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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **A.A. 389/2006**

b

%17.03.2009 **Date of decision: 17th March, 2009**

SUSHIL KUMAR BHARDWAJ ....Petitioner

c

Through: Mr V.K. Sharma, Advocate.

Versus

UNION OF INDIA ....Respondent

d

Through: Mr Sushil Dutt Salwan.

And

e

A.A. 522/2006

M/S BINDRA ASSOCIATES ....Petitioner

Through: Ms Anusuya Salwan, Advocate

f

Versus

MUNICIPAL CORPORATION OF DELHI ....Respondent

Through: Ms Smita Shankar, Advocate.

g

And

A.A. 523/2006 & 524/2006

h

M/S R & T ENTERPRISES ....Petitioner

Through: Ms Anusuya Salwan, Advocate

Versus

MUNICIPAL CORPORATION OF DELHI .....Respondent

Through: Ms Smita Shankar, Advocate.

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And

A.A. 153/2008

SHRI RAM CHANDER DAGAR ....Petitioner

b

Through: Ms Anusuya Salwan, Advocate

Versus

MUNICIPAL CORPORATIN OF DELHI .... Respondent

Through: Ms Smita Shankar, Advocate.

c

And

A.A. 323/2008

d

M/S RAJORA BUILDERS ....Petitioner

Through: Mr. N.K. Kantawala, Advocate

Versus

e

D.S.I.D.C. .... Respondent

Through: none.

f

And

A.A. 421/2008

ENGINEERING DEVELOPMENT CORP. ....Petitioner

g

Through: Ms Anusuya Salwan, Advocate

Versus

MUNICIPAL CORPORATION OF DELHI ....Respondent

Through: Ms Smita Shankar, Advocate.

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CORAM :-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? Yes

2. To be referred to the reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

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RAJIV SAHAI ENDLAW, J.

1. Common question as to interpretation of clause 25 in General Conditions of contracts of MCD and Government of NCT of Delhi is involved in all these cases. Vide order dated 29th August, 2008, the divergence of opinion on the interpretation of the said clause was noticed and all the matters ordered to be taken up for hearing together.

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2. The said clause 25 is as under:

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> **"clause 25**.
>
> Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in-before mentioned and as to the quality of workmanship or materials used on the work **or as to any other question, claim, right, matter or thing whatsoever in 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 cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:**
>
> i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or **disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract of carrying out of the work, to be unacceptable**, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.
>
> If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence

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in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Chief Engineer for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

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ii) Except where the decision has become final, binding and conclusive in terms of sub para (i) above disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work of if there be no Chief Engineer, the administrative head of the said CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

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It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute alongwith the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

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It is also a terms of this contract that no person other than a person appointed by such Chief Engineer CPWD or the administrative head of the CPWD as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

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It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

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The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

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It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/- the arbitrator shall give reasons for the award.

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> It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.
>
> It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid."

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In the MCD cases, the clause is identical save that authority for appointing the Arbitrator is the Commissioner, MCD.

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3. The common questions which arise for adjudication are as under:

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A. Whether the procedure prescribed in sub clause (i) of clause 25 is applicable to all disputes or to only the matters of the contractor being required to do any work considered by him to be outside the contract or where the contractor disputes any drawing, record or decision given in writing only.

B. Whether the procedure prescribed in sub clause (i) is mandatory or directory.

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C. Whether the designate of the Chief Justice under Section 11(6) of the Arbitration Act, 1996 is empowered to appoint an arbitrator if the procedure prescribed in sub-clause (i) is not followed.

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Re: Question A

4. The divergence of opinion noted above is with respect to this question. While a Single Judge of this Court in **Concrete India Vs MCD** Arbitration Application No.130/2005 decided on 29th September, 2005 held that clause 25(i) is so widely worded as to include all claims of the contractor in relation to any matter in

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connection or arisen out of a contract of carrying out the work, in a subsequently decided **Gursaran Vs MCD** 2006 IV AD (Delhi) 35, another Single Judge whose attention had not been invited to **Concrete India** (supra) expressed a view that the disputes pertaining to actual working of the contract did not fall within the scope of clause 25(i) and thus the procedure prescribed therein was not required to be followed and the clause applicable was clause 25(ii) which dealt with any other issues not covered by clause 25(i); it was further held that in the case of disputes falling under clause 25(ii), only a demand for appointment of an arbitrator to the Commissioner of MCD (in that case concerning MCD) was required to be made and upon the failure of the Commissioner to appoint the arbitrator Section 11(6) could be invoked.

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5. At the outset, I may notice that Sub-clauses (i) and (ii) are not intended to apply to different contingencies or different kinds of disputes. Sub-clause (ii) is in continuation of sub-clause (i). Clause 25 refers to all kinds of disputes which may arise between the parties. Thereafter sub-clause (i) is not so widely worded as clause 25. That appears to have led to it being held in **Gursaran** (supra) that sub-clause (i) applies to only some out of the various disputes mentioned in clause 25. However, sub-clause (i) though using fewer words while describing disputes, in comparison to clause 25, takes within its sweep all kinds of disputes and I am unable to fathom as to which disputes can be said to be not covered by sub-clause (i). The words "the contractor....... disputes any....... record or decision given in writing by Engineer-in-charge on any matter in connection with or arising out of the contract of carrying out the work to be unacceptable......." in sub-clause (i) are very wide, enough to cover all kinds of disputes, described more expressly in clause 25. Of

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course, there may be disputes/claims on which there may be no decision in writing of the Engineer-in-charge. For adjudication of such disputes, is the contractor to immediately by passing the Engineer-in-charge, Superintending Engineer and Chief Engineer, demand appointment of arbitrator. In my view, No. The purport /idea/ meaning appears to be that if there are any claims/disputes, they should first be raised before the Engineer-in-charge and he is required to give a decision thereon in writing. Though the contract does not so provide expressly, but in the absence of any decision in writing of Engineer-in-charge and upon his failure to give a decision in writing inspite of demand, the contractor is still to follow up with superintending engineer and so on. If the contractor is not satisfied with the said decision in writing, he is to within 15 days request the Superintending Engineer to take a decision in the matter. The Superintending Engineer is required under the contract to give his decision within the period of one month from the receipt of the contractor's letter. Upon the failure of the Superintending Engineer to give the decision within the time aforesaid or if the contractor is dissatisfied with the decision of the Superintending Engineer, the contractor is required to within 15 days thereof appeal to the chief engineer who is again required to give his decision within 30 days. Only upon being dissatisfied with the decision of the chief engineer and / or upon the failure of the chief engineer to give a decision within the stipulated time, is a contractor entitled to apply to the chief engineer for appointment of arbitrator. The contract further provides that upon the failure of the contractor to so apply for appointment of the arbitrator within the time of 30 days, the decision, if any, of the chief engineer shall become binding and conclusive on the contractor.

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6. Not only is the language wide enough as aforesaid to cover all disputes, I also do not find any rationale in providing the aforesaid procedure for only some and not all disputes. The parties, in the making of contract, while interpreting the same, are expected to have been guided by reason, rather than having acted irrationally. Yet another reason for me to hold so, is that if procedure prescribed in sub-clause (i) is held to apply to some only and not all disputes, it will add another tier of conflict between the parties, leading to further delays in disposal of applications under Section 11(6) of the Act.

7. The aforesaid procedure has been prescribed so that before the parties resort to lengthy/costly arbitration, there is ample opportunity to the MCD to, if finds any merit in the claims of the contractor, to settle the same. The parties are perfectly within their right to provide for such a procedure. A public body as the MCD, in the discharge of its functions is dependent upon its officials and since such bodies are the largest employers for such works, and the value whereof may vary to a large extent, the intent seems to be that even if the engineer–in-charge or the superintending engineer for any reason whatsoever out of any differences with the contractor, have not acted reasonably, there is full opportunity at all levels for amicable settlement of the claims. The clause is also intended to prevent a contractor from without inviting the attention of the engineer-in-charge and/or superintending engineer approaching the chief engineer who may otherwise not be in know of all the facts, to appoint the arbitrator. Once the aforesaid procedure has been followed, the Chief Engineer, before appointing the arbitrator would have the reasons of the engineer-in-charge and the superintending engineer before him and would also be entitled to, if he still finds

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a merit in the claims of the contractor, to settle the same without resorting to arbitration.

b 8. Sub clause (ii) does not use the word "other disputes" so as to apply the same to any dispute other than that defined in sub clause (i). In fact sub clause (i) ends with a notice for appointment of arbitrator being required to be given and sub clause (ii) is in continuation of the said procedure by providing for appointment of arbitrator. The purpose seems to be that there should be due application of mind by the expert body of the public body before the contractor is compelled to take recourse to the arbitration proceedings. Conversely, the possibility of the contractor being satisfied by the reasoning given by successive officials and hence not insisting on arbitration, cannot also be ruled out. Most of such contractors have several such projects with such public bodies and may be convinced / satisfied with the hearing of their grievance by higher officials. I would thus respectfully agree with **Concrete India** (supra), particularly when there does not appear to be much discussion on this aspect in the latter judgment. The question No.1 is thus answered to the effect that the procedure of inviting the decision in writing on any claim/dispute, of approaching the superintending engineer and thereafter the chief engineer for decision on the dispute is to be exhausted before the chief engineer can be approached for appointment of the arbitrator.

Re: Question No. B

9. In **Saraswati Construction Co. Vs East Delhi Coop. Group Housing Society Ltd** 57 (1995) DLT 343 decided under the 1940 Act and relied upon by counsel for petitioners, a view was taken that such procedure as in clause 25 is directory and not mandatory and a

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petition to the court for appointment of arbitrator cannot be defeated for the reason of the procedure having not been exhausted. It was held that once an arbitration clause is found, the court necessarily has to appoint the arbitrator. But I find that there is a marked shift in the provision qua filing of application in the court for appointment of the arbitrator, in the 1996 Act from the 1940 Act.

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10. Under Section 20 of the 1940 Act any party to an arbitration agreement, instead of following the procedure prescribed in Chapter II thereof i.e., of themselves appointing an arbitrator, could apply to the court for having the arbitrator appointed by the court. Thus, under Section 20 of the 1940 Act, the party had a choice of either themselves appointing an arbitrator or straightway approach the court for appointment of the arbitrator. All that the court was required to see in a petition under section 20 was as to whether there was an agreement of appointment of arbitrator. The court was not required to see whether the party had attempted constitution of arbitral tribunal themselves as per procedure prescribed in Chapter II and/or whether the parties were unable to do so. It was in the aforesaid state of law that it was held that the agreed procedure for appointment was directory and not mandatory.

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11. Per contra, under Section 11 of the 1996 Act, the designate of the Chief Justice can be approached for appointment of an arbitrator only where a party has failed to act as required under the agreed procedure and/or where a person or an institution has failed to perform any function entrusted to him/it under that procedure. Thus, the parties now under the 1996 Act do not have a choice of either, attempt appointment of the arbitral Tribunal themselves or at least take steps therefor or approaching the court directly but are

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now before approaching the court required to first exhaust the agreed procedure or the procedure prescribed by law. Without the same being done, there would be no cause of action for approaching the designate of the Chief Justice. I may in this regard also refer to the judgments relied upon by the counsel for the Government of NCT of Delhi.

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12. In **The Iron & Steel Co. Ltd Vs M/s Tiwari Road Lines** AIR 2007 SC 2064 it was held that in the matter of settlement of dispute the agreement executed by the parties has to be given great importance and an agreed procedure for appointing the arbitrator has been placed on high pedestal and has to be given preference to any other mode for securing appointment of an arbitrator. Similarly in **Municipal Corp, Jabalpur Vs Rajesh Construction Co.** 2007 (2) Arb. L.R. 65(SC), the agreement required furnishing security before demanding constitution of Arbitral Tribunal, the Apex Court held that the obligation of corporation to constitute an Arbitration Board to resolve disputes could not arise because of failure of applicant to furnish security and the designate of the Chief Justice of the High was held to be in error in appointing an independent arbitrator. The Kerala High Court also in **M/s Bel House Associates Pvt. Ltd Vs General Manager Southern Railway** AIR 2001, Kerala 163 and **Nirman Sindia Vs M/s Indal Electromelts Ltd** AIR 1999 Kerala 440 held that where agreement stipulated reference to arbitration to be proceeded by a decision by the Engineer and a challenge to that decision before the adjudicator, without resorting to those essential or preceding steps for arbitration or waiver thereof, the agreement prohibited either party from enforcing the arbitration clause; the application under Section 11(6) was held to be premature.

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13. The counsel for the petitioners relied upon **Kailash Vs Nankhe** (2005) 4 SCC 480 in paragraphs 28 to 30 whereof it has been emphasized "procedure are the handmade of justice". Reliance was also placed on **Hindustan Petroleum Corpn Vs Pinkcity Midway Petroleums** (2003) 6 SCC 503 to urge that in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer parties to arbitration. However, neither of the said judgments is on the controversy before this court. There is a definite purpose, as aforesaid in the agreement providing for steps to be taken before resorting to arbitration and such agreement ought not to be interfered with specially when Section 11(6) also provides cause of action only after such agreement has been followed.

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14. There is yet another aspect of the matter. The 1940 Act deals with arbitration only. Per contra, the 1996 Act gives legal recognition to conciliation and the two are not repugnant to each other. The steps preceding arbitration are to encourage conciliation and the designate of the Chief Justice ought to encourage such mechanism for conciliation agreed upon by the parties.

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15. The second question is also thus answered to the effect that the procedure prescribed is mandatory and not directory.

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Re: Question No. C

16. Axiomatically this question has to be answered to the effect that following the agreed procedure being mandatory, in the absence of an averment or a pleading to the effect that the agreed procedure or the procedure prescribed in law has been followed, there would

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be no option but to reject the application under Section 11(6) of the Act as without cause of action and/or premature.

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17. In this regard I may also notice a recent judgment of the Apex Court in **P Manohar Reddy Vs Maharashtra Krishna Valley Development Corp**. MANU/SC/8480/2008 giving supremacy to contractual terms in arbitration. Arbitration is a feature of an agreement and in arbitration matters the agreement is supreme and cannot be given a go-bye by the parties, especially when it is found to be in the interest of the parties and to have been inserted with a view to avoid unnecessary arbitrations in matters in which the higher authorities find a possibility of settlement.

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The factual data with respect to the various petitions is as under:

Re: Arbitration Application No. 389/2006

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18. Though the petition does not plead compliance of the terms of clause 25 but the annexures to the petition show that the petitioner, vide letters dated 8th March, 2004, 16th December, 2004 and 29th December, 2004, approached the Executive Engineer being the engineer-in-charge. The Executive Engineer vide letter dated 3rd January, 2005 gave his decision. The petitioner, thereafter, approached the Chief Engineer for appointment of arbitrator. However, there is on record a letter addressed to the Superintending Engineer also prior thereto. The respondents in their reply have, inter alia, taken a stand that in pursuance to the application of the petitioner for appointment of arbitrator, the respondent vide its letter dated 26th August, 2005 asked the petitioner to submit the claim alongwith supporting documents. The respondent relied upon a letter dated 20th January, 2006 of the Superintending Engineer to

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the effect that all pre-conditions necessary for making request for appointment of arbitrator had not been complied with.

Though there is no strict compliance with clause 25 in the instant case but since the petition has been pending since August, 2006 and further since there was a dichotomy of view of this court as aforesaid and yet further since rejection of the application at this stage may lead to complication qua limitation, it is deemed expedient to direct the respondent to appoint an arbitrator within one month of this order.

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With these directions, the application is disposed of.

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Re : Arbitration Application No.522/2006

19. In this Petition neither any pleading nor any document to show any compliance with the procedure prescribed in clause 25. However, for the same reasons as in arbitration application 389/2006 in this case also the respondent / Commissioner MCD is directed to appoint the arbitrator within one month of the date of this order.

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Re : Arbitration Application No.523/2006 & 524/2006

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20. In these petitions again there is neither pleading nor proof of compliance of the procedure. The respondent / MCD has in the short affidavit also pleaded that the petitions are time barred, the works having been completed on 21st July, 2003, the final bill having been prepared on 24th May, 2006.

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These petitions have also been pending since 2006. For the reasons stated in Arbitration Application No.389/2006 these petitions are disposed of with the direction to the Commissioner MCD to appoint the arbitration within one month. The respondent

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/MCD shall be free to take the plea of limitation before the arbitrator.

Re : Arbitration Application No.153/2008

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21. In this again there is neither pleading nor proof of compliance of the procedure prescribed in clause 25. This fact was brought to notice of the counsel for the petitioner on 7th November, 2008. However, no attempt was made to satisfy that procedure had been followed. The petition is rejected as premature/without cause of action with liberty to the petitioner to apply afresh after complying with the procedure.

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Re : Arbitration Application No.323/2008

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22. In this case also there is no pleading of compliance. The documents also do not show any compliance. Upon the same being brought to notice of counsel for the petitioner, the petitioner filed an additional affidavit stating that the post of Superintending Engineer had been removed and hence the question of filing an appeal before the Chief Engineer did not arise. Even if the post of Superintending Engineer was not existing, though the same is not believable the petitioner ought to have approached the officer with corresponding authority and thereafter the chief Engineer. The petitioner having not done so, the petition is premature and is rejected with liberty, of course, to the petitioner to apply afresh after complying with the procedure.

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Re : Arbitration Application No.421/2008

23. In this petition also there is neither pleading nor proof of compliance with the procedure. In the affidavit accompanying the

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petition it is generally stated that the petitioner approached the Executive Engineer, Superintending Engineer and Chief Engineer but no reply was received. However, no particulars are given. The documents filed with petition comprise of copies of letters written to Executive Engineer only and not to the Superintending Engineer or Chief Engineer. The copy of the letter written to Commissioner MCD, also for appointment of arbitrator also merely states that office of Superintending Engineer was visited but he did not do anything. This letter also refers to a letter to Chief Engineer but neither are particulars given nor copy filed. It was brought to notice of counsel for petitioner on very first day when petition was listed that procedure prescribed in Clause 25 does not appear to have been followed. However, no attempt was made to satisfy that procedure had been followed. The petition is found to be premature and without cause of action and is rejected with liberty as aforesaid.

RAJIV SAHAI ENDLAW
(JUDGE)

March 17, 2009
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