

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO. 1070 OF 2025

WITH

COMMERCIAL ARBITRATION APPLICATION NO. 675 OF 2025

Generic Engineering Construction

and Projects Ltd.

..... PETITIONER/APPLICANT

: VERSUS :

Maharashtra Maritime Board

....RESPONDENT

Mr. Rohaan Cama with Mr. Chetan Shah, Ms. Farnaaz Karbhari, Mr. Rahul Jain and Mr. Sharan Shetty i/b HSA Advocates, for the Petitioner /Applicant.

Dr. Birendra Saraf, Senior Advocate with Mr. Jay Sanklecha, Mr. Harshvardhan Nankani, Mr. Ishwar Nankani, Mr. Huzefa Khokhawala and Mr. Kartik Gupta i/b Nankani & Associates, for the Respondent.

CORAM : SANDEEP V. MARNE, J.

Reserved On : 10 April 2026.

Pronounced On: 27 April 2026.

JUDGMENT:

1) Commercial Arbitration Application No. 675 of 2025 is filed under Section 11 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) seeking appointment of Arbitrator for adjudication of disputes and differences between the parties, which have arisen out of

Work Order dated 25 January 2023 and Agreement dated 6 February 2023 in relation to construction of office building on Plot No. C-47, Block G in Bandra Kurla Complex, Mumbai. Commercial Arbitration Petition No.1070 of 2025 is filed under Section 9 of the Arbitration Act for seeking interim measures.

2) Petitioner is engaged in the business *inter-alia* of civil construction projects. The Respondent/Maharashtra Maritime Board (MMB) floated tenders inviting online bids for construction of its office building on Plot No. C-47, Block G, at Bandra Kurla Complex (BKC), Mumbai, at estimated work value of Rs.68,18,50,446/-. The Petitioner participated in the tender process and was declared as a successful bidder. The Respondent issued Letter of Intent dated 30 September 2022 in favour of the Petitioner. Thereafter Work Order dated 25 January 2023 was issued and Agreement dated 6 February 2023 was executed between the Petitioner and Respondent. In terms of the Work Order and the Agreement, the duration of project was 24 months. Since the work commenced in February 2023 the same was supposed to be completed by February 2025. According to the Petitioner, certain disputes arose between the parties relating to site handover and commencement, delayed removal of previous contractor's material, delayed provision of necessary drawings/approvals, issues relating to obtaining statutory approvals and commencement certification and stop work notice from statutory authority, delays in the issuance of various permissions and NOCs and request for extension of time. The Respondent issued show cause notice dated 28 July 2025 to the Petitioner alleging breaches of the

Agreement and calling it upon to explain as to why the contract should not be terminated. The Petitioner submitted reply dated 3 August 2025. The Respondent issued order dated 18 August 2025 terminating the Work Order and the Agreement.

3) The Petitioner invoked Clause 25 of Section 3 of Conditions of Contract and suggested a name to be appointed as Dispute Review Expert. However, the Respondent did not respond to the requisition sent by the Petitioner. The Petitioner accordingly issued notice dated 11 September 2025 under Section 21 of the Arbitration Act suggesting the name of the Arbitrator.

4) The Petitioner filed Commercial Arbitration Petition No.1070 of 2025 under Section 9 of the Arbitration Act, seeking stay of termination order dated 18 August 2025. The Respondent issued fresh e-tender dated 9 October 2025 for completion of the project. The Petitioner accordingly amended Section 9 Petition and sought stay in respect of fresh e-tender dated 9 October 2025. The Respondent issued Work Order dated 20 January 2026 to Akshaya Infra Projects Pvt. Ltd. and ShrijiKrupa Projects Ltd. (JV) for completion of the balance work.

5) In the meantime, the Petitioner has filed Commercial Arbitration Application No.675 of 2025 for appointment of Arbitrator under Section 11 of the Arbitration Act. The Respondent have filed affidavit-in-reply in both the proceedings. The Petition under Section 9 as

well as Application under Section 11 of the Arbitration Act are taken up for analogous hearing.

6) At the very outset, Mr. Cama, the learned counsel appearing for the Petitioner has fairly submitted that if Arbitral Tribunal is constituted in Section 11 Application, the Petitioner shall exercise the remedy under Section 17 of the Arbitration Act before the Arbitral Tribunal for seeking interim measures in the Application. However, Dr. Saraf, the learned Senior Advocate appearing for the Respondent has strenuously opposed Application under Section 11 of the Arbitration Act. Accordingly, I have heard extensive submissions canvassed by the learned counsel appearing for the rival parties in Section 11 Application. I proceed to briefly record their submissions canvassed.

7) Mr. Cama, the learned counsel appearing for the Petitioner/Applicant submits that there is express agreement to arbitrate between the parties under Clauses 24 and 25 of the General Conditions of Contract (**GCC**). He submits that Clause 24 of the GCC provides for reference of dispute to Dispute Review Expert (Board), which has not been nominated in any manner by the Respondent. That therefore the Petitioner wrote to the Respondent on 16 August 2025 nominating Dispute Review Expert and called upon the Respondent to confirm the suggested name or to nominate any other Expert within a period of seven days. He submits that Respondent however has failed to nominate Dispute Review Expert. That in absence of any joint nomination of any Dispute Review Expert, the Petitioner became entitled to invoke the

arbitration clause and accordingly notice under Section 21 of the Arbitration Act was served on 11 September 2025. He further invites my attention to Clause 3 of the Special Conditions of Contract (**SCC**), which is referred to in Clause 25.3 of the GCC. He submits that though clause 3 refers to arbitration limited to matters concerning design and methodology of construction, subsequent portion of clause also includes references to arbitration for disputes relating to and arising out of the entire contract. Clause 3.4 of SCC is widely worded and takes into its sweep every dispute arising out of and relating to the contract in question.

8) Inviting the Court's attention to Clause 2 of the GCC, Mr. Cama submits that mere heading of a clause has no significance and that agreement in the clause has to be gathered from reading of the entire clause ignoring the heading. He submits that parties have expressly intended to arbitrate disputes relating to termination of contract, which is a reason why Clause 3.3 of the SCC is deleted.

9) Mr. Cama further submits that Clause 3 of SCC needs to be read in conjunction of Clause 25 and that therefore the term 'engineer' appearing in Clause 24.1 has to be understood as the 'Superintending Engineer'. That decision to terminate the contract is taken by Superintending Engineer, who has signed the termination letter. He submits that since Dispute Review Expert has not been appointed, the Petitioner is entitled to seek appointment of Arbitrator by treating the decision of the Superintending Engineer as final. He submits that

intention of parties to arbitrate can clearly be gathered from conjoint reading of various clauses of the Contract. He further submits that Executive Engineer has also participated in the termination of the contract since the show cause notice dated 28 July 2025 was issued by the Executive Engineer. On the other hand, if the decision to terminate the contract is actually taken by Chief Engineer, there is no point in leaving the matter to be decided by any other inferior officer in the hierarchy and appropriate course of action would be to appoint an Arbitrator. In support, he relies on judgment of this Court in **Quick Heal Technologies Limited Versus. NCS Computech Private Limited and another**¹ in which judgment of the Apex Court in **Visa International Limited Versus. Continental Resources (USA) Ltd.**² is followed. In support of his contention that Court is empowered to appoint Arbitrator in absence of Dispute Review Expert, reliance is placed on judgment of Calcutta High Court in **M/S. National Project Construction (NPCCL) Versus. Military Engineer Services (MES)**³.

10) Mr. Cama also submits that this Court need not decide the issue of arbitrability conclusively and the same can be left open to be decided by the Arbitrator. That the present case clearly indicates arbitration agreement in Clause 25 of GCC and that therefore the Court may appoint Arbitrator leaving open all objections of Respondent to be decided under Section 16 of the Arbitration Act. Mr. Cama therefore prays for appointment of an Arbitrator under Section 11 of Arbitration Act. He

1 2020 SCC Online Bom 687

2 2009 2 SCC 55

3 AP-COM/559/2025 decided on 29 July 2025

submits that Commercial Arbitration Petition No. 1070 of 2025 be converted into Application under Section 17 of the Arbitration Act to be decided by the Arbitral Tribunal.

11) Dr. Saraf, the learned Senior Advocate appearing for the Respondent opposes Section 11 Application submitting that here is no arbitration agreement between the parties and that therefore no reference can be made to arbitration. He submits that Clause 2.3 of GCC provides for priority in the matter of interpretation of various documents forming part of contract and according to him, the terms and conditions of contractor's bid would have priority over the General Conditions of Contract including Special Conditions of Contract. He submits that Clause 36 is a part of contractor's bid, which provides for mechanism of decision by Superintending Engineer, appeal before the Chief Engineer and Second Appeal before the Secretary of the Department. That Clause 36 of contractor's bid does not provide for resolution of disputes through arbitration. That if there is any conflict between clause 36 of contractor's bid and clauses 24 and 25 of the GCC, the conditions of contractor's bid would prevail. He further submits that Section 4 of the Contract specifically provides that Dispute Review Expert would be as per Clause 36 of Section 1 (Contractor's Bid) and contests the argument of Petitioner that no Dispute Review Expert is nominated. He further submits that the decision to terminate the contract is taken by the Chief Executive Officer of Respondent and his decision cannot otherwise be made subject matter of arbitration under Clauses 24 or 25 of the GCC. That under Clause 59 of

GCC, only the employer himself can terminate the contract, which in the present case is the CEO of the Respondent.

12) Dr. Saraf further submits that even if it is assumed that Clauses 24 and 25 GCC constitute arbitration agreement, only the disputes relating to a decision taken by the 'engineer' can be subject to arbitration. He submits that the word 'engineer' appearing in clause 24.1 means the Executive Engineer as per Section 4 of the Contract. That in the present case, no decision is taken by the engineer. That if the Superintending Engineer is treated to have taken decision to terminate the contract, the same would not be a decision of the engineer, capable of being subject to arbitration. That even if the decision to terminate is treated to be the one taken by the engineer, only departmental remedies of appeals before the Chief Engineer and Secretary is all that is agreed between the parties. That Clause 25.3 of GCC provides for arbitration in accordance with the procedure stated in the SCC. That Clause 3 of the SCC provides for merely a decision by the Superintending Engineer. That GCC are ultimately superseded by the special conditions, which are specially made applicable to the contract in question. That parties have consciously deleted clauses 3.1 to 3.3 of the SCC meaning thereby that there is conscious agreement not to arbitrate the disputes.

13) Dr. Saraf, relies on judgment of this Court in *M/s. Mehra & Company Versus. State of Maharashtra*⁴. He submits that the contractual clauses involved in *M/s. Mehra & Company* (supra) were

4 Arbitration Application No.4/2016 decided on 2 December 2022

identical to the one involved in the present case. Without prejudice, Dr. Saraf submits that the Applicant has otherwise not followed the procedure of filing appeals before the Chief Engineer and Secretary of the Department. He therefore submits that there is no question of appointing an arbitrator. Dr. Saraf accordingly prays for dismissal of Section 11 Application. So far as Section 9 petition is concerned, he submits that since there is no agreement to arbitrate, there is no question of making any interim measures in the present case. He prays for dismissal of both the petition under Section 9 and Application under Section 11.

14) Rival contentions urged on behalf of the parties now fall for my consideration.

15) In these two petitions filed by the Petitioner for appointment of arbitrator and for seeking interim measures, dispute is raised on behalf of the Respondent about existence of arbitration agreement and it is therefore necessary to first take up Section 11 Application (CARAP-675 of 2025) for consideration.

16) The disputes between the parties have arisen out of performance of contract/agreement dated 6 February 2023, which was executed for construction of office building of Maharashtra Maritime Board on Plot No.C-47, Block-G, Bandra Kurla Complex at Mumbai. After issuing show cause notice dated 28 July 2025, the contract has been terminated by the Respondent-MMB vide order dated 18 August 2025. While terminating the Contract, the Respondent-MMB has also sought

recovery of amount of Rs.7,37,30,023/- and after adjusting the amounts of the Petitioner available with it, the Board has demanded amount of Rs.3,00,80,888/- from the Petitioner.

17) Petitioner is aggrieved by termination of its contract and after initially seeking reference to Dispute Review Expert, it has invoked arbitration clause by issuing notice dated 11 September 2025 under Section 21 of the Arbitration Act. Since notice dated 11 September 2025 is not responded to by the Respondent, the Petitioner has filed the present application under Section 11 of the Arbitration Act for appointment of an arbitrator. Respondent disputes that Clause 25.3 of Section 3 of Conditions of Contract contains arbitration agreement. It would therefore be necessary to reproduce Clauses 24 and 25 of the Agreement which reads thus:

24.0 Disputes

24.1 If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Dispute Review Expert within 14 days of the notification of the Engineer's decision.

25.0 Procedure of Disputes

25.1 The Dispute Review Expert (Board) shall give a decision in writing within 28 days of receipt of a notification of a dispute.

25.2 The Dispute Review Expert (Board) shall be paid daily at the rate specified in the Contract Data together with reimbursable expenses of the types specified in the Contract Data and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Dispute Review Expert. Either party may give notice to the other to refer decision of the Dispute Review Expert to an Arbitrator within 28 days of the Dispute Review Expert's written decision. If neither

party refers the dispute to arbitration within the next 28 days, the Dispute Review Expert's decision will be final and binding.

25.3 The arbitration shall be conducted in accordance with the arbitration procedure stated in the Special Conditions of Contract.

18) Thus, under Clause 25.2 of the GCC, the decision of Dispute Review Expert can be referred by either party to an arbitrator and the arbitration is required to be conducted in accordance with the arbitration procedure stated in the SCC. Clauses 25.2 and 25.3 therefore create a clear *prima-facie* impression about existence of arbitration agreement between the parties. However, the Respondent has contended that the present dispute relating to termination of contract is not agreed to be referred to arbitration by the parties. Therefore, though Clauses 25.2 and 25.3 of GCC do envisage resolution of disputes through arbitration, this Court is required to examine, in the context of various other clauses of the contract, as to whether the dispute, which has arisen due to termination of contract, can be referred to arbitration or not. It would therefore be necessary to consider various other clauses of the agreement. The Agreement dated 6 February 2023 is just a two-page document and Clause 4 thereof provides thus :

4. The following documents shall be deemed to form and be ready construed as part of this agreement viz.

- i) Work Order
- ii) Site Handover Letter
- iii) Contractor's Bid
- iv) Condition of contract: General and Special
- v) Contract Date
- vi) Additional condition

- vii) Drawings
- viii) Bill of Quantities and
- ix) Any other documents listed in the Contract Data as forming part of the Contract

19) Thus, the documents enumerated in Clause 4 of the Agreement forms part of the contract between the parties, which includes *inter-alia* contractors bid and conditions of contract, both general and special. Section 1 of the bid documents contain instructions to bidders and Clause 36 of Section 1 provides for Dispute Review Expert and it reads thus:

36.0 Dispute Review Expert

36.1 Except where otherwise specified in the contract and subject to the powers delegated to him by Government under the code, rules then in the force, the decision of the Superintending Engineer of the Circle for the time being shall be final, conclusive and binding on all parties of the contract upon all questions relating to the meaning of the specifications, designs, drawings and instruction 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 things whatsoever, if any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders, or other 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.

36.2 The Contractor may within thirty days of receipt by him of any order passed by the Superintending Engineer of the Circle as aforesaid appeal against it to the Chief Engineer. concerned with the contract work or project provided that -

- (a) The accepted value of the contract exceeds Rs. 10 lakhs (Rupees Ten lakhs)
- (b) Amount of claim is not less than Rs. 1,00,000 (Rupees one lakh)

36.3 If the Contractor is not satisfied with the order passed by the Chief Engineer as aforesaid, the Contractor may, within thirty days of receipt by him of any such order appeal against it to the concerned Secretary, Public Works Department/Irrigation Department who, if convinced that

Prima-facie the Contractors claim rejected by Superintending Engineer/Chief Engineer is not frivolous and that there is some substance in the claim of the Contractor as would merit a detailed examination and decision by the Standing Committee, shall put up to the Standing Committee at Government level for suitable decision.

20) Section 3 of the bid document contains conditions of contract and part (a) thereof deals with GCC. Clauses 24 and 25 of the GCC have already been reproduced above. Part (f) of Section 3 contains SCC and under clause 3, thereof parties have agreed as under:

3. ARBITRATION (Limited to Design & Methodology of construction only)

~~3.1 The Employer proposes that [name of proposed Dispute Review Expert as indicated in Appendix] be appointed as Dispute Review~~

~~3.2 For works costing above Rs 5 crore the procedure for arbitration will be as per GR of Law & Judiciary Department issued vide Sankim 2016/CR 20/ Ka 19 dt 13/10/2016 regarding Institutional Arbitration Policy"~~

~~3.3 The Arbitration Clause does not applicable for termination of contract.~~

3.4 Except where otherwise specified in the contract and subject to the powers delegated to him by Government under the code, rules then in the force, the decision of the Superintending Engineer of the Circle for the time being shall be final, conclusive and binding on all parties of the contract upon all questions relating to the meaning of the specifications, designs, drawings and instruction 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 things whatsoever, if any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders, or other 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.

3.5. The Contractor may within thirty days of receipt by him of any order passed by the Superintending Engineer of the Circle as aforesaid appeal

against it to the Chief Engineer, concerned with the contract work or project provided that-

- (a) The accepted value of the contract exceeds Rs. 10 lakhs (Rupees Ten lakhs)
- (b) Amount of claim is not less than Rs. 1.00 Lakh (Rupees One Lakh).

3.6. If the Contractor is not satisfied with the order passed by the Chief Engineer as aforesaid, the Contractor may, within thirty days of receipt by him of any such order appeal against it to the concerned Secretary, Public Works Department/Irrigation Department who, if convinced that Prima-facie the Contractors claim rejected by Superintending Engineer/Chief Engineer is not frivolous and that there is some substance in the claim of the Contractor as would merit a detailed examination and decision by the Standing Committee, shall put up to the Standing Committee at Government level for suitable decision (Vide PW Circular No. CAT-1086-CR-110/Bldg.2 Dated 7.5.1986).

21) Under clause 2 of the GCC, order of priority for interpreting the documents forming contract is agreed upon and clause 2.3 reads thus:

2.3. The documents forming the Contract shall be interpreted in the following order of priority

- (1) Agreement
- (2) Letter of Acceptance, notice to proceed with the works
- (3) Contractor's Bid
- (4) Contract Data
- (5) Conditions of Contract including Special Conditions of Contract
- (6) Specifications
- (7) Drawings
- (8) Bill of quantities and
- (9) any other document listed in the Contract Data as forming part of the Contract.

22) Relying on clause 2.3 of the GCC, it is contended on behalf of the Respondent-Board that Clause 36 of the contractor's bid would prevail over General or Special Conditions of Contract. Under Clause 36 of the contractor's bid, parties agreed that decision of Superintending Engineer of the Circle would be final, conclusive and binding on parties and that contractor can appeal before the Chief Engineer if the accepted value of contract exceeds Rs.10 lakhs and amount of claim is not less than Rs.1 lakhs. If the contractor is still not satisfied with the order passed by the Chief Engineer, there is further provision of appeal before the Secretary of the Department. Thus, Clause 36 of contractor's bid talks of only internal dispute resolution mechanism. As against this, Clauses 24 and 25 of the GCC specifically provide for resolution of disputes through arbitration. Thus, *qua* the arbitration agreement, there is no conflict between clause 36 of contractor's bid and clause 25 of the GCC. Therefore, it is not necessary to go into the issue of order of priority and reliance by the Respondents on clause 2.3 of GCC providing for order of priority in interpreting contract documents is misplaced.

23) Coming to clauses 24 and 25 of the GCC, it is sought to be contended by the Respondent that only a decision taken by the 'engineer', which is further reviewable by the Dispute Review Expert, can be referred to arbitration. Under Clause 24, a decision taken by the 'engineer' with which contractor is aggrieved, can be referred to Dispute Review Expert. Though it is sought to be contended by the Petitioner that no Dispute Review Expert is nominated/appointed, Section 4 of the contract provides that the Dispute Review Expert appointed jointly by employer and

contractor would be as per Clause 1.1 of Section 3 or Clause 36 of Section 1. Under Clause 1.1 of Section 3 the term 'adjudicator' which is synonymous with 'Dispute Review Expert' is defined to mean as under :

The Adjudicator (synonymous with Dispute Review Expert) is the person appointed jointly by the Employer and the Contractor to resolve disputes in the first instance, as provided for in Clauses 24 and 25 (Section 3). The name of the Adjudicator is defined in the Contract Data. Bill of Quantities means the priced and completed Bill of Quantities forming part of the Bid.

24) Thus, Dispute Review Expert is to be appointed jointly by the employer and contractor to resolve the disputes as provided for in clauses 24 and 25 of GCC and it is provided that the name of the adjudicator is defined in the contract data (Section 4). Thus, Clause 1.1 of Section 3, by itself, does not clarify as to who exactly is the Dispute Review Expert. That takes us to clause 36 of Section 1, which is already reproduced above, and which does not seek to nominate the Dispute Review Expert in any manner. Clause 36 only provides for decision of Superintending Engineer shall be final and can be appealed before the Chief Engineer and Secretary of the Department. Again, the Second Appeal is provided before the Secretary Public Works Department/Irrigation Department. It is not very clear whether Secretary of the Public Works Department or Irrigation Department can decide an appeal against decision of Chief Executive Officer of the Maharashtra Maritime Board. Therefore, it is difficult to conclude that any Dispute Review Expert is nominated mutually by the parties. The hierarchical departmental remedies for challenging decision of Superintending Engineer cannot be treated as 'Dispute Review Expert' within the meaning of Clauses 24 and 25 of the GCC. Faced with this

difficulty, the Petitioner sought to nominate Dispute Review Expert vide notice dated 16 August 2025 and sought concurrence of the Respondent or in the alternative suggested nomination of any other Dispute Review Expert. This is clear from the following portion of notice dated 16 August 2025 :

However, since there is no named person in the Contract Data and in terms of Clause 24.1 of the Section 3-Condition of Contract under the Work Order, we call upon you to appoint a Dispute Review Expert / we hereby nominate Mr. Jayesh Rawal to be appointed as the Dispute Review Expert.

You are requested to confirm the name or suggest an Expert within a period of 7 days from the date of receipt of the present notice.

25) Respondent did not reply to the notice dated 16 August 2025 indicating that the so-called mechanism of internal appeals before the Chief Engineer and Secretary under Clause 36 of contractors bid was the Dispute Review Expert available for the Petitioner. Instead, Respondent chose to maintain silence and created an impression as if no Dispute Review Expert was available. After waiting for some time, the Petitioner was left with no other alternative but to invoke arbitration as per Clause 25 vide notice dated 11 September 2025. Even after receipt of that notice, Respondent chose to maintain silence and did not dispute existence of arbitration agreement nor suggested to the Petitioner that Dispute Review Expert was available.

26) This takes me to another objection sought to be raised by the Respondent that only a decision taken by the 'engineer' is capable of

being referred to arbitration. Reliance is placed on Section 4 'Contract Data' under which the term 'Engineer' is defined as under:

The Engineer is Executive Engineer, Maharashtra Maritime Board, Mumbai 2nd floor, Indian Mercantile Chambers, Ramjibliai Kamani Road, Ballard Estate, Fort, Mumbai 400 001.

27) It is therefore contended by the Respondent that only decision of Executive Engineer was capable of being referred to arbitration, that too, after decision of reference by Dispute Review Expert. In the present case, the show cause notice was issued by the Executive Engineer, Maharashtra Maritime Board on 28 July 2025. Petitioner responded to the show cause notice on 3 August 2025 by addressing the response to the Executive Engineer. It is Respondent's own case that decision to terminate the contracts is taken by the Chief Executive Officer and that the same is merely communicated by the Superintending Engineer. Thus, though Executive Engineer issued the show cause notice, termination letter dated 18 August 2025 is signed and addressed by the Superintending Engineer, Maharashtra Maritime Board, Mumbai. However, it is the case of the Respondent that the Superintending Engineer is not capable of taking a decision to terminate the contract and that the same can only be taken only by the employer itself, which, in the present case, is the CEO. Reliance is placed on Clause 59.1 of the Contract which reads thus:

59.1 The Employer or the Contractor may terminate the Contract if the other party causes a fundamental breach of the Contract.

28) If Respondent's contention is accepted that only Engineer's decision can be referred to arbitration (*after decision of reference by Dispute Review Expert*) it would mean that no decision relating to termination can ever be referred to arbitration. This is because, it is Respondent's own case that decision to terminate the contract cannot be taken by the Executive Engineer and is always taken by the CEO. However, if clause 3.3 of the SCC is considered, the same deletes the condition for non-reference of dispute relating to termination of contract. Thus, there is a conscious deletion of clause for not making reference to arbitration relating to termination of contract. Thus, the deleted Clause 3.3 of SCC renders the contention raised by the Respondent about impermissibility to make reference to arbitration in relation to termination decision taken by CEO is completely misplaced. If decision to terminate can only be taken by the CEO and if decision of CEO is otherwise non-arbitrable (*since it is not taken by the 'engineer'*), there was no necessity to delete clause 3.3 of the SCC. On the other hand, deletion of clause 3.3 of SCC creates an impression that parties have agreed to arbitrate the decision relating to termination of contract.

29) It is also sought to be suggested on behalf of the Respondent that GCC are mere conditions of contract which are general in nature and that SCC contain conditions which are specific to the contract in question. It is therefore sought to be contended that SCC would prevail over GCC. I am unable to accept this contention in view of clause 23 of GCC relied upon by the Respondents themselves, which does not give any special priority to SCC over the GCC. Both GCC and SCC contain same

priority as compared to other contractual stipulations. Even otherwise, clause 25 of the GCC needs to be read harmoniously with clause 3 of the SCC. Clause 25.3 of GCC makes a specific reference to the procedure prescribed in the SCC. Therefore, when it comes to determining existence of arbitration agreement, reference to SCC is necessary only for determining the arbitration procedure and nothing more. The arbitration agreement is in clause 25 of the GCC and if arbitration procedure is to be considered, reference to clause 3 of the SCC may become necessary. Therefore, clause 3 of the SCC does not determine whether parties have agreed for arbitration or not. Parties have undoubtedly agreed for arbitration under clause 25.2 of the GCC. Deletion of clauses 3.1 to 3.3 of the SCC would only mean that no specific arbitration procedure is agreed between the parties. Deletion of Clauses 3.1 to 3.3 of the SCC would not mean that arbitration agreement in clause 25.2 of the GCC would get wiped off.

30) It is also sought to be contended on behalf of the Respondent that clauses 3.4 to 3.6 of SCC again puts back parties to internal dispute resolution mechanism of filing appeal to Chief Engineer and Secretary. I am unable to agree. Clause 3 of the SCC may have relevance to only procedure agreed for arbitration. Clauses 3.4 to 3.6 (*which are merely reproduction of clause 36*) do not prescribe any arbitration procedure contemplated under clause 25.3 of the GCC. Therefore, for interpreting clause 25 providing for arbitration, clause 3 of the SCC does not provide any real assistance. At the highest, it can be contended that if a Superintending Engineer has taken a decision, the same is final subject to

appeals before the Chief Engineer and Secretary. This would mean that the Contractor may have to exhaust internal departmental remedies before the Chief Engineer and Secretary (*which according to the Respondent is the Dispute Review Expert*) and thereafter seek reference to arbitration. In the present case, however the decision is not taken by the Superintending Engineer which can be appealed before the Chief Engineer. CEO carries designation higher than the Chief Engineer. Therefore, the Chief Engineer cannot decide Appeal over the CEO's decision. Therefore, even if clauses 3.4 to 3.6 of the SCC are read to mean prescription of mandatory per-arbitration procedure, the same are clearly inapplicable to the present case.

31) In my view, therefore holistic reading of various clauses of the contract clearly creates an impression that parties have agreed for resolution of disputes even relating to termination of contract through arbitration. Petitioner has relied upon judgment of Calcutta High Court in *M/S. National Project Construction (NPCCL)* (supra) which also contemplated decision by Dispute Resolution Board before reference to arbitration. The Calcutta High Court held that Clause 28 of the contract providing for dispute resolution through Dispute Resolution Board could not be treated as mandatory. The Court further held that no useful purpose would be served by relegating the matter to Dispute Resolution Board which comprised of officers of MES. It was further observed that decision to cancel the contract was taken before the constitution of the Dispute Resolution Board and before communicating the composition of Dispute Resolution Board to the Petitioner therein. In the present case,

even if Dispute Review Expert is treated to be in hierarchical level of Superintending Engineer, Chief Engineer and Secretary, the same is not available in relation to decision taken by the Chief Executive Officer. Therefore, there is no per-arbitration procedure, which is applicable in the present case, without following of which, reference to arbitration cannot be made.

32) Mr. Cama also relied upon judgments of the Apex court in ***Visa International Limited*** (supra) and of this Court in ***Quick Heal Technologies*** (supra) in which it has been held that if correspondence between the parties make it abundantly clear that settlement was not possible, the condition in the contract providing for arbitration of only those disputes '*which cannot be settled amicably shall be finally settled in accordance with the 1996 Act*' would not come in the way of appointment of Arbitrator. In the present case also, this Court is satisfied that decision by Dispute Review Expert is not possible on account of decision of termination of contract being taken by Chief Executive Officer. Therefore, there is no per-arbitration procedure available for the Petitioner which he must exhaust before seeking appointment of Arbitrator.

33) Reliance by Dr. Saraf on judgment of this Court in ***M/s. Mehra & Company*** is inapposite. Though contractual clauses in case before this Court in ***M/s. Mehra & Company*** appear to be similar to clause 36 of contractor's bid and clauses 3.4 to 3.6 of the SCC, it appears that there was no separate arbitration agreement/clause in case before

this Court in *M/s. Mehra & Company*. This Court relied upon its judgment in *B.T. Patil Construction Versus. Maharashtra Krishna Valley Development Corporation*,⁵ (which also contained similar clauses) and this Court held that the clauses quoted therein did not contain arbitration agreement. The case in *M/s. Mehra & Company* and *B.T. Patil Construction* (supra) did not involve the issue of conflict between various clauses of contract. There was no specific arbitration agreement and mere contractual clauses providing for appeals before the Chief Engineer and Secretary was held to be not constituting arbitration agreement between the parties. The judgment in the case of *M/s. Mehra & Company* is thus clearly distinguishable.

34) In a case where few other clauses in the contract may be slightly inconsistent or may be in conflict with the main arbitration clause, the Courts will have to rule in favour of the arbitration rather than giving weightage to those confusing or conflicting clauses. Once there is clear agreement to arbitrate, the Courts would tend to ignore other clauses of contract which may create confusion about existence of arbitration agreement. After all arbitration is aimed at declogging the overburdened Courts and therefore Courts need to necessarily rule in favour of arbitration rather than concentrating on other inconsistent clauses for holding that specific arbitration clause present in the contract would get nullified by those clauses.

5 Arbitration Application No. 117 of 2013 decided on 11 July 2024

35) Considering the overall conspectus of the case, I am of the view that there exists arbitration agreement between the parties and disputes relating to termination of Petitioner's contract can be referred to arbitration. It would therefore be just and proper to constitute Arbitral Tribunal of a sole arbitrator for adjudication of disputes and differences between the parties arising out of contract/agreement dated 6 February 2023.

36) Coming to Petition filed under Section 9 of the Arbitration Act (CARBP-1070 of 2025), Mr. Cama submits that Petition under Section 9 can be converted into application under Section 17 of the Arbitration Act since pleadings therein are complete and that if Arbitral Tribunal is constituted, Petitioner is willing to exercise remedy under Section 17 of the Arbitration Act before the Arbitral Tribunal.

37) In view of the above, I proceed to pass the following order :

(A) Smt. Justice Anuja Prabhudesai, former Judge of this Court, is appointed as the Sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of contract/agreement dated 6 February 2023 referred to above. The contact details of the Ld. Arbitrator are as under:

Office Address :- Office No.106, Arcadia Building, NCPA Marg, Nariman Point, Mumbai-400 021.

Email ID :- desaianuja@yahoo.com

Mobile No.:- 9823855445

- (B) A copy of this order be communicated to the learned sole Arbitrator by the Advocate for the Petitioner/Applicant within a period of one week from the date of uploading of this order. The Petitioner/Applicant shall provide the contact and communication particulars of the parties to the Arbitral Tribunal alongwith a copy of this order.
- (C) The learned sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the parties within a period of 2 weeks from receipt of a copy of this order.
- (D) The parties shall appear before the learned sole Arbitrator on such date and at such place as indicated by her, to obtain appropriate direction with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc.
- (E) The fees of the sole Arbitrator shall be as prescribed under the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018 and the arbitral costs and fees of the Arbitrator shall be borne by the parties in equal portion and shall be subject to the final Award that may be passed by the Tribunal.
- 38) Commercial Arbitration Petition No. 1070 of 2025 is converted into application under Section 17 of the Arbitration Act to be decided by the learned Arbitrator on its own merits.

39) All rights and contentions of the parties are expressly kept open to be raised before the Arbitral Tribunal.

40) With the above directions, the Petition and Application are **disposed of.**

[SANDEEP V. MARNE, J.]

NEETA
SHAILESH
SAWANT

Digitally signed by
NEETA SHAILESH
SAWANT
Date: 2026.04.27
19:15:51 +0530