner is an NGO registered under the Societies Registration Act. The respondent No. 2 is a State Nodal Office, Mid-day Meals scheme, Assam. The scheme is floated by the Government for supply of mid-day meals to the children of various primary and upper primary classes studying in Government and Government-aided schools. The respondent No. 2 is represented by the Mission Director, who is a Government Official of the State of Assam under the respondent No. 1, namely the Department of Elementary Education, Government of Assam.

**2.** In response to the Expression of Interest (EoI) issued by the respondent No. 2 inviting applications from various NGOs for supplying freshly cooked mid-day meals to Government and Government-aided schools in Assam, the petitioner being eligible and having experience in

the said category of work applied under the Scheme. By communication dated 01.09.2018, the petitioner was granted approval for establishing a Central Kitchen and was allotted work in the districts of Bongaigaon, Dhubri and Morigaon, as per norms, to provide hygienic, healthy and nutritious hot-cooked food to children under the Mid-Day Meal Scheme in accordance with the existing guidelines of the Government of India. Thereafter, a contract agreement was executed between the petitioner and the respondent No. 2 by way of an MoU/Agreement dated 26.10.2018 for the said purpose. Subsequent communications were exchanged between the respondents and the petitioner regarding the supply requirements, including the number of schools, number of children, beneficiaries, and the scheduled date of commencement of supply from 01.01.2019 to 01.04.2019. There was a request made by the petitioner for extension of time for commencement of the hot-cooked Mid-Day Meal supply. Meanwhile, in pursuance of the allotted work, the petitioner incurred an expenditure of Rs. 3,87,78,435/- towards purchase of land, construction of buildings, rental charges, and investment in fixed assets. The petitioner further claims to have availed a cash credit facility from a bank, on which an amount of Rs. 36,63,063/- has been paid as interest up to 31.03.2023.

**3.** While the petitioner's request for extension was not replied to, by communication dated 10.11.2019, the respondents instructed the petitioner to stop further supply of hot cooked mid-day meals until further orders. Although no reasons were stated to have been cited in the said communication, petitioner however continued to maintain the infrastructure/kitchens which were also inspected by the officials of the SSA from the district of Bongaigaon and a proper inspection report to that effect has also been issued.

**4.** It is the case of the petitioner that under Clause 54 of the MoU/Agreement dated 26.10.2018, a notice period of 30 days was required before terminating the contract. Accordingly, the petitioner submitted a representation dated 28.12.2020 before the authorities, requesting reconsideration of the arbitrary termination of the contract. However, no response was received from the respondents. The petitioner being aggrieved approached this Court by filing W.P(C) No. 1620/2022 which came to be dismissed by the order dated 26.06.2023. However, petitioner was granted liberty to invoke arbitration as per Clause 56 of the MoU/Agreement dated 26.10.2018.

**5.** According to the petitioner, notice was sent under section 11(6) for appointment of an arbitrator through its advocate on 27.07.2023 but no response was received from the respondents to the said notice. Being aggrieved, the present application under section 11(6) has been filed.

**6.** The learned counsel for the petitioner submits that since the respondents have failed to appoint an Arbitrator as per the demand raised by the notice, the petitioner has approached this Court. It is further submitted that in terms of the Clause 56 of the MoU/Agreement, it is provided that the demand for arbitration shall be raised on which the matter will be referred to the State Government and who will thereafter appoint a sole Arbitrator. This provision in any event of the matter is contrary to the law laid down by the Apex Court in a series of Judgments rendered in *Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd*, reported in (2019) SCCOnline SC 1517 and finally, the issue came to be settled by the Apex Court in a Constitution Bench Judgment rendered in *Re: Interplay between Arbitration Agreements and Arbitration and Consolidation Act 1966 and the Indian Stamp Act 1899* on the scope of the powers of a referral Court under Section 11 of the Act of 1996.

**7.** The learned counsel for the petitioner submits that since the respondents have failed to act upon the notice issued by the petitioner calling upon them to appoint an Arbitrator and in any event of the matter, since the arbitration agreement contains a Clause that the matter should be referred to the State Government who in turn will appoint an officer of the Government being contrary to the amendments brought into the Act of 1996 under Section 12(5), more particularly when the petitioner has not expressed its consent towards appointment of such an officer, this application should be allowed and a sole Arbitrator be appointed by the Court to decide the dispute(s) and the differences arising by and between the parties relating to the agreement dated 26.10.2018.

**8.** The learned counsel for the petitioner has referred to the Judgments of the Apex Court rendered in *Gojii Technologies Pvt Ltd. Vs. Sokrati Technologies Pvt. Ltd.*, reported in (2025) 2 SCC 192 to submit that the law laid down by the Apex Court with regard to the powers on the referral Court under section 11(6) of the Act of 1996 is that the referral Court is only to look into the existence of a valid arbitration agreement. The arbitrability of the disputes are to be left to be decided by the Arbitral Tribunal. In so far as this application is concerned, there is

no dispute that there is a valid arbitration clause being Clause No. 56 of the said MoU/Agreement. The respondents have also not disputed the existence of a valid arbitration clause. Therefore, the prayer of the petitioner should be allowed and direction be issued by the Court for appointment of a sole Arbitrator who will decide the difference and disputes arising out of the agreement dated 26.10.2019 executed by and between the parties.

**9.** *Per contra*, Mr. P. Nayak, learned Addl. Advocate General, Assam representing the respondents submits that the petitioner had earlier approached this Court which came to be dismissed. Referring to the said order dated 26.06.2023 passed in W.P(C) No. 1620/2022, he submits that the Co-ordinate Bench while dismissing the writ petition had returned a finding that the normal tenure of the MoU having been found to have expired on 31.12.2021 which is after normal tenure of three years of the MoU. The contract was found to be determinable in nature and it was held that the petitioner is not found to be entitled to any further specific performance of the contract after a lapse and/or expiry of the contract period covered by the said MoU/Agreement. The learned Single Bench held that at best the petitioner would be perhaps entitled to approach the

Civil Court for seeking damages and/or compensation if so advised and accordingly, it was held that the writ petition failed and the same is dismissed. However, having regard to clause 56 of the MoU/Agreement, the Court was inclined to provide that the dismissal of the writ petition shall not be a bar for the petitioner to invoke the arbitration clause. It was further provided that the period spent before the Writ court from 25.02.2022 till the date of passing of the order, i.e order dated 26.06.2023, the petitioner would be entitled to claim extension of time for proceeding *bona fide* in Court without jurisdiction. The learned Addl. Advocate General therefore submits that the finding recorded in the Writ petition clearly revealed that the petitioner is not entitled to any claims save and except damages and compensation for which the petitioner has been permitted to avail of before a Civil court. As such, notwithstanding the liberty granted to invoke the arbitration clause, the finding of the Court, not having been appealed against, has attained finality to the effect that the petitioner is entitled only to claim compensation and damages, for which he may approach the Civil Court. Therefore, referring the petitioner to arbitration would be futile, as no relief can be granted to the petitioner in view of the categorical findings recorded by the Writ Court in the writ petition filed by the petitioner. Therefore, the present

application should be dismissed. The learned counsel for the respondents has referred to the Judgments of the Apex Court rendered in *SBI General Insurance Co. Ltd. Vs. Krish Spinning*, reported in *2024 SCC Online SC 1754* to submit that where no arbitrable dispute subsists then the reference to arbitration must not be allowed. The Hon'ble Court in that Judgment was also pleaded to hold that in cases where the claims are found to be ex-facie time barred and deadwood, the Court can interfere and refuse to refer the matter for arbitration. He submits that in the present case also in view of the finding of the Writ Court that the petitioner is entitled only to damages and compensation, such claims can be determined by a competent Court of Civil jurisdiction. No reference to arbitration is called for. Under such circumstances, the application should be dismissed as not maintainable.

**10.** The further argument of the respondents counsel is that the procedure prescribed in the arbitration agreement at Clause 56 has not been adhered to by the petitioner. In terms of the provisions of the Act of 1996, petitioner will issue a notice under section 21 calling upon the respondents to appoint an Arbitrator in terms of the agreement. It is the submission of the counsel for the respondents that such notice was never

issued on the respondents calling upon them to appoint an Arbitrator. Rather, they were intimated by communication dated 21.02.2024 whereby the petitioner has intimated the respondents that an application under Section 11 of the Arbitration and Conciliation act shall be filed for appointment of the arbitrator as unilateral appointment of a sole arbitrator, is invalid in terms of the Judgment rendered in *Perkins Eastman Architects DPC (Supra)*. It is submitted that in terms of the Provisions of Clause 56 of the agreement, the petitioner is to issue a notice calling upon the respondents to appoint an arbitrator. Even assuming, though not admitting, that the respondents are required to refer the matters to the State government for appointment of an arbitrator, that stage had not been crossed and prior to that this application under Section 11(6) has been filed praying for an arbitrator. Had the petitioner issued a notice as contemplated under Clause 56 of the Agreement, the matter would have been referred to the Government for appointment of a sole arbitrator. Only upon the matter being referred to an arbitrator or to the State Government, the question of appointment of an arbitrator by the State in terms of Clause 56 of the Agreement would have arisen. If thereupon the petitioners did not agree to the name suggested, then the stage for filing an application under section 11(6)

would have arisen. In the present case before even the respondents were called upon to perform their duties as contemplated under Section 11 read with Section 21 of the Act of 1996, the petitioner is filed this application under Section 11(6) of the Arbitration and Conciliation Act, 1996. Therefore, the stage for invocation of power under section 11(6) at this stage has not a reason in view of the failure of the petitioner to comply with the provisions of Clause 56 of the MoU/Agreement.

**11.** The learned counsel for the parties have been heard. Pleadings available on record have been carefully perused. The arbitration Clause as provided at Clause 56 of the Agreement reads as under:

*“56. Arbitration : In the event of any dispute arising out of the contract between the parties here to, the same shall be referred to the sole arbitrator of the State Government or any officer appointed by the State Government on its behalf. The proceedings held by the arbitration in making award will be in accordance with the provisions of Indian Arbitration and Conciliation Act 1996 or any statutory amendments thereof. The award of the arbitrator shall be final and binding on the parties.”*

**12.** From a perusal of the said Clause, it is clear that once disputes arise, the contractor would call upon the respondents to raise their claims before the employer and if they are not settled, call upon them to refer the matter to arbitration. In terms of Clause 56 once such a notice is

issued, the respondents would refer the matter to the Government and thereupon the Government will appoint an Arbitrator. If under Section 12(5) of the Act of 1996 read with the Judgments of *Central Organization for Railway Electrification Vs. ECI SPIC SMO MCML (JV)*, reported in 2024 SCC Online SC 3219 and *Re: Interplay between Arbitration Agreements and Arbitration and Consolidation Act 1966 and the Indian Stump Act 1899*, if the contractor does not give its consent for appointment of the arbitrator from the curated panel maintained by the Government then an application under 11(6) can be filed. The relevant portions of these Judgments are extracted below.

In *Central Organization for Railway Electrification (Supra)*, the Constitution Bench of five Hon'ble Judges of the Supreme Court passed the judgment in three parts, the majority view of the Judgment is extracted as under:

*“a. The principle of equal treatment of parties applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators;*

*b. The Arbitration Act does not prohibit PSUs from empanelling potential arbitrators. However, an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs;*

*c. A clause that allows one party to unilaterally appoint a sole arbitrator*

*gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, such a unilateral clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrators;*

*d. In the appointment of a three-member panel, mandating the other party to select its arbitrator from a curated panel of potential arbitrators is against the principle of equal treatment of parties. In this situation, there is no effective counterbalance because parties do not participate equally in the process of appointing arbitrators. The process of appointing arbitrators in CORE (supra) is unequal and prejudiced in favour of the Railways;*

*e. Unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution;*

*f. The principle of express waiver contained under the proviso to Section 12(5) also applies to situations where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties. After the disputes have arisen, the parties can determine whether there is a necessity to waive the nemo judex rule; and*

*g. The law laid down in the present reference will apply prospectively to arbitrator appointments to be made after the date of this judgment. This direction applies to three-member tribunals"*

**13.** These provisions have been consistently referred to also in the subsequent Judgments rendered in *SBI General Insurance Co. Ltd. (Supra)*.

**14.** The question before this Court is whether, in the absence of a

specific notice under Section 21 of the Act of 1996 calling upon the respondents to appoint an Arbitrator and whether the referral Court can invoke its jurisdiction under section 11(6) of the act of 1996 pursuant to the amendments brought in under Section 12(5) of the Act of 1996 as also the Judgments of the Apex Court rendered in *Central Organization for Railway Electrification (Supra)* and *Re: Interplay between Arbitration Agreements and Arbitration and Consolidation Act 1966 and the Indian Stump Act 1899* as well as *SBI General Insurance Co. Ltd. (Supra)*, it has time again in the conclusion of the Apex Court that the extent of examination of a referral Court is to see whether a valid arbitration agreement exists. Ordinarily, that is the power to be exercised. In so far as the question of whether the disputes urged are at all arbitrable. Ordinarily a referral Court would not examine the issue in detailed unless *prima facie* appears to the Court that these issues are dead-wood and cannot be decided or not required to be decided by the Arbitral Tribunal in view of the accepted position on facts and/or being expressly barred under some statute.

**15.** Coming to facts of this case, when the present petitioner had approached the writ Court by filing W.P(C) No. 1620/2020, the Writ

petition stood dismissed vide order dated 26.06.2023 and the Court returned a finding as under:

*“6. It is seen that vide Memorandum of Understanding (MoU for short) dated 26.10.2018, the period of engagement of the petitioner was for an initial period of 3 (three) years with effect from 01.01.2019. Therefore, the normal three year tenure of the MoU is found to have already expired on 31.12.2021. Therefore, as the contract is found to be determinable in nature, the petitioner is not found to be entitled to any further specific performance of contract after lapse and/or expiry of the contract period covered by the said MoU. At best, the petitioner would perhaps be entitled to approach the civil court for seeking damages and/or compensation, if so advised.*

*7. The cases cited by the learned senior counsel for the petitioners would also not help the petitioner in any way because on facts, the cited cases are distinguishable. In the case of Doiwala Sehkari Shram Samvida Samiti Ltd. (supra), the appellant before the Supreme Court of India was granted minor mineral mining lease for 10 (ten) years, but due to change in policy decision, the agreed lease period was sought to be curtailed and therefore, as the change of policy came during the currency of the lease agreement, the Supreme Court of India had held that the appellant therein was entitled to relief of continuing the lease till the expiry of lease for 10 (ten) years. Similarly, in the case of Beg Raj Singh (supra), the mining lease was for 1 (one) year in accordance with the policy decision, and when renewal was sought for another two years, the lease was granted for only one year, when it should have been for three years and under such circumstances, the Supreme Court of India had held that the petitioner should be allowed to operate the mining lease for full period of lease, subject to adjustment for the period for which he has already operated. Therefore, the said two cases cited on behalf of the petitioner are not authority on the point that even if the contract period is lapsed, the High Court in exercise of writ jurisdiction under Article 226 of the Constitution of India can direct the respondents to continue the contract for any further period.*

*8. Therefore, this writ petition fails and the same is dismissed.*

*9. However, before parting with the records, as the learned senior counsel for the petitioner had referred to clause 56 of the MoU, which contains arbitration clause, the Court is inclined to provide that the dismissal of this writ petition shall not be a bar for the petitioner to invoke arbitration clause. In the said regard, as the present writ petition was filed on 25.02.2022, it is provided that in respect of the period spent before this Court from 25.02.2022 till the date of passing of this order, the petitioner would be entitled to claim extension of time of proceeding bona fide in Court without jurisdiction."*

**16.** It is clear that the only issue left to be determined in view of the writ Court are the compensation and damages, if any, that may be required to be paid to the petitioner as the period of contract itself had expired on the date when the matter was examined and decided by the Writ Court. No appeal or review has been filed against this order and therefore this order has attained finality as on date. In the face of a judicial finding that the petitioner is entitled to claim only for compensation and damages, the question that would arise now is whether such claim can be decided by an arbitrator.

**17.** It is clear from the Judgment examined above that arbitration, as conceived under the Act of 1996, empowers the arbitrator appointed to decide all disputes arising out of the contract executed between the parties, subject to there being a valid agreement between the parties that in case of disputes matters are to be referred to arbitration. Therefore, to

say that an Arbitrator, if appointed, would otherwise, be incompetent to decide the issue on the question of compensation and damages, is contrary to the law pronounced by the Apex court and this is hold in force as on date.

**18.** Now coming to the question as to whether in the face of an agreement, the referral Court under Section 11(6) can invoke its jurisdiction on the failure of the person approaching the referral Court for invoking the arbitration proceedings by issuance of a notice Under section 21 of the Act. The answer to this question, perhaps ordinarily, has to be answered is negative However, taking into consideration the law expounded by the Apex Court regarding the right of waiver of consent by the party for appointment of an Arbitrator or Arbitrators from the curated panel maintained by the employer, it was held that such appointments from the curated panel can also be made subject to such a valid consent being granted by the contractor. Before this Court, it is clear that the contractor is aggrieved by the termination of its Agreement/MoU dated 26.10.2018 and non-consideration of its pleas for extension of the said contract. The communication dated 21.02.2024 although strictly not a notice under Section 21, it does appear that the intention of the

petitioner before this court while issuing the notice was to impliedly not give its consent in the event of any such reference to arbitration to a sole arbitrator that would ultimately be made by the state government. On the other hand, it is also seen that the respondents do not dispute the existence of a valid arbitration agreement nor is it disputed that the position in law is for appointment of an arbitrator by the Government from its curated panel, is possible only in the face of expressed consent by the contractor. From the facts narrated in the pleadings before the Court, it appears that the dispute between the parties have not been resolved and on the other hand there is a method for taking recourse to resolving such disputes expressly agreed upon by the parties by way of reference to arbitration. The only hurdle that is presented before the Court by the Respondents is non issuance of a notice under section 21 and thereby the power required to be invoked by the referral Court under section 11(6) cannot be invoked until and unless such agreed terms are enforced by the parties in terms of the said agreement.

**19.** In this context reference to the Judgment of the Apex Court rendered in *Adavya Projects (P) Ltd. Vs. Vishal Structural (P) Ltd.*, reported in *2025 SCC Online SC 806*, on the question of who can be

impleaded as a party to the arbitral proceedings. The Apex Court held that once a person consents to refer disputes to arbitration and enters into an arbitration agreement under Section 7 is bound by the same. It was held that the implication of being a party to the arbitration agreement is that such person has contractually undertaken to resolve any dispute referenced in the arbitration agreement through the agreed upon method of dispute resolution, that is, Arbitration. It is under this contractual obligation that a person can be impleaded as a party to arbitral proceedings, even if, he was not served with a Section 21 notice and not referred to arbitration by Court under Section 11. It was held that not being served with Section 21 notice and not being made a party in Section 11, application are not sufficient grounds to hold that a person cannot be made a party to arbitral proceedings. The Apex Court went on to hold that the purpose of Section 11, application for constitution of an Arbitral Tribunal is for the limited scope of examination about the existence of an arbitration agreement and the *prima facie* finding as to who are the parties. Upon such examination, if there is a clear intention of the parties to refer the dispute to arbitration, the Court under Section 11 does not conclusively determine or rule who can be made a party to arbitral Tribunals. Therefore, the question of determination of whether

certain persons are parties to an arbitration agreement and consequently whether they can be made party to arbitration proceedings is left to be decided by the arbitrial tribunal.

**20.** In conclusion, this Court therefore holds that there is a valid arbitration agreement existing between the petitioner and the respondents to refer the dispute, if any, for arbitration. Procedure prescribed is for the petitioner to issue a notice calling upon the respondent to appoint an Arbitrator and failing which in terms of Section 11, the application before the Court can be taken recourse. Assuming, the petitioner had issued a notice under Section 21 in terms of the arbitration agreement, the respondent would have referred the matter to the State government and who in turn will appoint a sole arbitrator from its curated panel.

**21.** As discussed about the long standing dispute between the petitioner and the respondents, *prima facie*, appears to the Court will not evince a voluntary consent from the petitioner for referral to arbitration before a sole Arbitrator appointed by the Government from the curated panel. In such a case, the matter ultimately would have been referred to a Court

under Section 11(6) for appointment of the Arbitrator.

**22.** The other issue is in view of the orders of the Writ Court dated 26.06.2023 passed in W.P(C) 1620/2022, the disputes found to be referred to arbitration by a Writ Court are in respect of compensation and damages. It has been held by the Courts across the country and the Apex Court that an arbitral Tribunal is empowered to pass any order as an ordinary Civil Court would be required to pass and therefore, the contention of the respondents that since the Writ Court has limited the claims of the petitioner to damages and compensation which would necessarily have to be determined by competent Court of Civil Jurisdiction, reference to arbitration is not called for, is therefore rejected. It is held that an arbitral Tribunal is competent under the provisions of the Act of 1996 to decide and answer the disputes arising by and between the parties relating to the questions of damages and compensation as may be claimed by the petitioner in terms of the disputes which he claims has arisen by and between the parties in terms of the agreement dated 26.10.2018. This Court, therefore, holds that this petition is maintainable. In the peculiar facts and circumstances of the case for non-issuance of a notice under Section 21 cannot be considered

to be a ground for invocation of the powers under Section 11(6) by referral Court when there is no dispute with regard to the existence of a valid arbitration Tribunal. Therefore, under the powers bestowed on this court under Section 11(6) read with the Notification No. 29 dated 21.05.2024 issued by the Gauhati High Court, this Court considers it appropriate to appoint Mr. Justice Achintya Malla Bujor Barua, Former Judge, Gauhati High Court as a sole arbitrator to decide on the disputes and differences arising by and between the parties in respect of the agreement/MoU dated 26.10.2018. This appointment is prospective, however, subject to receipt of a written declaration as is required under section 12(1) of the act of 1996.

**23.** Copy of this order be communicated by the Registry of the Court to Mr. Justice Achintya Malla Bujor Barua, Former Judge, Gauhati High Court prospective arbitrator appointed. The parties are also permitted to furnish certified copies of this order.

**24.** If the prospective appointment is confirmed upon receipt of such written declaration as directed, then the arbitral Tribunal will proceed to decide the arbitrability of the disputes between the parties and also the

question regarding the jurisdiction before addressing its attention to the various claims and counter-claims of the parties.

**25.** List this matter again on 13.05.2026

**JUDGE**

**Comparing Assistant**