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WHETHER PERSONS DISQUALIFIED TO ACT AS AN ARBITRATOR THEMSELVES, CAN APPOINT/ NOMINATE AN ARBITRATOR?

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1. Introduction

1.1 When by an agreement it is decided that the parties intend to refer their disputes to arbitration, the arbitrator is appointed in terms of such agreement or the arbitration clause governing the parties.

1.2 Section 12 of The Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015 (the Act) states the grounds of challenge to the appointment of an arbitrator.

1.3 It provides that any person appointed as an arbitrator in a cause must disclose in writing the circumstances which may give rise to justifiable doubts as to the independence and impartiality of the arbitrator in adjudicating fairly the disputes of the parties.

1.4 Section 12(5) contemplates that any person, whose relationship with the disputes or the parties falls under the categories mentioned in the Seventh Schedule, shall be ineligible to be appointed as an arbitrator.

1.5 The Seventh Schedule lists the relationships of the arbitrator that shall render him/her ineligible to be appointed as such.

1.6 Proviso to section 12(5) states that the parties may subsequent to the disputes having arisen, waive the applicability of such sub-section by an express agreement in writing.

1.7 The question as to the interpretation of section 12(5) has been answered by various decisions of the Courts. The most relevant judgments in this regard are being dealt with in this article.

2. *TRF Limited vs. Energo Engineering Projects Limited (2017) 8 SCC 377*

2.1 This was an application under section 11(6) wherein the appellant moved Court for appointment of an arbitrator consequently implying that the original appointment of the arbitrator by the Managing Director was invalid.

2.2 The three-judge bench of the Supreme Court set aside the impugned judgment of the High Court which held that the appointment of an arbitrator by a Managing Director, otherwise unable to be appointed as an arbitrator himself, would be valid.

2.3 The fundamental issue urged by the parties was whether the Managing Director could have nominated an arbitrator when he was statutorily disqualified to act as one or he retains the right to nominate irrespective of such disqualification.

2.4 The court referred to various decisions of the Supreme Court and on analysis of the arbitration clause in the present case, held that a person who has become ineligible by operation of law, cannot nominate another as an arbitrator, who may be otherwise eligible.

A copy of the judgment is annexed hereto **at page 3 to 27.**

3. *Bharat Broadband Network Limited vs. United Telecoms Limited (2019) 5 SCC 755*

3.1 The Division Bench in this decision dealt with the appeals which raised a question of interpretation of section 12(5) of the Act.

3.2 The appellants challenged the appointment of an arbitrator on the ground that the same was invalid in light of section 12(5), although the sole arbitrator was appointed by the appellant themselves.

3.3 The respondent contended that such appointment could not be challenged since there is an implied contract between the parties waiving the application of section 12(5) to the present dispute.

3.4 The Supreme Court relying on the Law Commission Report in regard to the amendment of the Act and insertion of section 12(5) observed that the ineligibility pre-supposed in the sub-section can only be removed when the parties waive the applicability of the same through an "express agreement in writing".

3.5 Such provision arises on the strength of real and genuine party autonomy which is a fundamental base to the structure of arbitration.

3.6 The Court held that letter for appointment of an arbitrator and the filing of statement of claim could not be regarded as "express agreement in writing" for the purposes of the proviso to section 12(5).

3.7 The court reached to a conclusion that the Managing Director of the appellant was ineligible to act as an arbitrator.

3.8 Consequently, relying on *TRF Limited*, it held that by reason of ineligibility, an appointment made by the Managing Director shall be void ab initio.

A copy of the judgment is annexed hereto **at page 28 to 43.**

4. *Perkins Eastman Architects DPC vs. HSCC (India) Ltd. 2019 SCC OnLine SC 1517*

4.1 This application was filed for appointment of independent and impartial arbitrator on the ground of ineligibility of the person who appointed the arbitrator, among other grounds.

4.2 The issue framed by the court was whether court must exercise its power in the facts of the case for appointment of an arbitrator.

4.3 The Court relied heavily on the decision in *TRF Limited* and held that in natural course, a person who has an interest in the outcome of the dispute or its impact on the parties to dispute, shall not have the power to appoint a sole arbitrator.

4.4 The decision in *Voestalpine Schienen Gmbh vs. DMRC Ltd. (2017) 4 SCC 665* was also relied on for the importance of independence and impartiality of the arbitrator being the imperatives of creating a healthy arbitration environment.

4.5 The Court declared the appointment of an arbitrator by an ineligible person as void.

A copy of the judgment is annexed hereto **at page 44 to 59.**

5. *Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) 2019 SCC OnLine SC 1635*

5.1 A decision of the Allahabad High Court stating that the power of a court under section 11(6) for appointment of an arbitrator was independent of the terms of the contract was challenged in this present appeal.

5.2 The Supreme Court held that the High Court was not justified in appointing the arbitrator without resorting to the General Conditions of Contract in relation to such procedure.

5.3 Further, relying on *Voetalpine*, the Court held that retired employees shall not be ineligible to act as arbitrators since the idea behind their empanelment is to ensure that the technical aspect of the disputes are suitably considered.

5.4 On the question of ineligibility, the Court observed that since the agreement itself provides for constitution of the Arbitral Tribunal from amongst the retired officers of the railway, the appointment must be made within such terms.

5.5 The Court held that in terms of such agreement, the Managing Director himself did not become ineligible to act as an arbitrator and hence the proposition laid down in *TRF Limited* shall not be applicable.

5.6 Thus, this decision took a different view on the subject as against the general position being followed until then.

A copy of the judgment is annexed hereto **at page 60 to 71.**

6. *Union of India vs. Tantia Constructions Limited*

6.1 The High Court at Calcutta in this case had passed an order observing that the General Manager could not appoint an arbitrator since section 12(5) and the Seventh Schedule of the Act were squarely applicable to the facts of the case.

6.2 This order was challenged before a three-judge bench of the Supreme Court.

6.3 The Supreme Court held that the judgment of the High Court was appropriate and cannot be faulted with.

6.4 It further observed that the decision in *Central Organization for Railway Electrification* could not be relied upon for the basic reason that once the appointing authority itself becomes incapacitated, the appointments made subsequently cannot be valid.

6.5 The Bench called for constitution of a larger bench to check the correctness of the proposition laid down in such decision.

A copy of the judgment is annexed hereto **at page 72 to 73.**

7. Conclusion

7.1 There might be lack of precedential value in the answers to the question proposed in the present subject.

7.2 However, the decisions of the Supreme Court make it invariably clear that a person ineligible to act as an arbitrator in a dispute shall also be ineligible to appoint an arbitrator for adjudication of such dispute.

7.3 Such ineligibility shall be governed by the provisions of section 12(5) read with the Seventh Schedule for the purposes of Arbitration.

7.4 Although the decision of validity or invalidity of the appointment may rest on the facts of the case, as observed in *Central Organization*, the question of ineligibility must be answered in light of the statutory provisions.

(2017) 8 Supreme Court Cases 377 : (2017) 4 Supreme Court Cases (Civ) 72 : 2017 SCC OnLine SC 692

In the Supreme Court of India

(BEFORE DIPAK MISRA, A.M. KHANWILKAR AND MOHAN M. SHANTANAGOUDAR, JJ.)

TRF LIMITED . . Appellant;

Versus

ENERGO ENGINEERING PROJECTS LIMITED . . Respondent.

Civil Appeals No. 5306 of 2017[†] with Nos. 5307 of 2017[‡], 5308 of 2017[††], 5309 of 2017[‡‡] and 5311 of 2017[‡†], decided on July 3, 2017

A. **Arbitration and Conciliation Act, 1996 — S. 12(5) r/w Schs. V and VII (post Amendment Act, 2015) — Nomination of an arbitrator by named arbitrator, when such named arbitrator standing disqualified by virtue of 2015 Amendment — Validity of**

— In terms of the arbitration clause any dispute or difference between the parties in connection with the agreement was to be referred to the sole arbitration of the Managing Director (of respondent) or his nominee — Managing Director, having become ineligible to act as the arbitrator by virtue of the 2015 Amendment, on disputes having arisen between the parties nominated another, in terms of the arbitration clause — Held, once the named arbitrator becomes ineligible by operation of law, he cannot nominate another person as an arbitrator — Therefore, once the identity of the Managing Director as the sole arbitrator was lost, the power to nominate someone else as an arbitrator was obliterated as well

B. **Arbitration and Conciliation Act, 1996 — Ss. 11(6) and 12(5) — Appointment of arbitrator by parties — When can be adjudicated upon by Court**

— The courts, in proceeding under S. 11 of the Act, can exercise the jurisdiction to nullify the appointments made by the authorities when there has been failure of procedure or ex facie contravention of the inherent facets of the arbitration clause — In the present case, plea pertaining to statutory disqualification of the nominated arbitrator permitted to be raised

C. **Arbitration and Conciliation Act, 1996 — S. 12(5) r/w Schs. V and VII (post Amendment Act, 2015) — Ineligibility for appointment of an arbitrator — How and when can be waived — The waiver can only take place subsequent to dispute having arisen between the parties, and such waiver must be by an express agreement in writing — Estoppel, Acquiescence and Waiver — Waiver**

The appellant vide letter dated 28-12-2015 invoked the arbitration in terms of Clause 33 of the General Terms and Conditions of the Purchase Order (GTCPO) seeking reference of the disputes that had arisen between the parties to an arbitrator. The appellant by letter dated 27-1-2016 nominated an arbitrator, a former Judge, as the sole arbitrator in terms of Clause 33(*d*) of the purchase order.

Clause 33 providing for resolution of disputes/arbitration read as following:

"33. Resolution of dispute/arbitration

* * *

(*c*) All disputes which cannot be settled by mutual negotiation shall be referred to and determined by arbitration as per the Arbitration and Conciliation Act, 1996 as amended.

(*d*) Unless otherwise provided, any dispute or difference between the parties in connection with this agreement shall be referred to sole arbitration of the Managing Director of buyer or his nominee. Venue of arbitration shall be Delhi, and the arbitration shall be conducted in English language.

* * *"

After the appointment was made, the appellant preferred an application under Section 11(5) read with Section 11(6) of the Act for appointment of an arbitrator under Section 11(2) of the Act. The said foundation was structured on the basis that under Section 12(5) of the Arbitration and Conciliation

(Amendment) Act, 2015 (3 of 2016) read with the Fifth and the Seventh Schedules to the amended Act, the Managing Director had become ineligible to act as the arbitrator and as a natural corollary, he had no power to nominate.

The issues involved in these appeals were:

1. Whether once the person who was required to arbitrate upon the disputes arisen under the terms and conditions of the contract becomes ineligible by operation of law, he would not be eligible to nominate a person as an arbitrator, i.e. whether the Managing Director of the respondent, who had become ineligible to act as an arbitrator subsequent to the Arbitration and Conciliation (Amendment) Act, 2015, could not have also nominated any other person as arbitrator?

2. Whether challenge to an appointment of arbitrator nominated by Managing Director, under could only be made before the Arbitral Tribunal or the same could be raised before the court in application preferred under Section 11(6) of the Act.

Allowing the appeals, the Supreme Court

Held :

On the disqualification of the Managing Director of the respondent

Clause 33(*c*) of the GTCPO clearly postulates that if the dispute cannot be settled by negotiation, it has to be determined under the Act, as amended. Therefore, the amended provisions do apply.

(Para 9)

Section 12(5) (as amended) commences with a non obstante clause. It categorically lays down that if a person whose relationship with the parties or the

counsel or the subject-matter of dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. There is a qualifier which indicates that parties may, subsequent to the disputes arisen between them, waive the applicability by express agreement in writing. The qualifier finds place in the proviso appended to Section 12(5). On a careful scrutiny of the proviso, it is discernible that there are fundamentally three components, namely, the parties can waive the applicability of the sub-section; the said waiver can only take place subsequent to dispute having arisen between the parties, and such waiver must be by an express agreement in writing.

(Para 12)

It is not in dispute that the Managing Director, by virtue of the amended provision that has introduced Section 12(5), had enumerated the disqualification in the Seventh Schedule. It has to be clarified here that the agreement had been entered into before the amendment came into force. The procedure for appointment was, thus, agreed upon.

(Para 17)

On the jurisdiction of the court to disqualify an arbitrator in a proceeding under Section 11 of the Act

The courts in certain circumstances have exercised the jurisdiction to nullify the appointments made by the authorities as there has been failure of procedure or ex facie contravention of the inherent facet of the arbitration clause.

(Para 30)

Northern Railway Admn., Ministry of Railway v. *Patel Engg. Co. Ltd.*, (2008) 10 SCC 240, *followed*

Datar Switchgears Ltd. v. *Tata Finance Ltd.*, (2000) 8 SCC 151, *affirmed*

Deep Trading Co. v. *Indian Oil Corpn.*, (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449; *Punj Lloyd Ltd.* v. *Petronet MHB Ltd.*, (2006) 2 SCC 638, *harmonised* and *relied on*

Newton Engg. and Chemicals Ltd. v. *Indian Oil Corpn. Ltd.*, (2013) 4 SCC 44 : (2013) 2 SCC (Civ) 457; *Municipal Corpn., Jabalpur* v. *Rajesh Construction Co.*, (2007) 5 SCC 344, *harmonised* and *affirmed*

Newton Engg. & Chemicals Ltd. v. *Indian Oil Corpn. Ltd.*, 2006 SCC OnLine Del 1359 : (2007) 93 DRJ 127, *held, reversed*

Naginbhai C. Patel v. *Union of India*, 1998 SCC OnLine Bom 668 : (1999) 2 Bom CR 189; *B.W.L. Ltd.* v. *MTNL*, 2000 SCC OnLine Del 196 : (2000) 2 Arb LR 190; *Sharma & Sons* v. *Army Headquarters*, 1999 SCC OnLine AP 846 : (2000) 2 Arb LR 31, *referred to*

It cannot be said in absolute terms that the proceeding once initiated cannot be interfered with the

proceeding under Section 11 of the Act.

(Para 31)

Antrix Corpn. Ltd. v. *Devas Multimedia (P) Ltd.*, (2014) 11 SCC 560 : (2014) 4 SCC (Civ) 147, *distinguished*

Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law.

(Para 32)

Walter Bau AG v. *Municipal Corpn. of Greater Mumbai*, (2015) 3 SCC 800 : (2015) 2 SCC (Civ) 450, *followed*

State of W.B. v. *Associated Contractors*, (2015) 1 SCC 32 : (2015) 1 SCC (Civ) 1, *distinguished*

Pricol Ltd. v. *Johnson Controls Enterprise Ltd.*, (2015) 4 SCC 177 : (2015) 2 SCC (Cri) 530, *impliedly distinguished*

State of Maharashtra v. *Atlanta Ltd.*, (2014) 11 SCC 619 : (2014) 4 SCC (Civ) 206, *referred to*

Apart from the fact that the Designated Judge can, at the initial stage, adjudicate upon his jurisdiction, he is also entitled to scrutinise the existence of the condition precedent for the exercise of his power and also the disqualification of the arbitrator or arbitrators.

(Para 40)

SBP & Co. v. *Patel Engg. Ltd.*, (2005) 8 SCC 618, *relied on*

Arasmeta Captive Power Co. (P) Ltd. v. *Lafarge India (P) Ltd.*, (2013) 15 SCC 414 : (2014) 5 SCC (Civ) 302; *Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689, *explained* and *affirmed*

On the validity of nomination by a disqualified arbitrator

In light of Section 11(8) and sub-section (6-A) of Section 11 (as amended), the amended law requires the Court to confine the examination of the existence of an arbitration agreement notwithstanding any judgment of the Supreme Court or the High Court while considering an application under Section 11(6) of the Act.

(Para 43)

Three cases exposit three different situations. The first one relates to non-failure of the procedure and the authority of the owner to appoint the arbitrator; the second relates to non-survival of the arbitration clause; and the third pertains to forfeiture of the right of the Corporation to appoint the sole arbitrator because of the failure to act with the procedure agreed upon by the parties in Clause 29 which was the arbitration clause in the agreement. In the first and third case, the parties had not stipulated that there will be no one else who can arbitrate while in the second case i.e. such a stipulation was postulated.

(Paras 47 and 48)

Datar Switchgears Ltd. v. *Tata Finance Ltd.*, (2000) 8 SCC 151; *Newton Engg. and Chemicals Ltd.* v. *Indian Oil Corpn. Ltd.*, (2013) 4 SCC 44 : (2013) 2 SCC (Civ) 457; *Deep Trading Co.* v. *Indian Oil Corpn.*, (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449, *explained* and *harmonised*

Arbitration clause 33(*c*) states that all disputes which cannot be settled by mutual negotiation shall be referred to and determined by arbitration as per the Act, as amended. Clause 33(*c*) is independent of Clause 33(*d*). Clause 33(*d*) provides that unless otherwise provided, any dispute or difference between the parties in connection with the agreement shall be referred to the sole arbitration of the Managing Director or his nominee.

(Para 49)

By virtue of Section 12(5) (as amended), if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law.

(Para 50)

State of Orissa v. *Commr. of Land Records & Settlement*, (1998) 7 SCC 162; *Roop Chand* v. *State of Punjab*, AIR 1963 SC 1503; *Behari Kunj Sahkari Awas Samiti* v. *State of U.P.*, (1997) 7 SCC 37; *Indore Vikas Pradhikaran* v. *Pure Industrial Coke & Chemicals Ltd.*, (2007) 8 SCC 705, *considered*

Once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once

the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated.

(Para 54)

Pratapchand Nopaji v. *Kotrike Venkata Setty & Sons*, (1975) 2 SCC 208, *impliedly relied on*

Clause (*c*) is independent of Clause (*d*), the arbitration clause survives and hence, the Court can appoint an arbitrator taking into consideration all the aspects.

(Para 55)

TRF Ltd. v. *Energo Engg. Projects Ltd.*, 2016 SCC OnLine Del 2532, *reversed*

VN-D/58848/CV

Advocates who appeared in this case :

C.A. Sundaram, Senior Advocate (Sumeet Gadodia, Kaushik Poddar and Gautam Singh, Advocates) for the Appellant;

P. Chidambaram, Senior Advocate (Dhruv Dewan, Ms Reena Choudhary and S.S. Shroff, Advocates) for the Respondent.

Chronological list of cases cited ***on page(s)***

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2. (2015) 4 SCC 177 : (2015) 2 SCC (Cri) 530, *Pricol Ltd.* v. *Johnson Controls Enterprise Ltd.* 39
3. (2015) 3 SCC 800 : (2015) 2 SCC (Civ) 450, *Walter Bau AG* v. *Municipal Corpn. of Greater Mumbai* 384*g*, 386*a*, 397*b-c*, 397*c-e*, 399*c-d*, 399*a*
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8. (2013) 4 SCC 44 : (2013) 2 SCC (Civ) 457, *Newton Engg. and Chemicals Ltd.* v. *Indian Oil Corpn. Ltd.* 392*d*, 393*a-b*, 394*d-e*, 394 395*d-e*, 401*g*, 402*c-d*, 402*e* 40

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15. 2006 SCC OnLine Del 1359 : (2007) 93 DRJ 127, *Newton Engg. & Chemicals Ltd.* v. *Indian Oil Corpn. Ltd.* **(held, reversed)** 393*a*, 393*a*

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18. 2000 SCC OnLine Del 196 : (2000) 2 Arb LR 190, *B.W.L. Ltd.* v. *MTNL* 39

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20. (1998) 7 SCC 162, *State of Orissa* v. *Commr. of Land Records & Settlement* 40

21. 1998 SCC OnLine Bom 668 : (1999) 2 Bom CR 189, *Naginbhai C. Patel* v. *Union of India* 391*b*

22. (1997) 7 SCC 37, *Behari Kunj Sahkari Awas Samiti* v. *State of U.P.* 40·

23. (1975) 2 SCC 208, *Pratapchand Nopaji* v. *Kotrike Venkata Setty & Sons* 384*e-f*, 404*b*

24. AIR 1963 SC 1503, *Roop Chand* v. *State of Punjab* 403*g*, 40·

The Judgment of the Court was delivered by

DIPAK MISRA, J.— In this batch of appeals, by special leave, the seminal issues that emanate for consideration are; whether the High Court[1], while dealing with the applications under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for brevity, "the Act"), is justified to repel the submissions of the appellants that once the person who was required to arbitrate upon the disputes arisen under the terms and conditions of the contract becomes ineligible by operation of law, he would not be eligible to nominate a person as an arbitrator, and second, a plea that pertains to statutory disqualification of the nominated arbitrator can be raised before the court in application preferred under Section 11(6) of the Act, for such an application is not incompetent. For the sake of clarity, convenience and apposite appreciation, we shall state the facts from Civil Appeal No. 5306 of 2017.

2. The respondent Company is engaged in the business of procuring bulk material handling equipment for installation in thermal power plants on behalf of its clients like National Thermal Power Corporation (NTPC) and Moser Baer, Lanco Projects Ltd., etc. On 10-5-2014, the respondent issued a purchase order to the appellant for the complete design, manufacturing, supply, transport to site, unloading, storage, erection, testing, commissioning and performance guarantee testing of various articles including wagon tippler, side arm charger, apron feeder, etc. To secure the performance under the purchase order, the appellant had submitted an advance bank guarantee and a performance bank guarantee.

3. As the controversy arose with regard to encashment of bank guarantee, the appellant approached the High Court under Section 9 of the Act seeking an order of restraint for encashment of the advance bank guarantee and the performance bank guarantee. As is reflectible from the impugned order, the said petitions were pending consideration when the High Court dealt with this matter. Be that as it may, the narration of the controversy under Section 9 in the impugned order or the consequences thereof is not germane to the adjudication of this case.

4. As the facts would unveil, the appellant vide letter dated 28-12-2015 invoked the arbitration in terms of Clause 33 of the General Terms and Conditions of the Purchase Order (GTCPO) seeking reference of the disputes that had arisen between the parties to an arbitrator. It was also asserted before the High Court that the appellant had objected to the procedure for appointment of arbitrator provided under the purchase order and accordingly, communicated that an arbitrator be appointed dehors the specific terms of the purchase order. There was denial of the same by the respondent on the ground that it

was contrary to the binding contractual terms and accordingly, it rejected the suggestion given by the appellant and eventually by letter dated 27-1-2016 nominated an arbitrator, a former Judge of this Court, as the sole arbitrator in terms of Clause 33(*d*) of the purchase order. It is apt to note here that in certain cases, a former Chief Justice of a High Court was also appointed as arbitrator by the Managing Director.

5. After the appointment was made, the appellant preferred an application under Section 11(5) read with Section 11(6) of the Act for appointment of an arbitrator under Section 11(2) of the Act. The said foundation was structured on the basis that under Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) read with the Fifth and the Seventh Schedules to the amended Act, the Managing Director had become ineligible to act as the arbitrator and as a natural corollary, he had no power to nominate. The stand put forth by the appellant was controverted by the respondent before the High Court on the ground that the Fifth and the Seventh Schedules lay down the guidelines and the arbitrator is not covered under the same and even if it is so, his power to nominate someone to act as an arbitrator is not fettered or abrogated. The High Court analysed the clauses in the agreement and opined that the right of one party to a dispute to appoint a sole arbitrator prior to the amended Act had been well recognised and the amended Act does not take away such a right. According to the learned Designated Judge, had the intent of the amended Act been to take away a party's right to nominate a sole arbitrator, the same would have been found in the detailed list of ineligibility criteria enumerated under the Seventh Schedule to the Act and, therefore, the submission advanced by the appellant, the petitioner before the High Court, was without any substance. Additionally, the High Court noted that the learned counsel for the petitioner before it had clearly stated that it had

faith in the arbitrator but he was raising the issue as a legal one, for a Managing Director once disqualified, he cannot nominate. That apart, it took note of the fact that the learned arbitrator by letter dated 28-1-2016 has furnished the requisite disclosures under the Sixth Schedule and, therefore, there were no circumstances which were likely to give rise to justifiable doubts as to the independence and impartiality. Finally, the Designated Judge directed that besides the stipulation in the purchase order governing the parties, the court was inclined to appoint the former Judge as the sole arbitrator to decide the disputes between the parties.

6. Questioning the soundness of the order passed by the High Court, Mr Sundaram, learned Senior Counsel for the appellant has raised the following contentions:

6.1. The relevant clause in the agreement relating to appointment of arbitrator has become void in view of Section 12(5) of the amended Act, for the Managing Director having statutorily become ineligible, cannot act as an arbitrator and that acts as a disqualification and in such a situation to sustain the stand that his nominees have been validly appointed arbitrators would bring in an anomalous situation which is not countenanced in law.

6.2. Once the owner/employer has been declared disqualified in law, a nominee by the owner to arbitrate upon is legally unacceptable. In support of this proposition, reliance has been placed upon *Indore Vikas Pradhikaran* v. *Pure Industrial Coke & Chemicals Ltd.*[2]

6.3. The principle embedded in the maxim *qui facit per alium facit per se* (what one does through another is done by oneself) is attracted in the instant case. Additionally, if such liberty is granted, it will usher in the concept that an action that cannot be done or is outside the prohibited area can be done illegally by taking means to the appointment of a nominee. In this regard, the decision in *Pratapchand Nopaji* v. *Kotrike Venkata Setty & Sons*[3] has been commended.

6.4. The status of the nominee does not take away the prohibition of ineligibility of

nomination as the nominator has become ineligible to arbitrate upon. A legal issue of this nature which goes to the very root of the appointment of the arbitrator pertaining to his appointment which is ex facie invalid, cannot be said to be raised before the Arbitral Tribunal. For this purpose, inspiration has been drawn from the authority in *Walter Bau AG* v. *Municipal Corpn. of Greater Mumbai*[4].

7. Mr Chidambaram, learned Senior Counsel for the respondent, assisted by Mr S.S. Shroff, resisting the aforesaid submissions, raised by the learned Senior Counsel for the appellant, proponed as follows:

7.1. The submission to the effect that since the Managing Director of the respondent has become ineligible to act as an arbitrator subsequent to the amendment in the Act, he could also not have nominated any other person as arbitrator is absolutely unsustainable, for the Fifth and the Seventh Schedules fundamentally guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence and impartiality of the arbitrator. To elaborate, if any person whose relationship with the parties or the counsel or the subject-matter of dispute falls under any of the categories specified in the Seventh Schedule, he is ineligible to be appointed as an arbitrator but not otherwise.

7.2. The appellants have not been able to substantiate before the High Court how the appointment of the sole arbitrator falls foul of the Seventh Schedule and in the absence of that, the appeals, being devoid of merit, deserve to be dismissed. As far as the language employed in the Fifth Schedule is concerned, it is also a guide, which indicates existence of circumstances that give rise to justifiable doubts as to the arbitrator's independence and impartiality and when such a stand has been abandoned before the High Court, the impugned order is totally invulnerable.

7.3. On a careful appreciation of the Fifth and Seventh Schedules of the amended Act, it is manifest that grounds provided thereunder clearly pertain to the appointed arbitrator and not relating to the appointing authority and, therefore, each and every ground/circumstance categorised under the Fifth and Seventh Schedules is to be reckoned and decided vis-à-vis the appointed arbitrator alone and not as a general principle.

7.4. There is no warrant for the conclusion that an appointed arbitrator will automatically stand disqualified merely because the named arbitrator has become ineligible to become the arbitrator, for he always has the right to nominate an independent and neutral arbitrator.

7.5. The language of the purchase order does not stipulate that the Managing Director of the respondent will have the right to nominate a sole arbitrator as long as he is also qualified to act as an arbitrator. The role to act as an arbitrator and to nominate an arbitrator are in two independent spheres and hence, the authority to nominate is not curtailed.

7.6. Challenge to an appointment of arbitrator under Section 13 of the Act can only be made before the Arbitral Tribunal, for despite introducing the Fifth, the Sixth and the Seventh Schedules to the amended Act under Section 12, the legislature has consciously retained the challenge procedure under Section 13 of the Act. It is because Sections 13(2) and 13(3) of the Act clearly postulate that a challenge to the authority of arbitrator has to be made before the Arbitral Tribunal and the said procedure cannot be bypassed by ventilating the objection under Section 11 of the Act. Any objection to be raised under the Fifth Schedule or the Seventh Schedule of the amended Act has to be raised before the Arbitral

Tribunal. To bolster the said submission, heavy reliance has been placed on *Antrix Corpn. Ltd.* v. *Devas Multimedia (P) Ltd.*[5]

7.7. The authority relied on *Walter Bau AG*[4] is not a precedent for the proposition advanced, as it was dealing with a challenge to an order of a judicial authority and not that of a court and furthermore, the said decision has been distinguished in *State of W.B.* v. *Associated Contractors*[6].

8. To appreciate the contentions raised at the Bar, it is necessary to refer to the relevant clauses of GTCPO that deal with the resolution of dispute. Clause 33 that provides resolution of disputes/arbitration reads as follows:

"33. Resolution of dispute/arbitration

(*a*) In case any disagreement or dispute arises between the buyer and the seller under or in connection with the PO, both shall make every effort to resolve it amicably by direct informal negotiation.

(*b*) If, even after 30 days from the commencement of such informal negotiation, seller and the buyer have not been able to resolve the dispute amicably, either party may require that the dispute be referred for resolution to the formal mechanism of arbitration.

(*c*) All disputes which cannot be settled by mutual negotiation shall be referred to and determined by arbitration as per the Arbitration and Conciliation Act, 1996 as amended.

(*d*) Unless otherwise provided, any dispute or difference between the parties in connection with this agreement shall be referred to sole arbitration of the Managing Director of buyer or his nominee. Venue of arbitration shall be Delhi, and the arbitration shall be conducted in English language.

(*e*) The award of the Tribunal shall be final and binding on both, buyer and seller."

9. We have reproduced the entire Clause 33 to appreciate the dispute resolution mechanism in its proper perspective. Sub-clause (*c*) of Clause 33 clearly postulates that if the dispute cannot be settled by negotiation, it has to be determined under the Act, as amended. Therefore, the amended provisions do apply. Sub-clause (*d*) stipulates that dispute or reference between the parties in connection with the agreement shall be referred to sole arbitration of the Managing Director of the buyer or his nominee. This is the facet of the clause which is required to be interpreted and appositely dwelt upon. Prior to amendment, Section 12 read as follows:

"**12. *Grounds for challenge***.—(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose

in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(*a*) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(*b*) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment

he has participated, only for reasons of which he becomes aware after the appointment has been made."

10. Section 13 of the Act dealt with challenge procedure. After the amendment, Section 12 that deals with the grounds of challenge is as follows:

"**12. *Grounds for challenge***.—(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances—

(*a*) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional, or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(*b*) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(*a*) circumstances exist that give rise to justifiable doubts as to his independence or impartiality; or

(*b*) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

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(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

11. We have referred to both the provisions to appreciate the change in the fundamental concept of grounds for challenge. The disclosures to be made by the arbitrator have been made specific and the disclosures are required to be made in accordance with the Sixth Schedule to the amended Act. The Sixth Schedule stipulates, apart from others, the circumstances which are to be disclosed. We think it appropriate to reproduce the same:

"Circumstances disclosing any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to your independence or impartiality (list out):

Circumstances which are likely to affect your ability to devote sufficient time to the arbitration and in particular your ability to finish the entire arbitration within twelve

months (list out)."

12. Sub-section (5) of Section 12, on which immense stress has been laid by the learned counsel for the appellant, as has been reproduced above, commences with a non obstante clause. It categorically lays down that if a person whose relationship with the parties or the counsel or the subject-matter of dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. There is a qualifier which indicates that parties may, subsequent to the disputes arisen between them, waive the applicability by express agreement in writing. The qualifier finds place in the proviso appended to sub-section (5) of Section 12. On a careful scrutiny of the proviso, it is discernible that there are fundamentally three components, namely, the parties can waive the applicability of the sub-section; the said waiver can only take place subsequent to dispute having arisen between the parties, and such waiver must be by an express agreement in writing.

13. At this stage, we think it appropriate to refer to the Seventh Schedule, which finds mention in Section 12(5). The Seventh Schedule has three parts, namely, (*i*) arbitrator's relationship with the parties or counsel; (*ii*) relationship of the arbitrator to the dispute; and (*iii*) arbitrator's direct or indirect interest in the dispute.

14. In the present case, we are concerned with the first part of the Seventh Schedule. Be it noted, the first part has 14 items. For the present controversy, the relevant items are Items 1, 5 and 12, which read as follows:

"**1.** The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

* * *

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

* * *

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties."

15. We will be failing in our duty, if we do not refer to some of the aspects which find mention in the Fifth Schedule. Our attention has been drawn to Items 22 and 24 of the Fifth Schedule. They are as follows:

"**22.** The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.

* * *

24. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties."

We have noted this for the sake of completion.

16. What is fundamentally urged, as is noticeable from the submissions of Mr Sundaram, learned Senior Counsel appearing for the appellants, is that the learned arbitrator could not have been nominated by the Managing Director as the said authority has been statutorily disqualified. The submission of the respondent, per contra, is that the Managing Director may be disqualified to act as an arbitrator, but he is not deprived of his right to nominate an arbitrator who has no relationship with the respondent. Additionally, it is assiduously urged that if the appointment is hit by the Fifth Schedule or the Sixth Schedule or the Seventh Schedule, the same has to be raised before the Arbitral Tribunal

during the arbitration proceeding but not in an application under Section 11(6) of the Act.

17. First we shall address the issue whether the Court can enter into the arena of controversy at this stage. It is not in dispute that the Managing Director, by virtue of the amended provision that has introduced sub-section (5) to Section 12, had enumerated the disqualification in the Seventh Schedule. It has to be clarified here that the agreement had been entered into before the amendment came into force. The procedure for appointment was, thus, agreed upon. It has been observed by the Designated Judge that the amending provision does not take away the right of a party to nominate a sole arbitrator, otherwise the legislature could have amended other provisions. He has also observed that the grounds including the objections under the Fifth and the Seventh Schedules of the amended Act can be raised before the Arbitral Tribunal and further when the nominated arbitrator has made the disclosure as required under the Sixth Schedule to the Act, there was no justification for interference. That apart, he has also held in his conclusion that besides the stipulation of the agreement

governing the parties, the Court has decided to appoint the arbitrator as the sole arbitrator to decide the dispute between the parties.

18. In *Northern Railway Admn., Ministry of Railway* v. *Patel Engg. Co. Ltd.*[7], while dealing with sub-section (6) of Section 11 and sub-section (8) of Section 11 and appreciating the stipulations in sub-sections (3) and (5), a three-Judge Bench opined that: (SCC p. 246, para 13)

> "*13.* The expression "due regard" means that proper attention to several circumstances has been focused. The expression "necessary" as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. Necessary measures can be stated to be the reasonable steps required to be taken."

19. Being of this view, the Court ruled that the High Court had not focused on the requirement of having due regard to the qualification required by the agreement or other considerations necessary to secure appointment of an independent and impartial arbitrator and further ruled that it needs no reiteration that appointment of an arbitrator or arbitrators named in the arbitration agreement is not a must because while making the appointment, the twin responsibilities of sub-section (8) of Section 11 have to be kept in view, considered and taken into account. The Court further observed that if the same is not done, the appointment becomes vulnerable. In the said case, the Court set aside the appointment made by the High Court and remitted the matter to make fresh appointment keeping in view the parameters indicated therein.

20. In *Datar Switchgears Ltd.* v. *Tata Finance Ltd.*[8], the appellant questioned the authority of the first respondent in appointing an arbitrator after a long lapse of notice period of 30 days on the foundation that the power of appointment should have been exercised within a reasonable time. It was further contended that unilateral appointment of arbitrator was not envisaged under the lease agreement and, therefore, the first respondent should have obtained the consent of the appellant and the name of the arbitrator should have been proposed to the appellant before the appointment. The Court took note of the fact that the arbitration clause in the lease agreement contemplated appointment of a sole arbitrator. The Court further took note of the fact that the appellant therein had not issued any notice to the first respondent seeking appointment of an arbitrator and it explicated that an application under Section 11(6) of the Act can be filed when there is a failure of the procedure for appointment of arbitrator. Elaborating the said concept, the Court held: (SCC p. 155, para 6)

> "*6.* ... This failure of procedure can arise under different circumstances. It can be a case where a party who is bound to appoint an arbitrator refuses to appoint the

arbitrator or where two appointed

arbitrators fail to appoint the third arbitrator. If the appointment of an arbitrator or any function connected with such appointment is entrusted to any person or institution and such person or institution fails to discharge such function, the aggrieved party can approach the Chief Justice for appointment of an arbitrator."

21. After so stating, the Court adverted to the issue whether there was any real failure of the mechanism provided under the lease agreement. The Court took note of the fact that the respondent had made the appointment before the appellant had filed the application under Section 11 of the Act though the said appointment was made beyond 30 days. It posed the question whether in a case falling under Section 11(6) of the Act, the opposite party cannot appoint an arbitrator after the expiry of 30 days from the date of appointment. Distinguishing the decisions of *Naginbhai C. Patel* v. *Union of India*[9], *B.W.L. Ltd.* v. *MTNL*[10] and *Sharma & Sons* v. *Army Headquarters*[11], the Court held: (*Datar Switchgears case*[8], SCC p. 158, paras 19-21)

> "*19*. So far as cases falling under Section 11(6) are concerned — such as the one before us — no time-limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, "*so far as Section 11(6) is concerned*", if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. *If the opposite party makes an appointment even after 30 days of the demand, but "before the first party has moved the court under Section 11", that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases.* We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.
>
> *20*. In the present case the respondent made the appointment before the appellant filed the application under Section 11(6) though it was beyond 30 days from the date of demand. In our view, the appointment of the arbitrator by the respondent is valid and it cannot be said that the right was forfeited after expiry of 30 days from the date of demand.

> *21*. We need not decide whether for purposes of sub-sections (4) and (5) of Section 11, which expressly prescribe 30 days, the period of 30 days is mandatory or not."
>
> (emphasis supplied)

And again: (SCC pp. 158-59, para 23)

> "*23*. When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. Even though rigour of the doctrine of "freedom of contract" has been whittled down by various labour and social welfare legislation, still the court has to respect the terms of the contract entered into by

parties and endeavour to give importance and effect to it. When the party has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause."

22. On the aforesaid basis, the Court opined that the first respondent did not fail to follow the procedure contemplated under the agreement in appointing the arbitrator nor did it contravene the provisions of the arbitration clause. The said conclusion was arrived at as the appellant therein had really not sent a notice for appointment of arbitrator as contemplated under Clause 20.9 of the agreement which was the arbitration clause.

23. In *Newton Engg. and Chemicals Ltd.* v. *Indian Oil Corpn. Ltd.*[12], a two-Judge Bench was dealing with an arbitration clause in the agreement that provided that all disputes and differences between the parties shall be referred by any aggrieved party to the contract to the sole arbitration of ED (NR) of the respondent Corporation. The arbitration clause further stipulated that if such ED (NR) was unable or unwilling to act as the sole arbitrator, the matter shall be referred to the sole arbitration of some other person designated by ED (NR) in his place who was willing to act as sole arbitrator. It also provided that no person other than ED (NR) or the person designated by ED (NR) should act as an arbitrator. When the disputes arose between the parties, the appellant therein wrote to the Corporation for appointment of ED (NR) as the sole arbitrator, as per the arbitration clause. The Corporation informed the contractor that due to internal reorganisation in the Corporation, the office of ED (NR) had ceased to exist and since the intention of the parties was to get the dispute settled through the arbitration, the Corporation offered to the contractor the arbitration of the substituted arbitrator, that is, the Director (Marketing). The Corporation further informed the contractor that if he agreed to the same, it may send a written confirmation giving its consent to the substitution of the named arbitrator. The contractor informed that he would like to have the arbitration as per the provisions of the Act whereby each of the parties would be appointing one arbitrator each. The Corporation did not agree to the suggestion given by the company and ultimately appointed Director (Marketing) as the arbitrator. The

contractor, being aggrieved, moved the High Court of Delhi for appointment of arbitrator under Section 11(6)(*c*) of the Act and the learned Single Judge dismissed[13] the same and observed that the challenge to the appointment of the arbitrator may be raised by the contractor before the Arbitral Tribunal itself. Interpreting the agreement, this Court held: (*Newton Engg. and Chemicals case*[12], SCC p. 46, paras 7-8)

"*7.* Having regard to the express, clear and unequivocal arbitration clause between the parties that the disputes between them shall be referred to the sole arbitration of ED (NR) of the Corporation and, if ED (NR) was unable or unwilling to act as the sole arbitrator, the matter shall be referred to the person designated by such ED (NR) in his place who was willing to act as sole arbitrator and, if none of them is able to act as an arbitrator, no other person should act as arbitrator, the appointment of Director (Marketing) or his nominee as a sole arbitrator by the Corporation cannot be sustained. If the office of ED (NR) ceased to exist in the Corporation and the parties were unable to reach to any agreed solution, the arbitration clause did not survive and has to be treated as having worked its course. According to the arbitration clause, sole arbitrator would be ED (NR) or his nominee and no one else. In the circumstances, it was not open to either of the parties to unilaterally appoint any arbitrator for resolution of the disputes. Sections 11(6)(*c*), 13 and 15 of the 1996 Act have no application in the light of the reasons indicated above.

8. In this view of the matter, the impugned order dated 8-11-2006[13] has to be set aside and it is set aside. The appointment of Respondent 3 as sole arbitrator to adjudicate the disputes between the parties is also set aside. The proceedings, if any,

carried out by the arbitrator are declared to be of no legal consequence. It will be open to the contractor, the appellant to pursue appropriate ordinary civil proceedings for redressal of its grievance in accordance with law."

The aforesaid decision clearly lays down that it is not open to either of the parties to unilaterally appoint an arbitrator for resolution of the disputes in a situation that had arisen in the said case.

24. In *Deep Trading Co.* v. *Indian Oil Corpn.*[14], the three-Judge Bench referred to Clause 29 of the agreement, analysed sub-sections (1), (2), (6) and (8) of Section 11 of the Act, referred to the authorities in *Datar Switchgears*[8]

and *Punj Lloyd Ltd.* v. *Petronet MHB Ltd.*[15] and came to hold that: (*Deep Trading case*[14], SCC p. 42, paras 19-20)

> "*19*. If we apply the legal position exposited by this Court in *Datar Switchgears*[8] to the admitted facts, it will be seen that the Corporation has forfeited its right to appoint the arbitrator. It is so for the reason that on 9-8-2004, the dealer called upon the Corporation to appoint the arbitrator in accordance with the terms of Clause 29 of the agreement but that was not done till the dealer had made application under Section 11 (6) to the Chief Justice of the Allahabad High Court for appointment of the arbitrator. The appointment was made by the Corporation only during the pendency of the proceedings under Section 11(6). Such appointment by the Corporation after forfeiture of its right is of no consequence and has not disentitled the dealer to seek appointment of the arbitrator by the Chief Justice under Section 11(6). We answer the above questions accordingly.
>
> *20*. Section 11(8) does not help the Corporation at all in the fact situation. Firstly, there is no qualification for the arbitrator prescribed in the agreement. Secondly, to secure the appointment of an independent and impartial arbitrator, it is rather necessary that someone other than an officer of the Corporation is appointed as arbitrator once the Corporation has forfeited its right to appoint the arbitrator under Clause 29 of the agreement."

25. The Court accepted the legal position laid down in *Newton Engg.*[12] and referred to *Deep Trading Co.*[14] and opined that as the Corporation had failed to act as required under the procedure agreed upon and did not make the appointment until the application was made under Section 11(6) of the Act, it had forfeited its right of appointment of an arbitrator. In such a circumstance, the Chief Justice or his designate ought to have exercised his jurisdiction to appoint an arbitrator under Section 11(6) of the Act. Be it noted, the three-Judge Bench also expressly stated its full agreement with the legal position that has been laid down in *Datar Switchgears Ltd.*[8]

26. In *Deep Trading Co.*[14], the three-Judge Bench noticed as the Corporation did not agree to any of the names proposed by the appellant, and accordingly, remitted the matter to the High Court for an appropriate order on the application made under Section 11(6) of the Act.

27. At this stage, it is necessary to understand the distinction between the two authorities, namely, *Newton Engg.*[12] and *Deep Trading Co.*[14] In *Newton Engg.*[12] the arbitration clause provided that no person other than ED (NR) or a person designated by ED (NR) should act as an arbitrator. Though the

Corporation appointed its Director (Marketing) as the sole arbitrator yet the same was not

accepted by the contractor. On the contrary, it was assailed before the Designated Judge. The Court held that since the parties were unable to arrive at any agreed solution, the arbitration clause did not survive and the dealer was left to pursue appropriate ordinary civil proceedings for redressal of its grievance in accordance with law. In *Deep Trading Co.*[14] arbitration clause, as is noticeable, laid down that the dispute or difference of any nature whatsoever or regarding any right, liability, act, omission on account of any of the parties thereto or in relation to the agreement shall be referred to the sole arbitration of the Director (Marketing) of the Corporation or of some officer the Corporation who may be nominated by the Director (Marketing).

28. As the factual matrix of the said case would show, the appointing authority had not appointed arbitrator till the dealer moved the Court and it did appoint during the pendency of the proceeding. Be it noted that dealer had called upon the Corporation to appoint arbitrator on 9-8-2004 and as no appointment was made by the Corporation, he had moved the application on 6-12-2004. The Corporation appointed the sole arbitrator on 28-12-2004 after the application under Section 11(6) was made. Taking note of the factual account, the Court opined that there was a forfeiture of the right of appointment of arbitrator under the agreement and, therefore, the appointment of the arbitrator by the Corporation during the pendency of the proceeding under Section 11(6) of the Act was of no consequence and remanded the matter to the High Court. The arbitration clause in *Newton Engg.*[12] clearly provided that if the authority concerned is not there and the office ceases to exist and parties are unable to reach any agreed solution, the arbitration clause shall cease to exist. Such a stipulation was not there in *Deep Trading Co.*[14] That is the major distinction and we shall delineate on the said aspect from a different spectrum at a later stage.

29. At this juncture, we may also refer to a two-Judge Bench decision in *Municipal Corpn., Jabalpur* v. *Rajesh Construction Co.*[16] In the said case the arbitration clause specifically provided that if the party invoking arbitration is the contractor, no reference order shall be maintainable unless the contractor furnishes a security deposit of a sum determined as per the table given therein. The said condition precedent was not satisfied by the contractor. Appreciating the obtaining factual score, the Court held that it has to be kept in mind that it is always the duty of the Court to construe the arbitration agreement in a manner so as to uphold the same, and, therefore, the High Court was not correct in appointing an arbitrator in a manner, which was inconsistent with the arbitration agreement. Thus, emphasis was laid on the manner of appointment which is consistent with arbitration clause that prescribes for appointment.

30. The purpose of referring to the aforesaid judgments is that courts in certain circumstances have exercised the jurisdiction to nullify the appointments made by the authorities as there has been failure of procedure or ex facie contravention of the inherent facet of the arbitration clause. The submission of the learned counsel for the respondent is that the authority of the arbitrator can be raised before the learned arbitrator and for the said purpose, as stated hereinbefore, he has placed heavy reliance upon *Antrix Corpn. Ltd.*[5] In the said case, the two-Judge Bench referred to Article 20 of the agreement which specifically dealt with arbitration and provided that in the event any dispute or difference arises between the parties as to any clause or provision of the agreement, or as to the interpretation thereof, or as to any account or valuation, or as to rights and liabilities, acts, omissions of any party, such disputes would be referred to the senior management of both the parties to resolve the same within three weeks, failing which the matter would be referred to an Arbitral Tribunal comprising of three arbitrators and the seat of the

arbitration would be New Delhi and further that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce (ICC) or UNCITRAL. As the agreement was terminated, the petitioner therein wrote to the respondent Company to nominate the senior management to discuss the matter and to try and resolve the dispute between the parties. However, without exhausting the mediation process, as contemplated under Article 20(*a*) of the agreement, the respondent unilaterally and without prior notice addressed a request for arbitration to the ICC International Court of Arbitration and one Mr V.V. Veedar was nominated as the arbitrator in accordance with the ICC Rules. The correspondence between the parties was not fruitful and the petitioner filed an application under Section 11(4) read with Section 11(10) of the Act for issuance of a direction to the respondent to nominate an arbitrator in accordance with an agreement dated 28-1-2005 and the Rules to adjudicate upon the disputes which had arisen between the parties and to constitute an Arbitral Tribunal and to proceed with the arbitration.

31. When the matter was listed before the designate of the Chief Justice of this Court, it was referred to a larger Bench and the Division Bench, analysing the various authorities, came to hold thus: (*Antrix Corpn. case*[5], SCC p. 573, para 35)

> "*35.* ... Once the provisions of the ICC Rules of Arbitration had been invoked by Devas, the proceedings initiated thereunder could not be interfered with in a proceeding under Section 11 of the 1996 Act. The invocation of the ICC Rules would, of course, be subject to challenge in appropriate proceedings but not by way of an application under Section 11(6) of the 1996 Act. Where the parties had agreed that the procedure for the arbitration would be governed by the ICC Rules, the same would necessarily include the appointment of an Arbitral Tribunal in terms

of the arbitration agreement and the said Rules. Arbitration Petition No. 20 of 2011 under Section 11(6) of the 1996 Act for the appointment of an arbitrator must, therefore, fail and is rejected, but this will not prevent the petitioner from taking recourse to other provisions of the aforesaid Act for appropriate relief."

The said pronouncement, as we find, is factually distinguishable and it cannot be said in absolute terms that the proceeding once initiated could not be interfered with the proceeding under Section 11 of the Act. As we find, the said case pertained to the ICC Rules and, in any case, we are disposed to observe that the said case rests upon its own facts.

32. Mr Sundaram, learned Senior Counsel for the appellant has also drawn inspiration from the judgment passed by the Designated Judge of this Court in *Walter Bau AG*[4], where the learned Judge, after referring to *Antrix Corpn. Ltd.*[5], distinguished the same and also distinguished the authority in *Pricol Ltd.* v. *Johnson Controls Enterprise Ltd.*[17] and came to hold that: (*Walter Bau AG case*[4], SCC p. 806, para 10)

> "*10.* Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law. ..."

33. We may immediately state that the opinion expressed in the aforesaid case is in consonance with the binding authorities we have referred to hereinbefore.

34. The learned counsel for the respondent commenting on the authority in *Walter Bau AG*[4] would submit that the decision rendered therein is not a precedent and for the said purpose, he has placed reliance upon *Associated Contractors*[6] wherein a three-Judge Bench was dealing with a reference that gave rise to the following issue: (*Associated Contractors case*[6], SCC p. 37, para 1)

"*1*. ... '... which court will have the jurisdiction to entertain and decide an application under Section 34 of the Arbitration and Conciliation Act, 1996?' "

35. The three-Judge Bench was called upon to lay down the meaning of the term "court" under Section 2(1)(*e*) and Section 42 of the Act. The Court came to hold that an essential ingredient of Section 42 of the Act is that an application under Part I must be made to a court. The three-Judge Bench

adverted to the definition of the court under Section 2(1)(*e*) of the Act and opined that the definition contained in the 1940 Act spoke of civil court whereas the definition of the 1996 Act which says court to be the Principal Civil Court of Original Jurisdiction in a district or the High Court in exercise of original civil jurisdiction. That apart, Section 2(1)(*e*) further goes on to say that the court would not include any civil court of a grade inferior to such Principal Civil Court, or a Small Cause Court. The Court discussed with regard to the concept of "court", referred to the meaning of the phrase "means and includes", reverted to the judgment in *State of Maharashtra* v. *Atlanta Ltd.*[18] and also reproduced few passages from the seven-Judge Bench in *SBP & Co.* v. *Patel Engg. Ltd.*[19] and eventually ruled: (*Associated Contractors case*[6], SCC p. 46, para 24)

"*24*. If an application were to be preferred to a court which is not a Principal Civil Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction to decide questions forming the subject-matter of an arbitration if the same had been the subject-matter of a suit, then obviously such application would be outside the four corners of Section 42. If, for example, an application were to be filed in a court inferior to a Principal Civil Court, or to a High Court which has no original jurisdiction, or if an application were to be made to a court which has no subject-matter jurisdiction, such application would be outside Section 42 and would not debar subsequent applications from being filed in a court other than such court."

36. The Court summed up the conclusions as follows: (*Associated Contractors case*[6], SCC pp. 46-47, para 25)

"*25*. (*a*) Section 2(1)(*e*) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act, 1996.

(*b*) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.

(*c*) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(*d*) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(*e*) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(*e*), and whether the Supreme Court does or does not retain seisin after

appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

(*f*) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.

(*g*) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42."

37. Relying on the said pronouncement, it is urged by the learned Senior Counsel for the respondent that the authority in *Walter Bau AG*[4] is not a precedent.

38. We have discussed in detail to understand the context in which the judgment in *Associated Contractors*[6] was delivered. Suffice it to mention that in *Walter Bau AG*[4], the Designated Judge only reiterated the principles which have been stated by a two-Judge or three-Judge Bench decisions that had dealt with Section 11 of the Act. We may also hasten to make it clear that the authority in *Associated Contractors*[6] deals with a different situation and it has nothing to do with the conundrum that has arisen in the instant case. We have devoted some space as the said authority was pressed into service with enormous conviction. Be it clearly stated that the said decision is only concerned with the "concept of court" in the context of Sections 42, 34, 9 and 2(1)(*e*) of the Act. In the present case, we are exclusively concerned with the statutory disqualification of the learned arbitrator. The principles laid down in *Associated Contractors*[6] have no applicability to the case at hand and reliance placed upon the same, we are obliged to say, is nothing but a Sisyphean endeavour.

39. As we are required to adjudge on the jurisdiction of the Designated Judge, we may reproduce the relevant conclusion from the majority judgment in *SBP & Co.*[19] Conclusion (*iv*), as has been summed up in para 47 in *SBP case*[19] by the majority, reads as follows: (SCC pp. 663-64)

"*47.* (*iv*) The Chief Justice or the Designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this

judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the Designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the Designated Judge."

40. In *Arasmeta Captive Power Co. (P) Ltd.* v. *Lafarge India (P) Ltd.*[20], the two-Judge Bench, though was dealing with the pregnability of the order passed by the Designated Judge pertaining to excepted matters, dealt with the submission advanced by the learned counsel for the appellant that the three-Judge Bench in *Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.*[21] has not appositely understood the principle stated in major part of the decision rendered by the larger Bench in *SBP case*[19]. In the said case, the Court, after referring to paras 39 and 47(*iv*), stated thus: (*Arasmeta Captive case*[20], SCC pp. 423-24, para 18)

"*18.* On a careful reading of para 39 and Conclusion (*iv*), as set out in para 47 of *SBP case*[19], it is limpid that for the purpose of setting into motion the arbitral procedure the Chief Justice or his designate is required to decide the issues, namely, (*i*) territorial

jurisdiction, (*ii*) existence of an arbitration agreement between the parties, (*iii*) existence or otherwise of a live claim, and (*iv*) existence of the conditions for exercise of power and further satisfaction as regards the qualification of the arbitrator. That apart, under certain circumstances the Chief Justice or his designate is also required to see whether a long-barred claim is sought to be restricted and whether the parties had concluded the transaction by recording satisfaction of the mutual rights and obligations or by receiving the final payment without objection."

It is worthy to note here that in the said case, the Court set aside the impugned order as the Designated Judge had entered into the billing disputes, which he could not have. The purpose of referring to these two judgments is that apart from the fact that the Designated Judge can, at the initial stage, adjudicate upon his jurisdiction, he is also entitled to scrutinise the existence of the condition precedent for the exercise of his power and also the disqualification of the arbitrator or arbitrators.

41. Section 11(8) of the Act, which has been introduced in 2015, reads as follows:

"**11. (8)** The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator,

shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of Section 12, and have due regard to—

(*a*) any qualifications required for the arbitrator by the agreement of the parties; and

(*b*) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator."

42. We are referring to the same as the learned counsel for the parties have argued at length with regard to the disclosure made by the arbitrator and that has also been referred to by the Designated Judge. In this context, we may profitably refer to sub-section (6-A) of Section 11 of the Act which reads as follows:

"**11. (6-A)** The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement."

43. The purpose of referring to the said provision is that the amended law requires the Court to confine the examination of the existence of an arbitration agreement notwithstanding any judgment of the Supreme Court or the High Court while considering an application under Section 11(6) of the Act. As the impugned order would indicate, the learned Judge has opined that there had been no failure of procedure, for there was a request for appointment of an arbitrator and an arbitrator has been appointed. It is apt to state here that the present factual score projects a different picture altogether and we have to carefully analyse the same.

44. We are required to sit in a time machine and analyse the judgments in this regard. In *Datar Switchgears*[8], it has been held that the appointment made by the respondent was invalid inasmuch as there was no proper notice by the appellant to appoint an arbitrator and before an application under Section 11(6) of the Act was filed, the arbitrator was appointed. Relevant part of Clause 20.9 of the agreement in the said case postulates thus: (SCC p. 156, para 9)

"*9.* ... '20.9. It is agreed by and between the parties that in case of any dispute under this lease the same shall be referred to an arbitrator to be nominated by the lessor and the award of the arbitrator shall be final and binding on all the parties concerned.' "

The aforesaid clause lays down that the lessor shall nominate the arbitrator.

45. In *Newton Engg.*[12], though the agreement has not been produced in the judgment, the Court has analysed in detail the purport of the arbitration clause in the agreement and ruled that the matter shall be referred to the sole arbitration of ED (NR) of the respondent Corporation and if the said authority

is unable and unwilling to act, the matter shall be referred to the sole arbitration of some other person designated by ED (NR) in his place who is willing to act as a sole arbitrator. The said post had ceased to exist and as the parties intended the matter to go to arbitration, the respondent substituted the arbitrator with the Director (Marketing) in the arbitration clause subject to the written confirmation giving the consent by the contractor. The contractor informed the Corporation that it would like to have the arbitrator appointed under the Act whereby each of the parties would be appointing one arbitrator each to which the Corporation did not accede. At that juncture, the contractor moved an application under Section 11(6-C) of the Act and the High Court appointed a retired Judge. Taking exception to the view of the High Court, the two-Judge Bench held, as stated earlier, that the arbitration clause postulated that the sole arbitrator would be ED (NR) or his nominee and no one else and, therefore, Section 11(6-C) was not applicable. The Court ruled that as the parties had not been able to reach the agreed decision, the arbitration clause did not survive.

46. In *Deep Trading Co.*[14] while approving the view expressed in *Newton Engg.*[12], the Court observed that in the said case the Court was not concerned with the question of forfeiture of the right of the Corporation for appointment of an arbitrator and accordingly, while setting aside the order sent for fresh consideration by the Chief Justice or the Designated Judge.

47. The aforesaid three cases exposit three different situations. The first one relates to non-failure of the procedure and the authority of the owner to appoint the arbitrator; the second relates to non-survival of the arbitration clause; and the third pertains to forfeiture of the right of the Corporation to appoint the sole arbitrator because of the failure to act with the procedure agreed upon by the parties in Clause 29 which was the arbitration clause in the agreement. It is interesting to note that Clause 29 in *Deep Trading Co.*[14] does not mention unlike *Newton Engg.*[12] that no one else shall arbitrate upon.

48. One aspect needs to be noted. In the first and third case, the parties had not stipulated that there will be no one else who can arbitrate while in the second case i.e. *Newton Engg.*[12], such a stipulation was postulated.

49. Regard being had to the same, we have to compare and analyse the arbitration clause in the present case. Clause (*c*), which we have reproduced earlier, states that all disputes which cannot be settled by mutual negotiation shall be referred to and determined by arbitration as per the Act, as amended. Clause (*c*) is independent of Clause (*d*). Clause (*d*) provides that unless otherwise provided, any dispute or difference between the parties in connection with the agreement shall be referred to the sole arbitration of the Managing Director or his nominee.

50. First, we shall deal with Clause (*d*). There is no quarrel that by virtue of Section 12 (5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the

Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the "named sole arbitrator" and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. In this regard, our attention has been drawn to a two-Judge Bench decision in *State of Orissa* v. *Commr. of Land Records & Settlement*[22]. In the said case, the question arose, can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held: (SCC p. 173, para 25)

> "*25*. We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in *Roop Chand* v. *State of Punjab*[23]. In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, delegated its appellate powers vested in it under Section 21 (4) to an "officer", an order passed by such an officer was an order passed by the *State Government* itself and "not an order passed by any *officer* under this Act" within Section 42 and was not revisable by

the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer *in his own right* and *not as a delegate* of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate."

(emphasis in original)

51. Be it noted in the said case, reference was made to *Behari Kunj Sahkari Awas Samiti* v. *State of U.P.*[24], which followed the decision in *Roop Chand* v. *State of Punjab*[23]. It is seemly to note here that the said principle has been followed in *Indore Vikas Pradhikaran*[2].

52. Mr Sundaram has strongly relied on *Pratapchand Nopaji*[3]. In the said case, the three-Judge Bench applied the maxim "*qui facit per alium facit per se*". We may profitably reproduce the passage: (SCC p. 214, para 9)

> "*9*. ... The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim: "*qui facit per alium facit per se*" (what one does through another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited

area to do the illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the "pucca adatia", or, as the High Court had held, he is clothed with the powers of an ordinary commission agent only."

53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to the learned counsel for the appellant, ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.

54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing

Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.

55. Another facet needs to be addressed. The Designated Judge in a cryptic manner has ruled after noting that the petitioner therein had no reservation for nomination of the nominated arbitrator and further taking note of the fact that there has been a disclosure, that he has exercised the power under Section 11(6) of the Act. We are impelled to think that that is not the right procedure to be adopted and, therefore, we are unable to agree with the High Court on that score also and, accordingly, we set aside the order appointing the arbitrator. However, as Clause (*c*) is independent of Clause (*d*), the arbitration clause survives and hence, the Court can appoint an arbitrator taking into consideration all the aspects. Therefore, we remand the matter to the High Court for fresh consideration of the prayer relating to appointment of an arbitrator.

56. Resultantly, the appeals are allowed, the orders passed by the learned Single Judge are set aside and the matters are remitted to the High Court for fresh consideration. In the facts and circumstances of the case, there shall be no order as to costs.

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† Arising out of SLP (C) No. 22912 of 2016. From the Judgment and Order dated 19-4-2016 of the High Court of Delhi at New Delhi in *TRF Ltd.* v. *Energo Engg. Projects Ltd.*, 2016 SCC OnLine Del 2532

‡ Arising out of SLP (C) No. 23324 of 2016

†† Arising out of SLP (C) No. 23348 of 2016

†‡ Arising out of SLP (C) No. 14226 of 2016

‡† Arising out of SLP (C) No. 14331 of 2016

[1] *TRF Ltd.* v. *Energo Engg. Projects Ltd.*, 2016 SCC OnLine Del 2532

[2] *Indore Vikas Pradhikaran* v. *Pure Industrial Coke & Chemicals Ltd.*, (2007) 8 SCC 705

[3] *Pratapchand Nopaji* v. *Kotrike Venkata Setty & Sons*, (1975) 2 SCC 208

[4] *Walter Bau AG* v. *Municipal Corpn. of Greater Mumbai*, (2015) 3 SCC 800 : (2015) 2 SCC (Civ) 450

[5] *Antrix Corpn. Ltd.* v. *Devas Multimedia (P) Ltd.*, (2014) 11 SCC 560 : (2014) 4 SCC (Civ) 147

[6] *State of W.B.* v. *Associated Contractors*, (2015) 1 SCC 32 : (2015) 1 SCC (Civ) 1

[7] *Northern Railway Admn., Ministry of Railway* v. *Patel Engg. Co. Ltd.*, (2008) 10 SCC 240

[8] *Datar Switchgears Ltd.* v. *Tata Finance Ltd.*, (2000) 8 SCC 151

[9] *Naginbhai C. Patel* v. *Union of India*, 1998 SCC OnLine Bom 668 : (1999) 2 Bom CR 189

[10] *B.W.L. Ltd.* v. *MTNL*, 2000 SCC OnLine Del 196 : (2000) 2 Arb LR 190

[11] *Sharma & Sons* v. *Army Headquarters*, 1999 SCC OnLine AP 846 : (2000) 2 Arb LR 31

* **Ed.**: The matter between two asterisks has been emphasised in original.

[12] *Newton Engg. and Chemicals Ltd.* v. *Indian Oil Corpn. Ltd.*, (2013) 4 SCC 44 : (2013) 2 SCC (Civ) 457

[13] *Newton Engg. & Chemicals Ltd.* v. *Indian Oil Corpn. Ltd.*, 2006 SCC OnLine Del 1359 : (2007) 93 DRJ 127

[14] *Deep Trading Co.* v. *Indian Oil Corpn.*, (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449

[15] *Punj Lloyd Ltd.* v. *Petronet MHB Ltd.*, (2006) 2 SCC 638

[16] *Municipal Corpn., Jabalpur* v. *Rajesh Construction Co.*, (2007) 5 SCC 344

[17] *Pricol Ltd.* v. *Johnson Controls Enterprise Ltd.*, (2015) 4 SCC 177 : (2015) 2 SCC (Cri) 530

[18] *State of Maharashtra* v. *Atlanta Ltd.*, (2014) 11 SCC 619 : (2014) 4 SCC (Civ) 206

[19] *SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618

[20] *Arasmeta Captive Power Co. (P) Ltd.* v. *Lafarge India (P) Ltd.*, (2013) 15 SCC 414 : (2014) 5 SCC (Civ) 302

[21] *Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689

[22] *State of Orissa* v. *Commr. of Land Records & Settlement*, (1998) 7 SCC 162

[23] *Roop Chand* v. *State of Punjab*, AIR 1963 SC 1503

[24] *Behari Kunj Sahkari Awas Samiti* v. *State of U.P.*, (1997) 7 SCC 37

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In the Supreme Court of India

(BEFORE ROHINTON FALI NARIMAN AND VINEET SARAN, JJ.)

BHARAT BROADBAND NETWORK LIMITED . . Appellant;

Versus

UNITED TELECOMS LIMITED . . Respondent.

Civil Appeals No. 3972 of 2019[†] with No. 3973 of 2019[‡], decided on April 16, 2019

A. **Arbitration and Conciliation Act, 1996 — Ss. 12(5) (w.e.f. 23-10-2015), 12 & 13, 14 & 15 and Sch. 7 Item 5 — Application for termination of mandate of a de jure ineligible arbitrator by a party which itself had appointed such arbitrator — Permissibility of, even when such appointment takes place after 23-10-2015 — Appellant who had appointed de jure ineligible arbitrator in present case, if estopped from challenging such appointment**

— Proper proceedings for clarifying/obtaining declaration that appointment of arbitrator is void as he is de jure ineligible — Proceedings under Ss. 12 & 13 distinguished from those under Ss. 14 & 15

— De jure ineligibility of arbitrator appointed by person who is himself de jure ineligible to be arbitrator vide S. 12(5) r/w Sch. 7, reiterated — Appointment of such arbitrator is void ab initio and arbitration proceedings conducted by such arbitrator/awards passed by such arbitrator, held, are also void

— Disputes having arisen, the respondent, by its letter dt. 3-1-2017, invoked the arbitration clause and by a letter dt. 17-1-2017, CMD of the appellant (a person de jure ineligible to be arbitrator vide Sch. VII Item 5), in terms of the arbitration clause nominated a sole arbitrator, *K* — That such ineligible person cannot himself appoint arbitrator was only made clear by the judgment in *TRF Ltd.*, (2017) 8 SCC 377 on 3-7-2017, wherein it was held that an appointment made by an ineligible person is itself void ab initio — Thus the moment the appellant came to know that the appointment of the arbitrator *K* itself would be invalid, it ultimately filed an application under Ss. 14 and 15 for termination of his mandate and appointment of a substitute arbitrator — Held, appointment of *K* was ab initio void, and neither estoppel nor waiver operated against appellant from challenging the same — There was no "agreement in writing" as required by S. 12(5) proviso to save such appointment either [see *Shortnote* B in this regard] — Therefore arbitral awards rendered by *K* were also void — High Court may appoint a substitute arbitrator with the consent of both the parties

(Paras 12 to 20)

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B. **Arbitration and Conciliation Act, 1996 — S. 12(5) proviso and Ss. 4 and 7 — Waiver of ineligibility prescribed in S. 12(5) — How permissible — Requirement of "express agreement in writing" in S. 12(5) proviso, distinguished from requirements of Ss. 4 and 7**

— Held, the expression "express agreement in writing" in the proviso to S. 12(5), refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct — Further, this agreement must be an agreement by which both parties, with full knowledge of the fact that the arbitrator concerned is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such — In the present case, held, the facts did not disclose any such express agreement — Furthermore, S. 12(5) proviso must be contrasted with S. 4 which deals with cases of deemed waiver by conduct — Hence, argument based on analogy of S. 7 must also be rejected — Thus, impugned judgment erred in holding that there was an express waiver in writing from the fact that an appointment letter was issued by the appellant appointing *K* as arbitrator, and a statement of claim was filed by the respondent before the said arbitrator — Contract and Specific Relief — Contract Act, 1872 — S.

9 — Words and Phrases — "Agreement in writing" — Estoppel, Acquiescence and Waiver — Waiver

(Para 20)

Since disputes and differences arose between the parties, the respondent, by its letter dated 3-1-2017, invoked the arbitration clause. By a letter dated 17-1-2017, the Chairman and Managing Director of the appellant, in terms of the arbitration clause contained in the GCC, nominated one *K* as sole arbitrator to adjudicate and determine disputes that had arisen between the parties.

The appellant itself having appointed the aforesaid sole arbitrator, referred to the judgment in *TRF Ltd.*, (2017) 8 SCC 377, and stated that being a declaration of law, appointments of arbitrators made prior to the judgment are not saved. Thus, the prayer before the sole arbitrator was that since he is de jure unable to perform his function as arbitrator, he should withdraw from the proceedings to allow the parties to approach the High Court for appointment of a substitute arbitrator in his place. By an order dated 21-10-2017, *K* rejected the appellant's application after hearing both sides, without giving any reasons therefor. This led to a petition being filed by the appellant before the High Court of Delhi dated 28-10-2017 under Sections 14 and 15 of the Act to state that the arbitrator had become de jure incapable of acting as such and that a substitute arbitrator be appointed in his place. By the impugned judgment dated 22-11-2017, this petition was rejected, stating that the very person who appointed the arbitrator is estopped from raising a plea that such arbitrator cannot be appointed after participating in the proceedings.

The respondent contended that Section 12(4) makes it clear that a party may challenge the appointment of an arbitrator appointed by it only for reasons of which it became aware after the appointment has been made. It was contended that since Section 12(5) and the Seventh Schedule were on the statute book since 23-10-2015, the appellant was fully aware that the Managing Director of the appellant would be hit by Item 5 of the Seventh Schedule, and consequently, any appointment made by him would be null and void. This being so, Section 12(4) acts as a bar to the petition filed under Sections 14 and 15 by the appellant. It was further contended that the requirement of an "express agreement in writing" in the proviso to Section 12(5) is clearly met in the facts of the present case. This need not be in the form of a formal agreement between the parties, but can be culled out, from the appointment letter issued by the appellant as well as the statement of claim

filed by the respondent before the arbitrator leading, therefore, to a waiver of the applicability of Section 12(5).

The issues involved in this appeal were:

(1) Whether the person who himself has appointed an arbitrator after 23-10-2015, pursuant to the arbitration agreement is precluded from raising the plea that such arbitrator was de jure incapable of acting as such?

(2) Whether there was an "express agreement in writing" in accordance with Section 12(5) proviso of the Arbitration and Conciliation Act, 1996 in the present case, waiving the applicability of Section 12 (5)?

Answering in the terms below and allowing the appeals, the Supreme Court

Held :

Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(*a*), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible".

(Para 12)

HRD Corpn. v. *GAIL (India) Ltd.*, (2018) 12 SCC 471 : (2018) 5 SCC (Civ) 401; *Voestalpine Schienen GmbH* v. *DMRC Ltd.*, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607, *relied on*

Section 12(5) is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. Section 12(5) then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing.

What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an "express agreement in writing".

(Para 15)

The scheme of Sections 12, 13 and 14 [as they stand post the 2015 Amendment] is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. The disclosure is to be made in the form specified in the Sixth Schedule, and the grounds stated in the Fifth Schedule are to serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Once this is done, the appointment of the arbitrator may be challenged on the ground that justifiable doubts have arisen under sub-section (3) of Section 12 subject to the caveat entered by sub-section (4) of Section 12. The challenge procedure is then set out in Section 13, together with the time-limit laid down in Section 13(2). What is important to note is that the Arbitral Tribunal must first decide on the said challenge, and if it is not successful, the Tribunal shall continue the proceedings and make an award. It is only post award that the party challenging the appointment of an arbitrator may make an

application for setting aside such an award in accordance with Section 34 of the Act.

(Paras 17 and 14)

However, where a person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case i.e. a case which falls under Section 12(5), Section 14(1)(*a*) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e. de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act.

(Para 17)

Section 12(4) will only apply when a challenge is made to an arbitrator, inter alia, by the same party who has appointed such arbitrator. This then refers to the challenge procedure set out in Section 13 of the Act. Section 12(4) has no applicability to an application made to the Court under Section 14(2) to determine whether the mandate of an arbitrator has terminated as he has, in law, become unable to perform his functions because he is ineligible to be appointed as such under Section 12(5) of the Act.

(Para 19)

Once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Thus, an appointment of an arbitrator made by a person who is ineligible to make such an appointment goes to "eligibility" i.e. to the root of the matter, it is obvious that *K*'s appointment would be void. The judgment in *TRF Ltd.*, (2017) 8 SCC 377 nowhere states that it will apply only prospectively. That is, *TRF Ltd.*, (2017) 8 SCC 377 does not say that the appointments that have been made of persons such as *K* would be valid if made before the date of the judgment.

(Paras 13 and 18)

TRF Ltd. v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72, *clarified* and *followed*

TRF Ltd. v. *Energo Engg. Projects Ltd.*, 2016 SCC OnLine Del 2532, *cited*

As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with

Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an "express agreement in writing". Reading Section 12(5) of the 1996 Act with Section 9 of the Contract Act, 1872, it is clear that the expression "express agreement in writing" refers to

an agreement made in words as opposed to an agreement which is to be inferred by conduct.

(Paras 17 and 20)

It is thus necessary that there be an "express" agreement in writing to satisfy the requirements of Section 12(5) proviso. Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule. This agreement must be an agreement by which both parties, with full knowledge of the fact that *K* is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case disclose no such express agreement.

(Paras 20 and 15)

The judgment under appeal is incorrect in stating that there is an express waiver in writing from the fact that an appointment letter was issued by the appellant appointing *K* as arbitrator, and a statement of claim was filed by the respondent before the arbitrator. The moment the appellant came to know that *K*'s appointment itself would be invalid after the judgment in *TRF Ltd.*, (2017) 8 SCC 377 was delivered, it filed an application before the sole arbitrator for termination ofhis mandate. This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2), and Section 16(2) of the Act to the facts of the present case.

(Para 20)

All India Power Engineer Federation v. *Sasan Power Ltd.*, (2017) 1 SCC 487 : (2017) 1 SCC (Civ) 277; *Vasu P. Shetty* v. *Hotel Vandana Palace*, (2014) 5 SCC 660 : (2014) 3 SCC (Civ) 304; *BSNL* v. *Motorola (India) (P) Ltd.*, (2009) 2 SCC 337 : (2009) 1 SCC (Civ) 524, *distinguished*

Bharat Broadband Network Ltd. v. *United Telecoms Ltd.*, 2017 SCC OnLine Del 11905, *reversed*

Bharat Broadband Network Ltd. v. *United Telecoms Ltd.*, 2018 SCC OnLine SC 3276, *referred to*

VN-D/62164/CV

Advocates who appeared in this case :

Vikramjit Banerjee, Additional Solicitor General (Chandan Kumar and Aniruddha P. Mayee, Advocates) for the Appellant;

Sharad Yadav and S.B. Upadhyay, Senior Advocates (Pawan Upadhyay, S.S. Sastri, Sarvjit Pratap Singh, Ms Anisha Upadhyay, Nishant Kr., UNUC Legal LLP and C.M. Patel, Advocates) for the Respondent.

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5. (2017) 1 SCC 487 : (2017) 1 SCC (Civ) 277, *All India Power Engineer Federation* v. *Sasan Power Ltd.* 77:

6. 2017 SCC OnLine Del 11905, *Bharat Broadband Network Ltd.* v. *United Telecoms Ltd.* **(reversed)** 761*d*, 761*f-g*, 772*d*, 77:

7. 2016 SCC OnLine Del 2532, *TRF Ltd.* v. *Energo Engg. Projects Ltd.* 767*e*

8. (2014) 5 SCC 660 : (2014) 3 SCC (Civ) 304, *Vasu P. Shetty* v. *Hotel Vandana Palace* 77:

9. (2009) 2 SCC 337 : (2009) 1 SCC (Civ) 524, *BSNL* v. *Motorola (India) (P) Ltd.* 772*c*, 772*c*

The Judgment of the Court was delivered by

ROHINTON FALI NARIMAN, J.— Leave granted. The present appeals raise an interesting question as to the interpretation of Section 12(5) of the Arbitration and Conciliation Act, 1996 ["the Act"].

2. The appellant, Bharat Broadband Network Ltd. ["BBNL"], had floated a tender dated 5-8-2013 inviting bids for a turnkey project for supply, installation, commissioning and maintenance of GPON equipment and solar power equipment. The respondent was the successful L1 bidder. The appellant issued an advance purchase order ["APO"] dated 30-9-2014. Clause III. 20.1 of the General (Commercial) Conditions of Contract ["GCC"] provides for arbitration. The said clause reads as under:

"**III. 20 ARBITRATION**

20.1 In the event of any question, dispute or difference arising under the agreement or in connection therewith (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CMD, BBNL or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CMD, BBNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CMD or the said officer is unable or unwilling to act as such, then to the sole arbitration of some other person appointed by the CMD or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act, 1996. There will be no objection to any such appointment on the ground that the arbitrator is a government servant or that he has

to deal with the matter to which the agreement relates or that in the course of his duties as a government servant/PSU employee he has expressed his views on all or any of the matters in dispute. The award of the arbitrator shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the CMD, BBNL or the said officer shall appoint another person to act as an arbitrator in accordance with the terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors."

3. Since disputes and differences arose between the parties, the respondent, by its letter dated 3-1-2017, invoked the aforesaid arbitration clause and called upon the appellant's Chairman and Managing Director to appoint an independent and impartial arbitrator for adjudication of disputes which arose out of the aforesaid APO dated 30-9-2014. By a letter dated 17-1-2017, the Chairman and Managing Director of the appellant, in terms of the arbitration clause contained in the GCC, nominated one Shri K.H. Khan as sole arbitrator to adjudicate and determine disputes that had arisen between the parties. He

also made it clear that the parties would be at liberty to file claims and counter-claims before the aforesaid sole arbitrator.

4. On 3-7-2017, this Court, by its judgment in *TRF Ltd.* v. *Energo Engg. Projects Ltd.*[1] ["*TRF Ltd.*"], held that since a Managing Director of a company which was one of the parties to the arbitration, was himself ineligible to act as arbitrator, such ineligible person could not appoint an arbitrator, and any such appointment would have to be held to be null and void.

5. Given the aforesaid judgment, the appellant itself having appointed the aforesaid sole arbitrator, referred to the aforesaid judgment, and stated that being a declaration of law, appointments of arbitrators made prior to the judgment are not saved. Thus, the prayer before the sole arbitrator was that since he is *de jure* unable to perform his function as arbitrator, he should withdraw from the proceedings to allow the parties to approach the High Court for appointment of a substitute arbitrator in his place. By an order dated 21-10-2017, Shri Khan rejected the appellant's application after hearing both sides, without giving any reasons therefor. This led to a petition being filed by the appellant before the High Court of Delhi dated 28-10-2017 under Sections 14 and 15 of the Act to state that the arbitrator has become *de jure* incapable of acting as such and that a substitute arbitrator be appointed in his place. By the impugned judgment dated 22-11-2017[2], this petition was rejected, stating that the very person who appointed the arbitrator is estopped from raising a plea that such arbitrator cannot be appointed after participating in the proceedings. In any event, under the proviso to Section 12(5) of the Act, inasmuch as the appellant itself has appointed Shri Khan, and the respondent has filed a statement of claim without any reservation, also in writing, the same would amount to an express agreement in writing, which would, therefore, amount to a waiver of the applicability of Section 12(5) of the Act.

6. Shri Vikramjit Banerjee, learned Additional Solicitor General appearing on behalf of the appellant, has relied upon Sections 12 to 14 of the Act, as also the judgment in *TRF Ltd.*[1], and has argued that the appointment of Shri Khan goes to eligibility to be appointed as an arbitrator, as a result of which the appointment made is void ab initio. Further, the judgment in *TRF Ltd.*[1] is declaratory of the law and would apply to the facts of this case. Further, since there is no express agreement in writing between the parties subsequent to disputes having arisen between them that Shri Khan's appointment is agreed upon, the proviso will not be applicable in the present case.

7. Shri Sharad Yadav, learned Senior Advocate appearing on behalf of the respondent, has supported the reasoning of the impugned judgment[2] and has added that Section 12 (4) makes it clear that a party may challenge the appointment of an arbitrator appointed by it only for reasons of which it became aware after the appointment has been made. In the facts of the present case, since Section 12(5) and the Seventh Schedule were on the statute book since 23-10-2015, the appellant was fully aware that the Managing Director of the appellant would be hit by Item 5 of the Seventh Schedule, and consequently, any appointment made by him would be null and void. This being so, Section 12(4)

acts as a bar to the petition filed under Sections 14 and 15 by the appellant. Further, Section 13(2) makes it clear that a party who intends to challenge the appointment of the arbitrator, shall, within 15 days after becoming aware of the circumstances referred to in Section 12(3), send a written statement of reasons for the challenge to the arbitrator. Admittedly, this has not been done within the time-frame stipulated by the said section, as a result of which, the aforesaid petition filed by the appellant should be dismissed.

8. Coming to the proviso to Section 12(5), Shri Yadav argued that "express agreement in writing" in the proviso to Section 12(5) is clearly met in the facts of the present case. This need not be in the form of a formal agreement between the parties, but can be culled out, as was rightly held by the High Court, from the appointment letter issued by the appellant as well as the statement of claim filed by the respondent before the arbitrator leading, therefore, to a waiver of the applicability of Section 12(5).

9. Pursuant to the 246th Law Commission Report, important changes were made in the Act. Insofar as the facts of this case are concerned, sub-section (8) of Section 11 was substituted for the earlier Section 11(8)[3], sub-section (1) of Section 12 was substituted for the earlier Section 12(1)[4] and a new Section 12(5)[5] was added after Section 12(4). The opening lines of Section 14(1)[6] were also substituted.

10. Post-amendment, the aforesaid sections are set out, as also Section 4 of the Act, as follows:

"**4.** ***Waiver of right to object***.—A party who knows that —

(*a*) any provision of this Part from which the parties may derogate, or

(*b*) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

* * *

11. ***Appointment of arbitrators***.— (1)-(7) * * *

(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of Section 12, and have due regard to—

(*a*) any qualifications required for the arbitrator by the agreement of the parties; and

(*b*) the contents of the disclosure and other considerations as are likely to secure

the appointment of an independent and impartial arbitrator.

* * *

12. *Grounds for challenge*.—(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances—

(*a*) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(*b*) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(*a*) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(*b*) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

13. *Challenge procedure*.—(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the Arbitral Tribunal or after becoming aware of any circumstances referred to in sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the Arbitral Tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the Arbitral Tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the Arbitral Tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the

arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the court may decide as to whether the arbitrator who is challenged is entitled to any fees.

14. ***Failure or impossibility to act***.—(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if—

(*a*) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(*b*) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (*a*) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub -section (3) of Section 12."

11. Section 12(5) has been earlier dealt with in three Supreme Court judgments. In *Voestalpine Schienen GmbH* v. *DMRC Ltd.*[7], this Court went into the recommendations of the aforesaid Law Commission Report, and referred in great detail to the law before the amendment made in Section 12 and then held: (SCC pp. 688-89, paras 23 & 25)

"*23*. It also cannot be denied that the Seventh Schedule is based on IBA guidelines which are clearly regarded as a representation of international based practices and are based on statutes, case law and juristic opinion from a cross-section on jurisdiction. It is so mentioned in the guidelines itself.

* * *

25. Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence and impartiality. The amended provision is enacted to identify the "circumstances" which give rise to "justifiable doubts" about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give

rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which would attract the provisions of sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empanelled by the respondent are not covered by any of the items in the said list."

12. In *HRD Corpn.* v. *GAIL (India) Ltd.*[8], this Court, after setting out the amendments made in Section 12 and the Fifth, Sixth and Seventh Schedules to the Act, held as follows: (SCC pp. 488-90 & 493, paras 12, 14 & 17)

"*12*. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become "ineligible" to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(*a*), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at

this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal.

* * *

14. The enumeration of grounds given in the Fifth and Seventh Schedules have been taken from the IBA Guidelines, particularly from the Red and Orange Lists thereof. The aforesaid guidelines consist of three lists. The Red List, consisting of non-waivable and waivable guidelines, covers situations which are "more serious" and "serious", the "more serious" objections being non-waivable. The Orange List, on the other hand, is a list of situations that may give rise to doubts as to the arbitrator's impartiality or independence, as a consequence of which the arbitrator has a duty to disclose such situations. The Green List is a list of situations where no actual conflict of interest exists from an objective point of view, as a result of which the arbitrator has no duty of disclosure. These Guidelines were first introduced in the year 2004 and have thereafter been amended, after seeing the experience of arbitration worldwide. In Part 1 thereof, general standards regarding impartiality, independence and disclosure are set out.

* * *

17. It will be noticed that Items 1 to 19 of the Fifth Schedule are identical with the aforesaid items in the Seventh Schedule. The only reason that these items also appear in the Fifth Schedule is for purposes of disclosure by the arbitrator, as unless the proposed arbitrator discloses in writing his involvement in terms of Items 1 to 34 of the Fifth Schedule, such disclosure would be lacking, in which case the parties would be put at a disadvantage as such information is often within the personal knowledge of the arbitrator only. It is for this reason that it appears that Items 1 to 19 also appear in the

Fifth Schedule."

13. In *TRF Ltd.*[1], this Court referred to Section 12(5) of the Act in the context of appointment of an arbitrator by a Managing Director of a corporation, who became ineligible to act as arbitrator under the Seventh Schedule. This Court held: (SCC pp. 403-05, paras 50 & 54)

> "*50*. First, we shall deal with Clause (*d*). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are

neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the "named sole arbitrator" and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. ...

* * *

> *54*. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view[2] expressed by the High Court is not sustainable and we say so."

14. From a conspectus of the above decisions, it is clear that Section 12(1), as substituted by the Arbitration and Conciliation (Amendment) Act, 2015 ["the Amendment Act, 2015"], makes it clear that when a person is approached in connection with his possible appointment as an arbitrator, it is his duty to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality. The disclosure is to be made in the form specified in the Sixth Schedule, and the grounds stated in the Fifth Schedule are to serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or

impartiality of an arbitrator. Once this is done, the appointment of the arbitrator may be challenged on the ground that justifiable doubts have arisen under sub-section (3) of Section 12 subject to the caveat entered by sub-section (4) of Section 12. The challenge procedure is then set out in Section 13, together with the time-limit laid down in Section 13(2). What is important to note is that the Arbitral Tribunal must first decide on the said challenge, and if it is not successful, the Tribunal shall continue the proceedings and make an award. It is only post

award that the party challenging the appointment of an arbitrator may make an application for setting aside such an award in accordance with Section 34 of the Act.

15. Section 12(5), on the other hand, is a new provision which relates to the *de jure* inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, *subsequent* to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may *after* disputes have arisen between them, waive the applicability of this sub-section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.

16. The Law Commission Report, which has been extensively referred to in some of our judgments, makes it clear that there are certain minimum levels of independence and impartiality that should be required of the arbitral process, regardless of the parties' agreement. This being the case, the Law Commission then found:

> "59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his *possible* appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the red and orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed Section 12(5) of the Act and the Fifth Schedule which incorporates the categories from the red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be *ineligible* to be so appointed, *notwithstanding any prior agreement* to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed Explanation to Section 14. Therefore, while the *disclosure* is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the red and orange lists of the IBA Guidelines), the *ineligibility* to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious subset of situations (as set out in the Fifth Schedule, and as based on the red list of the IBA Guidelines).

60. The Commission, however, feels that *real* and *genuine* party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, *subsequent to disputes having arisen between them*, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all other cases, the general rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1), and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator."

(emphasis in original)

Thus, it will be seen that party autonomy is to be respected only in certain exceptional situations which could be situations which arise in family arbitrations or other arbitrations where a person subjectively commands blind faith and trust of the parties to the dispute, despite the existence of objective justifiable doubts regarding his independence and impartiality.

17. The scheme of Sections 12, 13 and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case i.e. a case which falls under Section 12(5), Section 14(1)(*a*) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e. *de jure*), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become *de jure* unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being *de jure* unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them.

18. On the facts of the present case, it is clear that the Managing Director of the appellant could not have acted as an arbitrator himself, being rendered ineligible to act as arbitrator under Item 5 of the Seventh Schedule, which reads as under:

> "***Arbitrator's relationship with the parties or counsel***
>
> * * *
>
> **5.** The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration."

Whether such ineligible person could himself appoint another arbitrator was only made clear by this Court's judgment in *TRF Ltd.*[1] on 3-7-2017, this Court holding that an appointment made by an ineligible person is itself void ab initio. Thus, it was only on 3-7-2017, that it became clear beyond doubt that the appointment of Shri Khan would be void ab initio. Since such appointment goes to "eligibility" i.e. to the root of the matter, it is obvious that Shri Khan's appointment would be void. There is no doubt in this case that disputes arose only after the introduction of Section 12(5) into the statute book, and Shri Khan was appointed long after 23-10-2015. The judgment in *TRF Ltd.*[1] nowhere states that it will apply only prospectively i.e. the appointments that have been made of persons such as Shri Khan would be valid if made before the date of the judgment. Section 26 of the Amendment Act, 2015 makes it clear that the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after 23-10-2015. Indeed, the judgment itself set aside the order appointing the arbitrator, which was an order dated 27-1-2016, by which the Managing Director of the respondent nominated a former Judge of this Court as sole arbitrator in terms of Clause 33(*d*) of the purchase order dated 10-5-2014. It will be noticed that the facts in the present case are somewhat similar. The APO itself is of the year 2014, whereas the appointment by the Managing Director is after the Amendment Act, 2015, just as in *TRF Ltd.*[1] Considering that the appointment in *TRF Ltd.*[1] of a retired Judge of this Court was set aside as being non est in law, the appointment of Shri Khan in the present case must follow suit.

19. However, the learned Senior Advocate appearing on behalf of the respondent has argued that Section 12(4) would bar the appellant's application before the Court. Section 12(4) will only apply when a challenge is made to an arbitrator, inter alia, by the same party who has appointed such arbitrator. This then refers to the challenge procedure set out in Section 13 of the Act. Section 12(4) has no applicability to an application made to the Court under Section 14(2) to determine whether the mandate of an arbitrator has terminated as he has, in law, become unable to perform his functions because he is ineligible to be appointed as such under Section 12(5) of the Act.

20. This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express

agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an "express agreement in writing". The expression "express agreement in writing" refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. Here, Section 9 of the Contract Act, 1872 becomes important. It states:

> "**9.** ***Promises, express and implied***.—Insofar as the proposal or acceptance of any

promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."

It is thus necessary that there be an "express" agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court as indicating an express agreement on the facts of the case is dated 17-1-2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in *TRF Ltd.*[1] which, as we have seen hereinabove, was only on 3-7-2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 7-10-2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in *TRF Ltd.*[1] and asking him to declare that he has become *de jure* incapable of acting as an arbitrator. Equally, the fact that a statement of claim may have been filed before the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such. This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2) and Section 16(2) of the Act to the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also incorrect in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate.

21. The learned Additional Solicitor General appearing on behalf of the appellant has relied upon *All India Power Engineer Federation* v. *Sasan*

Power Ltd.[10], and referred to para 21 thereof, which reads as follows: (SCC pp. 515-16)

"*21*. Regard being had to the aforesaid decisions, it is clear that when waiver is spoken of in the realm of contract, Section 63 of the Contract Act, 1872 governs. But it is important to note that waiver is an intentional relinquishment of a known right, and that, therefore, unless there is a clear intention to relinquish a right that is fully known to a party, a party cannot be said to waive it. But the matter does not end here. It is also clear that if any element of public interest is involved and a waiver takes place by one of the parties to an agreement, such waiver will not be given effect to if it is contrary to such public interest. This is clear from a reading of the following authorities."

This judgment cannot possibly apply as the present case is governed by the express language of the proviso to Section 12(5) of the Act. Similarly, the judgments relied upon by the learned Senior Advocate appearing on behalf of the respondent, namely, *Vasu P. Shetty* v. *Hotel Vandana Palace*[11], and *BSNL* v. *Motorola (India) (P) Ltd.*[12] ["*BSNL*"], for the same reason, cannot be said to have any application to the express language of the proviso to Section 12(5). It may be noted that *BSNL*[12] deals with Section 4 of the Act which, as has been stated hereinabove, has no application, and must be contrasted with the language of the proviso to Section 12(5).

22. We thus allow the appeals and set aside the impugned judgment[2]. The mandate of

Shri Khan having been terminated, as he has become *de jure* unable to perform his function as an arbitrator, the High Court may appoint a substitute arbitrator with the consent of both the parties.

23. Vide order dated 25-1-2018[13], we had issued notice in the special leave petition as well as notice on the interim relief prayed for by the appellant. Since there was no order of stay, the arbitral proceedings continued even after the date of the impugned judgment i.e. 22-11-2017[2], and culminated in two awards dated 11-7-2018 and 12-7-2018. We have been informed that the aforesaid awards have been challenged by the appellant by applications under Section 34 of the Act, in which certain interim orders have been passed by the Single Judge of the High Court of Delhi. These awards, being subject to the result of this petition, are set aside. Consequently, the appellant's Section 34 proceedings have been rendered infructuous. It will be open to the appellant to approach the High Court of Delhi to reclaim the deposit amounts that have been made in pursuance of the interim orders passed in Section 34 petition filed in the High Court of Delhi.

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† Arising out of SLP (C) No. 1550 of 2018. Arising from the impugned Judgment and Order in *Bharat Broadband Network Ltd.* v. *United Telecoms Ltd.*, 2017 SCC OnLine Del 11905 [Delhi High Court, Application OMP (T) (Comm.) 84 of 2017, dt. 22-11-2017]

‡ Arising out of SLP (C) No. 1644 of 2018

[1] *TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72

[2] *Bharat Broadband Network Ltd.* v. *United Telecoms Ltd.*, 2017 SCC OnLine Del 11905

[3] *Subs.* by Act 3 of 2016, Section 6(*iv*) (w.r.e.f. 23-10-2015). Prior to substitution, Section 11(8) read as:

"**11. *Appointment of arbitrators.***— (1)-(7) * * *

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to—

(*a*) any qualifications required of the arbitrator by the agreement of the parties; and

(*b*) other considerations as are likely to secure the appointment of an independent and impartial arbitrator."

[4] *Subs.* by Act 3 of 2016, Section 8(*i*) (w.r.e.f. 23-10-2015). Prior to substitution, Section 12(1) read as:

"**12. *Grounds for challenge.***—(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality."

[5] *Ins.* by Act 3 of 2016, Section 8(*ii*) (w.r.e.f. 23-10-2015).

[6] *Subs.* by Act 3 of 2016, Section 9 (w.r.e.f. 23-10-2015). Prior to substitution, Section 14(1) read as:

"**14. *Failure or impossibility to act.***—(1) The mandate of an arbitrator shall terminate if—"

[7] *Voestalpine Schienen GmbH* v. *DMRC Ltd.*, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607

[8] *HRD Corpn.* v. *GAIL (India) Ltd.*, (2018) 12 SCC 471 : (2018) 5 SCC (Civ) 401

[9] *TRF Ltd.* v. *Energo Engg. Projects Ltd.*, 2016 SCC OnLine Del 2532

[10] *All India Power Engineer Federation* v. *Sasan Power Ltd.*, (2017) 1 SCC 487 : (2017) 1 SCC (Civ) 277

[11] *Vasu P. Shetty* v. *Hotel Vandana Palace*, (2014) 5 SCC 660 : (2014) 3 SCC (Civ) 304

[12] *BSNL* v. *Motorola (India) (P) Ltd.*, (2009) 2 SCC 337 : (2009) 1 SCC (Civ) 524

[13] *Bharat Broadband Network Ltd.* v. *United Telecoms Ltd.*, 2018 SCC OnLine SC 3276

Arbitration Application No. 32 of 2019

Perkins Eastman Architects DPC v. HSCC (India) Ltd.

2019 SCC OnLine SC 1517

In the Supreme Court of India

(BEFORE UDAY UMESH LALIT AND INDU MALHOTRA, JJ.)

Perkins Eastman Architects DPC and Another ..... Applicants;

v.

HSCC (India) Ltd. ..... Respondent.

Arbitration Application No. 32 of 2019

Decided on November 26, 2019

The Judgment of the Court was delivered by

UDAY UMESH LALIT, J.:— This application under Section 11(6) read with Section 11 (12)(a) of Act[1] and under the Scheme[2] prays for the following principal relief:

"(a) appoint a sole Arbitrator, in accordance with clause 24 of the Contract dated 22nd May, 2017 executed between the parties and the sole Arbitrator so appointed may adjudicate the disputes and differences between the parties arising from the said Contract."

2. The application has been filed with following assertions:—

(A) As an executing agency of Ministry of Health and Family Welfare, the respondent was desirous of comprehensive architectural planning and designing for the works provided under Pradhan Mantri Swasthya Suraksha Yojna (PMSSY). Therefore a request for Proposals bearing RFP No. HSCC/3-AIIMS/Guntur/2016 was issued on 15.07.2016 for appointment of Design Consultants for the "comprehensive planning and designing, including preparation and development of concepts, master plan for the campus, preparation of all preliminary and working drawings for various buildings/structures, including preparation of specifications and schedule of quantities' for the proposed All India Institute of Medical Sciences at Guntur, Andhra Pradesh".

(B) In response to the RFP, the consortium of the Applicants, namely, (i) Perkins Eastman Architects DPC, an Architectural firm having its registered office in New York and (ii) Edifice Consultants Private Limited, having its office in Mumbai submitted their bid on 28.09.2016. Letter of Intent was issued on 31.11.2017 awarding the project to the Applicants, the consideration being Rs. 15.63 crores. A letter of award was issued in favour of the Applicants on 22.02.2017 and a contract was entered into between the Applicants and the respondent on 22.05.2017, which provided *inter alia* for dispute resolution in Clause 24. The relevant portion of said Clause was as under:

"24.0 **DISPUTE RESOLUTION**

24.1 Except as otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to the quality of services rendered for the works or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, design, 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 thereof shall be dealt with as mentioned hereinafter:

(i) If the Design Consultant considers any work demanded of him to be outside the requirements of the contract or disputes on any drawings, record or decision given in writing by HSCC on any matter in connection with arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request CGM, HSCC in writing for written instruction or decision. There upon, the CGM, HSCC shall give his written instructions or decision within a period of one month from the receipt of the Design Consultant's letter. If the CGM, HSCC fails to give his instructions or decision in writing within the aforesaid period or if the Design Consultant(s) is dissatisfied with the instructions or decision of the CGM, HSCC, the Design Consultants(s) may, within 15 days of the receipt of decision, appeal to the Director (Engg.) HSCC who shall offer an opportunity to the Design Consultant to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Director (Engg.), HSCC shall give his decision within 30 days of receipt of Design Consultant's appeal. If the Design Consultant is dissatisfied with the decision, the Design Consultant shall within a period of 30 days from receipt of this decision, give notice to the CMD, HSCC for appointment of arbitrator failing which the said decision shall be final, binding and conclusive and not referable to adjudication by the arbitrator.

(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 CMD HSCC within 30 days form the receipt of request from the Design Consultant. 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 reference from the stage at which it was left by his predecessor. 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 along with the notice for appointment of arbitrator and giving reference to the rejection by the CMD, HSCC of the appeal. It is also a term of this contract that no person other than a person appointed by such CMD, HSCC as aforesaid should act as arbitrator. It is also a term of the contract that if the Design Consultant 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 HSCC that the final bill is ready for payment, the claim of the Design Consultant shall be deemed to have been waived and absolutely barred and HSCC shall be discharged and released of all liabilities under the contract and in respect of these claims. 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."

(C) Within six days of the signing of the said contract, in letter dated 26.5.2017 the respondent alleged failure on part of the Applicants which was followed by stop work notice dated 03.11.2017. It is the case of the Applicants that officials of the respondents were deliberately trying to stall the project and were non-co-operative right from the initial stages.

(D) Later, a termination notice was issued by the respondent on 11.01.2019

alleging non-compliance of contractual obligations on part of the Applicants, which assertions were denied. However, termination letter was issued on 20.02.2019. On 11.04.2019 a notice was issued by the Advocate for the applicants invoking the dispute resolution Clause namely Clause 24 as aforesaid raising a claim of Rs. 20.95 crores. According to the Applicants, a decision in respect of the notice dated 11.04.2019 was required to be taken within one month in terms of Clause 24 of the contract but a communication was sent by the respondent on 10.05.2019 intimating that a reply to the notice would be sent within 30 days.

(E) An appeal was filed by the Applicants before the Director (Engineering) in terms of said Clause 24 but there was complete failure on part of the Director (Engineering) to discharge the obligations in terms of said Clause 24. Therefore, by letter dated 28.06.2019 the Chief Managing Director of the respondent was called upon to appoint a sole arbitrator in terms of said Clause 24. However, no appointment of an arbitrator was made within thirty days but a letter was addressed by Chief General Manager of the respondent on 30.07.2019 purportedly appointing one Major General K.T. Gajria as the sole arbitrator.

(F) The relevant averments in para 3 of the application are:—

> "z. The 30 (thirty) day time period for appointment of a sole arbitrator stood expired on 28th July, 2019 and yet the CMD of the respondent failed to appoint a sole arbitrator or even respond to the letter dated 28th June, 2019 (received on 29th June, 2019).
>
> aa. Shockingly, in continuance of its highhanded approach and in contravention to its own letter dated 24th June, 2019, the CGM of the Respondent addressed the Purported Appointment Letter dated 30th July, 2019 to one Major General K.T. Gajria thereby purportedly appointing him as a sole arbitrator in the matter. On the same date, the CGM of the Respondent also addressed a letter to the Applicants *inter alia* informing about the purported appointment of Mr. Gajria"

3. In the aforesaid premises the Applicants submit:—

(a) The Applicants had duly invoked the arbitration clause;

(b) The Chairman and Managing Director was the competent authority to appoint a sole arbitrator;

(c) But the Chief General Manager of the respondent wrongfully appointed the sole arbitrator;

(d) Such appointment was beyond the period prescribed;

(e) In any case, an independent and impartial arbitrator is required to be appointed.

4. In response to the application, an affidavit-in-reply has been filed by the respondent denying all material allegations. It is accepted that the contract entered into between the parties contains Clause 24 regarding dispute resolution. It is, however, disputed that there was any inaction on part of the respondent in discharging their obligations in terms of Clause 24. It is submitted, *inter alia,* that

(a) The appointment of Major General K.T. Gajria was in consonance with Clause 24 of the contract;

(b) Such appointment could not in any way be said to be illegal;

(c) There was no occasion to file an application seeking appointment of any other person under the provisions of Section 11(6) read with Section 11(12)(a) of the Act; and

(d) In any case, the arbitration in the present matter would not be an International Commercial Arbitration within the meaning of Section 2(1)(f) of the Act.

5. We heard Mr. Amar Dave, learned Advocate for the Applicants and Mr. Guru Krishna Kumar, learned Senior Advocate for the respondent.

6. It was submitted by Mr. Dave, learned Advocate that on account of failure on part of the respondent in discharging its obligations in terms of Clause 24, the applicants would be entitled to maintain the present Application and seek appointment of an arbitrator as prayed for. It was further submitted that the appointment process contemplated in Clause 24 gave complete discretion to the Chairman and Managing Director of the respondent to make an appointment of an arbitrator of his choice, the Chairman and Managing Director of the respondent would naturally be interested in the outcome or decision in respect of the dispute, the prerequisite of element of impartiality would, therefore, be conspicuously absent in such process; and as such it would be desirable that this Court makes an appropriate appointment of an arbitrator. Reliance was placed on the decisions of this Court in *Walter Bau AG, Legal Successor of the Original Contractor, Dyckerhoff and Widmann, A.G.* v. *Municipal Corporation of Greater Mumbai*[3] and *TRF Limited* v. *Energo Engineering Projects Limited*[4] in support of the submissions. Mr. Dave, learned Advocate also relied upon the decision of this Court in *Larsen and Toubro Limited SCOMI Engineering BHD* v. *Mumbai Metropolitan Region Development Authority*[5] to bring home the point that the arbitration in the present matter would be an International Commercial Arbitration.

7. Mr. Guru Krishna Kumar, learned Senior Advocate appearing for the respondent submitted that no case was made out to maintain the instant application. He submitted that two basic submissions were raised in para 3 in sub-para (z) and (aa) of the application that the Chairman and Managing Director failed to appoint the sole arbitrator within 30 days of the requisition dated 28.06.2019 and that it was the Chief General Manager of the respondent who purportedly made the appointment of a sole arbitrator on 30.07.2019. The infirmities thus projected were on two counts, namely, for over-stepping the limit of 30 days; and secondly the appointment was not made by the Chairman and Managing Director of the respondent. He pointed out that the period in terms of requisition dated 28.06.2019 expired on Friday and the appointment was made on the first available working day. Secondly, the appointment was actually made by the Chairman and Managing Director but was conveyed by the Chief General Manager, and as such the alleged infirmities were completely non-existent. He further submitted that arbitration, if any, in the instant matter would not be an International Commercial Arbitration.

8. The present application, therefore, raises two basic issues; first whether the arbitration in the present case would be an International Commercial Arbitration or not. In case, it is not, then this Court cannot deal with the application under Section 11(6) read with Section 11(12)(a) of the Act. The second issue is whether a case is made out for exercise of power by the Court to make an appointment of an arbitrator.

9. During the course of hearing, reliance was placed by the Applicants on the Consortium Agreement entered into between the Applicant No. 1 and the Applicant No. 2 on 20.09.2016 which described the Applicant No. 1 as the lead member of the Consortium. The relevant recital and the Clause of the Agreement were as under:

> "1. WHEREAS all the Parties agree that Perkins Eastman will be the focal point for the agreement and interaction with the client."
>
> "9. Perkins Eastman and M/s. Edifice Consultants are jointly and severally responsible for the execution of the project"

10. In terms of requirements of the bid documents and RFP a "Declaration for Lead Member of the Consortium (Form E)" was also submitted. The declaration was as under:

> "WHEREAS M/s. HSCC (India) Ltd. (HSCC) (the Client) has invited Bids/Bids from the interested parties for providing Comprehensive Planning and Designing of

the Proposed All India Institute of Medical Sciences at Mangalagiri, Guntur (AP).

AND WHEREAS, the members of the Consortium are interested in bidding for the Project and implementing the Project in accordance with the terms and conditions of the Request for Bid (RFP) document, Terms of Reference, Client's Requirement, Notice Inviting Bid, Instructions to Bidders, Conditions of Contract and other connected documents in respect of the Project, and

AND WHEREAS, it is necessary under the RFP document for the members of the Consortium Bidder to designate one of them as the Lead Manager with all necessary power and authority to do for and on behalf of the Consortium bidder, all acts, deeds and things as may be necessary in connection with the Consortium Bidder's proposal for the Project.

NOW THIS DECLARATION WITNESSETH THAT; We, Perkins Eastman Architects DPC, and having its registered office at 115 5th Ave Floor 3, New York, NY 10003-10004, USA and M/s. Edifice Consultants Private Limited having its registered office at Srirams Arcade, 3rd Floor, Opp. Govandi P.O., Off Govandi Station Road, Govandi East, Mumbai, Maharashtra 400088 do hereby designate Perkins Eastman Architects DPC being one of the members of the Consortium, as the Lead Member of the Consortium, to do on behalf of the Consortium, all or any of the acts, deeds of things necessary or incidental to the Consortium's Application/Bid for the Project, including submission of Application/Bid, participating in conferences, responding to queries, submission of information/documents and generally to represent the Consortium in all its dealings with HSCC, any other Government Agency or any person, in connection with the Project until culmination of the process of bidding and thereafter till the completion of the Contract."

11. It is not disputed by the respondent that it was a requisite condition to declare a lead member of the Consortium and that by aforesaid declaration the applicant No. 1 was shown to be the lead member of the Consortium. The reliance is however placed by the respondent on Clause 9 of the Consortium Agreement by virtue of which both the Applicants would be jointly and severely responsible for the execution of the project. It is clear that the declaration shows that the Applicant No. 1 was accepted to be the lead member of the Consortium. Even if the liability of both the Applicants was stated in Clause 9 to be joint and several, that by itself would not change the status of the Applicant No. 1 to be the lead member. We shall, therefore, proceed on the premise that Applicant No. 1 is the lead member of the Consortium.

12. In *Larsen and Toubro Limited SCOMI Engineering BHD*[5] more or less similar fact situation came up for consideration. The only distinction was that the lead member in the consortium was an entity registered in India. Paragraphs 2, 3, 4, 15, 17, 18 and 19 of the decision are as under:

"**2.** Since disputes arose between the parties to the agreement, various interim claims had been made by the Consortium of M/s. Larsen and Toubro, an Indian company, together with Scomi Engineering Bhd, a company incorporated in Malaysia, for which the Consortium has filed this petition under Section 11 of the Act to this Court, since according to them, one of the parties to the arbitration agreement, being a body corporate, incorporated in Malaysia, would be a body corporate, which is incorporated in a country other than India, which would attract Section 2(1)(*f*)(*ii*) of the Act.

3. Shri Gopal Jain, learned Senior Counsel appearing on behalf of the Consortium, has taken us through the agreement, in which he strongly relies upon the fact that the two entities, that is, the Indian company and the Malaysian company, though stated to be a Consortium, are jointly and severally liable, to the employer. The learned Senior Counsel has also relied upon the fact that throughout the working of the contract, separate claims have been made, which have been

rejected by the Mumbai Metropolitan Region Development Authority (hereinafter referred to as "MMRDA"). He has also further relied upon the fact that by at least three letters, during the working of the agreement, the claims have in fact been rejected altogether and that, therefore, there is no impediment in invoking the arbitration Clause under Section 20.4 of the general conditions of contract (hereinafter referred to as "GCC"), as the procedure outlined by Clauses 20.1 to 20.3 had already been exhausted.

4. On the other hand, Mr. Shyam Divan, learned Senior Counsel appearing on behalf of MMRDA, the respondent, has relied upon both the contract dated 9-1-2009 as well as the actual consortium agreement dated 4-6-2008 between the Indian company and the Malaysian company, which, when read together, would show that they are really an unincorporated association and would, therefore, fall within Section 2(1)(*f*)(*iii*) as being an association or a body of individuals, provided the central management and control is exercised in any country other than India.

... ...

15. Section 2(1)(*f*)(*iii*) of the Act refers to two different sets of persons: an "association" as distinct and separate from a "body of individuals". For example, under Section 2(31) of the Income Tax Act, 1961, "person" is defined as including, under sub-clause (*v.*), an association of persons, or body of individuals, whether incorporated or not. It is in this sense, that an association is referred to in Section 2 (1) (*f*)(*iii*) which would therefore include a consortium consisting of two or more bodies corporate, at least one of whom is a body corporate incorporated in a country other than India.

... ...

17. Law Commission Report No. 246 of August 2014, which made several amendments to the Arbitration and Conciliation Act, 1996, gave the following reason for deleting the words "a company or":

> "(*iii*) In sub-section (1), clause (*f*), sub-clause (iii), delete the words "a company or" before the words "an association or a body of individuals".
>
> [*Note*.—The reference to "a company" in subsection (*iii*) has been removed since the same is already covered under sub-section (*ii*). The intention is to determine the residence of a company based on its place of incorporation and not the place of central management/control. This further re-enforces the "place of incorporation" principle laid down by the Supreme Court in *TDM Infrastructure (P) Ltd.* v. *UE Development India (P) Ltd.*[6], and adds greater certainty in case of companies having a different place of incorporation and place of exercise of central management and control.]"

It would become clear that prior to the deletion of the expression "a company or", there were three sets of persons referred to in Section 2(1)(*f*)(*iii*) as separate and distinct persons who would fall within the said sub-clause. This does not change due to the deletion of the phrase "a company or" for the reason given by the Law Commission. This is another reason as to why "an association" cannot be read with "body of individuals" which follows it but is a separate and distinct category by itself, as is understood from the definition of "person" as defined in the Income Tax Act referred to above.

18. This being the case, coupled with the fact, as correctly argued by Shri Divan, that the Indian company is the lead partner, and that the Supervisory Board constituted under the consortium agreement makes it clear that the lead partner really has the determining voice in that it appoints the Chairman of the said Board (undoubtedly, with the consent of other members); and the fact that the Consortium's office is in Wadala, Mumbai as also that the lead member shall lead the arbitration proceedings, would all point to the fact that the central management

and control of this Consortium appears to be exercised in India and not in any foreign nation.

19. This being the case, we dismiss the petition filed under Section 11 of the Act, as there is no "international commercial arbitration" as defined under Section 2(1)(*f*) of the Act for the petitioner to come to this Court. We also do not deem it necessary to go into whether the appropriate stage for invoking arbitration has yet been reached."

13. It was thus held that "Association" and "Body of individuals" referred to in Section 2(1)(f) of the Act would be separate categories. However, the lead member of the Association in that case being an Indian entity, the "Central Management and Control" of the Association was held to be in a country other than India. Relying on said decision we conclude that the lead member of the Consortium company i.e. Applicant No. 1 being an Architectural Firm having its registered office in New York, requirements of Section 2(1)(f) of the Act are satisfied and the arbitration in the present case would be an "International Commercial Arbitration".

14. That takes us to the second issue, namely, whether a case has been made out for exercise of power by the Court for an appointment of an arbitrator.

15. The communication invoking arbitration in terms of Clause 24 was sent by the Applicants on 28.06.2019 and the period within which the respondent was to make the necessary appointment expired on 28.07.2019. The next day was a working day but the appointment was made on Tuesday, the 30th July, 2019. Technically, the appointment was not within the time stipulated but such delay on part of the respondent could not be said to be an infraction of such magnitude that exercise of power by the Court under Section 11 of the Act merely on that ground is called for.

16. However, the point that has been urged, relying upon the decision of this Court in *Walter Bau AG*[3] and *TRF Limited*[4], requires consideration. In the present case Clause 24 empowers the Chairman and Managing Director of the respondent to make the appointment of a sole arbitrator and said Clause also stipulates that no person other than a person appointed by such Chairman and Managing Director of the respondent would act as an arbitrator. In *TRF Limited*[4], a Bench of three Judges of this Court, was called upon to consider whether the appointment of an arbitrator made by the Managing Director of the respondent therein was a valid one and whether at that stage an application moved under Section 11(6) of the Act could be entertained by the Court. The relevant Clause, namely, Clause 33 which provided for resolution of disputes in that case was under:

"33. Resolution of dispute/arbitration

(a) In case any disagreement or dispute arises between the buyer and the seller under or in connection with the PO, both shall make every effort to resolve it amicably by direct informal negotiation.

(b) If, even after 30 days from the commencement of such informal negotiation, seller and the buyer have not been able to resolve the dispute amicably, either party may require that the dispute be referred for resolution to the formal mechanism of arbitration.

(c) All disputes which cannot be settled by mutual negotiation shall be referred to and determined by arbitration as per the Arbitration and Conciliation Act, 1996 as amended.

(d) Unless otherwise provided, any dispute or difference between the parties in connection with this agreement shall be referred to sole arbitration of the Managing Director of buyer or his nominee. Venue of arbitration shall be Delhi, and the arbitration shall be conducted in English language.

(e) The award of the Tribunal shall be final and binding on both, buyer and seller."

17. In *TRF Limited*[4], the Agreement was entered into before the provisions of the Amending Act (Act No. 3 of 2016) came into force. It was submitted by the appellant that by virtue of the provisions of the Amending Act and insertion of the Fifth and Seventh Schedules in the Act, the Managing Director of the respondent would be a person having direct interest in the dispute and as such could not act as an arbitrator. The extension of the submission was that a person who himself was disqualified and disentitled could also not nominate any other person to act as an arbitrator. The submission countered by the respondent therein was as under:—

> **"7.1.** The submission to the effect that since the Managing Director of the respondent has become ineligible to act as an arbitrator subsequent to the amendment in the Act, he could also not have nominated any other person as arbitrator is absolutely unsustainable, for the Fifth and the Seventh Schedules fundamentally guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence and impartiality of the arbitrator. To elaborate, if any person whose relationship with the parties or the counsel or the subject-matter of dispute falls under any of the categories specified in the Seventh Schedule, he is ineligible to be appointed as an arbitrator but not otherwise.

18. The issue was discussed and decided by this Court as under:—

> 50. First, we shall deal with Clause (*d*). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the "named sole arbitrator" and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. In this regard, our attention has been drawn to a two-Judge Bench decision in *State of Orissa* v. *Commr. of Land Records & Settlement*[7]. In the said case, the question arose, can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held: (SCC p. 173, para 25)
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> > "*25.* We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in *Roop*

Chand v. *State of Punjab*[8]. In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, delegated its appellate powers vested in it under Section 21(4) to an "officer", an order passed by such an officer was an order passed by the *State Government* itself and "not an order passed by any *officer* under this Act" within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer *in his own right* and *not as a delegate* of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate."

(emphasis in original)

51. Be it noted in the said case, reference was made to *Behari Kunj Sahkari Awas Samiti* v. *State of U.P.*[9], which followed the decision in *Roop Chand* v. *State of Punjab*[8]. It is seemly to note here that the said principle has been followed in *Indore Vikas Pradhikaran*[10].

52. Mr. Sundaram has strongly relied on *Pratapchand Nopaji*[11]. In the said case, the three-Judge Bench applied the maxim "*qui facit per alium facit per se*". We may profitably reproduce the passage: (SCC p. 214, para 9)

"*9.* … The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim: "*qui facit per alium facit per se*" (what one does through another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the "pucca adatia", or, as the High Court had held, he is clothed with the powers of an ordinary commission agent only."

53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to the learned counsel for the appellant, ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.

54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."

19. It was thus held that as the Managing Director became ineligible by operation of law to act as an arbitrator, he could not nominate another person to act as an arbitrator and that once the identity of the Managing Director as the sole arbitrator

was lost, the power to nominate someone else as an arbitrator was also obliterated. The relevant Clause in said case had nominated the Managing Director himself to be the sole arbitrator and also empowered said Managing Director to nominate another person to act as an arbitrator. The Managing Director thus had two capacities under said Clause, the first as an arbitrator and the second as an appointing authority. In the present case we are concerned with only one capacity of the Chairman and Managing Director and that is as an appointing authority.

20. We thus have two categories of cases. The *first*, similar to the one dealt with in *TRF Limited*[4] where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the *second* category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the *first* or *second* category of cases. We are conscious that if such deduction is drawn from the decision of this Court in *TRF Limited*[4], all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.

21. But, in our view that has to be the logical deduction from *TRF Limited*[4]. Paragraph 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in *TRF Limited*[4].

22. We must also at this stage refer to the following observations made by this Court in para 48 of its decision in *Indian Oil Corpn. Ltd.* v. *Raja Transport (P) Ltd.*[12], which were in the context that was obtaining before Act 3 of 2016 had come into force:—

> **"48.** In the light of the above discussion, the scope of Section 11 of the Act containing the scheme of appointment of arbitrators may be summarised thus:

(*i*) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an arbitrator within 30 days from the receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief Justice or his designate will exercise power under sub-section (4) of Section 11 of the Act.

(*ii*) Where the agreement provides for arbitration by a sole arbitrator and the parties have not agreed upon any appointment procedure, the Chief Justice or his designate will exercise power under sub-section (5) of Section 11, if the parties fail to agree on the arbitration within thirty days from the receipt of a request by a party from the other party.

(*iii*) Where the arbitration agreement specifies the appointment procedure, then irrespective of whether the arbitration is by a sole arbitrator or by a three-member Tribunal, the Chief Justice or his designate will exercise power under sub-section (6) of Section 11, if a party fails to act as required under the agreed procedure (or the parties or the two appointed arbitrators fail to reach an agreement expected of them under the agreed procedure or any person/institution fails to perform any function entrusted to him/it under that procedure).

(*iv*) While failure of the other party to act within 30 days will furnish a cause of action to the party seeking arbitration to approach the Chief Justice or his designate in cases falling under sub-sections (4) and (5), such a time-bound requirement is not found in sub-section (6) of Section 11. The failure to act as per the agreed procedure within the time-limit prescribed by the arbitration agreement, or in the absence of any prescribed time-limit, within a reasonable time, will enable the aggrieved party to file a petition under Section 11(6) of the Act.

(*v.*) Where the appointment procedure has been agreed between the parties, but the cause of action for invoking the jurisdiction of the Chief Justice or his designate under clauses (*a*), (*b*) or (*c*) of sub-section (6) has not arisen, then the question of the Chief Justice or his designate exercising power under subsection (6) does not arise. The condition precedent for approaching the Chief Justice or his designate for taking necessary measures under sub-section (6) is that

(*i*) a party failing to act as required under the agreed appointment procedure; or

(*ii*) the parties (or the two appointed arbitrators) failing to reach an agreement expected of them under the agreed appointment procedure; or

(*iii*) a person/institution who has been entrusted with any function under the agreed appointment procedure, failing to perform such function.

(*vi*) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 *shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause*.

(*vii*) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else."

23. Sub para (vii) of aforesaid paragraph 48 lays down that if there are justifiable doubts as to the independence and impartiality of the person nominated, and if other circumstances warrant appointment of an independent arbitrator by ignoring the

procedure prescribed, such appointment can be made by the Court. It may also be noted that on the issue of necessity and desirability of impartial and independent arbitrators the matter was considered by the Law Commission in its report No. 246. Paragraphs 53 to 60 under the heading "Neutrality of Arbitrators" are quoted in the Judgment of this Court in *Voestapline Schienen Gmbh* v. *Delhi Metro Rail Corpn. Ltd.*[13], while paras 59 and 60 of the report stand extracted in the decision of this Court in *Bharat Broadband Network Limited* v. *United Telecoms Limited*[14]. For the present purposes, we may rely on paragraph 57, which is to the following effect:—

> "57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the Arbitral Tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles — even if the same has been agreed prior to the disputes having arisen between the parties. *There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed*. The Commission hastens to add that Mr. P.K. Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. *In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous — and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes*."

24. In *Voestalpine*[3], this Court dealt with independence and impartiality of the arbitrator as under:

> **"20.** Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and nonimpartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in *Hashwani* v. *Jivraj*[15] in the following words: (WLR p. 1889, para 45)
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> > "*45.* … the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were

not personal services under the direction of the parties."

21. Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in *Consorts Ury*, underlined that:

"an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator."

22. Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings.

… …. ….. … …

30. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by DMRC. It, therefore, becomes imperative to have a much broadbased panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broadbased panel on the aforesaid lines, within a period of two months from today."

25. In the light of the aforestated principles, the report of the Law Commission and the decision in *Voestapline Schienen Gmbh*[13], the imperatives of creating healthy arbitration environment demand that the instant application deserves acceptance.

26. The further question that arises is whether the power can be exercised by this Court under Section 11 of the Act when the appointment of an arbitrator has already been made by the respondent and whether the appellant should be left to raise challenge at an appropriate stage in terms of remedies available in law. Similar controversy was gone into by a Designated Judge of this Court in *Walter Bau AG*[3] and the discussion on the point was as under:—

"9. While it is correct that in *Antrix*[16] and *Pricol Ltd.*[17], it was opined by this Court that after appointment of an arbitrator is made, the remedy of the aggrieved party is not under Section 11(6) but such remedy lies elsewhere and under different provisions of the Arbitration Act (Sections 12 and 13), the context in which the aforesaid view was expressed cannot be lost sight of. In *Antrix*[16], appointment of the arbitrator, as per the ICC Rules, was as per the alternative procedure agreed upon, whereas in *Pricol Ltd.*[17]., the party which had filed the application under Section 11(6) of the Arbitration Act had already submitted to the jurisdiction of the arbitrator. In the present case, the situation is otherwise.

10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law. In the present case, the agreed upon procedure between the parties contemplated the appointment of the arbitrator by the second party within 30 days of receipt of a notice from the first party. While the decision in *Datar Switchgears Ltd.*[18] may have

introduced some flexibility in the time frame agreed upon by the parties by extending it till a point of time anterior to the filing of the application under Section 11(6) of the Arbitration Act, it cannot be lost sight of that in the present case the appointment of Shri Justice A.D. Mane is clearly contrary to the provisions of the Rules governing the appointment of arbitrators by ICADR, which the parties had agreed to abide by in the matter of such appointment. The option given to the respondent Corporation to go beyond the panel submitted by ICADR and to appoint any person of its choice was clearly not in the contemplation of the parties. If that be so, obviously, the appointment of Shri Justice A.D. Mane is non est in law. Such an appointment, therefore, will not inhibit the exercise of jurisdiction by this Court under Section 11(6) of the Arbitration Act. It cannot, therefore, be held that the present proceeding is not maintainable in law. The appointment of Shri Justice A.D. Mane made beyond 30 days of the receipt of notice by the petitioner, though may appear to be in conformity with the law laid down in *Datar Switchgears Ltd.*[18], is clearly contrary to the agreed procedure which required the appointment made by the respondent Corporation to be from the panel submitted by ICADR. The said appointment, therefore, is clearly invalid in law."

27. It may be noted here that the aforesaid view of the Designated Judge in *Walter Bau AG*[3] was pressed into service on behalf of the appellant in *TRF Limited*[4] and the opinion expressed by the Designated Judge was found to be in consonance with the binding authorities of this Court. It was observed:—

> **"32.** Mr. Sundaram, learned Senior Counsel for the appellant has also drawn inspiration from the judgment passed by the Designated Judge of this Court in *Walter Bau AG*[3], where the learned Judge, after referring to *Antrix Corpn. Ltd.*[16]., distinguished the same and also distinguished the authority in *Pricol Ltd.* v. *Johnson Controls Enterprise Ltd.*[17] and came to hold that: (*Walter Bau AG case*[3], SCC p. 806, para 10)
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> > "*10.* Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law. …"
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> 33. We may immediately state that the opinion expressed in the aforesaid case is in consonance with the binding authorities we have referred to hereinbefore."

28. In *TRF Limited*[4], the Managing Director of the respondent had nominated a former Judge of this Court as sole arbitrator in terms of aforesaid Clause 33(d), after which the appellant had preferred an application under Section 11(5) read with Section 11(6) of the Act. The plea was rejected by the High Court and the appeal therefrom on the issue whether the Managing Director could nominate an arbitrator was decided in favour of the appellant as stated hereinabove. As regards the issue about fresh appointment, this Court remanded the matter to the High Court for fresh consideration as is discernible from para 55 of the Judgment. In the light of these authorities there is no hindrance in entertaining the instant application preferred by the Applicants.

29. It is also clear from the Clause in the instant case that no special qualifications such as expertise in any technical field are required of an arbitrator. This was fairly accepted by the learned Senior Counsel for the respondent.

30. In the aforesaid circumstances, in our view a case is made out to entertain the instant application preferred by the Applicants. We, therefore, accept the application, annul the effect of the letter dated 30.07.2019 issued by the respondent and of the appointment of the arbitrator. In exercise of the power conferred by Section 11(6) of the Act, we appoint Dr. Justice A.K. Sikri, former Judge of this Court as the sole arbitrator to decide all the disputes arising out of the Agreement dated 22.05.2017,

between the parties, subject to the mandatory declaration made under the amended Section 12 of the Act with respect to independence and impartiality and the ability to devote sufficient time to complete the arbitration within the period as per Section 29A of the Act. A copy of the Order be dispatched to Dr. Justice A. K. Sikri at 144, Sundar Nagar, New Delhi - 110003 (Tel. No.:- 011 - 41802321). The arbitrator shall be entitled to charge fees in terms of the Fourth Schedule to the Act. The fees and other expenses shall be shared by the parties equally.

31. Before we part, we must say that the appointment of an arbitrator by this Court shall not be taken as any reflection on the competence and standing of the arbitrator appointed by the respondent. We must place on record that not even a suggestion in that respect was made by the learned counsel for the Applicants. The matter was argued and has been considered purely from the legal perspective as discussed hereinabove.

32. This application is allowed in aforesaid terms.

ARBITRATION APPLICATION NO. 34 OF 2019

Perkins Eastman Architects DPC & Anr. …Applicants

VERSUS

HSCC (India) Ltd. …Respondent

33. The basic facts in this application are more or less identical except that the request for proposal in this case pertains to "comprehensive planning and designing, including preparation and development of concepts, master plan for the campus, preparation of all preliminary and working drawings for various buildings/structures, including preparation of specifications and schedule of quantities' for the proposed All India Institute of Medical Sciences at Kalyani, West Bengal.". Clause No. 24 titled as "Dispute Resolution" in this case and the communication addressed by the Applicants are also identical and the response by the respondent was also similar. In this case also, appointment of a sole arbitrator was made by the respondent vide communication dated 30.07.2019.

34. Since the facts are identical and the submissions are common, this application is disposed of in terms similar to the main matter.

35. In the aforesaid circumstances, we accept the application, annul the effect of the letter dated 30.07.2019 issued by the respondent and of the appointment of the arbitrator. In exercise of the power conferred by Section 11(6) of the Act, we appoint Dr. Justice A.K. Sikri, former Judge of this Court as the sole arbitrator to decide all the disputes arising out of the Agreement dated 22.05.2017, between the parties, subject to the mandatory declaration made under the amended Section 12 of the Act with respect to independence and impartiality and the ability to devote sufficient time to complete the arbitration within the period as per Section 29A of the Act. A copy of the Order be dispatched to Dr. Justice A. K. Sikri at 144, Sundar Nagar, New Delhi - 110003 (Tel. No.:- 011 - 41802321). The arbitrator shall be entitled to charge fees in terms of the Fourth Schedule to the Act. The fees and other expenses shall be shared by the parties equally.

ARBITRATION APPLICATION NO. 35 OF 2019

Perkins Eastman Architects DPC & Anr. …Applicants

VERSUS

HSCC (India) Ltd. …Respondent

36. The basic facts in this application are more or less identical except that the request for proposal in this case pertains to "comprehensive planning and designing, including preparation and development of concepts, master plan for the campus, preparation of all preliminary and working drawings for various buildings/structures, including preparation of specifications and schedule of quantities' for the proposed All

India Institute of Medical Sciences at Nagpur, Maharashtra." Clause No. 24 titled as "Dispute Resolution" in this case and the communication addressed by the Applicants are also identical and the response by the respondent was also similar. In this case also, appointment of a sole arbitrator was made by the respondent vide communication dated 30.07.2019.

37. Since the facts are identical and the submissions are common, this application is disposed of in terms similar to the main matter.

38. In the aforesaid circumstances, we accept the application, annul the effect of the letter dated 30.07.2019 issued by the respondent and of the appointment of the arbitrator. In exercise of the power conferred by Section 11(6) of the Act, we appoint Dr. Justice A.K. Sikri, former Judge of this Court as the sole arbitrator to decide all the disputes arising out of the Agreement dated 22.05.2017, between the parties, subject to the mandatory declaration made under the amended Section 12 of the Act with respect to independence and impartiality and the ability to devote sufficient time to complete the arbitration within the period as per Section 29A of the Act. A copy of the Order be dispatched to Dr. Justice A. K. Sikri at 144, Sundar Nagar, New Delhi - 110003 (Tel. No.:- 011 - 41802321). The arbitrator shall be entitled to charge fees in terms of the Fourth Schedule to the Act. The fees and other expenses shall be shared by the parties equally.

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[1] The Arbitration and Conciliation Act, 1996

[2] The Appointment of Arbitrators by the Chief Justice of India Scheme, 1996

[3] (2015) 3 SCC 800

[4] (2017) 8 SCC 377

[5] (2019) 2 SCC 271

[6] (2008) 14 SCC 271

[7] (1998) 7 SCC 162

[8] AIR 1963 SC 1503

[9] (1997) 7 SCC 37

[10] *Indore Vikas Pradhikaran* v. *Pure Industrial Coke & Chemicals Ltd.*, (2007) 8 SCC 705

[11] *Pratapchand Nopaji* v. *Kotrike Venkata Setty & Sons*, (1975) 2 SCC 208

[12] (2009) 8 SCC 520

[13] (2017) 4 SCC 665

[14] (2019) 5 SCC 755

[15] (2011) 1 WLR 1872; 2011 UKSC 40

[16] (2014) 11 SCC 560

[17] (2015) 4 SCC 177

[18] (2000) 8 SCC 151

Civil Appeal Nos. 9486-9487 of 2019

Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company

2019 SCC OnLine SC 1635

In the Supreme Court of India
(BEFORE R. BANUMATHI, A.S. BOPANNA AND HRISHIKESH ROY, JJ.)

Central Organisation for Railway Electrification ..... Appellant;

v.

ECI-SPIC-SMO-MCML (JV) A Joint Venture Company ..... Respondent.

Civil Appeal Nos. 9486-9487 of 2019
(Arising out of SLP(C) Nos. 24173-74 of 2019)
Decided on December 17, 2019

The Judgment of the Court was delivered by

R. BANUMATHI, J.:— Leave granted.

2. These appeals have been preferred against the impugned orders dated 03.01.2019 and 29.03.2019 passed by the High Court of Judicature at Allahabad in Arbitration Application No. 151 of 2018 in and by which the High Court rejected the contention of the appellant that the arbitrator is to be appointed as per General Conditions 64(3)(a)(ii) and 64(3)(b) of the Contract and appointed Shri Justice Rajesh Dayal Khare as the sole arbitrator for resolving the dispute between the parties.

3. The appellant awarded work contract of Rs. 165,67,98,570/- to the respondent-Company by an agreement dated 20.09.2010 which contains the arbitration clause. Subsequently, after coming into force of Arbitration and Conciliation (Amendment) Act, 2015 (w.e.f. 23.10.2015), the Government of India, Ministry of Railways made a modification to Clause 64 of the General Conditions of Contract and issued a notification dated 16.11.2016 for implementation of modification. The modified Clause 64(3)(a)(ii) (where applicability of Section 12(5) has been waived off) inter alia provided that in cases where the total value of all claims exceeds Rs. 1 crore, the Arbitral Tribunal shall consist of a panel of three gazetted Railway Officers not below JA (Junior Administrative) Grade or two Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of Senior Administrative (SA) Grade officer as arbitrators. The procedure for constitution of the Arbitral Tribunal is provided thereon. Clause 64(3)(b) deals with the appointment of arbitrator where applicability of Section 12(5) of the Arbitration and Conciliation Act has not been waived off. Clause 64(3)(b) stipulates that the Arbitral Tribunal shall consist of a panel of three retired railway officers not below the rank of Senior Administrative Officer as the arbitrators as per the procedure indicated thereon.

4. Since the respondent did not complete the work under the contract within the prescribed period, on 18.10.2017, the appellant issued "Seven days" notice under Clause 62 of the General Conditions of Contract to the respondent. Thereafter on 27.10.2017, the appellant issued a "48 hours' notice" to the respondent calling upon the respondent to make good the progress of work, failing which the contract will stand terminated. Since the respondent did not make adequate progress in the work, on 01.11.2017, the contract was terminated as per Clause 62 of the General Conditions of the Contract. The respondent was also informed that their security deposit has been forfeited and the performance guarantee submitted by it shall also

be encashed.

5. The respondent filed a Petition No. 760 of 2017 before the High Court challenging the termination of the contract which came to be dismissed by the High Court vide order dated 28.11.2017 and the High Court directed the respondent to avail the alternative remedy by invoking arbitration clause. The respondent vide its letter dated 27.07.2018 requested the appellant for appointment of an Arbitral Tribunal for resolving the disputes between the parties and settle the claims value of Rs. 73.35 crores. In reply dated 24.09.2018, the appellant sent a list of four serving Railway Electrification Officers of JA Grade to act as arbitrators. The respondent was asked to select any two and communicate to the appellant for formation of the arbitration tribunal panel. Vide letter dated 25.10.2018, the respondent was sent a list of another panel comprising four retired Railway officers. In terms of Clause 63(3)(b) of Railway's General Conditions of Contract, the respondent was asked to select any two from this list and communicate them to the appellant within thirty days for constitution of the arbitration tribunal.

6. The respondent did not send a reply to the above letters of the appellant; but filed Arbitration Petition No. 151 of 2018 before High Court under Section 11(6) of the Arbitration and Conciliation Act seeking appointment of a sole arbitrator for resolution of differences. In its petition, the respondent suggested the name of one Shri Ashwani Kumar Kapoor, retired member Electrical from Railway Board to be appointed as an arbitrator in the matter. According to the respondent, there exists a valid and binding arbitration clause between the parties being clause 1.2.54 of Part I of Chapter 2 and also 64 of the General Conditions of Contract; but since no neutral arbitrator is contemplated to be appointed in the General Conditions of Contract, the respondent has no other recourse except by filing the petition under Section 11(6) of the Arbitration and Conciliation Act, 1996.

7. The High Court vide the impugned order dated 03.01.2019 rejected the argument of the appellant that the arbitrator ought to be appointed only from the panel of arbitrators in terms of General Conditions of Contract. The High Court observed that the powers of the Court to appoint arbitrator are independent of the contract between the parties and no fetters could be attached to the powers of the court. With those findings, the High Court appointed Shri Rajesh Dayal Khare, a retired judge of the Allahabad High Court as the sole arbitrator subject to his consent, under Section 11(8) of the Arbitration and Conciliation Act. Subsequently, vide order dated 29.03.2019, the High Court noted the consent of the arbitrator appointed by the court and directed the Arbitrator to proceed with the arbitration proceedings. Being aggrieved, the appellant has preferred these appeals.

8. Mr. A.N.S. Nadkarni, learned Additional Solicitor General (ASG) appearing for the appellant submitted that in terms of Clause 64(3)(a)(ii) of the General Conditions of Contract (where applicability of Section12(5) of the Amended Act has been waived off), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below Junior Administrative Grade or two Railway Gazetted Officers not below Junior Administrative Grade and a retired Railway Officer retired not below the rank of Senior Administrative Grade Officer as the arbitrators. It was submitted that as per Clause 64 (3)(b) of the General Conditions of Contract (where applicability of Section 12(5) of the Act has not been waived off), the Arbitral Tribunal shall consist of a panel of three retired Railway Officers retired not below the rank of Senior Administrative Grade Officers as the arbitrators after compliance of the procedure stipulated in Clause 64(3) (b). It was contended that when the agreement and the General Conditions of Contract provided for appointment of Arbitral Tribunal consisting of three arbitrators from the Panel, the High Court erred in appointing the sole arbitrator outside the panel of the arbitrators. The learned ASG further submitted that the appointment of an

independent arbitrator is in contravention of Clauses 64(3)(a)(i), 64(3)(a)(ii) and 64 (3)(b) of the General Conditions of Contract and the impugned judgment appointing a former Judge of the High Court of Allahabad is not sustainable. In support of the contention, the learned ASG inter alia placed reliance upon *Union of India* v. *Parmar Construction Company* 2019 SCC OnLine SC 442 and *Union of India* v. *Pradeep Vinod Construction Company* 2019 SCC OnLine SC 1467 and other judgments.

9. Refuting the above contention, Mr. Sridhar Potaraju, learned counsel appearing for the respondent submitted that the Arbitration and Conciliation Act, 1996 was amended with effect from 23.10.2015 and in the present case, the demand for arbitration for resolution of disputes was made by the respondent on 27.07.2018 and hence, the provisions of the amended Act applies to the present case. It was submitted that by virtue of the provisions of Section 12(5) read with Schedule VII to the Arbitration and Conciliation Act, 1996, the panel of arbitrators proposed by the appellant vide letter dated 24.09.2018 were statutorily made ineligible to be appointed as arbitrators since they were either serving or retired employees of the appellant. It was contended that as per the provisions of the Amendment Act, 2015, all employees present or past are statutorily made ineligibile for appointment as arbitrators. The learned counsel further submitted that when the General Manager himself being ineligible to be appointed as an arbitrator under Section 12(5) read with Schedule VII of the Act, the General Manager cannot nominate any of the persons to be arbitrator. The learned counsel for the respondent inter alia placed reliance upon *Voestalpine Schienen Gmbh* v. *Delhi Metro Rail Corporation Limited* (2017) 4 SCC 665, *TRF Limited* v. *Energo Engineering Projects Limited* (2017) 8 SCC 377 and number of other judgments which would be referred to at the appropriate place.

10. We have carefully considered the submissions and perused the impugned judgment and materials on record. The point falling for consideration is whether the High Court was right in appointing an independent arbitrator in contravention of the Clauses 64(3)(a)(ii) and 64(3)(b) of the General Conditions of Contract.

Appointment of an independent arbitrator without reference to the Clauses of General Conditions of Contract (GCC) - Whether correct?

11. Learned counsel for the respondent submitted that being serving employees of the appellant, the panel of arbitrators proposed by the appellant vide letter dated 24.09.2018 were not eligible to be appointed as arbitrators in view of provisions of Section 12(5) read with Schedule VII of the Arbitration and Conciliation Act. Learned counsel further submitted that the panel of arbitrators proposed by the appellant vide letter dated 25.10.2018 comprising of retired employees of the appellant were also not eligible to be appointed as arbitrators under Section 12(5) read with Schedule VII of the Act as the employees of the appellant are expressly made ineligible.

12. In support of the above contention, learned counsel for the respondent has placed reliance upon *Voestalpine Schienen Gmbh* v. *Delhi Metro Rail Corporation Limited* (2017) 4 SCC 665 wherein, the Supreme Court held as under:—

> "24. …….The amended provision puts an embargo on a person to act as an arbitrator, who is the employee of the party to the dispute. It also deprives a person to act as an arbitrator if he had been the consultant or the advisor or had any past or present business relationship with DMRC……."

13. On behalf of the respondent, reliance was also placed upon *Bharat Broadband Network Limited* v. *United Telecoms Limited* (2019) 5 SCC 755 wherein, the Supreme Court held as under:—

> "15. Section 12(5), on the other hand, is a new provision which relates to the *de jure* inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the

subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, *subsequent* to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may *after* disputes have arisen between them, waive the applicability of this sub-section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule."

14. Per contra, on behalf of the appellant, Mr. A.N.S. Nadkarni, learned ASG has submitted that the appointment of arbitrator is governed as per Clauses 64(3)(a)(i) and 64(3)(a)(ii) of the General Conditions of Contract (GCC) where applicability of Section 12(5) of the Arbitration and Conciliation Act has been waived off and the Arbitral Tribunal shall consist of a panel of three serving Railway Officers or two serving officers and one retired officer. Learned ASG submitted that Clause 64(3)(b) of GCC deals with appointment of arbitrator where applicability of Section 12(5) of the Act has not been waived off. It was further submitted that Clause 64(3)(b) of GCC stipulates that the Arbitral Tribunal shall consist of a panel of three retired railway officers not below the rank of Senior Administrative Officer and the Arbitral Tribunal to be constituted as per the procedure indicated thereon. Placing reliance upon *Union of India* v. *Parmar Construction Company* 2019 SCC OnLine SC 442 and *Union of India* v. *Pradeep Vinod Construction Company* 2019 SCC OnLine SC 1467, learned ASG has submitted that when the agreement specifically provides for appointment of panel of arbitrators, the appointment should be in terms of the agreement and the appointment of independent sole arbitrator is in contravention of the General Conditions of Contract which govern the parties for appointment of arbitrators.

15. Clause 64 of the General Conditions of Contract deals with the procedure for resolution of the disputes and provides for "Demand for arbitration" and appointment of the arbitrators. Clause 64 of the General Conditions of Contract (GCC) reads as under:—

"64. (1): Demand for Arbitration:

64. (1) (i) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in Clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

64. (1) (ii) (a) The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute or difference, in respect of which the demand has been made, together with counter claims or set off, given by the Railway, shall be referred to arbitration and other matters shall not be included in the reference.

64. (1) (ii) (b) The parties may waive of the applicability of sub-section 12(5)

of Arbitration and Conciliation (Amendment) Act, 2015. If they agree or such waiver in writing after having arisen between them in the formation under Annexure XII of these conditions."

16. After coming into force of Arbitration and Conciliation (Amendment) Act, 2015, the Government of India, Ministry of Railways made a modification to Clause 64 of the General Conditions of Contract and the Railway Board issued a notification dated 16.11.2016 in this regard. The modified Clause 64(3)(a)(i) (where applicability of Section 12(5) of the Act has been waived off) inter alia provided that in case where the total value of all claims in question added together does not exceed rupees one crore, the arbitral tribunal shall consist of a sole arbitrator who shall be a Gazetted Officer of Railways not below JA Grade nominated by the General Manager. In terms of Clause 64(3)(a)(i), the sole arbitrator shall be appointed within sixty days from the day when a written and valid demand for arbitration is received by the General Manager. In the present case, since the value of the work contract is worth more than Rs. 165 crores, Clause 64(3)(a)(i) is not applicable.

17. Clause 64(3)(a)(ii) of GCC deals with cases not covered by Clause 64(3)(a)(i) where applicability of Section 12(5) of the Act has been waived off. Clause 64(3)(a)(ii) of General Conditions of Contract reads as under:—

"64. (3) Appointment of Arbitrator:

.....

64. (3) (a) (ii) In case not covered by the Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a Panel of three Gazette Railway Officers not below JA Grade or two Railway Gazette Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG officer, as the arbitrators. For this purpose, the railway will send a panel of at least four (4) names of Gazette Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM.....".

18. Clause 64(3)(b) of GCC deals with appointment of arbitrator where applicability of Section 12(5) of the Act has not been waived off. The modified Clause 64(3)(b) inter alia provided that the arbitral tribunal shall consist of a panel of three retired railway officers not below the rank of SAO officer as arbitrator. For this purpose, the Railway will send a panel of at least four names of retired railway officer(s) empanelled. The contractor will be asked to suggest to the General Manager at least two names out of the panel for appointment as the contractor's nominee and the General Manager shall appoint at least one out of them as the contractor's nominee. The General Manager will also simultaneously appoint the balance number of arbitrators from the panel or from outside the panel. The modified Clause 64(3)(b) of the General Conditions of Contract reads as under:—

"64. (3)(b) Appointment of Arbitrator where applicability of Section 12 (5) of A & C Act has not been waived off.

The Arbitrator Tribunal shall consist of a Panel of three retired Railway Officer retired not below the rank of SAO officer, as the arbitrator. For this purpose, the Railway will send a panel of at least four names of retired Railway Officer(s) empanelled to work as Railway. Arbitrator indicating their retirement date to the contractor within 60 days from the day when a written and valid demand for arbitrators is received by the GM.

Contractor will be asked to suggest to General Manager at least two names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the

balance number of arbitrators other from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the three arbitrators so appointed CM shall complete tis exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contract's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them has served in the Accounts Department."

19. After coming into force of the Arbitration and Conciliation (Amendment) Act, 2015, when Clause 64 of the General Conditions of Contract has been modified *inter alia* providing for constitution of Arbitral Tribunal consisting of three arbitrators either serving or retired railway officers, the High Court is not justified in appointing an independent sole arbitrator without resorting to the procedure for appointment of the arbitrator as prescribed under Clause 64(3)(b) of the General Conditions of Contract.

20. It is pertinent to note that even in the application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, the respondent prayed for appointment of a sole arbitrator in terms of Clause 1.2.54(b)(i) of the Tender Agreement/Clause 64 of the General Conditions of Contract for adjudicating the disputes which have arisen between the parties. In the petition filed under Section 11(6) of the Act, the respondent prayed for appointment of one Shri Ashwani Kumar Kapoor to act as the arbitrator. Thus, the respondent itself sought for appointment of arbitrator in terms of Clause 64 of the General Conditions of Contract. The appointment of Shri Ashwani Kumar Kapoor as arbitrator, of course, was not agreeable to the appellant, since it was found that said Shri Ashwani Kumar Kapoor was not in the panel of arbitrators and therefore, could not be considered for appointment as arbitrator. As the value of the work contract was worth more than Rs. 165 crores, the dispute can be resolved only by a panel of three arbitrators in terms of Clause 64(3)(b) of the General Conditions of Contract. The respondent was not right in seeking for appointment of a sole arbitrator in terms of Clause 1.2.54(b)(i) of the Tender Agreement/Clause 64 of the General Conditions of Contract.

21. Considering the various matters of railway contracts and interference with the appointment of independent arbitrators, after referring to *Union of India* v. *M.P. Gupta* (2004) 10 SCC 504 and *Union of India* v. *V.S. Engineering (P) Ltd.* (2006) 13 SCC 240 and other judgments, in *Union of India* v. *Parmar Construction Company* 2019 SCC OnLine SC 442, the Supreme Court set aside the appointment of an independent arbitrator and directed the General Manager of Railways to appoint arbitrator in terms of Clause 64(3) of the agreement. In Para (44) of *Parmar Construction Company*, the Supreme Court held as under:—

"44. To conclude, in our considered view, the High Court was not justified in appointing an independent arbitrator without resorting to the procedure for appointment of an arbitrator which has been prescribed under clause 64(3) of the contract under the inbuilt mechanism as agreed by the parties."

22. Applying ratio of the *Parmar Construction Company*, in *Pradeep Vinod Construction Company* 2019 SCC OnLine SC 1467, the Supreme Court held that the appointment of arbitrator should be in terms of the agreement and the High Court was not right in appointing an independent arbitrator ignoring Clause 64 of the General Conditions of Contract. As held in *Parmar Construction Company* and *Pradeep Vinod Construction Company*, the High Court was not justified in appointing an independent arbitrator without resorting to the procedure for appointment of the arbitrators which has been prescribed under the General Conditions of Contract.

RE: Contention:- Retired Railway Officers are not eligible to be appointed as arbitrators under Section 12(5) read with Schedule VII of the Act and were statutorily made ineligible to be appointed as an arbitrator.

23. Vide letter dated 27.07.2018, the respondent made a request for appointment

of arbitrator/constitution of Arbitral Tribunal. In response to the same, the appellant sent a letter dated 24.09.2018 nominating the names of four serving railway officers and the respondent was asked to select any two names from the list of the four railway officers and communicate to the appellant. It is seen from the record that the respondent vide their letter dated 26.09.2018 expressed their disagreement in waiving off the applicability of Section 12(5) of the Amendment Act, 2015. Referring to its own earlier letter dated 24.09.2018 and letter of the respondent dated 26.09.2018, the appellant had sent a communication dated 25.10.2018 nominating the panel of four retired railway officers to act as arbitrators and requesting the respondent to select any two names from the list in terms of Clause 64(3)(b) of GCC and communicate to the appellant within thirty days from the date of the letter for formation of Arbitration Tribunal. According to the appellant, the respondent failed to select any of the nominee from the panel within the stipulated time of thirty days. The respondent neither responded to the appellant's letter dated 25.10.2018 not suggested the names of two arbitrators from the panel sent by the appellant. Instead the respondent approached the High Court under Section 11(6) of the Act for appointment of an independent sole arbitrator by filing a petition on 17.12.2018.

24. The contention of the learned counsel for the respondent is that the panel of arbitrators proposed by the appellant vide letter dated 25.10.2018 comprising of retired employees of the appellant are not eligible to be appointed as arbitrators under Section 12(5) read with Schedule VII of the Act. Further contention of the learned counsel for the respondent is that the panel of arbitrators drawn by the appellant consist of those persons who were railway employees or Ex-railway employees and therefore, they are statutorily made ineligible to be appointed as arbitrators.

25. Contending that the appointment of retired employees as arbitrators cannot be assailed merely because an arbitrator is a retired employee of one of the parties, learned ASG has placed reliance upon *Voestalpine Schienen Gmbh* v. *Delhi Metro Rail Corporation Limited* (2017) 4 SCC 665. After referring to various judgments and also the scope of amended provision of Section 12 of the Amendment Act, 2015 and the entries in the Seventh Schedule, the Supreme Court observed that merely because the panel of arbitrators drawn by the respondent-Delhi Metro Rail Corporation are the Government employees or Ex-Government employees, that by itself may not make such persons ineligible to act as arbitrators of the respondent-DMRC. It was observed that the persons who have worked in the Railways under the Central Government or the Central Public Works Department or Public Sector Undertakings cannot be treated as employee or consultant or advisor of the respondent-DMRC. In para (26) of *Voestalpine Schienen Gmbh*, the Supreme Court held as under:—

> "26. It cannot be said that simply because the person is a retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with DMRC (the party in dispute), he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. It may also be mentioned herein that the Law Commission had proposed the incorporation of the Schedule which was drawn from the red and orange list of IBA guidelines on conflict of interest in international arbitration with the observation that the same would be treated as the guide "to determine whether circumstances exist which give rise to such justifiable doubts". Such persons do not get covered by red or orange list of IBA guidelines either." [Underlining added]

26. The same view was reiterated in *Government of Haryana PWD Haryana (B and R) Branch* v. *G.F. Toll Road Private Limited* (2019) 3 SCC 505 wherein, the Supreme Court held that the appointment of a retired employee of a party to the agreement cannot be assailed on the ground that he is a retired/former employee of one of the parties to the agreement. Absolutely, there is no bar under Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015 for appointment of a retired employee to act as an arbitrator.

27. By the letter dated 25.10.2018, the appellant has forwarded a list of four retired railway officers on its panel thereby giving a wide choice to the respondent to suggest any two names to be nominated as arbitrators out of which, one will be nominated as the arbitrator representing the respondent-Contractor. As held in *Voestalpine Schienen Gmbh* (2017) 4 SCC 665, the very reason for empanelling the retired railway officers is to ensure that the technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. Merely because the panel of the arbitrators are the retired employees who have worked in the Railways, it does not make them ineligible to act as the arbitrators.

RE: Contention:- Failure to act in terms of the Contract in not responding within thirty days from the date of the request.

28. Learned counsel for the respondent has submitted that vide letter dated 27.07.2018, the respondent requested for referring the dispute to arbitration but, no steps were taken by the appellant within thirty days from the date of request dated 27.07.2018. It was submitted that on 17.12.2018, respondent filed application under Section 11(6) of the Act before the High Court for appointment of a sole arbitrator, by which time, no steps were taken by the appellant under the Contract, except sending two lists of persons by letters dated 24.09.2018 and 25.10.2018 who were *de jure* ineligible to be appointed as the arbitrators. In this regard, reliance was placed upon *Punj Lloyd Ltd.* v. *Petronet MHB Ltd.* (2006) 2 SCC 638. Considering the applicability of Section 11(6) of the Act, in *Punj Lloyd Ltd.*, the Supreme Court held as under:—

> "5. Having heard the learned counsel for the parties, we are satisfied that the appeal deserves to be allowed. The learned counsel for the appellant has placed reliance on the law laid down by this Court in the case of *Datar Switchgears Ltd.* v. *Tata Finance Ltd.* (2000) 8 SCC 151, wherein this Court has held as under:
>
> "*[S]o far as Section 11(6) is concerned*, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but *before the first party has moved the court under Section 11*, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases."

29. As held in *Punj Lloyd Ltd.*, if the opposite party has not made any application for appointment of the arbitrator within thirty days of demand, the right to make appointment is not forfeited but continues; but the appointment has to be made before the former files application under Section 11 of the Act seeking appointment of an arbitrator. Only then the right of the opposite party ceases.

30. In *Union of India* v. *Bharat Battery Manufacturing Co. (P) Ltd.* (2007) 7 SCC 684, on 30.03.2006, the respondent thereon filed petition under Section 11(6) seeking appointment of an arbitrator. Union of India-the appellant thereon appointed Dr. Gita Rawat on 15.05.2006 as a sole arbitrator in terms of Clause 24 of the agreement. In

such facts and circumstances of the case, considering the decision in *Punj Lloyd Ltd.*, the Supreme Court held that *"once a party files an application under Section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to appoint arbitrator under the clause of agreement ceases after Section 11(6) petition has been filed by the other party before the Court seeking appointment of an arbitrator….."*.

31. As discussed earlier, as per the modified Clause 64(3)(b) of GCC, when a written and valid demand for arbitration is received by the General Manager, the Railway will send a panel of at least four names of retired railway officers empanelled to work as arbitrators. The contractor will be asked to suggest to the General Manager at least two names out of the panel for appointment as contractor's nominee within thirty days from the date of dispatch of the request by the Railway. Vide letter dated 27.07.2018, the respondent has sought for appointment of an arbitrator for resolving the disputes. The appellant by its letter dated 24.09.2018 (which is well within the period of sixty days) in terms of Clause 64(3)(a)(ii) (where applicability of Section 12 (5) of the Act has been waived off) sent a panel of four serving railway officers of JA Grade to act as arbitrators and requested the respondent to select any two from the list and communicate to the office at the earliest for formation of Arbitration Tribunal. By the letter dated 26.09.2018, the respondent conveyed their disagreement in waiving the applicability of Section 12(5) of the Amendment Act, 2015. By the letter dated 25.10.2018, in terms of Clause 64(3)(b) of GCC (where applicability of Section 12(5) has not been waived off) the appellant has nominated a panel of four retired railway officers to act as arbitrators and requested the respondent to select any two from the list and communicate to the appellant within thirty days from the date of the letter for formation of Arbitration Tribunal. The respondent has neither sent its reply nor selected two names from the list and replied to the appellant. Without responding to the appellant, the respondent has filed petition under Section 11(6) of the Arbitration and Conciliation Act before the High Court on 17.12.2018. When the respondent has not sent any reply to the communication dated 25.10.2018, the respondent is not justified in contending that the appointment of Arbitral Tribunal has not been made before filing of the application under Section 11 of the Act and that the right of the appellant to constitute Arbitral Tribunal is extinguished on filing of the application under Section 11(6) of the Act.

RE: Contention:- General Manager himself becoming ineligible by operation of law to be appointed as arbitrator, is not eligible to nominate the arbitrator.

32. Stand of the learned counsel for the respondent is that by virtue of Section 12 (5) read with Schedule VII of the Act, General Manager himself is made ineligible to be appointed as an arbitrator and hence, he cannot nominate any other person to be an arbitrator. The essence of the submission is "that which cannot be done directly, may not be done indirectly". In support of his contention, the learned counsel for the respondent placed reliance upon *TRF Limited* v. *Energo Engineering Projects Limited* (2017) 8 SCC 377 wherein the Supreme Court held as under:—

> "54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth.

Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."

33. In *TRF Limited*, though the court observed that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator, in para (50), the Court has discussed about another situation where both the parties could nominate respective arbitrators of their choice and that it would get counter-balanced by equal power with the other party. In para (50) of *TRF Limited*, the Supreme court held as under:—

"50. …..We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto…." [Underlining added]

34. Considering the decision in *TRF Limited*, in *Perkins Eastman Architects DPC* v. *HSCC (India) Limited* 2019 SCC OnLine SC 1517, the Supreme Court observed that there are two categories of cases. The first, similar to the one dealt with in *TRF Limited* where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself; but is authorized to appoint any other person of his choice or discretion as an arbitrator. Observing that if in the first category, the Managing Director was found incompetent similar invalidity will always arise even in the second category of cases, in para (20) in *Perkins Eastman*, the Supreme Court held as under:

"20. ….If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in *TRF Limited*, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator."

35. After referring to para (50) of the decision in TRF Limited, in *Perkins Eastman*, the Supreme Court referred to a different situation where both parties have the advantage of nominating an arbitrator of their choice and observed that the advantage of one party in appointing an arbitrator would get counter-balanced by equal power with the other party. In para (21), it was held as under:—

"21. ….The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a

party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party.....”

36. As discussed earlier, after Arbitration and Conciliation (Amendment) Act, 2015, the Railway Board vide notification dated 16.11.2016 has amended and notified Clause 64 of the General Conditions of Contract. As per Clause 64(3)(a)(ii) [where applicability of Section 12(5) of the Act has been waived off], in a case not covered by Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below the rank of Junior Administrative Grade or two Railway Gazetted Officers not below the rank of Junior Administrative Grade and a retired Railway Officer retired not below the rank of Senior Administrative Grade Officer, as the arbitrators. For this purpose, the General Manager, Railway will send a panel of at least four names of Gazetted Railway Officers of one or more departments of the Railway within sixty days from the date when a written and valid demand for arbitration is received by the General Manager. The contractor will be asked to suggest to General Manager at least two names out of the panel for appointment as contractor's nominees within thirty days from the date of dispatch of the request from the Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will also simultaneously appoint balance number of arbitrators from the panel or from outside the panel duly indicating the “Presiding Officer” from amongst the three arbitrators so appointed. The General Manager shall complete the exercise of appointing the Arbitral Tribunal within thirty days from the date of the receipt of the names of contractor's nominees.

37. Clause 64(3)(b) of GCC deals with appointment of arbitrator where applicability of Section 12(5) of the Act has not been waived off. In terms of Clause 64(3)(b) of GCC, the Arbitral Tribunal shall consist of a panel of three retired Railway Officers retired not below the rank of Senior Administrative Grade Officers as the arbitrators. For this purpose, the Railway will send a panel of at least four names of retired Railway Officers empanelled to work as arbitrators indicating their retirement date to the contractor within sixty days from the date when a written and valid demand for arbitration is received by the General Manager. The contractor will be asked to suggest the General Manger at least two names out of the panel for appointment of contractor's nominees within thirty days from the date of dispatch of the request of the Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will simultaneously appoint the remaining arbitrators from the panel or from outside the panel, duly indicating the “Presiding Officer” from amongst the three arbitrators. The exercise of appointing Arbitral Tribunal shall be completed within thirty days from the receipt of names of contractor's nominees. Thus, the right of the General Manager in formation of Arbitral Tribunal is counter-balanced by respondent's power to choose any two from out of the four names and the General Manager shall appoint at least one out of them as the contractor's nominee.

38. In the present matter, after the respondent had sent the letter dated 27.07.2018 calling upon the appellant to constitute Arbitral Tribunal, the appellant sent the communication dated 24.09.2018 nominating the panel of serving officers of Junior Administrative Grade to act as arbitrators and asked the respondent to select any two from the list and communicate to the office of the General Manager. By the letter dated 26.09.2018, the respondent conveyed their disagreement in waiving the applicability of Section 12(5) of the Amendment Act, 2015. In response to the respondent's letter dated 26.09.2018, the appellant has sent a panel of four retired Railway Officers to act as arbitrators giving the details of those retired officers and requesting the respondent to select any two from the list and communicate to the office of the General Manager. Since the respondent has been given the power to select two names from out of the four names of the panel, the power of the appellant nominating its arbitrator gets counter-balanced by the power of choice given to the

respondent. Thus, the power of the General Manager to nominate the arbitrator is counter-balanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers. In view of the modified Clauses 64(3)(a)(ii) and 64(3)(b) of GCC, it cannot therefore be said that the General Manager has become ineligible to act as the arbitrator. We do not find any merit in the contrary contention of the respondent. The decision in *TRF Limited* is not applicable to the present case.

39. There is an express provision in the modified clauses of General Conditions of Contract, as per Clauses 64(3)(a)(ii) and 64(3)(b), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers [Clause 64(3)(a)(ii)] and three retired Railway Officers retired not below the rank of Senior Administrative Grade Officers [Clause 64(3)(b)]. When the agreement specifically provides for appointment of Arbitral Tribunal consisting of three arbitrators from out of the panel serving or retired Railway Officers, the appointment of the arbitrators should be in terms of the agreement as agreed by the parties. That being the conditions in the agreement between the parties and the General Conditions of the Contract, the High Court was not justified in appointing an independent sole arbitrator ignoring Clauses 64(3)(a)(ii) and 64(3)(b) of the General Conditions of Contract and the impugned orders cannot be sustained.

40. In the result, the impugned orders dated 03.01.2019 and 29.03.2019 passed by the High Court of Judicature at Allahabad in Arbitration Application No. 151 of 2018 are set aside and these appeals are allowed. The appellant is directed to send a fresh panel of four retired officers in terms of Clause 64(3)(b) of the General Conditions of Contract within a period of thirty days from today under intimation to the respondent-contractor. The respondent-contractor shall select two from the four suggested names and communicate to the appellant within thirty days from the date of receipt of the names of the nominees. Upon receipt of the communication from the respondent, the appellant shall constitute the Arbitral Tribunal in terms of Clause 64(3)(b) of the General Conditions of Contract within thirty days from the date of the receipt of the communication from the respondent. Parties to bear their respective costs.

ITEM NO.6 Court 3 (Video Conferencing) SECTION XVI

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (C) No(s). 12670/2020

(Arising out of impugned final judgment and order dated 12-03-2020 in AP No. 732/2018 passed by the High Court At Calcutta)

UNION OF INDIA Petitioner(s)

VERSUS

M/S TANTIA CONSTRUCTIONS LIMITED Respondent(s)

(FOR ADMISSION and I.R. and IA No.108662/2020-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT)

Date : 11-01-2021 This petition was called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN
HON'BLE MR. JUSTICE NAVIN SINHA
HON'BLE MR. JUSTICE K.M. JOSEPH

For Petitioner(s) **Mr. K.M. Natarj, ASG**
Mr. Sharath Nambiar, Adv
Mr. Uday P Yadav, Adv.
Mr. Raj Bahadur Yadav, AOR

For Respondent(s) **Mr. Soumya Chakraborty,Sr. Adv.**
Mr. Raghunath Ghose, Adv.
Mr. Santanu Ghosh Adv.
Mr. Nikhil Jain, AOR

UPON hearing the counsel the Court made the following
O R D E R

Having heard Mr. K.M. Nataraj, learned ASG for sometime, it is clear that on the facts of this case, the judgment of the High Court cannot be faulted with. Accordingly, the Special Leave Petition is dismissed. However, reliance has been placed upon a recent three-Judge Bench decision of this Court delivered on 17.12.2019 in *Central Organisation for Railway Electrification* vs. *M/s ECI-SPIC-SMO-MCML (JV) A Joint Venture Company*, 2019 SCC OnLine

1635. We have perused the aforesaid judgment and *prima facie* disagree with it for the basic reason that once the appointing authority itself is incapacitated from referring the matter to arbitration, it does not then follow that notwithstanding this yet appointments may be valid depending on the facts of the case.

We therefore request the Hon'ble Chief Justice to constitute a larger Bench to look into the correctness of this judgment.

Pending application stands disposed of.

(R. NATARAJAN)
ASTT. REGISTRAR-cum-PS

(NISHA TRIPATHI)
BRANCH OFFICER