

11th February, 2020

CHALLENGE TO APPOINTMENT OF AN ARBITRATOR

1. IOCL vs. Raja Transport, (2009) 8 SCC 520, Relevant Paras 13,14,30-39

- If the party with open eyes enters into a contract with a government department of PSU containing a clause that the directors/ secretaries shall be the arbitrator he cannot turn around subsequently and challenge the appointment of the arbitrator.
- The named arbitrator is an employee of the company is not ipso facto ground to raise a presumption of bias or partiality or lack of independence on his part.
- There can be a justifiable apprehension to impartiality if he was dealing with the subject matter himself.
- Where the named arbitrator being a secretary or director had nothing to do with the subject matter of the contract becomes a named arbitrator such appointment is valid
- Government Companies should reconsider their policy providing for employee arbitrators

A Copy of the judgment attached hereto at **page no. 2 to 21.**

2. TRF Limited vs. Energo Engineering, 2017 8 SCC 377, Relevant Paras 27-34, 41-53

- If the Managing Director as an arbitrator is interested in the outcome of the dispute he cannot be eligible to be an arbitrator
- Once an arbitrator becomes ineligible to be an arbitrator in dispute he cannot nominate another arbitrator
- The Court followed the principle of "Quit facit per alium facit per se" i.e. what cannot be done directly cannot be done indirectly.

A Copy of the judgment attached hereto at **page no. 22 to 50.**

3. Perkins Eastman Architects vs. HSCC India Ltd., 2019 SCC Online 1517, Relevant Paras 18-26

- If the CMD could not be an arbitrator he could nominate someone else as an arbitrator
- The Court would decide on the basis whether CMD was interested in the outcome to the arbitration.

A Copy of the judgment attached hereto at **page no. 51 to 66.**

4. Bharat Broadbands Network Limited vs. United Telecoms Limited, (2019) 5 SCC 719, Relevant Paras 15-22

- If the arbitrator becomes ineligible he cannot nominate another arbitrator. However the parties may by an express agreement in writing waive the applicability of Section 12(5) of the Arbitration Act.
- In the present case there was no express agreement in writing and the challenge to appointment of an arbitrator could not be waived under Section 4 of the Arbitration Act

A Copy of the judgment attached hereto at **page no. 67 to 84.**

5. HRD vs. GAIL, (2018) SCC 719, Relevant Paras 12-29

- Challenge to appointment of the two arbitrators in the present case

- Ground for challenge of one of the arbitrator was that he had given legal opinion in one of the unrelated matters'
- The Court held that in case of providing legal opinion to attract items of Seventh Schedule the advice should be "regular" and the opinion should be "qua the dispute at hand"
- Ground for challenge for the other arbitrator was that the present arbitrator was an arbitrator in the previous rounds of arbitration in the same dispute
- The Court held that in case of involvement in a previous arbitration between the same parties would not, by itself, render him ineligible to be an arbitrator in a subsequent arbitration.
- What is required is that the involvement should be in the very dispute contained in the present arbitration.

A Copy of the judgment attached hereto at **page no. 85 to 113.**

6. Voestalpine vs. DMRC, (2017)4SCC 665, Relevant Paras 18, 21-30

- The panel of arbitrators suggested by DMRC i.e. respondent in the present case were government employees or ex government employees.
- The Supreme Court held that the mere fact that the panel had government employees will not make the arbitrators ineligible.
- Bias or likelihood of bias could not be attributed simply on the ground that the suggested panel of arbitrators served the government.

A Copy of the judgment attached hereto at **page no. 114 to 140.**

7. Antrix Corporation vs. Devas Multimedia, (2014) 11 SCC 560, Relevant Paras 27-35

- Once an arbitrator has been appointed in accordance with the arbitration agreement and conveyed to the other party, a separate application for appointment of arbitrator is not applicable

A Copy of the judgment attached hereto at **page no. 141 to 154.**

8. Pricol Limited vs. Johnson Controls Enterprise Limited, (2015)4SCC 177, Relevant Paras 10-11

- Ambiguity in the arbitration clause with regard to rules of appointment of an arbitrator.
- The Court held reasonable construction of arbitration clause needs to be carried out to interpret and make the appointment.

A Copy of the judgment attached hereto at **page no. 155 to 159.**

9. Walter Bau vs. Municipal Corporation of Greater Bombay, (2015)3SCC 800, Relevant Paras 9-10

- If the appointment procedure of the arbitrator is not in compliance with the arbitration agreement then the appointment procedure may on the face of it may seem valid but the Court can interfere with the same and it has to be in accordance Section 11 of the Arbitration Act

A Copy of the judgment attached hereto at **page no. 160 to 166.**

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(BEFORE R.V. RAVEENDRAN AND D.K. JAIN, JJ.)

INDIAN OIL CORPORATION LIMITED
AND OTHERS

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.. Appellants;

Versus

RAJA TRANSPORT PRIVATE LIMITED

.. Respondent.

Civil Appeal No. 5760 of 2009[†], decided on August 24, 2009

A. Arbitration and Conciliation Act, 1996 — Ss. 11(6) & (8), 12, 18, 2(1)(b) and 7 — Appointment of arbitrator — Provision for Secretaries/Directors of Government/Statutory corporation/Public sector undertakings or their nominees acting as arbitrator in terms of arbitration clause — Validity and binding effect — Part of arbitration clause if can be denied to be binding — Such arbitration clause, held, valid and binding on the parties — Case law discussed — A party cannot refuse to be bound by any part of the agreement unless such part is impossible of performance or is void for repugnancy to the Act and is severable from the rest of the agreement — Power under S. 11(8) has to be used keeping in view the terms of the arbitration clause — Unless the named arbitrator was the controlling or dealing authority in regard to the subject contract or was a direct subordinate of the officer whose decision was the subject-matter of the dispute, the mere fact that he was an employee of one of the parties, held, not ipso facto a ground to raise a presumption of bias, partiality or lack of independence or impartiality on his part — Contract and Specific Relief — Freedom of contract — Contract Act, 1872 — Ss. 10, 37 and 36 — Administrative Law — Natural Justice — Bias/Nemo debet esse judex in propria sua causa — Presumption against bias — Public Sector — Public sector undertakings/PSUs — Appointment of arbitrator

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B. Arbitration and Conciliation Act, 1996 — S. 2(1)(a) — Arbitration, what is — Held, it is a binding voluntary alternative dispute resolution process by a private forum chosen by the parties

C. Arbitration and Conciliation Act, 1996 — Ss. 11(6) & (8), 2(1)(b), 7, 12, 18 and 34(2) — Policy of Governments/statutory authorities/public sector undertakings to provide for arbitration by employee arbitrators — Desirability of reconsideration of — While upholding the validity of such arbitration clause, desirability of reconsideration of such policy emphasised — Public Sector — Public sector undertakings/PSUs — Appointment of arbitrator

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Allowing the respondent's application under Section 11(6), the Chief Justice of the High Court appointed a retired High Court Judge as the sole arbitrator on the ground that: (i) the Director (Marketing) of the appellant PSU, being its employee, should be presumed not to act independently or impartially, and (ii) after receiving the respondent's notice, the appellant had neither referred the matter to its Director (Marketing) nor did it take any step for the appointment of the arbitrator, and thus it failed to act as required under the agreed procedure. The appellant then filed the present appeal by special leave.

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[†] Arising out of SLP (C) No. 26906 of 2008. From the Judgment and Order dated 26-9-2008 of the High Court of Uttarakhand at Nainital in Arbitration Application No. 2 of 2006

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a The respondents opposed the appeal on the ground that in view of the emphasis on the independence and impartiality of the arbitrator in Sections 11(8), 12(1) & (3) and 18 of the Act and having regard to the basic principle of natural justice that no man should be judge in his own cause, any arbitration agreement to the extent it nominated an officer of one of the parties as arbitrator, would be invalid and unenforceable.

The Supreme Court formulated the following questions:

b (i) Whether the Chief Justice was justified in assuming that when an employee of one of the parties to the dispute is appointed as an arbitrator, he will not act independently or impartially?

(ii) In what circumstances, can the Chief Justice or his designate ignore the appointment procedure or the named arbitrator in the arbitration agreement, to appoint an arbitrator of his choice?

c (iii) Whether the respondent herein had taken necessary steps for appointment of an arbitrator in terms of the agreement, and had the appellants failed to act in terms of the agreed procedure, by not referring the dispute to its Director (Marketing) for arbitration?

Allowing the appeal, the Supreme Court

Held :

d Arbitration is a binding voluntary alternative dispute resolution process by a private forum chosen by the parties. If a party, with open eyes and full knowledge and comprehension of the relevant provision enters into a contract with a Government/statutory corporation/public sector undertaking containing an arbitration agreement providing that one of its Secretaries/Directors shall be the arbitrator, he cannot subsequently turn around and contend that he is agreeable for settlement of the disputes by arbitration, but not by the named arbitrator who is an employee of the other party. (Para 13)

e No party can say he will be bound by only one part of the agreement and not the other part, unless such other part is impossible of performance or is void being contrary to the provisions of the Act, and is severable from the remaining part of the agreement. A party to the contract cannot claim the benefit of arbitration under the arbitration clause, but ignore the appointment procedure relating to the named arbitrator contained in the arbitration clause. (Para 14)

f It is now well settled by a series of decisions that arbitration agreements in government contracts providing that an employee of the Department (usually a high official unconnected with the work or the contract) will be the arbitrator, are neither void nor unenforceable. All the decisions proceed on the basis that when senior officers of Government/statutory corporations/public sector undertakings are appointed as arbitrators, they will function independently and impartially, even though they are employees of such institutions/organisations.

(Paras 15 and 29)

g *Executive Engineer v. Gangaram Chhapolia*, (1984) 3 SCC 627; *Eckersley v. Mersey Docks and Harbour Board*, (1894) 2 QB 667 : (1891-94) All ER Rep 1130 (CA); *Secy. to Govt., Transport Deptt. v. Munuswamy Mudaliar*, 1988 Supp SCC 651; *S. Rajan v. State of Kerala*, (1992) 3 SCC 608; *Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd.*, (1996) 1 SCC 54; *Union of India v. M.P. Gupta*, (2004) 10 SCC 504; *Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.*, (2007) 5 SCC 304, *relied on*

h *International Airports Authority of India v. K.D. Bali*, (1988) 2 SCC 360, *cited*

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Nothing in Sections 11, 12, 18 or other provisions of the Act suggests that any provision in an arbitration agreement naming the arbitrator will be invalid if such named arbitrator is an employee of one of the parties to the arbitration agreement. Sub-section (8) gives the discretion to the Chief Justice/his designate to choose an arbitrator suited to meet the requirements of a particular case. The said power is in no way intended to nullify a specific term of arbitration agreement naming a particular person as arbitrator. The power under Section 11(8) is intended to be used keeping in view the terms of the arbitration agreement. (Paras 30, 32 and 33)

The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject-matter of the dispute. (Para 34)

Where however the named arbitrator though a senior officer of the Government/statutory body/government company, had nothing to do with the execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer(s) (usually Heads of Department or equivalent) of a Government/statutory corporation/public sector undertaking, not associated with the contract, are considered to be independent and impartial and are not barred from functioning as arbitrators merely because their employer is a party to the contract. (Para 35)

The position may be different where the person named as the arbitrator is an employee of a company or body or individual other than the State and its instrumentalities. In such cases, if any circumstance exists to create a reasonable apprehension about the impartiality or independence of the agreed or named arbitrator, then the court has the discretion not to appoint such a person. (Para 36)

Subject to the said clarifications, it is held that a person being an employee of one of the parties (which is the State or its instrumentality) cannot *per se* be a bar to his acting as an arbitrator. Accordingly, the answer to the first question is that the learned Chief Justice was not justified in his assumption of bias. (Para 37)

However, it is a ground reality that contractors in their anxiety to secure contracts from Government/statutory bodies/public sector undertakings, agree to arbitration clauses providing for employee arbitrators. But when subsequently disputes arise, they balk at the idea of arbitration by such employee arbitrators and tend to litigate to secure an “independent” arbitrator. It will be appropriate if Governments/statutory authorities/public sector undertaking reconsider their policy providing for arbitration by employee arbitrators in deference to the specific provisions of the new Act reiterating the need for independence and impartiality in arbitrators. A general shift may in future be necessary for understanding the word “independent” as referring to someone not connected with either party. That may improve the credibility of arbitration as an alternative dispute resolution process. (Paras 38 and 39)

D. Arbitration and Conciliation Act, 1996 — Ss. 11(6) & (8), 12, 34(2)(a)(v) — Appointment of arbitrator under S. 11(6) — Provision in arbitration clause for reference to a named arbitrator (named by designation or an individual's name) — When can be ignored — Held, such a provision, should normally be given effect to — Only where there is material to create a reasonable apprehension that the named person is not likely to act independently or impartially or he is not available, can an independent arbitrator be appointed in accordance with S. 11(8) after recording reasons — Emphasised, that referring the disputes to the named arbitrator shall be the rule — Ignoring the named arbitrator/Arbitral Tribunal and nominating an independent arbitrator shall be the exception to the rule, to be resorted to for valid reasons — However, where arbitration clause refers to a person not by designation but by name, then his non-availability would be fatal to the arbitration agreement itself

[Paras 44 to 47 and 48(iv) to (vii)]

E. Arbitration and Conciliation Act, 1996 — Ss. 11(6) & (8), 12, 34(2)(a)(v), 2(1)(b) and 7 — Appointment of arbitrator — Provision in arbitration clause seeking to exclude power of C.J. and his designate to appoint a suitable person under S. 11(8) as arbitrator — Legality — Condition in arbitration clause that no person other than that designated therein should act as arbitrator, held, contrary to the Act and therefore, liable to be ignored

(Para 46)

F. Arbitration and Conciliation Act, 1996 — Ss. 11(6), (4) & (5) and (8) — Appointment of arbitrator — Scope of S. 11(6) vis-à-vis S. 11(4) & (5), laid down in detail — Extent to which agreement prescribed appointment procedure to be followed by C.J. or his designate — Unlike in cases falling under Ss. 11(4) and 11(5), held, there is no time-bound requirement for the other party to act for appointing, or agreeing on, an arbitrator in cases falling under S. 11(6) — Therefore, where appointment procedure has been agreed upon and there is failure of action as postulated in Ss. 11(6)(a), (b) or (c) within the time-limit prescribed by the arbitration agreement, or in the absence of any prescribed time-limit, within a reasonable time, the arbitration-seeking party can file a petition under S. 11(6) — C.J. or his designate would then endeavour to give effect to the appointment procedure prescribed in arbitration clause — Only if there exist circumstances raising justifiable doubts as to independence and impartiality of the person nominated in arbitration clause or otherwise warranting appointment of an independent arbitrator by ignoring the prescribed procedure, C.J. or his designate can, for recorded reasons, appoint someone else as arbitrator

[Paras 48(iv) to (vii) and 45]

Held :

g If the arbitration agreement provides for arbitration by a named arbitrator, the courts should normally give effect to the provisions of the arbitration agreement. But, where there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the arbitrator is not likely to act independently or impartially, or if the named person is not available, then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure of referring the dispute to the named arbitrator, appoint an independent arbitrator in accordance with Section 11(8) of the Act. In other words, referring the disputes to the named arbitrator shall be the rule. Ignoring

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the named arbitrator/Arbitral Tribunal and nominating an independent arbitrator shall be the exception to the rule, to be resorted for valid reasons. (Para 45)

Northern Railway Admn. v. Patel Engg. Co. Ltd., (2008) 10 SCC 240 : (2008) 11 Scale 500, followed a

Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd., (2007) 5 SCC 304; *Union of India v. Bharat Battery Mfg. Co. (P) Ltd.*, (2007) 7 SCC 684, considered

G. Arbitration and Conciliation Act, 1996 — Ss. 11(6) and (8) — Appointment of arbitrator — Provision in arbitration clause for reference of disputes to the person designated, if on facts followed by arbitration-seeking party (respondent) and defied by the other party (appellant) so as to justify appointment of an independent arbitrator — Dispute arising but respondent, instead of seeking arbitration, pursuing remedy of suit which culminating in court's direction to the parties to refer dispute to arbitrator as per arbitration clause within time specified — Respondent, instead of referring dispute to the designated person, or calling upon appellant to do so, issuing notice to appellant to agree upon an independent arbitrator — In such circumstances, held, respondent and not the appellant failed to act in terms of the procedure contained in arbitration clause — Notice issued by the respondent, being contrary to provisions of arbitration clause, could not be said to be a step taken for invoking arbitration in terms of arbitration clause — Therefore, non-compliance by appellant, with such notice did not entitle C.J. to appoint an independent arbitrator at instance of respondent — Hence, person designated in arbitration clause appointed as arbitrator b
(Paras 49 to 58) c
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H. Civil Procedure Code, 1908 — S. 96 — Merger — Where appellate court upheld trial court's direction to the parties to refer dispute to arbitration within time specified but added a rider that the reference should be as per the arbitration clause, held, trial court's order stood merged with the order of appellate court — Practice and Procedure — Merger e

(Paras 50 and 51)

I. Arbitration and Conciliation Act, 1996 — S. 34(2)(v) — Legislative intent behind, held, is that the parties should abide by the terms of the arbitration clause f

(Para 44)

H-D/43565/C

Advocates who appeared in this case :

H.K. Puri, S.K. Puri, V.M. Chauhan and Ms Priya Puri, Advocates, for the Appellants; Sunil Kumar, Senior Advocate (Atul Kumar, Ms Sweety Singh and Himanshu Shekhar, Advocates) for the Respondent.

Chronological list of cases cited

on page(s)

1. (2008) 10 SCC 240 : (2008) 11 Scale 500, *Northern Railway Admn. v. Patel Engg. Co. Ltd.* 534f, 535f g
2. (2007) 7 SCC 684, *Union of India v. Bharat Battery Mfg. Co. (P) Ltd.* 534d-e, 534e-f
3. (2007) 5 SCC 304, *Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.* 531b, 531c-d, 532b-c, 534c, 534e-f
4. (2004) 10 SCC 504, *Union of India v. M.P. Gupta* 531a, 532b-c
5. (1996) 1 SCC 54, *Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd.* 530e-f
6. (1992) 3 SCC 608, *S. Rajan v. State of Kerala* 530b h
7. (1988) 2 SCC 360, *International Airports Authority of India v. K.D. Bali* 529g-h

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8. 1988 Supp SCC 651, *Secy. to Govt., Transport Deptt. v. Munuswamy Mudaliar* 529c-d, 529e
- a 9. (1984) 3 SCC 627, *Executive Engineer v. Gangaram Chhapolia* 528d, 528e
10. (1894) 2 QB 667 : (1891-94) All ER Rep 1130 (CA), *Eckersley v. Mersey Docks and Harbour Board* 529a

The Judgment of the Court was delivered by

b **R.V. RAVEENDRAN, J.**— Leave granted. This appeal by special leave is filed against the order dated 26-9-2008 of the learned Chief Justice of the Uttaranchal High Court, in a petition filed by the respondent herein under Section 11(6) of the Arbitration and Conciliation Act, 1996 (“the Act”, for short), whereby he appointed a retired Judge as the sole arbitrator to adjudicate upon the disputes between the parties.

c 2. Under an agreement dated 28-2-2005, the appellant appointed the respondent as its dealer for retail sale of petroleum products. Clause 69 of the said agreement provided for settlement of disputes by arbitration. The said clause reads thus:

d “69. Any dispute or a difference of any nature whatsoever or regarding any right, liability, act, omission or account of any of the parties hereto arising out of or in relation to this agreement *shall be referred to the sole arbitration of the Director, Marketing of the Corporation or of some officer of the Corporation who may be nominated by the Director, Marketing.* The dealer will not be entitled to raise any objection to any such arbitrator on the ground that the arbitrator is an officer of the contract relates or that in the course of his duties or differences (*sic*). In the event of the arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason the Director, Marketing as aforesaid at the time of such transfer, vacation of office or inability to act, shall designate another person to act as the arbitrator in accordance with the terms of the agreement. Such person shall be entitled to proceed with the reference from the point at which it was left by his predecessor. *It is also a term of this contract that no person other than the Director, Marketing or a person nominated by such Director, Marketing of the Corporation as aforesaid shall act as arbitrator hereunder.* The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to the agreement, subject to the provisions of the Arbitration Act, 1940 or any statutory modification of re-enactment thereof and the Rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause.” (emphasis supplied)

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h 3. By a letter dated 6-8-2005, the appellant terminated the dealership of the respondent on the recommendation of its Vigilance Department. The respondent filed Suit No. 43 of 2005 in the Court of the Civil Judge, Junior Division, Rishikesh, Dehradun for a declaration that the order of the termination of dealership dated 6-8-2005 was illegal and void and for a permanent injunction restraining the appellant from stopping supply of petroleum products to its retail outlet. In the said suit, the appellant filed an

application under Section 8 of the Act read with Order 7 Rule 11 of the Civil Procedure Code, praying that the suit be rejected and the matter be referred to arbitration in terms of Clause 69 of the agreement. a

4. The learned Civil Judge, by an order dated 16-11-2005 allowed the said application filed by the appellant directing the parties to refer the matter to arbitration within two months, with a further direction that the appellant shall not stop supplies to the respondent for a period of two months. Both the appellant and the respondent challenged the order dated 16-11-2005. b

5. The respondent filed Civil Appeal No. 96 of 2005 being aggrieved by the restriction of supply for only two months from 16-11-2005. The appellant filed Civil Appeal No. 214 of 2005, being aggrieved by the direction to continue the supply for a period of two months from 16-11-2005. The respondent also filed an application under Section 9 of the Act seeking an interim injunction against the appellant. b

6. The two appeals and the application under Section 9 of the Act were disposed of by a common order dated 20-1-2006 by the learned District Judge, Dehradun. He dismissed both the appeals but allowed the application under Section 9 of the Act and restrained the appellant herein from interrupting the supply of petroleum products to the respondent for a period of two months, and directed the parties to refer the matter to arbitration as per the agreement within the said period of two months. c
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7. When the said appeals were pending, the respondent issued a notice dated 4-1-2006 through its counsel to the appellant, referring to the appellant's insistence that only its Director (Marketing) or an officer nominated by him could act as the arbitrator, in pursuance of the order of the Civil Judge dated 16-11-2005. The respondent alleged that it did not expect fair treatment or justice, if the Director (Marketing) or any other employee of the appellant was appointed as the arbitrator, and that therefore any such appointment would be prejudicial to its interest. e

8. The respondent contended that any provision enabling one of the parties or his employee to act as an arbitrator was contrary to the fundamental principle of natural justice that no person can be a judge in his own cause. The respondent therefore called upon the appellant by the said notice dated 4-1-2006, to fix a meeting at Dehradun between the officers of the appellant and the respondent within seven days so as to mutually agree upon an independent arbitrator. f

9. The appellant submits that the said request of the respondent, apart from being contrary to the arbitration agreement, was also contrary to the subsequent order dated 20-1-2006 which directed that the disputes should be referred to the arbitrator as *per the agreement* and therefore, it did not agree to the said request for an outside arbitrator. g

10. In this background, the respondent filed an application (Arbitration Application No. 2 of 2006) under Section 11(6) of the Act in March 2006 before the Chief Justice of the Uttaranchal High Court praying for the h

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appointment of an independent arbitrator to decide the dispute relating to the validity of the termination of the dealership, contending as follows:

a “That a dispute between the parties has arisen and by notice dated 4-1-2006, the applicant served the respondent a notice calling upon them to appoint an independent arbitrator, but in spite of expiry of reasonable time, no independent arbitrator has been appointed.”

The said petition was resisted by the appellant by contending that an arbitrator can be appointed only in terms of Clause 69 of the agreement.

b 11. The learned Chief Justice, after hearing the parties allowed the application by the impugned order dated 26-9-2008 and appointed a retired High Court Judge as the sole arbitrator to decide the dispute. The learned Chief Justice assigned the following two reasons to appoint a retired Judge as the arbitrator, instead of the person named in the arbitration agreement:

c (i) The Director (Marketing) of the appellant, being its employee, should be presumed not to act independently or impartially.

d (ii) The respondent had taken steps in accordance with the agreed appointment procedure contained in the arbitration agreement and the directions of the civil court, by issuing a notice dated 4-1-2006 calling upon the appellant to appoint an arbitrator. After the receipt of the notice dated 4-1-2006, the appellant had to refer the matter for arbitration to its Director, Marketing, but it did not do so. Nor did it take any step for the appointment of the arbitrator. By not referring the matter to arbitration to its own Director, despite receipt of the notice dated 4-1-2006, the appellant had failed to act as required under the agreed procedure.

e 12. The said order of the Chief Justice is challenged by the appellant. On the rival contentions urged by the parties, the following questions arise for our consideration:

(i) Whether the learned Chief Justice was justified in assuming that when an employee of one of the parties to the dispute is appointed as an arbitrator, he will not act independently or impartially?

f (ii) In what circumstances, the Chief Justice or his designate can ignore the appointment procedure or the named arbitrator in the arbitration agreement, to appoint an arbitrator of his choice?

(iii) Whether the respondent herein had taken necessary steps for the appointment of an arbitrator in terms of the agreement, and the appellant had failed to act in terms of the agreed procedure, by not referring the dispute to its Director (Marketing) for arbitration?

g *Re: Question (i)*

h 13. Arbitration is a binding voluntary alternative dispute resolution process by a private forum chosen by the parties. It is quite common for Governments, statutory corporations and public sector undertakings while entering into contracts, to provide for settlement of disputes by arbitration, and further provide that the arbitrator will be one of its senior officers. If a party, with open eyes and full knowledge and comprehension of the said provision enters into a contract with a Government/statutory corporation/

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public sector undertaking containing an arbitration agreement providing that one of its Secretaries/Directors shall be the arbitrator, he cannot subsequently turn around and contend that he is agreeable for settlement of the disputes by arbitration, but not by the named arbitrator who is an employee of the other party. a

14. No party can say he will be bound by only one part of the agreement and not the other part, unless such other part is impossible of performance or is void being contrary to the provisions of the Act, and such part is severable from the remaining part of the agreement. The arbitration clause is a package which may provide for what disputes are arbitrable, at what stage the disputes are arbitrable, who should be the arbitrator, what should be the venue, what law would govern the parties, etc. A party to the contract cannot claim the benefit of arbitration under the arbitration clause, but ignore the appointment procedure relating to the named arbitrator contained in the arbitration clause. b

15. It is now well settled by a series of decisions of this Court that arbitration agreements in government contracts providing that an employee of the Department (usually a high official unconnected with the work or the contract) will be the arbitrator, are neither void nor unenforceable. We may refer to a few decisions on this aspect. c

16. In *Executive Engineer v. Gangaram Chhapolia*¹ this Court was considering the validity of the appointment of the arbitrator where the arbitration required that the disputes shall be referred to the sole arbitration of a Superintending Engineer of the Public Works Department unconnected with the work at any stage nominated by the Chief Engineer concerned. d

17. This Court in *Gangaram case*¹ held: (SCC pp. 631-32, para 9)

“9. ... The use of the expression ‘Superintending Engineer, State Public Works Department’ in Clause 23 qualified by the restrictive words ‘unconnected with the work’ clearly manifests an intention of the parties that all questions and disputes arising out of a works contract shall be referred to the sole arbitration of a Superintending Engineer of the department concerned. From the very nature of things, a dispute arising out of a works contract relating to the Department of Irrigation has to be referred to a Superintending Engineer, Irrigation as he is an expert on the subject and it cannot obviously be referred to a Superintending Engineer, Building & Roads. The only limitation on the power of the Chief Engineer under Clause 23 was that he had to appoint a ‘Superintending Engineer unconnected with the work’ i.e. unconnected with the works contract in relation to which the dispute has arisen. The learned Subordinate Judge was obviously wrong in assuming that since D. Sahu, Superintending Engineer, Irrigation was subordinate to the Chief Engineer, he was not competent to act as an arbitrator or since he was a Superintending Engineer, Irrigation, he could not adjudicate upon the dispute between the parties. The impugned order passed by the learned Subordinate Judge is accordingly set aside.” e f g h

1 (1984) 3 SCC 627

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18. In *Eckersley v. Mersey Docks and Harbour Board*² it was held: (QB p. 667)

a “The rule which applies to a Judge or other person holding judicial office—namely, that he ought not to hear cases in which he might be suspected of a bias in favour of one of the parties—does not apply to an arbitrator, named in a contract, to whom both the parties have agreed to refer disputes which may arise between them under it. In order to justify the court in saying that such an arbitrator is disqualified from acting, b circumstances must be shewn to exist which establish, at least, a probability that he will in fact be biased in favour of one of the parties in giving his decision.

c Where, however, in a contract for the execution of works, the arbitrator selected by the parties is the servant of one of them, he is not disqualified by the mere fact that under the terms of the submission he may have to decide disputes involving the question whether he has himself acted with due skill and competence in advising his employers in respect of the carrying out of the contract.”

d 19. In *Secy. to Govt., Transport Deptt. v. Munuswamy Mudaliar*³ the contract between the respondent and the State Government contained an arbitration clause providing that the Superintending Engineer will be the arbitrator. Disputes arising in respect of cancellation of the contract by the Department were referred to the said arbitrator. An application under Section 5 of the Arbitration Act, 1940 was filed by the contractor for removal of the arbitrator on the ground of apprehended bias on the part of the arbitrator as he was an employee of the State Government and was subordinate of the Chief Engineer who took the decision to cancel the contract.

e 20. This Court negated the said contention and held in *Munuswamy case*³: (SCC pp. 654-55, paras 11 & 13)

f “11. ... When the parties entered into the contract, the parties knew the terms of the contract including arbitration clause. The parties knew the scheme and the fact that the Chief Engineer is superior and the Superintending Engineer is subordinate to the Chief Engineer of the particular circle. In spite of that the parties agreed and entered into arbitration ... Unless there is allegation against the named arbitrator either against his honesty or capacity or mala fides or interest in the subject-matter or reasonable apprehension of the bias, a named and agreed arbitrator cannot and should not be removed in exercise of a discretion vested in the Court under Section 5 of the Act.

g * * *

13. This Court in *International Airports Authority of India v. K.D. Bali*⁴ held that there must be reasonable evidence to satisfy that there was a real likelihood of bias. Vague suspicions of whimsical, capricious and

h 2 (1894) 2 QB 667 : (1891-94) All ER Rep 1130 (CA)

3 1988 Supp SCC 651

4 (1988) 2 SCC 360

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unreasonable people should not be made the standard to regulate normal human conduct. In this country in numerous contracts with the Government, clauses requiring the Superintending Engineer or some official of the Government to be the arbitrator are there. It cannot be said that the Superintending Engineer, as such, cannot be entrusted with the work of arbitration and that an apprehension, simpliciter in the mind of the contractor without any tangible ground, would be a justification for removal.”

21. In *S. Rajan v. State of Kerala*⁵ this Court held: (SCC pp. 614-15, para 12)

“12. ... Clause (3) of the agreement ... says that ‘the arbitrator for fulfilling the duties set forth in the arbitration clause of the Standard Preliminary Specification shall be the Superintending Engineer, Buildings and Roads Circle, Trivandrum’. Thus, this is a case where the agreement itself specifies and names the arbitrator. ... *In such a situation, it was obligatory upon the learned Subordinate Judge, in case he was satisfied that the dispute ought to be referred to the arbitrator, to refer the dispute to the arbitrator specified in the agreement. It was not open to him to ignore the said clause of the agreement and to appoint another person as an arbitrator.* (emphasis supplied) Only if the arbitrator specified and named in the agreement refuses or fails to act does the court get the jurisdiction to appoint another person or persons as the arbitrator. This is the clear purport of sub-section (4). It says that the reference *shall* (emphasis in original) be to the arbitrator appointed by the parties. Such agreed appointment may be contained in the agreement itself or may be expressed separately. To repeat, only in cases where the agreement does not specify the arbitrator and the parties cannot also agree upon an arbitrator, does the court get the jurisdiction to appoint an arbitrator.”

22. In *Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd.*⁶ this Court held: (SCC p. 60, para 17)

“17. ... Shri Desai submits that Respondent 3 may not be required to arbitrate inasmuch as he being an appointee of the Chairman and Managing Director of the appellant himself, the respondents’ case may not be fairly examined. He prays that any retired High Court Judge may be appointed as an arbitrator by us. We have not felt inclined to accept this submission, because arbitration clause states categorically that the difference/dispute shall be referred ‘to an arbitrator appointed by the Chairman and Managing Director of IPDL’ (Indian Drugs and Pharmaceuticals Limited) who is the appellant. This provision in the arbitration clause cannot be given a go-by merely at the askance of the respondent unless he challenged its binding nature in an appropriate proceeding which he did not do.”

⁵ (1992) 3 SCC 608

⁶ (1996) 1 SCC 54

h

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23. In *Union of India v. M.P. Gupta*⁷ this Court was considering an arbitration agreement which provided for the appointment of two gazetted railway officers as arbitrators. But a learned Single Judge of the High Court while allowing an application under Section 20 of the Arbitration Act, 1940, appointed a retired Judge as the sole arbitrator and a Division Bench affirmed the same. Reversing the said decision, this Court held that having regard to the express provision in the arbitration agreement that two gazetted railways officers shall be the arbitrators, a retired Judge could not be appointed as the sole arbitrator.

24. In *Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.*⁸ this Court considered a somewhat similar clause of another petroleum corporation which also provided that the arbitration will be by its Director (Marketing) or some other officer nominated by the Director (Marketing). The contractor expressed an apprehension about the independence and impartiality of the named arbitrator and prayed for appointment of a retired Judge as the arbitrator in his application under Section 11(6) of the Act.

25. This Court in *Ace Pipeline case*⁸ held: (SCC p. 316, para 21)

“21. In the present case, in fact the appellant’s demand was to get some retired Judge of the Supreme Court to be appointed as arbitrator on the ground that if any person nominated in the arbitration clause is appointed, then it may suffer from bias or the arbitrator may not be impartial or independent in taking decision. Once a party has entered into an agreement with eyes wide open it cannot wriggle out of the situation [by contending] that if any person of the respondent BPCL is appointed as arbitrator he will not be impartial or objective. However, if the appellant feels that the arbitrator has not acted independently or impartially, or he has suffered from any bias, it will always be open to the party to make an application under Section 34 of the Act to set aside the award on the ground that the arbitrator acted with bias or malice in law or fact.”

26. The learned counsel for the respondent attempted to distinguish the said decisions. He submitted that except the last two decisions, all others were rendered with reference to the provisions of the Arbitration Act, 1940, whose provisions were different from the provisions of the Arbitration and Conciliation Act, 1996. It was also submitted that the last two decisions merely followed the legal position enunciated with reference to the old Act, without considering the provisions under the new Act.

27. The learned counsel contended that the provisions of the Arbitration and Conciliation Act, 1996, in regard to the appointment of arbitrators, are materially different from the provisions of the old Act. It was submitted that several provisions of the new Act lay stress upon the independence and impartiality of the arbitrator. Reference was invited to sub-section (8) of Section 11, sub-sections (1) and (3) of Section 12 and Section 18 of the Act.

⁷ (2004) 10 SCC 504

⁸ (2007) 5 SCC 304

28. It is contended by the respondent that in view of the emphasis on the independence and impartiality of an arbitrator in the new Act and having regard to the basic principle of natural justice that no man should be judge in his own cause, any arbitration agreement to the extent it nominates an officer of one of the parties as the arbitrator, would be invalid and unenforceable. a

29. While the provisions relating to independence and impartiality are more explicit in the new Act, it does not mean that the old Act (the Arbitration Act, 1940) enabled persons with bias to act as arbitrators. What was implicit under the old Act is made explicit in the new Act in regard to impartiality, independence and freedom from bias. The decisions under the old Act on this issue are therefore not irrelevant when considering the provisions of the new Act. At all events, *M.P. Gupta*⁷ and *Ace Pipeline*⁸ are cases under the new Act. All the decisions proceed on the basis that when senior officers of Government/statutory corporations/public sector undertakings are appointed as arbitrators, they will function independently and impartially, even though they are employees of such institutions/organisations. b

30. We find no bar under the new Act, for an arbitration agreement providing for an employee of a Government/statutory corporation/public sector undertaking (which is a party to the contract), acting as an arbitrator. Section 11(8) of the Act requires the Chief Justice or his designate, in appointing an arbitrator, to have due regard to: c

“11. (8)(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.”

31. Section 12(1) requires an arbitrator, when approached in connection with his possible appointment, to disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Section 12(3) enables the arbitrator being challenged if d

(i) the circumstances give rise to justifiable doubts as to his independence or impartiality, or

(ii) he does not possess the qualifications agreed to by the parties. e

32. Section 18 requires the arbitrator to treat the parties with equality (that is to say without bias) and give each party full opportunity to present his case. Nothing in Sections 11, 12, 18 or other provisions of the Act suggests that any provision in an arbitration agreement, naming the arbitrator will be invalid if such named arbitrator is an employee of one of the parties to the arbitration agreement. f

33. Sub-section (2) of Section 11 provides that parties are free to agree upon a procedure for appointment of arbitrator(s). Sub-section (6) provides that where a party fails to act, as required under the procedure prescribed, the g

⁷ *Union of India v. M.P. Gupta*, (2004) 10 SCC 504

⁸ *Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.*, (2007) 5 SCC 304 h

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Chief Justice or his designate can take necessary measures. Sub-section (8) gives the discretion to the Chief Justice/his designate to choose an arbitrator suited to meet the requirements of a particular case. The said power is in no way intended to nullify a specific term of arbitration agreement naming a particular person as arbitrator. The power under sub-section (8) is intended to be used keeping in view the terms of the arbitration agreement.

a **34.** The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other Department) to the officer whose decision is the subject-matter of the dispute.

c **35.** Where however the named arbitrator though a senior officer of the Government/statutory body/government company, had nothing to do with the execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer(s) (usually Heads of Department or equivalent) of a Government/statutory corporation/public sector undertaking, *d* not associated with the contract, are considered to be independent and impartial and are not barred from functioning as arbitrators merely because their employer is a party to the contract.

e **36.** The position may be different where the person named as the arbitrator is an employee of a company or body or individual other than the State and its instrumentalities. For example, if the Director of a private company (which is a party to the arbitration agreement), is named as the arbitrator, there may be a valid and reasonable apprehension of bias in view of his position and interest, and he may be unsuitable to act as an arbitrator in an arbitration involving his company. If any circumstance exists to create a reasonable apprehension about the impartiality or independence of the agreed or named arbitrator, then the court has the discretion not to appoint such a *f* person.

37. Subject to the said clarifications, we hold that a person being an employee of one of the parties (which is the State or its instrumentality) cannot *per se* be a bar to his acting as an arbitrator. Accordingly, the answer to the first question is that the learned Chief Justice was not justified in his assumption of bias.

g **38.** Before parting from this issue, we may however refer to a ground reality. Contractors in their anxiety to secure contracts from Government/statutory bodies/public sector undertakings, agree to arbitration clauses providing for employee arbitrators. But when subsequently disputes arise, they baulk at the idea of arbitration by such employee arbitrators and tend to litigate to secure an “independent” arbitrator. The number of litigations *h* seeking appointment of independent arbitrator bears testimony to this vexed problem.

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39. It will be appropriate if Governments/statutory authorities/public sector undertaking reconsider their policy providing for arbitration by employee arbitrators in deference to the specific provisions of the new Act reiterating the need for independence and impartiality in arbitrators. A general shift may in future be necessary for understanding the word “independent” as referring to someone not connected with either party. That may improve the credibility of arbitration as an alternative dispute resolution process. Be that as it may. a

Re: Question (ii) b

40. Where the arbitration agreement names or designates the arbitrator, the question whether the Chief Justice or his designate could appoint any other person as the arbitrator, has been considered by this Court in several decisions.

41. In *Ace Pipeline Contracts (P) Ltd.*⁸, a two-Judge Bench of this Court held that where the appointing authority does not appoint an arbitrator after receipt of request from the other party, a direction can be issued under Section 11(6) to the authority concerned to appoint an arbitrator as far as possible as per the arbitration clause. It was held that normally the court should adhere to the terms of the arbitration agreement except in exceptional cases for reasons to be recorded or where both the parties agree for a common name. c

42. In *Union of India v. Bharat Battery Mfg. Co. (P) Ltd.*⁹ another two-Judge Bench of this Court held that once the notice period provided for under the arbitration clause for appointment of an arbitrator elapses and the aggrieved party files an application under Section 11(6) of the Act, the right of the other party to appoint an arbitrator in terms of the arbitration agreement stands extinguished. d

43. The divergent views expressed in *Ace Pipeline*⁸ and *Bharat Battery*⁹ were sought to be harmonised by a three-Judge Bench of this Court in *Northern Railway Admn. v. Patel Engg. Co. Ltd.*¹⁰ After examining the scope of sub-sections (6) and (8) of Section 11, this Court held: (*Northern Railway Administration case*¹⁰, SCC pp. 245-46, paras 11-14) e

“11. The crucial expression in sub-section (6) is ‘a party may request the Chief Justice or any person or institution designated by him to take the necessary measure’ (emphasis in original). This expression has to be read along with requirement in sub-section (8) that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have ‘due regard’ to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitration. f

⁸ *Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.*, (2007) 5 SCC 304 g

⁹ (2007) 7 SCC 684

¹⁰ (2008) 10 SCC 240 : (2008) 11 Scale 500 h

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a 12. A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The Court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations. (emphasis supplied)

b 13. The expression 'due regard' means that proper attention to several circumstances have 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.

c 14. ... It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of sub-section (8) of Section 11 have to be kept in view, considered and taken into account."

d 44. While considering the question whether the arbitral procedure prescribed in the agreement for reference to a named arbitrator, can be ignored, it is also necessary to keep in view clause (v) of sub-section (2) of Section 34 of the Act which provides that an arbitral award may be set aside by the court if the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties (unless such agreement was in conflict with any provision of Part I of the Act from which parties cannot derogate, or, failing such agreement, was not in accordance with the provisions of Part I of the Act). The legislative intent is that the parties should abide by the terms of the arbitration agreement.

e 45. If the arbitration agreement provides for arbitration by a named arbitrator, the courts should normally give effect to the provisions of the arbitration agreement. But as clarified by *Northern Railway Admn.*¹⁰, where there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the arbitrator is not likely to act independently or impartially, or if the named person is not available, then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure of referring the dispute to the named arbitrator, appoint an independent arbitrator in accordance with Section 11(8) of the Act. In other words, referring the disputes to the named arbitrator shall be the rule. The Chief Justice or his designate will have to merely reiterate the arbitration agreement by referring the parties to the named arbitrator or named Arbitral Tribunal. Ignoring the named arbitrator/Arbitral Tribunal and nominating an independent arbitrator shall be the exception to the rule, to be resorted for valid reasons.

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

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46. This takes us to the effect of the condition in the arbitration agreement that “it is also a term of this contract that no person other than the Director, Marketing or a person nominated by such Director, Marketing of the Corporation as aforesaid shall act as the arbitrator”. Such a condition interferes with the power of the Chief Justice and his designate under Section 11(8) of the Act to appoint a suitable person as arbitrator in appropriate cases. Therefore, the said portion of the arbitration clause is liable to be ignored as being contrary to the Act. a

47. But the position will be different where the arbitration agreement names an individual (as contrasted from someone referred to by designation) as the arbitrator. An example is an arbitration clause in a partnership deed naming a person enjoying the mutual confidence and respect of all the parties, as the arbitrator. If such an arbitration agreement provides that there shall be no arbitration if such person is no more or not available, the person named being inextricably linked to the very provision for arbitration, the non-availability of the named arbitrator may extinguish the very arbitration agreement. Be that as it may. b
c

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. d
e

(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. f

(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). g

(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 h

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a 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.

b (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 sub-section (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

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

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

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

d (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.*

e (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.

Re: Question (iii)

f 49. In the present case, the respondent approached the Chief Justice of the High Court by alleging that it had acted in terms of the agreed procedure under the arbitration agreement, and that the appellant had failed to act as required under the appointment procedure. Therefore, the respondent invoked the power of the Chief Justice under sub-section (6) of Section 11. In view of it, what falls for consideration is whether the appellant had failed to act as required under the appointment procedure. This presupposes that the respondent had called upon the appellant to act as required under the agreed appointment procedure. Let us examine whether the respondent had in fact called upon the appellant to act in accordance with the agreed procedure.

g 50. When the dispute arose, the respondent did not seek arbitration, but went to the civil court. It was the appellant who sought reference to arbitration in terms of the arbitration agreement. The order dated 16-11-2005 of the Civil Judge, Junior Division directing reference to arbitration within two months from 16-11-2005 was challenged by both the parties.

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51. The District Judge, Dehradun by its order dated 20-1-2006 directed the parties to refer the dispute to the arbitrator as per the agreement, within two months. Therefore, the order dated 16-11-2005 stood merged with the order of the District Judge dated 20-1-2006, which directed reference of the dispute to arbitration as per the agreement, within two months. But there was no direction by the court to appoint an independent arbitrator contrary to the terms of the arbitration agreement. a

52. In view of the order dated 20-1-2006, the respondent ought to have referred the dispute to the Director (Marketing) of the appellant within two months from 20-1-2006. It failed to do so. Therefore, it was the respondent who failed to act in terms of the agreed procedure and not the appellant. In fact, as the arbitrator was already identified, there was no need for the respondent to ask the appellant to act in accordance with the agreed procedure. On the other hand, the respondent ought to have directly referred the disputes to the Director (Marketing) of the appellant Corporation in terms of the arbitration agreement. b
c

53. We may now deal with the notice dated 4-1-2006 by which the respondent notified the appellant that it was not willing for appointment of an arbitrator in terms of the agreement and that both should therefore hold discussions to decide upon an independent arbitrator. The letter dated 4-1-2006 cannot be construed as a step taken by the respondent for invoking arbitration in terms of the arbitration agreement, as it is a demand in violation of the terms of the arbitration agreement. It required the appellant to agree upon an arbitrator, contrary to the provisions of the arbitration agreement. d

54. If the respondent wanted to invoke arbitration in terms of the arbitration agreement, it ought to have referred the disputes to the Director (Marketing) in terms of Section 69 of the contract agreement for arbitration. Alternatively, the respondent ought to have at least called upon the appellant, to refer the dispute to the Director (Marketing) for arbitration. In the absence of any such demand under Clause 69, it cannot be said that the respondent invoked the arbitration clause or took necessary steps for invoking arbitration in terms of the arbitration agreement. If the respondent had called upon the appellant to act in a manner contrary to the appointment procedure mentioned in the arbitration agreement, it cannot be said that the appellant failed to respond and act as required under the agreed procedure. e
f

55. As the letter dated 4-1-2006 could not be construed as a valid demand for arbitration, the finding of the learned Chief Justice that non-compliance with such request would enable the respondent to appoint an independent arbitrator, is clearly illegal. g

56. What is significant is that even subsequent to the order dated 20-1-2006 passed by the District Court, the respondent did not refer the disputes to the Director (Marketing) of the appellant nor called upon the appellant to refer to the disputes in terms of the arbitration agreement, nor withdraw its earlier letter dated 4-1-2006 demanding appointment of an independent arbitrator contrary to the agreed procedure under the arbitration agreement. h

57. In the circumstances, the third question is answered in the negative. Consequently, the learned Chief Justice erred in having proceeded on the basis that the respondent had performed its duty in terms of the arbitration agreement in seeking reference to arbitration and that the appellant had failed to act in the matter and therefore, there was justification for appointing an independent arbitrator.

58. The appellant is therefore entitled to succeed on both the points. The appeal is, therefore, allowed. The order dated 26-9-2008 of the High Court is set aside. The Director (Marketing) of the appellant Corporation is appointed as the sole arbitrator to decide the disputes between the parties.

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(BEFORE K.G. BALAKRISHNAN, C.J. AND R.V. RAVEENDRAN,
D.K. JAIN, P. SATHASIVAM AND J.M. PANCHAL, JJ.)

KARNAIL SINGH . . . Appellant;

Versus

STATE OF HARYANA . . . Respondent.

Criminal Appeals No. 36 of 2003[†] with No. 606 of 2004,
decided on July 29, 2009

A. Narcotic Drugs and Psychotropic Substances Act, 1985 — Ss. 42(1) and (2) — Statutory requirement of writing down and conveying information to superior officer prior to entry, search and seizure — Nature of compliance required — Literal compliance or substantial compliance — Effect of conflicting precedents i.e. *Abdul Rashid case*, (2000) 2 SCC 513 and *Sajan Abraham case*, (2001) 6 SCC 692, explained — Advent of cellular phones and wireless services and its usefulness to deal with emergent situations, considered — Effect of amendment of S. 42 w.e.f. 2-10-2001 relaxing the sending time interval from “forthwith” to “within seventy-two hours” from receiving information, considered

— Held, in special circumstances and emergent situations (when the officer is on the move), and recording of information is not practical prior to search and seizure, and would be detrimental to effectiveness of the search and seizure concerned, the requirement of writing down and conveying information to superior officer, held, may be postponed by a reasonable period which may even be after the search, entry and seizure — Both *Abdul Rashid case* and *Sajan Abraham case*, held, revolved on facts, and did not require literal compliance with Ss. 42(1) & (2) — Whether there is adequate or substantial compliance with S. 42 or not is a question of fact to be decided in each case — Lastly held, non-compliance with S. 42 may not vitiate the trial if it does not cause any prejudice to the accused — Therefore, matter remanded to be decided on facts in the light of observations made

[†] From the Judgment and Order dated 12-7-2002 of the High Court of Punjab and Haryana at Chandigarh in Crl. Appeal No. 305-SB of 1998

TRF LTD. v. ENERGO ENGG. PROJECTS LTD.

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

a

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

b

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

c

— 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

d

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

e

— 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

f

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

g

[†] 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

h

^{††} 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

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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.

- a** 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)

- c** ***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)

- d** *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

- e** *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

- f** 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

- g** 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

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

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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)

a

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

b

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)

c

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)

d

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

e

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)

f

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)

g

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

h

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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

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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.

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23.	(1975) 2 SCC 208, <i>Pratapchand Nopaji v. Kotrike Venkata Setty & Sons</i>	384e-f, 404b-c
24.	AIR 1963 SC 1503, <i>Roop Chand v. State of Punjab</i>	403g, 404b

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 Court¹, 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.

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

- 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 de hors 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:

² (2007) 8 SCC 705

³ (1975) 2 SCC 208

⁴ (2015) 3 SCC 800 : (2015) 2 SCC (Civ) 450

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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. a

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: b

“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. c

(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

(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

(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: f

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

5 (2014) 11 SCC 560 : (2014) 4 SCC (Civ) 147

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

6 (2015) 1 SCC 32 : (2015) 1 SCC (Civ) 1

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

a (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—

b (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.”

c 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—

d (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

e (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.

f *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—

g (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.

h

(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: a

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: b

“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): c

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).” d

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. e

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. f

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: g

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

* * *

a **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.”

b **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.

c * * *

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.

d **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
e 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.

f **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.
g 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
h 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) a

“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.” b

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. c

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) d

“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 e

7 (2008) 10 SCC 240
8 (2000) 8 SCC 151

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a 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.”

b 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:
c (*Datar Switchgears case*⁸, SCC p. 158, paras 19-21)

d “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
e 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
f 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.

g 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.

9 1998 SCC OnLine Bom 668 : (1999) 2 Bom CR 189

10 2000 SCC OnLine Del 196 : (2000) 2 Arb LR 190

h 11 1999 SCC OnLine AP 846 : (2000) 2 Arb LR 31

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

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

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) a

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.” b

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. c

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 d e f g h

12 (2013) 4 SCC 44 : (2013) 2 SCC (Civ) 457

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a 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 dismissed¹³ 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)

b “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,
c 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
d 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.

e 8. In this view of the matter, the impugned order dated 8-11-2006¹³ 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.”

f 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.

g 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

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

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

14 (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449

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

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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 expounded 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

15 (2006) 2 SCC 638

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

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

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

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a 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).

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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.

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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.

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14 *Deep Trading Co. v. Indian Oil Corpn.*, (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449
12 *Newton Engg. and Chemicals Ltd. v. Indian Oil Corpn. Ltd.*, (2013) 4 SCC 44 : (2013) 2 SCC (Civ) 457
16 (2007) 5 SCC 344

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

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

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a 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.”

b 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.

c 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)

d “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. ...”

e 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.

f 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?’ ”

g 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

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

h 5 *Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd.*, (2014) 11 SCC 560 : (2014) 4 SCC (Civ) 147
17 (2015) 4 SCC 177 : (2015) 2 SCC (Cri) 530

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

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.

18 (2014) 11 SCC 619 : (2014) 4 SCC (Civ) 206

19 (2005) 8 SCC 618

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

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a (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.

b (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.

c (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.

d 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.

e 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)

f “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

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

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

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

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,

20 (2013) 15 SCC 414 : (2014) 5 SCC (Civ) 302

21 (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689

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

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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* (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.”

b 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:

- c* “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.”

d 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.

e 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)

- f* “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.

g 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

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

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

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.

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

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

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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

²² (1998) 7 SCC 162
²³ AIR 1963 SC 1503

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

²⁴ (1997) 7 SCC 37

²³ AIR 1963 SC 1503

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

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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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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 Act¹ and under the Scheme² 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 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 from 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*² and *TRF Limited v. Energo Engineering Projects Limited*³ 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 severally 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.*⁵, 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*². 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*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 Awasi 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 *Voestapline*², 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)

"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 aforesaid 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*² 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.*¹² and came to hold that: (*Walter Bau AG case*³, 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."

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

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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.

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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

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(2019) 5 Supreme Court Cases 755

a (BEFORE ROHINTON FALI NARIMAN AND VINEET SARAN, JJ.)
BHARAT BROADBAND NETWORK LIMITED . . . Appellant;
Versus
UNITED TELECOMS LIMITED . . . Respondent.

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

c **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

d **— 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**

e **— 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)**

h [†] 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

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).

a 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?

b (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 :

c 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*

d 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)

f 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)

- a** 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)

- b** 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 of his 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)

- c** *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

e 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.

- f** **Chronological list of cases cited** **on page(s)**
1. (2018) 12 SCC 471 : (2018) 5 SCC (Civ) 401, *HRD Corpn. v. GAIL (India) Ltd.* 765c-d
 2. 2018 SCC OnLine SC 3276, *Bharat Broadband Network Ltd. v. United Telecoms Ltd.* 772d-e
 3. (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72, *TRF Ltd. v. Energo Engg. Projects Ltd.* 761a, 761e-f, 761f, 766e-f, 770b-c, 770c-d, 770e-f, 771d-e, 771e
 4. (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607, *Voestalpine Schienen GmbH v. DMRC Ltd.* 764f
 5. (2017) 1 SCC 487 : (2017) 1 SCC (Civ) 277, *All India Power Engineer Federation v. Sasan Power Ltd.* 772a
 6. 2017 SCC OnLine Del 11905, *Bharat Broadband Network Ltd. v. United Telecoms Ltd. (reversed)* 761d, 761f-g, 772d, 767e-f
 7. 2016 SCC OnLine Del 2532, *TRF Ltd. v. Energo Engg. Projects Ltd.* 767e-f

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8. (2014) 5 SCC 660 : (2014) 3 SCC (Civ) 304, *Vasu P. Shetty v. Hotel Vandana Palace* 772c
9. (2009) 2 SCC 337 : (2009) 1 SCC (Civ) 524, *BSNL v. Motorola (India) (P) Ltd.* 772c, 772c-d a

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: b

“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.” c

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 d e f g h

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

a

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.

b

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 22-11-2017², 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.

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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.

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7. Shri Sharad Yadav, learned Senior Advocate appearing on behalf of the respondent, has supported the reasoning of the impugned judgment² 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)

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1 (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72

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

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.

a

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).

b

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.

c

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

d

“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.

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* * *

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

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:

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“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.”

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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:

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

a (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 (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—

c (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

d (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.

e (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—

f (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.

g (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.

h **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. a

(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. b

(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. c

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. d

(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.” e

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) f

“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. g

* * *

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 h

7 (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607

a 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.”

c 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)

d “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

8 (2018) 12 SCC 471 : (2018) 5 SCC (Civ) 401

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.

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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.

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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.”

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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)

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“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

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

BHARAT BROADBAND NETWORK LTD. v.
UNITED TELECOMS LTD. (*Nariman, J.*)

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a 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
b 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. ...

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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
d 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
e 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 view⁹ expressed by the High Court is not sustainable and we say so.”

f 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
g 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,
h the Tribunal shall continue the proceedings and make an award. It is only post

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

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).

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a 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)

c 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.

d 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

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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

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

a 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:

b “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.”

c 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.

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

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

*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 judgment². 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 25-1-2018¹³, 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. 22-11-2017², 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.

10 (2017) 1 SCC 487 : (2017) 1 SCC (Civ) 277

11 (2014) 5 SCC 660 : (2014) 3 SCC (Civ) 304

12 (2009) 2 SCC 337 : (2009) 1 SCC (Civ) 524

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

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

HRD CORPN. v. GAIL (INDIA) LTD.

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(2018) 12 Supreme Court Cases 471

(BEFORE ROHINTON FALI NARIMAN AND SANJAY KISHAN KAUL, JJ.)

a HRD CORPORATION (MARCUS OIL AND CHEMICAL DIVISION) ... Appellant;

Versus

GAIL (INDIA) LIMITED (FORMERLY GAS AUTHORITY OF INDIA LIMITED) ... Respondent.

b Civil Appeals No. 11126 of 2017[†] with No. 11127 of 2017[‡], decided on August 31, 2017

c **A. Arbitration and Conciliation Act, 1996 — Ss. 12(5), 14(1)(a), 14(2) and Sch. VII Items 1, 2, 8 & 14 — Rendering of legal opinion to one of the parties by the arbitrator — Non-consideration of as a disqualification, when the same is a stand-alone act in an earlier unconnected matter — “Business relationship”, “professional relationship” and “relationship” — Connotations of, and relative scope, explained**

d — Contrasting a business relationship from a professional relationship, held, for ineligibility under Sch. VII Item 1, the arbitrator must, be an “advisor” insofar as it concerns the business of a party and a business relationship would not include legal advice given — Further, contrasting Sch. VII Item 1 from Items 2, 8 and 14 relating to advices not restricted to business but of any kind, held, that though the word “regularly” is missing from Sch. VII Items 1 and 2, some degree of regularity is connoted in both items — Therefore, the advice given under any of these items could not be one opinion given by a retired Judge on a professional basis at arm’s length — In the present case, held, since the arbitrator (Justice *L*) had only given a professional opinion to GAIL, which had no concern with the dispute at hand, he was not disqualified under Item 1

e **B. Arbitration and Conciliation Act, 1996 — Ss. 12(5), 14(1)(a), 14(2) and Sch. VII Item 16 and Sch. V Item 24 — Rendering an award in an earlier arbitration between the parties — Non-consideration of, as “previous involvement in the case” i.e. a disqualification under Item 16**

f — Held, for being ineligible under Item 16, the arbitrator has to have a previous involvement in the very dispute contained in the arbitration — Further, contrasting Item 16 with Item 24 of Sch. V, held, Item 16 cannot be read as including previous involvements in another arbitration on a related issue involving one of the parties as otherwise Item 24 will be rendered largely ineffective — Further, Item 16 refers to previous involvement in an advisory or other capacity in the very dispute, but not as arbitrator — In the present case, held, the fact that the arbitrator (Justice *D*) had already rendered an award in a previous arbitration between the parties would not, by itself, on the ground

g [†] Arising out of SLP (C) No. 20679 of 2017. Arising from the final impugned Judgment and Order in *HRD Corpn. v. GAIL (India) Ltd.*, 2017 SCC OnLine Del 8034 : (2017) 240 DLT 132 [Delhi High Court, OMP (T) (COMM.) No. 22 of 2017, dt. 24-4-2017]

h [‡] Arising out of SLP (C) No. 20675 of 2017

of reasonable likelihood of bias, render him ineligible to be an arbitrator in a subsequent arbitration

C. Arbitration and Conciliation Act, 1996 — Ss. 12(5), 14(1)(a), 14(2) and Sch. V Items 22 & 24 — Held, the disqualification contained in Items 22 and 24 is not absolute, as an arbitrator who has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties or an affiliate, may yet not be disqualified on his showing that he was independent and impartial on the earlier two occasions

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D. Arbitration and Conciliation Act, 1996 — S. 12 r/w S. 14 and Schs. V and VII — Impartiality and independence of arbitrators — How can be determined — Commonsensical approach — Relevance of, for such determination

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— Held, doubts as to impartiality and independence of an arbitrator are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision — Further, this test requires taking a broad commonsensical approach to the items stated in Schs. V and VII — This approach would, therefore, require a fair construction of the words used therein, neither tending to enlarge or restrict them unduly

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E. Arbitration and Conciliation Act, 1996 — Ss. 13, 14 & 34 and S. 12(5) r/w Sch. VII and Sch. V — Procedure to challenge appointment of an arbitrator in various eventualities, explained

— Held, in order to determine whether an arbitrator is de jure unable to perform his functions being ineligible by virtue of S. 12(5) r/w Sch. VII, it is not necessary to go to the Arbitral Tribunal under S. 13 — Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under S. 14(2) to the court to decide on the termination of his/her mandate on this ground — However, in a challenge where grounds stated in Sch. V are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts have to be determined under S. 13 — It is only after an award is made, that the party challenging the arbitrator's appointment on grounds contained in Sch. V may make an application for setting aside the arbitral award in accordance with S. 34 — In the present case, held challenge contained in Sch. V against the appointment of *D* and *L* can be gone into only after the Arbitral Tribunal has given an award

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F. Arbitration and Conciliation Act, 1996 — Ss. 12 to 14, Sch. V and Sch. VII — Eligibility/Disqualification, independence or impartiality of arbitrator — Changes brought about by 2016 Amendment Act, explained

The respondent, GAIL (India), issued a notice inviting tenders for supply of wax generated at GAIL's plant at Pata, Uttar Pradesh for a period of 20 years on an exclusive basis. The appellant successfully tendered for the said contract and

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a the parties entered into an agreement dated 1-4-1999. Disputes arose between the parties, the appellant claiming that GAIL had wrongfully withheld supplies of wax, as a result of which the appellant invoked the arbitration clause included in the agreement. Three earlier arbitrations had taken place between the parties.

b In respect of the period from 2016 to 2019, initially, the appellant nominated Justice K. Ramamoorthy as its arbitrator. However, he withdrew from the case on 14-12-2016 and Justice Mukul Mudgal was nominated as arbitrator in his place. The respondent appointed Justice Doabia, and Justice Doabia and Justice K. Ramamoorthy appointed Justice K.K. Lahoti to be the presiding arbitrator, before Justice K. Ramamoorthy withdrew from the case.

c Two applications were filed by the appellant under Section 12 of the Act, one seeking termination of the mandate of Justice Doabia and the other seeking termination of the mandate of Justice Lahoti. These two applications were heard and disposed of by an order dated 16-2-2017. Justice Lahoti, with whom Justice Doabia concurred, held that they were entitled to continue with the arbitration. Justice Mukul Mudgal, on the other hand, concurred in the appointment of Justice Lahoti but held that Justice Doabia's appointment was hit by certain clauses of the Fifth and Seventh Schedules to the Act and, therefore, that his mandate has terminated. As against this order, OMP No. 22 of 2017 was filed before a Single Judge of the Delhi High Court who then dismissed both the petitions.

d The appellant, inter alia, contended that since on a legal issue between GAIL and another public sector undertaking an opinion had been given by Justice Lahoti to GAIL in the year 2014, he would stand disqualified under Item 1 of the Seventh Schedule. According to the appellant, the appointment of Justice Lahoti attracted Items 1, 8 and 15 of the Seventh Schedule thereby making him ineligible to act as arbitrator. It was contended that Items 20 and 22 contained in the Fifth Schedule were also attracted to the facts of this case, thereby giving rise to justifiable doubts as to his independence or impartiality.

e It was further contended that if for any reason Justice Doabia's appointment was held to be bad, Justice Lahoti's appointment must follow as being bad as an ineligible arbitrator cannot appoint another arbitrator. It was also contended that Justice Doabia had previously rendered an award between the same parties in an earlier arbitration concerning the same disputes, but for an earlier period, he is hit by Item 16 of the Seventh Schedule, which states that the arbitrator should not have previous involvement "in the case".

The issues involved in this case were:

g (1) Whether giving an opinion to one of the parties to the arbitration, in an earlier unconnected matter, by the arbitrator, would be a disqualification under Item 1 of the Seventh Schedule?

(2) Whether rendering an award between the same parties in an earlier arbitration concerning the same disputes, would be a disqualification under Item 16 of the Seventh Schedule?

h

Answering in the negative, the Supreme Court

Held :

1. On challenge under the Fifth Schedule prior to rendering of award

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. (Para 12)

2. On disqualification under Item 1 of Seventh Schedule

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. (Para 14)

Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence and impartiality. The amended provision is

a 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. (Para 16)

b *Voestalpine Schienen GmbH v. DMRC Ltd.*, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607, *relied on*

Hashwani v. Jivraj, (2011) 1 WLR 1872 : 2011 UKSC 40; *Consorts Ury v. S.A. des Galeries Lafayette*, Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France), *cited*

c 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. (Para 17)

d The 246th Law Commission Report brought in amendments to the Act narrowing the grounds of challenge coterminous with seeing that independent, impartial and neutral arbitrators are appointed. Both Sections 34 and 48 have been brought back to the position of law contained where “public policy” will now include only two of the three things set out therein viz. “fundamental policy of Indian law” and “justice or morality”. The ground relating to “the interest of India” no longer obtains. “Justice or morality” has been tightened and is now to be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the Court. Section 28(3) has also been amended, making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one. (Para 18)

f *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705; *ONGC Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12; *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644; *Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204, *referred to and clarified*

g The items contained in the Schedules owe their origin to the IBA Guidelines, which are to be construed in the light of the general principles contained therein—that every arbitrator shall be impartial and independent of the parties at the time of accepting his/her appointment. Doubts as to the above are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision. This test requires taking a broad commonsensical approach to the items stated in the Fifth and Seventh Schedules. This approach would, therefore, require a fair construction of the words used therein, neither tending to enlarge or restrict them unduly. (Para 20)

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Justice Lahoti's appointment is challenged on the ground that the arbitrator has been an advisor to GAIL in another unconnected matter and, therefore, Justice Lahoti should be removed. In his disclosure statement made on 24-11-2016, Lahoti, J. had said:

"That on a legal issue between GAIL and another public sector undertaking, an opinion was given by me to GAIL, in the year 2014, but it has no concern with respect to the present matter. I am an arbitrator in a pending matter between M/s Pioneer Power Ltd. and GAIL (India) Ltd." (Para 21)

On reading Item 1 of the Seventh Schedule, it is clear that the item deals with "business relationships". The words "any other" show that the first part of Item 1 also confines "advisor" to a "business relationship". The arbitrator must, therefore, be an "advisor" insofar as it concerns the business of a party. Howsoever widely construed, it is very difficult to state that a professional relationship is equal to a business relationship, as, in its widest sense, it would include commercial relationships of all kinds, but would not include legal advice given. This becomes clear if it is read along with Items 2, 8, 14 and 15, the last item specifically dealing with "legal advice". Under Items 2, 8 and 14, advice given need not be advice relating to business but can be advice of any kind. The importance of contrasting Item 1 with Items 2, 8 and 14 is that the arbitrator should be a regular advisor under Items 2, 8 and 14 to one of the parties or the appointing party or an affiliate thereof, as the case may be. Though the word "regularly" is missing from Items 1 and 2, it is clear that the arbitrator, if he is an "advisor", in the sense of being a person who has a business relationship in Item 1, or is a person who "currently" advises a party or his affiliates in Item 2, connotes some degree of regularity in both items. The advice given under any of these items cannot possibly be one opinion given by a retired Judge on a professional basis at arm's length. Something more is required, which is the element of being connected in an advisory capacity with a party. Since Justice Lahoti has only given a professional opinion to GAIL, which has no concern with the present dispute, he is clearly not disqualified under Item 1. (Para 22)

3. On disqualification under Item 16 of Seventh Schedule

It is important to refer to the IBA Guidelines, which are the genesis of the items contained in the Seventh Schedule. Under the waivable Red List of the IBA Guidelines, Para 2.1.2 states:

"2.1.2. The arbitrator had a prior involvement in the dispute." (emphasis supplied)

(Para 23)

On reading the aforesaid guideline and reading the heading which appears with Item 16, namely, "Relationship of the arbitrator to the dispute", it is obvious that the arbitrator has to have a previous involvement in the very dispute contained in the present arbitration. Admittedly, Justice Doabia has no such involvement. Further, Item 16 must be read along with Items 22 and 24 of the Fifth Schedule. The disqualification contained in Items 22 and 24 is not absolute, as an arbitrator who has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties or an affiliate, may yet not be disqualified on

a his showing that he was independent and impartial on the earlier two occasions. Also, if he currently serves or has served within the past three years as arbitrator in another arbitration on a related issue, he may be disqualified under Item 24, which must then be contrasted with Item 16. Item 16 cannot be read as including previous involvements in another arbitration on a related issue involving one of the parties as otherwise Item 24 will be rendered largely ineffective. It must not be forgotten that Item 16 also appears in the Fifth Schedule and has, therefore, to be harmoniously read with Item 24. It has also been argued by the learned
b counsel appearing on behalf of the respondent that the expression “the arbitrator” in Item 16 cannot possibly mean “the arbitrator” acting as an arbitrator, but must mean that the proposed arbitrator is a person who has had previous involvement in the case in some other avatar. This is a sound argument as “the arbitrator” refers to the proposed arbitrator. This becomes clear, when contrasted with Items
c 22 and 24, where the arbitrator must have served “as arbitrator” before he can be disqualified. Obviously, Item 16 refers to previous involvement in an advisory or other capacity in the very dispute, but not as arbitrator. Appointment as an arbitrator is not a “business relationship” with the respondent under Item 1. Nor is the delivery of an award providing an expert “opinion” i.e. advice to a party covered by Item 15. (Para 24)

d An objection to the appointment of a member of a previous panel would not be sustained simply on the basis that the arbitrator had previously decided a particular issue in favour of one or other party. It equally follows that an arbitrator can properly be appointed at the outset in respect of a number of layers of coverage, even though he may then decide the dispute under one layer before hearing the case on another layer. (Para 25)

e *H. v. L.*, (2017) 1 WLR 2280 : 2017 EWHC 137, *approved*
Locabail (U.K.) Ltd. v. Bayfield Properties Ltd., 2000 QB 451 : (2000) 2 WLR 870 : (2000) 1 All ER 65 (CA); *Amec Capital Projects Ltd. v. Whitefriars City Estates Ltd.*, (2005) 1 All ER 723 (CA), *cited*

f There is no real possibility that Justice Doabia will not bring an open mind and objective judgment to bear on arguments made by the parties in the fourth arbitration, which may or may not differ from arguments made in the third arbitration. (Para 28)

Locabail (U.K.) Ltd. v. Bayfield Properties Ltd., 2000 QB 451 : (2000) 2 WLR 870 : (2000) 1 All ER 65 (CA), *distinguished*

Rustal Trading Ltd. v. Gill & Duffus S.A., (2000) 1 Lloyd’s Rep 14; *Argonaut Insurance Co. v. Republic Insurance Co.*, 2003 EWHC 547, *cited*

g Explanation 3 (*to the Seventh Schedule*) stands by itself and has to be applied as a relevant fact to be taken into account. It has no indirect bearing on any of the other items mentioned in the Seventh Schedule. (Para 31)

HRD Corpn. v. GAIL (India) Ltd., 2017 SCC OnLine Del 8034 : (2017) 240 DLT 132, *affirmed*

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Advocates who appeared in this case :

Shyam Divan and Gopal Jain, Senior Advocates (Bindu Saxena, Ms Aprajita Swarup, Ms Chimayee Chandra, Ms Krita Awasthi and Shailendra Swarup, Advocates) for the Appellant;

Ms Vanita Bhargava, Ajay Bhargava, Jeevan B. Panda and Abhisar Bairagi (for M/s Khaitan & Co.), Advocates, for the Respondent.

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

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5. (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12, *ONGC Ltd. v. Western Geco International Ltd.* 493d-e
6. (2011) 1 WLR 1872 : 2011 UKSC 40, *Hashwani v. Jivraj* 491g
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13. Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France), *Consorts Ury v. S.A. des Galeries Lafayette* 492a-b

The Judgment of the Court was delivered by

ROHINTON FALI NARIMAN, J.— Leave granted. The present appeals raise interesting questions relating to the applicability of Sections 12 and 14 of the Arbitration and Conciliation Act, 1996, in particular with respect to sub-section (5) of Section 12 added by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) (hereinafter referred to as “the 2016 Amendment Act”).

2. Briefly stated, the relevant facts necessary to decide this case are as follows. The respondent, GAIL (India), issued a notice inviting tenders for supply of wax generated at GAIL’s plant at Pata, Uttar Pradesh for a period of 20 years on an exclusive basis. The appellant successfully tendered for the said contract and the parties entered into an agreement dated 1-4-1999. Disputes arose between the parties, the appellant claiming that GAIL had wrongfully withheld supplies of wax, as a result of which the appellant invoked the arbitration clause included in the agreement.

3. Three earlier arbitrations have taken place between the parties. The present dispute arises from fourth such arbitration. For the period 2004-2007, an Arbitral Tribunal consisting of Justice A.B. Rohatgi (Presiding Arbitrator), Justice J.K. Mehra and Justice N.N. Goswamy published an award on 8-4-2006 in which they directed specific performance of the agreement dated 1-4-1999. This award was never challenged and has since become final.

4. For the period 2007-2010, a second arbitration was held consisting of the same panel as the first arbitration.

a 5. For the period 2010-2013, the same Arbitral Tribunal was constituted. However, while the proceedings were pending, Justice Goswamy expired and Justice T.S. Doabia was appointed in his place. Justice A.B. Rohatgi resigned on 17-2-2013 as the presiding arbitrator, as a result of which Justice S.S. Chadha was appointed to fill his vacancy. This third arbitration proceeding culminated into two separate awards, both dated 22-7-2015. The appellant has filed a petition under Section 34 of the Act assailing the said awards, which is pending before the Delhi High Court.

b 6. In respect of the period from 2016 to 2019, initially, the appellant nominated Justice K. Ramamoorthy as its arbitrator. However, he withdrew from the case on 14-12-2016 and Justice Mukul Mudgal was nominated as arbitrator in his place. The respondent appointed Justice Doabia, and Justice c Doabia and Justice K. Ramamoorthy appointed Justice K.K. Lahoti to be the presiding arbitrator, before Justice K. Ramamoorthy withdrew from the case. Two applications have been filed by the appellant under Section 12 of the Act, one seeking termination of the mandate of Justice Doabia and the other seeking termination of the mandate of Justice Lahoti. These two applications were heard and disposed of by an order dated 16-2-2017. Justice Lahoti, with whom Justice d Doabia concurred, held that they were entitled to continue with the arbitration. Justice Mukul Mudgal, on the other hand, concurred in the appointment of Justice Lahoti but held that Justice Doabia's appointment was hit by certain clauses of the Fifth and Seventh Schedules to the Act and, therefore, that his mandate has terminated. As against this order, OMP No. 22 of 2017 was filed before a Single Judge of the Delhi High Court who then dismissed¹ both the e petitions.

f 7. Shri Shyam Divan, learned Senior Advocate appearing in civil appeal arising out of SLP (C) No. 20679 of 2017 and Shri Gopal Jain, learned Senior Advocate, appearing in civil appeal arising out of SLP (C) No. 20675 of 2017 have assailed the judgment of the Single Judge. According to Shri Divan, the appointment of Justice Lahoti squarely attracted Items 1, 8 and 15 of the Seventh Schedule thereby making him ineligible to act as arbitrator. He also argued that Items 20 and 22 contained in the Fifth Schedule are also attracted to the facts of this case, thereby giving rise to justifiable doubts as to his independence or impartiality. He further argued that if for any reason Justice Doabia's appointment is held to be bad, Justice Lahoti's appointment must follow as being bad as an ineligible arbitrator cannot appoint another arbitrator. g He has argued before us that the 2016 Amendment Act, which substituted Section 12(1), read with the Fifth and Seventh Schedules and introduced Section 12(5), has to be read in the context of the grounds for challenge to awards being made narrower than they were under Section 34 of the Act. This being so, it is extremely important that the independence and impartiality of an arbitrator be squarely and unequivocally established, and for this purpose, the h

1 *HRD Corpn. v. GAIL (India) Ltd.*, 2017 SCC OnLine Del 8034 : (2017) 240 DLT 132

grounds contained in the Fifth and Seventh Schedules should be construed in a manner that heightens independence and impartiality. According to the learned counsel, once a Seventh Schedule challenge is presented before the Court, the arbitrator becomes ineligible and consequently becomes de jure unable to perform his functions under Section 14 of the Act. a

8. Shri Gopal Jain, learned Senior Advocate appearing in civil appeal arising from SLP (C) No. 20679 of 2017, argued that the object of the 2016 Amendment Act is to appoint neutral arbitrators who are independent and fair in their decision-making. According to the learned counsel, Justice Doabia was ineligible as he squarely fell within Items 1, 15 and 16 of the Seventh Schedule, the last Item 16 being contrasted with Explanation 3 thereof. According to him, Justice Doabia has not disclosed in writing circumstances which are likely to affect his ability to devote sufficient time to the arbitration and for this reason also, his appointment should be set aside. According to the learned counsel, once Justice Doabia's appointment falls, Justice Lahoti's appointment also falls. b c

9. Ms Vanita Bhargava, learned counsel appearing on behalf of the respondent, has argued, referring to various provisions of the Seventh Schedule, that neither Justice Doabia nor Justice Lahoti are ineligible to act as arbitrators. According to her, the list in the Fifth and Seventh Schedules is taken from the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, 2014 (hereinafter referred to as "the IBA Guidelines") and must be read in consonance therewith. Once that is done, it becomes plain that Item 16 would not apply to Justice Doabia for the simple reason that he should be an arbitrator who has had previous involvement in the very dispute at hand and not in an earlier arbitration. For this purpose, she contrasted Item 16 with Items 22 and 24 of the Fifth Schedule. She also argued that the point regarding non-disclosure on grounds contained in Section 12(1)(b) is an afterthought and has never been argued before either the Arbitral Tribunal or the Single Judge. According to her, the Single Judge¹ is right in holding that Justice Lahoti's appointment is not hit by Item 1 of the Seventh Schedule nor is Justice Doabia's appointment hit by Item 16 of the same Schedule, and the reasoning contained in the judgment being correct need not be interfered with. d e f

10. Having heard the learned counsel for both the sides, it is necessary to first set out the statutory scheme contained in Sections 12 to 14 of the Act. These sections read as under:

"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— g

(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 h

1 HRD Corpn. v. GAIL (India) Ltd., 2017 SCC OnLine Del 8034 : (2017) 240 DLT 132

or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

- a (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.

- b *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.

- c (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.

- d (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:

- e 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.

- f (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.

- g (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.

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(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. Under Section 12, it is clear that when a person is approached in connection with his possible appointment as an arbitrator, he has to make a disclosure in writing, in which he must state the existence of any direct or indirect present or past relationship or interest in any of the parties or in relation to the subject-matter in dispute, which is likely to give justifiable doubts as to his independence or impartiality. He is also to disclose whether he can devote sufficient time to the arbitration, in particular to be able to complete the entire arbitration within a period of 12 months. Such disclosure is to be made in a form specified in the Sixth Schedule, grounds stated in the Fifth Schedule being a guide in determining whether such circumstances exist. Unlike the scheme contained in the IBA Guidelines, where there is a Non-Waivable Red List, parties may, subsequent to disputes having arisen between them, waive the applicability of the items contained in the Seventh Schedule by an express agreement in writing. The Fifth, Sixth and Seventh Schedules are important for determination of the present disputes, and are set out with the corresponding provisions of the IBA Guidelines hereunder:

“THE FIFTH SCHEDULE

[See Section 12(1)(b)]

The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators:

<i>Fifth Schedule</i>	<i>Corresponding provision in the IBA Guidelines</i>
1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.	(Non-Waivable Red List) 1.1. There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration.



a	<p>2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.</p>	<p>(Waivable Red List) 2.3.1. The arbitrator currently represents or advises one of the parties, or an affiliate of one of the parties.</p>
b	<p>3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.</p>	<p>(Waivable Red List) 2.3.2. The arbitrator currently represents or advises the lawyer or law firm acting as counsel for one of the parties.</p>
c	<p>4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.</p>	<p>(Waivable Red List) 2.3.3. The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.</p>
d	<p>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.</p>	<p>(Waivable Red List) 2.3.4. The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence in an affiliate** of one of the parties, if the affiliate is directly involved in the matters in dispute in the arbitration.</p>
e	<p>6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.</p>	<p>(Waivable Red List) 2.3.5. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.</p>
f	<p>7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.</p>	<p>(Waivable Red List) 2.3.6. The arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties.</p>
g	<p>8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.</p>	<p>(Waivable Red List) 2.3.7. The arbitrator regularly advises one of the parties, or an affiliate of one of the parties, but neither the arbitrator nor his or her firm derives a significant financial income therefrom.</p>
h	<p>9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.</p>	<p>(Waivable Red List) 2.3.8. The arbitrator has a close family relationship with one of the parties, or with a manager, director or member of the supervisory board, or any person having a controlling influence in one of the parties, or an affiliate of one of the parties, or with a counsel representing a party.</p>
h	<p>10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.</p>	<p>(Waivable Red List) 2.3.9. A close family member of the arbitrator has a significant financial or</p>



	personal interest in one of the parties, or an affiliate of one of the parties.	
11. The arbitrator is a legal representative of an entity that is a party in the arbitration.	(Non-Waivable Red List) 1.1. There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration.	a
12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.	(Non-Waivable Red List) 1.2. The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration.	b
13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.	(Non-Waivable Red List) 1.3. The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case.	c
14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.	(Non-Waivable Red List) 1.4. The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom.	d
15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.	(Waivable Red List) 2.1.1. The arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties.	e
16. The arbitrator has previous involvement in the case.	(Waivable Red List) 2.1.2. The arbitrator had a prior involvement in the dispute.	
17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.	(Waivable Red List) 2.2.1. The arbitrator holds shares, either directly or indirectly, in one of the parties, or an affiliate of one of the parties, this party or an affiliate being privately held.	f
18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.	(Waivable Red List) 2.2.2. A close family member* of the arbitrator has a significant financial interest in the outcome of the dispute.	g
19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.	(Waivable Red List) 2.2.3. The arbitrator, or a close family member of the arbitrator, has a close relationship with a non-party who may be liable to recourse on the part of the unsuccessful party in the dispute.	h



a	<p>20. The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.</p>	<p>(Orange List) 3.1.1. The arbitrator has, within the past three years, served as counsel for one of the parties, or an affiliate of one of the parties, or has previously advised or been consulted by the party, or an affiliate of the party, making the appointment in an unrelated matter, but the arbitrator and the party, or the affiliate of the party, have no ongoing relationship.</p>
b	<p>21. The arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter.</p>	<p>(Orange List) 3.1.2. The arbitrator has, within the past three years, served as counsel against one of the parties, or an affiliate of one of the parties, in an unrelated matter.</p>
c	<p>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.</p>	<p>(Orange List) 3.1.3. 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.†</p>
d	<p>23. The arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.</p>	<p>(Orange List) 3.1.4. The arbitrator's law firm has, within the past three years, acted for or against one of the parties, or an affiliate of one of the parties, in an unrelated matter without the involvement of the arbitrator.</p>
e	<p>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.</p>	<p>(Orange List) 3.1.5. 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.</p>
f	<p>25. The arbitrator and another arbitrator are lawyers in the same law firm.</p>	<p>(Orange List) 3.3.1. The arbitrator and another arbitrator are lawyers in the same law firm.</p>
g	<p>26. The arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration.</p>	<p>(Orange List) 3.3.3. The arbitrator was, within the past three years, a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the arbitration.</p>
h	<p>27. A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties or an affiliate of one of the parties.</p>	<p>(Orange List) 3.3.4. A lawyer in the arbitrator's law firm is an arbitrator in another dispute</p>



	involving the same party or parties, or an affiliate of one of the parties.	
28. A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.	(Orange List) 3.3.5. A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.	a
29. The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.	(Orange List) 3.3.8. The arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm.	b
30. The arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties.	(Orange List) 3.4.1. The arbitrator's law firm is currently acting adversely to one of the parties, or an affiliate of one of the parties.	c
31. The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner.	(Orange List) 3.4.2. The arbitrator has been associated with a party, or an affiliate of one of the parties, in a professional capacity, such as a former employee or partner.	d
32. The arbitrator holds shares, either directly or indirectly, which by reason of number or denomination constitute a material holding in one of the parties or an affiliate of one of the parties that is publicly listed.	(Orange List) 3.5.1. The arbitrator holds shares, either directly or indirectly, that by reason of number or denomination constitute a material holding in one of the parties, or an affiliate of one of the parties, this party or affiliate being publicly listed.	e
33. The arbitrator holds a position in an arbitration institution with appointing authority over the dispute.	(Orange List) 3.5.3. The arbitrator holds a position with the appointing authority with respect to the dispute.	f
34. 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, where the affiliate is not directly involved in the matters in dispute in the arbitration.	(Orange List) 3.5.4. The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.	g
<i>Explanation 1.</i> —The term “close family member” refers to a spouse, sibling, child, parent or life partner.	<i>*Footnote 3.</i> —Throughout the Application Lists, the term “close family member” refers to a: spouse, sibling, child, parent or life partner, in addition to any other family member with whom a close relationship exists.	h



a	<i>Explanation 2.</i> —The term “affiliate” encompasses all companies in one group of companies including the parent company.	** <i>Footnote 4.</i> —Throughout the Application Lists, the term “affiliate” encompasses all companies in a group of companies, including the parent company.
b	<i>Explanation 3.</i> —For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.	† <i>Footnote 5.</i> —It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice.”
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“THE SIXTH SCHEDULE

[See Section 12(1)(b)]

Name:

Contact Details:

d Prior Experience (Including Experience with Arbitrations):

Number of ongoing arbitrations:

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):

e 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).

“THE SEVENTH SCHEDULE

[See Section 12(5)]

f ***Arbitrator’s relationship with the parties or counsel***

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

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

g 3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.

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.

h 6. The arbitrator’s law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom. a

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties. b

11. The arbitrator is a legal representative of an entity that is a party 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.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case. c

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties. d

16. The arbitrator has previous involvement in the case.

Arbitrator's direct or indirect interest in the dispute

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held. e

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.—The term “close family member” refers to a spouse, sibling, child, parent or life partner. f

Explanation 2.—The term “affiliate” encompasses all companies in one group of companies including the parent company.

Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently, to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above. g

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 h

a 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.

13. Confining ourselves to ineligibility, it is important to note that the Law Commission by its 246th Report of August 2014 had this to say in relation to the amendments made to Section 12 and the insertion of the Fifth and Seventh Schedules:

f “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

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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 sub-set 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)

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.

15. General Principle 1 reads as follows:

“IBA Guidelines on Conflicts of Interest in International Arbitration

(1) General Principle

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.”

On “conflicts of interest”, Guidelines laid down are as follows:

“(2) *Conflicts of Interest*

a (a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.

b (b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator’s impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard 4.

c (c) Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

(d) Justifiable doubts necessarily exist as to the arbitrator’s impartiality or independence in any of the situations described in the Non-Waivable Red List.”

d 16. In *Voestalpine Schienen GmbH v. DMRC Ltd.*², in the context of a Section 11 application made under the Act, this Court had occasion to delve into the independence and impartiality of arbitrators and the Guidelines that are laid down in the Fifth and Seventh Schedules. This Court stated: (SCC pp. 687-89, paras 20-23 & 25)

e “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 non-impartiality 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*³ in the following words: (WLR p. 1889, para 45)

g ‘45. ... the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties

h 2 (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607
3 (2011) 1 WLR 1872 : 2011 UKSC 40

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.’

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21. Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in *Consorts Ury*⁴, 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.’

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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.

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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.

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24. * * *

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

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4 (*Fouchard, Gaillard, Goldman on International Commercial Arbitration* 562 (Emmanuel Gaillard & John Savage, Eds., 1999) (quoting Cour de cassation [Cass.] [Supreme Court for judicial matters] *Consorts Ury v. S.A. des Galeries Lafayette*, Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France))).

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a 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.”

b 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.

c 18. Shri Divan is right in drawing our attention to the fact that the 246th Law Commission Report brought in amendments to the Act narrowing the grounds of challenge coterminous with seeing that independent, impartial and neutral arbitrators are appointed and that, therefore, we must be careful in preserving such independence, impartiality and neutrality of arbitrators. In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in *ONGC Ltd. v. Saw Pipes Ltd.*⁵ has been expressly done away with. So has the judgment in *ONGC Ltd. v. Western Geco International Ltd.*⁶ Both Sections 34 and 48 have been brought back to the position of law contained in *Renusagar Power Co. Ltd. v. General Electric Co.*⁷ where “public policy” will now include only two of the three things set out therein viz. “fundamental policy of Indian law” and “justice or morality”. The ground relating to “the interest of India” no longer obtains. “Fundamental policy of Indian law” is now to be understood as laid down in *Renusagar*⁷. “Justice or morality” has been tightened and is now to be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the Court as understood in *Associate Builders v. DDA*⁸. Section 28(3) has also been amended to bring it in line with the judgment of this Court in *Associate Builders*⁸, making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one.

f 19. Thus, an award rendered in an international commercial arbitration—whether in India or abroad—is subject to the same tests qua setting aside under Section 34 or enforcement under Section 48, as the case may be. g The only difference is that in an arbitral award governed by Part I, arising out of an arbitration other than an international commercial arbitration, one more ground of challenge is available viz. patent illegality appearing on the face of

h 5 (2003) 5 SCC 705
6 (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12
7 1994 Supp (1) SCC 644
8 (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204

the award. The ground of patent illegality would not be established, if there is merely an erroneous application of the law or a reappraisal of evidence.

20. However, to accede to Shri Divan's submission that because the grounds for challenge have been narrowed as aforesaid, we must construe the items in the Fifth and Seventh Schedules in the most expansive manner, so that the remotest likelihood of bias gets removed, is not an acceptable way of interpreting the Schedules. As has been pointed out by us hereinabove, the items contained in the Schedules owe their origin to the IBA Guidelines, which are to be construed in the light of the general principles contained therein—that every arbitrator shall be impartial and independent of the parties at the time of accepting his/her appointment. Doubts as to the above are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision. This test requires taking a broad commonsensical approach to the items stated in the Fifth and Seventh Schedules. This approach would, therefore, require a fair construction of the words used therein, neither tending to enlarge or restrict them unduly. It is with these prefatory remarks that we proceed to deal with the arguments of both sides in construing the language of the Seventh Schedule.

21. Coming to the challenge in the present case, Justice Lahoti's appointment is challenged on the ground that the arbitrator has been an advisor to GAIL in another unconnected matter and, therefore, Justice Lahoti should be removed. In his disclosure statement made on 24-11-2016, Lahoti, J. had said:

“That on a legal issue between GAIL and another public sector undertaking, an opinion was given by me to GAIL, in the year 2014, but it has no concern with respect to the present matter. I am an arbitrator in a pending matter between M/s Pioneer Power Ltd. and GAIL (India) Limited.”

22. Shri Divan has pressed before us that since on a legal issue between GAIL and another public sector undertaking an opinion had been given by Justice Lahoti to GAIL in the year 2014, which had no concern with respect to the present matter, he would stand disqualified under Item 1 of the Seventh Schedule. Items 8 and 15 were also faintly argued as interdicting Justice Lahoti's appointment. Item 8 would have no application as it is nobody's case that Justice Lahoti “regularly” advises the respondent. And Item 15 cannot apply as no legal opinion qua the dispute at hand was ever given. On reading Item 1 of the Seventh Schedule, it is clear that the item deals with “business relationships”. The words “any *other*” show that the first part of Item 1 also confines “advisor” to a “business relationship”. The arbitrator must, therefore, be an “advisor” insofar as it concerns the business of a party. Howsoever widely construed, it is very difficult to state that a professional relationship is equal to a business relationship, as, in its widest sense, it would include commercial relationships of all kinds, but would not include legal advice given. This becomes clear if it is read along with Items 2, 8, 14 and 15, the last item

- a specifically dealing with “legal advice”. Under Items 2, 8 and 14, advice given need not be advice relating to business but can be advice of any kind. The importance of contrasting Item 1 with Items 2, 8 and 14 is that the arbitrator should be a regular advisor under Items 2, 8 and 14 to one of the parties or the appointing party or an affiliate thereof, as the case may be. Though the word “regularly” is missing from Items 1 and 2, it is clear that the arbitrator, if he is an “advisor”, in the sense of being a person who has a business *relationship* in Item 1, or is a person who “currently” advises a party or his affiliates in Item 2,
- b connotes some degree of regularity in both items. The advice given under any of these items cannot possibly be one opinion given by a retired Judge on a professional basis at arm’s length. Something more is required, which is the element of being connected in an advisory capacity with a party. Since Justice Lahoti has only given a professional opinion to GAIL, which has no concern with the present dispute, he is clearly not disqualified under Item 1.
- c **23.** Coming to Justice Doabia’s appointment, it has been vehemently argued that since Justice Doabia has previously rendered an award between the same parties in an earlier arbitration concerning the same disputes, but for an earlier period, he is hit by Item 16 of the Seventh Schedule, which states that the arbitrator should not have previous involvement “in the case”. From the italicised words, it was sought to be argued that “the case” is an ongoing
- d one, and a previous arbitration award delivered by Justice Doabia between the same parties and arising out of the same agreement would incapacitate his appointment in the present case. We are afraid we are unable to agree with this contention. In this context, it is important to refer to the IBA Guidelines, which are the genesis of the items contained in the Seventh Schedule. Under the waivable Red List of the IBA Guidelines, Para 2.1.2 states:
- e “2.1.2. The arbitrator had a prior involvement in *the dispute.*” (emphasis supplied)
- f **24.** On reading the aforesaid guideline and reading the heading which appears with Item 16, namely, “Relationship of the arbitrator to the dispute”, it is obvious that the arbitrator has to have a previous involvement in the very dispute contained in the present arbitration. Admittedly, Justice Doabia has no such involvement. Further, Item 16 must be read along with Items 22 and 24 of the Fifth Schedule. The disqualification contained in Items 22 and 24 is not absolute, as an arbitrator who has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties or an affiliate, may yet not be disqualified on his showing that he was independent
- g and impartial on the earlier two occasions. Also, if he currently serves or has served within the past three years as arbitrator in another arbitration on a related issue, he may be disqualified under Item 24, which must then be contrasted with Item 16. Item 16 cannot be read as including previous involvements in another arbitration on a related issue involving one of the parties as otherwise Item 24 will be rendered largely ineffective. It must not be forgotten that Item 16 also
- h appears in the Fifth Schedule and has, therefore, to be harmoniously read with Item 24. It has also been argued by the learned counsel appearing on behalf of

the respondent that the expression “the arbitrator” in Item 16 cannot possibly mean “the arbitrator” acting as an arbitrator, but must mean that the proposed arbitrator is a person who has had previous involvement in the case in some other avatar. According to us, this is a sound argument as “the arbitrator” refers to the proposed arbitrator. This becomes clear, when contrasted with Items 22 and 24, where the arbitrator must have served “as arbitrator” before he can be disqualified. Obviously, Item 16 refers to previous involvement in an advisory or other capacity in the very dispute, but not as arbitrator. It was also faintly argued that Justice Doabia was ineligible under Items 1 and 15. Appointment as an arbitrator is not a “business relationship” with the respondent under Item 1. Nor is the delivery of an award providing an expert “opinion” i.e. advice to a party covered by Item 15.

25. The fact that Justice Doabia has already rendered an award in a previous arbitration between the parties would not, by itself, on the ground of reasonable likelihood of bias, render him ineligible to be an arbitrator in a subsequent arbitration. As has been stated in *H. v. L.*⁹: (WLR pp. 2288-89, paras 26-28)

“26. If authority were needed it is to be found in *Amec Capital Projects Ltd. v. Whitefriars City Estates Ltd.*¹⁰ An adjudicator had decided a case without jurisdiction as a result of defects in the procedural mechanism for his appointment. His adjudication was set aside and he was then reappointed to decide the same dispute, between the same parties, and decided it in the same way. At first instance it was held that his second adjudication should be set aside for apparent bias because, amongst other things, he had already decided the same issue. The Court of Appeal reversed the decision. Dyson, L.J. said: (All ER p. 732, paras 20-21)

‘20. In my judgment, the mere fact that the tribunal has previously decided the issue is not of itself sufficient to justify a conclusion of apparent bias. Something more is required. Judges are assumed to be trustworthy and to understand that they should approach every case with an open mind. The same applies to adjudicators, who are almost always professional persons. That is not to say that, if it is asked to redetermine an issue and the evidence and arguments are merely a repeat of what went before, the tribunal will not be likely to reach the same conclusion as before. It would be unrealistic, indeed absurd, to expect the tribunal in such circumstances to ignore its earlier decision and not to be inclined to come to the same conclusion as before, particularly if the previous decision was carefully reasoned. The vice which the law must guard against is that the tribunal may approach the rehearing with a closed mind. If a Judge has considered an issue carefully before reaching a decision on the first occasion, it cannot sensibly be said that he has a closed mind if, the evidence and arguments being the same as before, he does not give as careful a consideration on the second occasion as on the first. He will, however,

⁹ (2017) 1 WLR 2280 : 2017 EWHC 137

¹⁰ (2005) 1 All ER 723 (CA)

a be expected to give such reconsideration of the matter as is reasonably necessary for him to be satisfied that his first decision was correct. As I have said, it will be a most unusual case where the second hearing is for practical purposes an exact rerun of the first.

b 21. The mere fact that the tribunal has decided the issue before is therefore not enough for apparent bias. There needs to be something of substance to lead the fair-minded and informed observer to conclude that there is a real possibility that the tribunal will not bring an open mind and objective judgment to bear.’

c 27. Those comments apply with as much force to arbitrators in international reinsurance arbitration as they do to adjudicators in building disputes. Just as an arbitrator or adjudicator can be expected to bring an open mind and objective judgment to bear when redetermining the same question on the same evidence between the same parties, it is all the more so where the evidence is different and heard in a reference between different parties.

d 28. The position in Bermuda Form arbitrations is accurately summarised in a leading textbook, *Liability Insurance in International Arbitration*, 2nd Edn. (2011), at para 14.32 in these terms:

d ‘14.32. *Commencing a Bermuda Form Arbitration*

e The decision in *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.*¹¹ and the foregoing discussion, is also relevant in the fairly common situation where a loss, whether from boom or batch, gives rise to a number of arbitrations against different insurers who have subscribed to the same programme. A number of arbitrations may be commenced at around the same time, and the same arbitrator may be appointed at the outset in respect of all these arbitrations. Another possibility is that there are successive arbitrations, for example, because the policyholder wishes to see the outcome of an arbitration on the first layer before embarking on further proceedings. A policyholder, who has been successful before one tribunal, may then be tempted to appoint one of its members (not necessarily its original appointee, but possibly the chairman or even the insurer’s original appointee) as arbitrator in a subsequent arbitration. Similarly, if insurer A has been successful in the first arbitration, insurer B may in practice learn of this success and the identity of the arbitrators who have upheld insurer A’s arguments. It follows from *Locabail*¹¹ and *Amec Capital Projects Ltd. v. Whitefriars City Estates Ltd.*¹⁰ that an objection to the appointment of a member of a previous panel would not be sustained simply on the basis that the arbitrator had previously decided a particular issue in favour of one or other party. It equally follows that an arbitrator can properly be appointed at the outset in respect of a number of layers of coverage,

h ¹¹ 2000 QB 451 : (2000) 2 WLR 870 : (2000) 1 All ER 65 (CA)

¹⁰ (2005) 1 All ER 723 (CA)

even though he may then decide the dispute under one layer before hearing the case on another layer.’ ”

26. We were, however, referred to *Russell on Arbitration* (23rd Edn.), in which the learned author has referred to the ground of bias in the context of previous views expressed by an arbitrator. In Chapters 4-124, the learned author states as follows:

“In certain circumstances, previously expressed views of an arbitrator, which suggest a certain predisposition to a particular course of action, outcome or in favour of a party, can constitute grounds for removal. One of *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.*¹¹ applications (All ER at pp. 92-93) against a judge was successful on this basis. The Judge had written four strongly worded articles which led the Court to conclude that an objective apprehension of bias may arise on the part of one of the parties. However, a challenge against a sole arbitrator in a trade arbitration which alleged apparent bias because the arbitrator had previously been involved in a dispute with one of the parties failed. The Judge found this on the facts to be no more than “an ordinary incident of commercial life” occurring in the relatively small field of trade arbitrations where it was thought the parties and arbitrators were quite likely to have had prior dealing with each other (*Rustal Trading Ltd. v. Gill & Duffus S.A.*¹² Similarly, the fact that an insurance arbitrator had previously given a statement in another arbitration (and may have been called to give evidence subsequently) about the meaning of a standard form clause which might have had a tentative bearing on the present arbitration would not give grounds for removal (*Argonaut Insurance Co. v. Republic Insurance Co.*¹³”

27. The judgment referred to in *Russell* is reported in *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.*¹¹ In para 89 thereof, the Court of Appeal stated: (QB pp. 496-97)

“89. We have found this a difficult and anxious application to resolve. There is no suggestion of actual bias on the part of the recorder. Nor, quite rightly, is any imputation made as to his good faith. His voluntary disclosure of the matters already referred to show that he was conscious of his judicial duty. The views he expressed in the articles relied on are no doubt shared by other experienced commentators. We have, however, to ask, taking a broad commonsense approach, whether a person holding the pronounced pro-claimant anti-insurer views expressed by the recorder in the articles might not unconsciously have leaned in favour of the claimant and against the defendant in resolving the factual issues between them. Not without misgiving, we conclude that there was on the facts here a real danger of such a result. We do not think a lay observer with knowledge of the facts could have excluded that possibility, and nor can

11 2000 QB 451 : (2000) 2 WLR 870 : (2000) 1 All ER 65 (CA)

12 (2000) 1 Lloyd’s Rep 14

13 2003 EWHC 547

a we. We accordingly grant permission to appeal on this ground, allow the defendant's appeal and order a retrial. We should not be thought to hold any view at all on the likely or proper outcome of any retrial."

b **28.** We have not been shown anything to indicate that Justice Doabia would be a person holding a pronounced anti-claimant view as in *Locabail*¹¹. Therefore, we are satisfied that there is no real possibility that Justice Doabia will not bring an open mind and objective judgment to bear on arguments made by the parties in the fourth arbitration, which may or may not differ from arguments made in the third arbitration.

c **29.** The appointment of Justice Doabia was also attacked on the ground that he had not made a complete disclosure, in that his disclosure statement did not indicate as to whether he was likely to devote sufficient time to the arbitration and would be able to complete it within 12 months. We are afraid that we cannot allow the appellant to raise this point at this stage as it was never raised earlier. Obviously, if Justice Doabia did not indicate anything to the contrary, he would be able to devote sufficient time to the arbitration and complete the process within 12 months.

d **30.** It was also faintly urged that the arbitrator must *without delay* make a disclosure to the parties in writing. Justice Doabia's disclosure was by a letter dated 31-10-2016 which was sent to the Secretary General of the International Centre for Alternative Dispute Resolution (ICADR). It has come on record that for no fault of Justice Doabia, ICADR, through oversight, did not hand over the said letter or a copy thereof to the appellant until 24-11-2016, which is stated in its letter dated 29-11-2016. This contention also, therefore, need not detain us.

e **31.** It was then argued that under Explanation 3 to the Seventh Schedule, maritime or commodities arbitration may draw arbitrators from a small, specialised pool, in which case it is the custom and practice for parties to appoint the same arbitrator in different cases. This is in contrast to an arbitrator in other cases where he should not be appointed more than once. We are afraid that this argument again cannot be countenanced for the simple reason that Explanation 3 stands by itself and has to be applied as a relevant fact to be taken into account. It has no indirect bearing on any of the other items mentioned in the Seventh Schedule.

f **32.** This being the case, we are satisfied that the learned Single Judge's judgment¹ requires no interference. The appeals are, accordingly, dismissed.

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h ¹¹ *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.*, 2000 QB 451 : (2000) 2 WLR 870 : (2000) 1 All ER 65 (CA)

¹ *HRD Corpn. v. GAIL (India) Ltd.*, 2017 SCC OnLine Del 8034 : (2017) 240 DLT 132

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a (BEFORE DR A.K. SIKRI AND R.K. AGRAWAL, JJ.)
VOESTALPINE SCHIENEN GMBH Petitioner;

Versus

DELHI METRO RAIL CORPORATION LIMITED Respondent.

Arbitration Petition (C) No. 50 of 2016, decided on February 10, 2017

b **A. Arbitration and Conciliation Act, 1996 — Ss. 12(5) & 11(8) [as inserted/ amended] r/w Schs. 5 & 7 — Independence and impartiality of arbitrator without any bias towards any of the parties — Critical importance of ensuring — Law in regard thereto, summarised — Arbitrators appointed in terms of the arbitration agreement — When still ineligible to conduct arbitration — Scheme of Ss. 12(5) and 11(8) as inserted/amended, explained — Inference of bias or real likelihood of bias — Need for — Independence and impartiality of arbitrator — When cannot be doubted**

c — Appointment of Arbitral Tribunal from a panel of serving or retired officers of government departments or public sector undertakings — Legality of, when one of the parties is a public sector undertaking having trappings of the Government, as in the present case, respondent Delhi Metro Rail Corporation Ltd. (DMRC)

d — Held, notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves is contractual in nature and the source of an arbitrator’s appointment is deduced from the agreement entered into between the parties, yet non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration — However, in the present case, the panel of arbitrators not found to be ineligible — Certain directions issued on manner in which Arbitral Tribunal was to be constituted (*see Shortnote D*)

e — Disputes having arisen, the respondent, in terms of the agreement, furnished a list of names of persons to the petitioner with a request to nominate its arbitrator from the said panel — Panel of arbitrators drawn by the respondent DMRC consisted of persons who had worked in the Railways under the Central Government or the Central Public Works Department or public sector undertakings — Held, that by itself would not make such persons ineligible — Further, bias or even real likelihood of bias could not 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 and when the very reason for empanelling these persons was to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators

f **B. Arbitration and Conciliation Act, 1996 — Ss. 12(5) & 11(8) r/w Sch. 7 — “Neutrality of arbitrators” i.e. impartiality and independence of the arbitrators — Necessity of — Held, S. 12 has been amended with the objective to induce neutrality of arbitrators and the amended provision enacted to identify the “circumstances” which give rise to “justifiable doubts” about the independence or impartiality of the arbitrator — An arbitrator has**

adjudicatory role to perform and, therefore, must be independent of parties as well as impartial

C. Arbitration and Conciliation Act, 1996 — Ss. 12(5), 11(8) and 7 — Empanelment of arbitrators as per arbitration agreements with government departments/public sector — Broadbased panel — Necessity of, considering the nature of disputes i.e. not just technical but legal and accounts related too

— Held, the panel should be broadbased and apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included, likewise panel should comprise of persons with legal background like judges and lawyers of repute as there can be disputes involving purely or substantially legal issues, likewise, some disputes may have the dimension of accountancy, etc. and so it would be appropriate to include persons from this field as well

D. Arbitration and Conciliation Act, 1996 — Ss. 12(5), 11(8) and 7 — Restraint upon one party as to choice of arbitrator(s) from panel of arbitrators as per arbitration agreement, without any restraint on the other party — Impermissibility of — Arbitration procedure in the agreement limited the choice given to the opposite party to choose one out of the five names that were forwarded by respondent DMRC from the panel named in arbitration agreement

— Held, firstly there was no free choice to nominate a person out of the entire panel prepared by DMRC and secondly, with the discretion given to DMRC to choose five persons, a room for suspicion was created in the mind of the other side that DMRC may have picked up its own favourites — Therefore, choice should be given to both parties to nominate a person from the entire panel of arbitrators and likewise, the two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator from the whole panel — Formation Defects — Void and Voidable Contracts — Unconscionable contracts/Unequal bargaining power

E. Arbitration and Conciliation Act, 1996 — Ss. 12(5), 11(8) and 7 r/w Schs. 5 and 7 — “Independence” and “impartiality” of arbitrator — Relative meaning and scope, explained

— Held, 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

Delhi Metro Rail Corporation Ltd. (DMRC), respondent, awarded contract dated 12-8-2013 to the petitioner for supply of rails. Certain disputes arose between the parties with regard to the said contract. The petitioner wanted its claims to be adjudicated upon by an Arbitral Tribunal, having regard to the arbitration agreement between the parties as contained in Clause 9.2 of the General Conditions

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a of Contract (GCC) read with Clause 9.2 of the Special Conditions of Contract (SCC), the relevant part of which read:

“... there shall be three arbitrators. For this purpose the purchaser will make out a panel of engineers with the requisite qualifications and professional experience. This panel will be of serving or retired engineers “government departments or of public sector undertakings;

(b) * * *

b (c) For the disputes to be decided by three arbitrators, the purchaser will make out a list of five engineers from the aforesaid panel. The supplier and purchaser shall choose one arbitrator each, and the two so chosen shall choose the third arbitrator from the said list, who shall act as the presiding arbitrator.”

c The respondent furnished the names of five such persons to the petitioner with a request to nominate its arbitrator from the said panel. However, it was not acceptable to the petitioner as the petitioner felt that the panel prepared by the respondent consisted of serving or retired engineers either of the respondent or of the government department or public sector undertakings who did not qualify as independent arbitrators. According to the petitioner, with the amendment of Section 12 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”) such a panel, by the Amendment Act, 2015, as prepared by the respondent, had lost its validity, as it was contrary to the amended provisions of Section 12 of the Act. For this reason, the petitioner preferred the petition under Section 11(6) read with Section 11(8) of the Act for appointment of sole arbitrator/ Arbitral Tribunal under Clause 9.2 of GCC read with Clause 9.2 of SCC of the contract dated 12-8-2013.

d Partly allowing the petition, the Supreme Court

e Held :

Section 12 was also amended in 2015 and this amendment is also based on the recommendation of the Law Commission which specifically dealt with the issue of “neutrality of arbitrators” and a discussion in this behalf is contained in paras 53 to 60. (Para 16)

f *Executive Engineer, Irrigation Division v. Gangaram Chhapolia*, (1984) 3 SCC 627; *Transport Deptt. v. Munuswamy Mudaliar*, 1988 Supp SCC 651; *International Airports Authority v. K.D. Bali*, (1988) 2 SCC 360; *S. Rajan v. State of Kerala*, (1992) 3 SCC 608; *Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd.*, (1996) 1 SCC 54; *Union of India v. M.P. Gupta*, (2004) 10 SCC 504; *ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.*, (2007) 5 SCC 304; *Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.*, (2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460; *Denel (Proprietary) Ltd. v. Ministry of Defence*, (2012) 2 SCC 759 : (2012) 2 SCC (Civ) 37; *Bipromasz Bipron Trading Sa v. Bharat Electronics Ltd.*, (2012) 6 SCC 384 : (2012) 3 SCC (Civ) 702, considered

g In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In international sphere, the “appearance of neutrality” is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term “neutrality” used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties.

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In fact, the term “neutrality of arbitrators” is commonly used in this context as well. (Para 17)

It is manifest that the main purpose for amending Section 12 was to provide for neutrality of arbitrators. In order to achieve this, sub-section (5) of Section 12 lays down that 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, he shall be ineligible to be appointed as an arbitrator. In such an eventuality i.e. when the arbitration clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of the arbitration agreement. (Para 18)

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. (Para 25)

There are a number of judgments even prior to the amendment of Section 12 where courts have appointed the arbitrators, giving a go-by to the agreed arbitration clause in certain contingencies and situations, having regard to the provisions of unamended Section 11(8) of the Act which, inter alia, provided that while appointing the arbitrator, Chief Justice, or the person or the institution designated by him, shall have regard to the other conditions as are likely to secure the appointment of an independent and impartial arbitrator. (Para 19)

Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151; *Punj Lloyd Ltd. v. Petronet MHB Ltd.*, (2006) 2 SCC 638; *Union of India v. Bharat Battery Mfg. Co. (P) Ltd.*, (2007) 7 SCC 684; *Deep Trading Co. v. Indian Oil Corpn.*, (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449; *Union of India v. Singh Builders Syndicate*, (2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246; *North Eastern Railway v. Tripple Engg. Works*, (2014) 9 SCC 288 : (2014) 5 SCC (Civ) 30; *Union of India v. U.P. State Bridge Corpn. Ltd.*, (2015) 2 SCC 52 : (2015) 1 SCC (Civ) 732, considered

Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd., (2008) 10 SCC 240; *Deptt. of Economics, Policy and Development of the City of Moscow v. Bankers Trust Co.*, 2005 QB 207 : (2004) 3 WLR 533 : (2004) 4 All ER 746 : 2004 EWCA Civ 314; *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd.*, (2006) 6 SCC 204, cited

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O.P. Malhotra on the Law and Practice of Arbitration and Conciliation (3rd Edn. revised by Ms Indu Malhotra), *cited*

- a 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 non-impartiality 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. (Para 20)
- c *Hashwani v. Jivraj*, (2011) 1 WLR 1872 : 2011 UKSC 40; *Consorts Ury v. S.A. des Galeries Lafayette*, Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France), *relied on* *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 562 (Emmanuel Gaillard & John Savage eds., 1999), *relied on*
- d 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. (Para 22)
- e The panel of arbitrators drawn by the respondent consists of those persons who are government employees or ex-government employees. However, that by itself may not make such persons ineligible as the panel indicates that these are the persons who have worked in the Railways under the Central Government or the Central Public Works Department or public sector undertakings. They cannot be treated as employee or consultant or advisor of the respondent DMRC. If this contention of the petitioner is accepted, then no person who had earlier worked in any capacity with the Central Government or other autonomous or public sector undertakings, would be eligible to act as an arbitrator even when he is not even remotely connected with the party in question, like DMRC in this case. 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. No such case is made out by the petitioner. (Para 24)
- g 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
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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. (Para 26)

a

DMRC has now forwarded the list of all 31 persons on its panel thereby giving a very wide choice to the petitioner to nominate its arbitrator. They are not the employees or ex-employees or in any way related to DMRC. In any case, the persons who are ultimately picked up as arbitrators will have to disclose their interest in terms of amended provisions of Section 12 of the Act. We, therefore, do not find it to be a fit case for exercising our jurisdiction to appoint and constitute the Arbitral Tribunal. (Para 27)

b

Even when there are a number of persons empanelled, discretion is with DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (though in this case, it is now done away with). Not only this, DMRC is also to nominate its arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator from the very same list i.e. from remaining three persons. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by DMRC. Secondly, with the discretion given to DMRC to choose five persons, a room for suspicion is created in the mind of the other side that DMRC may have picked up its own favourites. Such a situation has to be countenanced. Hence, sub-clauses (b) and (c) of Clause 9.2 need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator from the whole panel. (Para 28)

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It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is imperative that panel should be broadbased. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy, etc. Therefore, it would also be appropriate to include persons from this field as well. (Para 29)

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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

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a discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. Hence, DMRC shall prepare a broadbased panel on the aforesaid lines, within a period of two months from today. (Para 30)

Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd., 2016 SCC OnLine Del 6568, referred to

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b Advocates who appeared in this case :
 Gopal Jain, Senior Advocate (Ajay Bhargava, Ms Vanita Bhargava, Jeevan B. Panda, Kudrat Dev and M/s Khaitan & Co., Advocates) for the Petitioner;
 Mukul Rohatgi, Attorney General, Ms Shashi Kiran and Dr Satish Chandra, Advocates, for the Respondent.

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- f 13. (2006) 6 SCC 204, *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd.* 686g
14. (2006) 2 SCC 638, *Punj Lloyd Ltd. v. Petronet MHB Ltd.* 683d-e, 684c-d, 685c-d
15. 2005 QB 207 : (2004) 3 WLR 533 : (2004) 4 All ER 746 : 2004 EWCA Civ 314, *Deptt. of Economics, Policy and Development of the City of Moscow v. Bankers Trust Co.* 686b
16. (2004) 10 SCC 504, *Union of India v. M.P. Gupta* 680e
- g 17. (2000) 8 SCC 151, *Datar Switchgears Ltd. v. Tata Finance Ltd.* 683d-e, 685d
18. (1996) 1 SCC 54, *Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd.* 680d-e
19. (1992) 3 SCC 608, *S. Rajan v. State of Kerala* 680d-e
20. (1988) 2 SCC 360, *International Airports Authority v. K.D. Bali* 680d-e
- h 21. 1988 Supp SCC 651, *Transport Deptt. v. Munuswamy Mudaliar* 680d-e

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22. (1984) 3 SCC 627, *Executive Engineer, Irrigation Division v. Gangaram Chhapolia* 680d-e
23. Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France), *Consorts Ury v. S.A. des Galeries Lafayette* 688b-c a

The Judgment of the Court was delivered by

DR A.K. SIKRI, J.— The petitioner, which is a company incorporated under the laws of Austria, with its registered office in that country, has its branch office in DLF City, Gurgaon, Phase II, India as well. It is engaged, inter alia, in the business of steel production with the use of advanced technology, like rolling technology and heat treatment technology, as well as manufacturing, producing and supplying rails and related products. It claims to be a European market leader and innovation pioneer with a worldwide reputation which has played a decisive role in the development of modern railway rails. The respondent, Delhi Metro Rail Corporation Ltd. (DMRC) awarded the contract dated 12-8-2013 to the petitioner for supply of rails. Certain disputes have arisen between the parties with regard to the said contract inasmuch as the petitioner feels that the respondent has wrongfully withheld a sum of Euros 5,31,276 (Euros five lakhs thirty-one thousand two hundred and seventy-six only) towards invoices raised for supply of last lot of 3000 MT of rails and has also illegally encashed performance bank guarantees amounting to Euros 7,83,200 (Euros seven lakhs eighty-three thousand and two-hundred only). The respondent has also imposed liquidated damages amounting to Euros 4,00,129.397 (Euros four hundred thousand one hundred twenty-nine and Cents three hundred ninety-seven only) and invoked price variation clause to claim a deposit of Euros 4,87,830 (Euros four lakhs eighty-seven thousand eight hundred and thirty only). Not satisfied with the performance of the petitioner, the respondent has suspended the business dealings with the petitioner for a period of six months. The petitioner feels aggrieved by all the aforesaid actions and wants its claims to be adjudicated upon by an Arbitral Tribunal, having regard to the arbitration agreement between the parties as contained in Clause 9.2 of the General Conditions of Contract (GCC) read with Clause 9.2 of the Special Conditions of Contract (SCC).

2. It may be pointed out, at the outset, that arbitration agreement between the parties, as contained in the aforesaid clause of the contract is not in dispute. It may also be pointed out that Clause 9.2(A) of SCC prescribes a particular procedure for constitution of the Arbitral Tribunal which, inter alia, stipulates that the respondent shall forward names of five persons from the panel maintained by the respondent and the petitioner will have to choose his nominee arbitrator from the said panel. As per the events mentioned in detail hereinafter, the respondent had, in fact, furnished the names of five such persons to the petitioner with a request to nominate its arbitrator from the said panel. However, it is not acceptable to the petitioner as the petitioner feels that the panel prepared by the respondent consists of serving or retired engineers either of the respondent or of the government department or public sector undertakings who do not qualify as independent arbitrators. According to the petitioner, with the amendment of Section 12 of the Arbitration and

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- a* Conciliation Act, 1996 (hereinafter referred to as “the Act”) such a panel, by the Amendment Act, 2015, as prepared by the respondent, has lost its validity, as it is contrary to the amended provisions of Section 12 of the Act. For this reason, the petitioner has preferred the instant petition under Section 11(6) read with Section 11(8) of the Act for appointment of sole arbitrator/Arbitral Tribunal under Clause 9.2 of GCC read with Clause 9.2 of SCC of the Contract dated 12-8-2013.
- b* **3.** With the aforesaid preliminary introduction reflecting the nature of these proceedings, we may take note of the relevant and material facts in some detail.
- c* **4.** Around January 2013, the respondent had floated a tender for the procurement of 8000 metric tonnes (MT) “Head Hardened Rails of certain specifications for Delhi Metro, Phase III projects and invited bids from the eligible bidders. The petitioner was one such bidder whose bid was ultimately accepted after tender evaluation process undertaken by the respondent. It resulted in the signing of contract agreement dated 12-8-2013 between the parties for the supply of the aforesaid material. As per the petitioner, it has duly delivered the rails in three lots of 3000 MT, 3000 MT and 2000 MT rails on 13-1-2014, 19-1-2014 and 3-8-2014 respectively at sea port at Mumbai, which delivery, according to the petitioner, was well within the agreed time-limits.
- d* However, after the delivery of the aforesaid rails at Mumbai, inland transport thereof from Mumbai to the respondent’s depots at Delhi was delayed due to various reasons. As per the petitioner, these reasons are not attributed to it and it cannot be faulted for the same. However, the respondent treated it as default on the part of the petitioner and imposed liquidated damages vide its letter dated 21-9-2015. The respondent also called upon the petitioner to submit its
- e* final bill so that the liquidated damages could be set off against the said bill. This was the starting point of dispute between the parties, as the petitioner refuted the allegations of the respondent and questioned the imposition of liquidated damages as well as calculations thereof. Correspondence ensued and exchanged between the parties but it may not be necessary to state the same in detail here as that would be the subject-matter of adjudication before the
- f* Arbitral Tribunal. Suffice it to state that the respondents also encashed the bank guarantee and raised claims against the petitioner as balance amount due from the petitioner. On the other hand, the petitioner states that it is the respondent which has to pay substantial amounts to the petitioner and a glimpse of the claims of the petitioner has already been indicated above.
- g* **5.** One thing is clear, there are disputes between the parties giving rise to claims and counterclaims against each other and these pertain to and arise out of contract dated 12-8-2013. In view of these disputes and after receipt of communication dated 28-4-2016 whereby the respondent had taken a decision to suspend business dealings with the petitioner for a period of six months, and feeling aggrieved thereby, the petitioner issued a legal notice dated 11-5-2016 through his advocates calling upon the respondent to withdraw the suspension
- h* orders with a threat to resort to legal proceedings if the same was not done within a period of seven days. The respondent did not succumb to the said

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demand and this inaction provoked the petitioner to approach the High Court by filing Writ Petition No. 5439 of 2016 challenging the respondent's action of suspending business with the petitioner. In this petition, order dated 3-6-2016¹ has been passed by the Delhi High Court thereby directing the respondent to keep its decision of suspension with the petitioner, in abeyance.

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6. The petitioner states that thereafter it invoked the dispute resolution clause and made efforts to amicably resolve the dispute. However, the said attempt failed and on 14-6-2016, the petitioner invoked the arbitration clause.

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7. At this juncture, we would like to reproduce Clause 9.2 of GCC as well as Clause 9.2 of SCC.

“9.2. If, after twenty-eight (28) days from the commencement of such informal negotiations, the parties have failed to resolve their dispute or difference by such mutual consultation, then either the purchaser or the supplier may give notice to the other party of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given. Any dispute or difference in respect of which a notice of intention, to commence arbitration has been given in accordance with this clause shall be finally settled by arbitration. Arbitration may be commenced prior to or after delivery of the goods under the contract. Arbitration proceedings shall be conducted in accordance with the rules of procedure specified in SCC.”

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“9.2. The rules of procedure for arbitration proceedings pursuant to GCC Clause 9.2 shall be as follows:

Arbitration & Resolution of Disputes.—The Arbitration and Conciliation Act, 1996 of India shall be applicable. Purchaser and the supplier shall make every necessary effort to resolve amicably by direct and informal negotiation any disagreement or dispute arising between them under or in connection with contract.

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Arbitration.—If the efforts to resolve all or any of the disputes through conciliation fail, then such, disputes or differences, whatsoever arising between the parties, arising out of touching or relating to supply/manufacture, measuring operation or effect of the contract or the breach thereof shall be referred to arbitration, in accordance with the following provisions:

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(a) Matters to be arbitrated upon shall be referred to a sole arbitrator where the total value of claims does not exceed Rs 1.5 million. Beyond the claim limit of Rs 1.5 million, there shall be three arbitrators. For this purpose, the purchaser will make out a panel of engineers with the requisite qualifications and professional experience. This panel will be of serving or retired engineers “government departments or of public sector undertakings;

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¹ Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd., 2016 SCC OnLine Del 6568

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a (b) For the disputes to be decided by a sole arbitrator, a list of three engineers taken in the aforesaid panel will be sent to the supplier by the purchaser from which the supplier will choose one;

b (c) For the disputes to be decided by three arbitrators, the purchaser will make out a list of five engineers from the aforesaid panel. The supplier and purchaser shall choose one arbitrator each, and the two so chosen shall choose the third arbitrator from the said list, who shall act as the presiding arbitrator;

c (d) Neither party shall be limited in the proceedings before such arbitrator(s) to the evidence or the arguments put before the conciliator;

d (e) The conciliation and arbitration hearings shall be held in Delhi only. The language of the proceedings that of the documents and communications shall be English and the awards shall be made in writing. The arbitrators shall always give item-wise and reasoned awards in all cases where the total claim exceeds Rs one million; and

e (f) The award of the sole arbitrator or the award by majority of three arbitrators, as the case may be, shall be binding on all parties.” (emphasis supplied)

f **8.** As per the aforesaid procedure, having regard to the quantum of claims and counterclaims, three arbitrators are to constitute the Arbitral Tribunal. The agreement further provides that the respondent would make out a panel of engineers with the requisite qualifications and professional experience, which panel will be of serving or retired engineers of government departments or public sector undertakings. From this panel, the respondent has to give a list of five engineers to the petitioner and both the petitioner and the respondent are required to choose one arbitrator each from the said list. The two arbitrators so chosen have to choose the third arbitrator from that very list, who shall act as the presiding arbitrator.

g **9.** In the letter dated 14-6-2016, addressed by the petitioner to the respondent while invoking arbitration, the petitioner took the stand that appointment of the Arbitral Tribunal as per the aforesaid clause from a panel of five persons comprising of serving or retired engineers of government departments or public sector undertakings, if followed, would lead to appointment of “ineligible persons” being appointed as arbitrators, in view of Section 12(5) of the Act read with Clause 1 of Schedule VII to the same Act. The petitioner, thus, nominated a retired Judge of this Court as a sole arbitrator and requested the respondent for its consent.

h **10.** The respondent, vide its letter dated 8-7-2016, stuck to the procedure as prescribed for the arbitration clause and asked the petitioner to nominate an arbitrator from the panel of five persons which it forwarded to the petitioner. Thereafter vide letter dated 19-7-2016, the respondent appointed one person as its nominee arbitrator from the said list of five persons who is a retired officer from Indian Railway Service of Engineers (IRSE) and called upon the

petitioner to appoint its nominee arbitrator from the remaining panel of four persons. At this juncture, on 17-8-2016, the present petition under Section 11 of the Act was filed by the petitioner for constitution of the Arbitral Tribunal by this Court with the prayer that the arbitrator nominated by the petitioner (i.e. a former Judge of this Court) should be appointed as the sole arbitrator if the respondent consents to it or any impartial and independent sole arbitrator if appointment of the petitioner's nominee is objected to by the respondent. Alternate prayer is made for appointment of an independent and impartial Arbitral Tribunal comprising of three members under Section 11(6) read with Section 11(8) of the Act for adjudication of the disputes between the parties.

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11. The respondents have contested the petition by filing its detailed reply, inter alia, taking upon the position that in view of the specific agreement between the parties containing arbitration clause, which prescribes the manner in which the Arbitral Tribunal is to be constituted, the present petition under Section 11(6) of the Act is not even maintainable. The respondent maintains that arbitration agreement as per which the Arbitral Tribunal is to be constituted from the panel prepared by the respondent does not offend provisions of Section 12 of the Act as maintained in the year 2015. It is submitted that the agreement is valid, operative and capable of being performed and the arbitrators proposed by the respondent are not falling in the category of "prohibited clause" as stipulated in under Section 12(5) of the Act read with Clause 1 of the Seventh Schedule thereto. As per the respondent, since the arbitration involves adjudication of technical aspects, the respondents have proposed the panel of retired engineers of the Government having requisite expertise to arbitrate the subject-matter. They are neither serving nor past employees of DMRC and have no direct or indirect relations with DMRC. Therefore, they are capable of arbitrating the subject-matter without compromising their independence and impartiality.

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12. In support of the aforesaid plea taken in the petition, Mr Gopal Jain, learned Senior Counsel appearing for the petitioner submitted that the entire ethos and spirit behind the amendment in Section 12 by the Amendment Act, 2015 were to ensure that the Arbitral Tribunal consists of totally independent arbitrators and not those persons who are connected with the other side, even remotely. He submitted that Respondent 1 i.e. DMRC was public sector undertaking which had all the trappings of the Government and, therefore, even those persons who were not in the employment of DMRC, but in the employment of the Central Government or other government body/public sector undertakings should not be permitted to act as arbitrators. He submitted that the very fact that the panel of the arbitrator consisted only of "serving or retired engineers of government departments or public sector undertaking" defied the neutrality aspect as they had direct or indirect nexus/privity with the respondent and the petitioner had reasonable apprehension of likelihood of bias on the part of such persons appointed as arbitrators, who were not likely to act in an independent and impartial manner.

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13. Mr Mukul Rohatgi, learned Attorney General justifying the stand taken by the respondent, with the aid of the provisions of the Act and the case law, also

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a drew attention to a subsequent development. He pointed out that though in its
earlier letter dated 8-7-2016 addressed by the respondent to the petitioner, a list
of persons was given asking the petitioner to choose its arbitrator therefrom, the
respondent has now forwarded to the petitioner the entire panel of arbitrators
maintained by it. This fresh list contains as many as 31 names and, therefore, a
wide choice is given to the petitioner to nominate its arbitrator therefrom. It was
b further pointed out that many panellists were the retired officers from Indian
Railways who retired from high positions and were also having high degree
of technical qualifications and experience. The said list included five persons
who were not from the Railways at all but were the ex-officers of the other
bodies like, Delhi Development Authority (DDA) and Central Public Works
Department (CPWD). No one was serving or ex-employee of DMRC. He
c further submitted that merely because these persons had served in the Railways
or other government departments, would not impinge upon their impartiality.

14. From the stand taken by the respective parties and noted above, it
becomes clear that the moot question is as to whether the panel of arbitrators
prepared by the respondent violates the amended provisions of Section 12 of
the Act. Sub-section (1) and sub-section (5) of Section 12 as well as the Seventh
Schedule to the Act, which are relevant for our purposes, may be reproduced
d below:

“8. (i) for sub-section (1), the following sub-section shall be substituted,
namely—

e ‘(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

f (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.

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

(ii) after sub-section (4), the following sub-section shall be inserted,
namely—

h ‘(5) Notwithstanding any prior agreement to the contrary, any person
whose relationship, with the parties or counsel or the subject-matter of the

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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.’ ” (emphasis supplied)

“THE SEVENTH SCHEDULE

[See Section 12(5)]

Arbitrator’s relationship with the parties or counsel

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

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.

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.

6. The arbitrator’s law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator’s law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party 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.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

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Arbitrator's direct or indirect interest in the dispute

a 17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

b 19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.—The term “close family member” refers to a spouse, sibling, child, parent or life partner.

Explanation 2.—The term “affiliate” encompasses all companies in one group of companies including the parent company.

c *Explanation 3.*—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently, to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.” (emphasis supplied)

d 15. It is a well-known fact that the Arbitration and Conciliation Act, 1996 was enacted to consolidate and amend the law relating to domestic arbitration, inter alia, commercial arbitration and enforcement of foreign arbitral awards, etc. It is also an accepted position that while enacting the said Act, basic structure of UNCITRAL Model Law was kept in mind. This became necessary in the wake of globalisation and the adoption of policy of liberalisation of Indian economy by the Government of India in the early 90s. This model law of UNCITRAL provides the framework in order to achieve, to the maximum possible extent, uniform approach to the international commercial arbitration. Aim is to achieve convergence in arbitration law and avoid conflicting or varying provisions in the Arbitration Acts enacted by various countries. Due to certain reasons, working of this Act witnessed some unpleasant developments and need was felt to smoothen out the rough edges encountered thereby.

e The Law Commission examined various shortcomings in the working of this Act and in its first report i.e. 176th Report made various suggestions for amending certain provisions of the Act. This exercise was again done by the Law Commission of India in its Report No. 246 in August 2004 suggesting sweeping amendments touching upon various facets and acting upon most of these recommendations, the Arbitration Amendment Act of 2015 was passed

f which came into effect from 23-10-2015.

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h 16. Apart from other amendments, Section 12 was also amended and the amended provision has already been reproduced above. This amendment is also based on the recommendation of the Law Commission which specifically dealt with the issue of “neutrality of arbitrators” and a discussion in this behalf is contained in paras 53 to 60 and we would like to reproduce the entire discussion hereinbelow:

“NEUTRALITY OF ARBITRATORS

53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. *In the context of arbitration, neutrality of arbitrators viz. their independence and impartiality, is critical to the entire process.*

54. In the Act, the test for neutrality is set out in Section 12(3) which provides—

‘12. (3) An arbitrator may be challenged only if—

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

55. The Act does not lay down any other conditions to identify the “circumstances” which give rise to “justifiable doubts”, and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any **actual** bias for that is setting the bar too high; but, whether the circumstances in question give rise to any **justifiable apprehensions** of bias.

56. The limits of this provision has been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court (see *Executive Engineer, Irrigation Division v. Gangaram Chhapolia*², *Transport Deptt. v. Munuswamy Mudaliar*³, *International Airports Authority v. K.D. Bali*⁴, *S. Rajan v. State of Kerala*⁵, *Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd.*⁶, *Union of India v. M.P. Gupta*⁷ and *ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.*⁸ that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in *Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.*⁹, carved out a minor exception in situations when the arbitrator

‘was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject-matter of the dispute’ (SCC p. 533, para 34)

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

2 (1984) 3 SCC 627

3 1988 Supp SCC 651

4 (1988) 2 SCC 360

5 (1992) 3 SCC 608

6 (1996) 1 SCC 54

7 (2004) 10 SCC 504

8 (2007) 5 SCC 304

9 (2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460

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a and this exception was used by the Supreme Court in *Denel (Proprietary) Ltd. v. Ministry of Defence*¹⁰ and *Bipromasz Bipron Trading Sa v. Bharat Electronics Ltd.*¹¹, to appoint an independent arbitrator under Section 11, this is not enough.

b 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.*

c 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.*

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f 58. Large-scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators, which the Commission believes is critical to the functioning of the arbitration process in India. In particular, amendments have been proposed to Sections 11, 12 and 14 of the Act.

g 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*

h ¹⁰ (2012) 2 SCC 759 : (2012) 2 SCC (Civ) 37 : AIR 2012 SC 817

¹¹ (2012) 6 SCC 384 : (2012) 3 SCC (Civ) 702

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

*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 sub-set 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 supplied)

17. We may put a note of clarification here. Though, the Law Commission discussed the aforesaid aspect under the heading “Neutrality of Arbitrators”, the focus of discussion was on impartiality and independence of the arbitrators which has relation to or bias towards one of the parties. In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In international sphere, the “appearance of neutrality” is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term “neutrality” used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties. In fact, the term “neutrality of arbitrators” is commonly used in this context as well.

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

- 18.** Keeping in mind the aforequoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, sub-section (5) of Section 12 lays down that 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, he shall be ineligible to be appointed as an arbitrator. In such an eventuality i.e. when the arbitration clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of the arbitration agreement.

- 19.** We may mention here that there are a number of judgments of this Court even prior to the amendment of Section 12 where courts have appointed the arbitrators, giving a go-by to the agreed arbitration clause in certain contingencies and situations, having regard to the provisions of unamended Section 11(8) of the Act which, inter alia, provided that while appointing the arbitrator, Chief Justice, or the person or the institution designated by him, shall have regard to the other conditions as are likely to secure the appointment of an independent and impartial arbitrator. See *Datar Switchgears Ltd. v. Tata Finance Ltd.*¹², *Punj Lloyd Ltd. v. Petronet MHB Ltd.*¹³, *Union of India v. Bharat Battery Mfg. Co. (P) Ltd.*¹⁴, *Deep Trading Co. v. Indian Oil Corpn.*¹⁵, *Union of India v. Singh Builders Syndicate*¹⁶ and *North Eastern Railway v. Tripple Engg. Works*¹⁷. Taking note of the aforesaid judgments, this Court in *Union of India v. U.P. State Bridge Corpn. Ltd.*¹⁸ summed up the position in the following manner: (SCC pp. 62-65, paras 13-17)

- “13. No doubt, ordinarily that would be the position. The moot question, however, is as to whether such a course of action has to be necessarily adopted by the High Court in all cases, while dealing with an application under Section 11 of the Act or is there room for play in the joints and the High Court is not divested of exercising discretion under some circumstances? If yes, what are those circumstances? It is this very aspect which was specifically dealt with by this Court in *Tripple Engg. Works*¹⁷. Taking note of various judgments, the Court pointed out that the notion that the High Court was bound to appoint the arbitrator as per the

12 (2000) 8 SCC 151

13 (2006) 2 SCC 638

14 (2007) 7 SCC 684

15 (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449

16 (2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246

17 (2014) 9 SCC 288 : (2014) 5 SCC (Civ) 30

18 (2015) 2 SCC 52 : (2015) 1 SCC (Civ) 732

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contract between the parties has seen a significant erosion in recent past. In paras 6 and 7 of the said decision, those judgments wherein departure from the aforesaid “classical notion” has been made are taken note of. It would, therefore, be useful to reproduce the said paragraph along with paras 8 and 9 hereinbelow: (SCC pp. 291-93)

“6. The “classical notion” that the High Court while exercising its power under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter for short “the Act”) must appoint the arbitrator as per the contract between the parties saw a significant erosion in *ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.*⁸, wherein this Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. A more significant development had come in a decision that followed soon thereafter in *Union of India v. Bharat Battery Mfg. Co. (P) Ltd.*¹⁴ wherein following a three-Judge Bench decision in *Punj Lloyd Ltd. v. Petronet MHB Ltd.*¹³, it was held that once an aggrieved party files an application under Section 11(6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the contract. The implication that the Court would be free to deviate from the terms of the contract is obvious.

7. The apparent dichotomy in *ACE Pipeline*⁸ and *Bharat Battery Mfg. Co. (P) Ltd.*¹⁴ was reconciled by a three-Judge Bench of this Court in *Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd.*¹⁹, wherein the jurisdiction of the High Court under Section 11(6) of the Act was sought to be emphasised by taking into account the expression “to take the necessary measure” appearing in sub-section (6) of Section 11 and by further laying down that the said expression has to be read along with the requirement of sub-section (8) of Section 11 of the Act. The position was further clarified in *Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.*⁹ Para 48 of the Report wherein the scope of Section 11 of the Act was summarised may be quoted by reproducing sub-paras (vi) and (vii) hereinbelow: (*Indian Oil case*⁹, SCC p. 537)

“48. (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,

8 (2007) 5 SCC 304

14 (2007) 7 SCC 684

13 (2006) 2 SCC 638

19 (2008) 10 SCC 240

9 (2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460

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a 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.”

b 8. The above discussion will not be complete without reference to the view of this Court expressed in *Union of India v. Singh Builders Syndicate*¹⁶, wherein the appointment of a retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that the arbitration proceedings had not concluded for over a decade making a mockery of the process. In fact, in para 25 of the Report in *Singh Builders Syndicate*¹⁶ this Court had suggested that the Government, statutory authorities and government companies should consider phasing out arbitration clauses providing for appointment of serving officers and encourage professionalism in arbitration.

c 9. A pronouncement of late in *Deep Trading Co. v. Indian Oil Corpn.*¹⁵ followed the legal position laid down in *Punj Lloyd Ltd.*¹³ which in turn had followed a two-Judge Bench decision in *Datar Switchgears Ltd. v. Tata Finance Ltd.*¹² The theory of forfeiture of the rights of a party under the agreement to appoint its arbitrator once the proceedings under Section 11(6) of the Act had commenced came to be even more formally embedded in *Deep Trading Co.*¹⁵ subject, of course, to the provisions of Section 11(8), which provision in any event, had been held in *Northern Railway Admn.*¹⁹ not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction under Section 11(6) of the Act.’ (emphasis in original)

d 14. Speedy conclusion of arbitration proceedings hardly needs to be emphasised. It would be of some interest to note that in England also, Modern Arbitration Law on the lines of UNCITRAL Model Law, came to be enacted in the same year as the Indian law which is known as the English Arbitration Act, 1996 and it became effective from 31-1-1997. It is treated as the most extensive statutory reform of the English arbitration law. Commenting upon the structure of this Act, Mustill and Boyd in their *Commercial Arbitration*, 2001 companion volume to the 2nd Edn., have commented that this Act is founded on four pillars. These pillars are described as:

16 (2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246

15 (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449

13 *Punj Lloyd Ltd. v. Petronet MHB Ltd.*, (2006) 2 SCC 638

12 (2000) 8 SCC 151

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

- (a) The first pillar: Three general principles.
- (b) The second pillar: The general duty of the Tribunal.
- (c) The third pillar: The general duty of the parties. a
- (d) The fourth pillar: Mandatory and semi-mandatory provisions.

Insofar as the first pillar is concerned, it contains three general principles on which the entire edifice of the said Act is structured. These principles are mentioned by an English Court in its judgment in *Deptt. of Economics, Policy and Development of the City of Moscow v. Bankers Trust Co.*²⁰ In that case, Mance, L.J. succinctly summed up the objective of this Act in the following words: (QB p. 228, para 31) b

‘31. ... Parliament has set out, in the Arbitration Act, 1996, to encourage and facilitate a reformed and more independent, as well as private and confidential, system of consensual dispute resolution, with only limited possibilities of court involvement where necessary in the interests of the public and of basic fairness.’ c

Section 1 of the Act sets forth the three main principles of arbitration law viz. (i) speedy, inexpensive and fair trial by an impartial tribunal; (ii) party autonomy; and (iii) minimum court intervention. This provision has to be applied purposively. In case of doubt as to the meaning of any provision of this Act, regard should be had to these principles. d

15. In the book *O.P. Malhotra on the Law and Practice of Arbitration and Conciliation* (3rd Edn. revised by Ms Indu Malhotra), it is rightly observed that the Indian Arbitration Act is also based on the aforesaid four foundational pillars.

16. First and paramount principle of the first pillar is “fair, speedy and inexpensive trial by an Arbitral Tribunal”. Unnecessary delay or expense would frustrate the very purpose of arbitration. Interestingly, the second principle which is recognised in the Act is the party autonomy in the choice of procedure. This means that if a particular procedure is prescribed in the arbitration agreement which the parties have agreed to, that has to be generally resorted to. It is because of this reason, as a normal practice, the court will insist the parties to adhere to the procedure to which they have agreed upon. This would apply even while making the appointment of substitute arbitrator and the general rule is that such an appointment of a substitute arbitrator should also be done in accordance with the provisions of the original agreement applicable to the appointment of the arbitrator at the initial stage. [See *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd.*²¹] However, this principle of party autonomy in the choice of procedure has been deviated from in those cases where one of the parties have committed default by not acting in accordance with the procedure prescribed. Many such instances where this course of action is taken and the Court appoint the arbitrator when the persona designata has failed to act, are e
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20 2005 QB 207 : (2004) 3 WLR 533 : (2004) 4 All ER 746 : 2004 EWCA Civ 314
21 (2006) 6 SCC 204 h

a taken note of in paras 6 and 7 of *Tripple Engg. Works*¹⁷. We are conscious of the fact that these were the cases where appointment of the independent arbitrator made by the Court in exercise of powers under Section 11 of account of “default procedure”. We are, in the present case, concerned with the constitution of substitute Arbitral Tribunal where earlier Arbitral Tribunal has failed to perform. However, the above principle of default procedure is extended by this Court in such cases as well as is clear from the judgment in *Singh Builders Syndicate*¹⁶.

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17. In the case of contracts between government corporations/State-owned companies with private parties/contractors, the terms of the agreement are usually drawn by the government company or public sector undertakings. Government contracts have broadly two kinds of arbitration clauses, first where a named officer is to act as sole arbitrator; and second, where a senior officer like a Managing Director, nominates a designated officer to act as the sole arbitrator. No doubt, such clauses which give the Government a dominant position to constitute the Arbitral Tribunal are held to be valid. At the same time, it also casts an onerous and responsible duty upon the persona designata to appoint such persons/officers as the arbitrators who are not only able to function independently and impartially, but are in a position to devote adequate time in conducting the arbitration. If the Government has nominated those officers as arbitrators who are not able to devote time to the arbitration proceedings or become incapable of acting as arbitrators because of frequent transfers, etc., then the principle of “default procedure” at least in the cases where Government has assumed the role of appointment of arbitrators to itself, has to be applied in the case of substitute arbitrators as well and the Court will step in to appoint the arbitrator by keeping aside the procedure which is agreed to between the parties. However, it will depend upon the facts of a particular case as to whether such a course of action should be taken or not. What we emphasise is that Court is not powerless in this regard.”

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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 non-impartiality 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

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17 *North Eastern Railway v. Tripple Engg. Works*, (2014) 9 SCC 288 : (2014) 5 SCC (Civ) 30
16 *Union of India v. Singh Builders Syndicate*, (2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246

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*²² in the following words: (WLR p. 1889, para 45)

“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*²³, 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.

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.

24. Keeping in view the aforesaid parameters, we advert to the facts of this case. Various contingencies mentioned in the Seventh Schedule render a person ineligible to act as an arbitrator. Entry 1 is highlighted by the learned counsel for the petitioner which provides that where the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with the party, would not act as an arbitrator. What was argued by the learned Senior Counsel for the petitioner was that the panel of arbitrators drawn by the respondent consists of those persons who are government employees or ex-government employees. However, that by itself may not make such persons ineligible as the panel indicates that these are the persons who have worked in the Railways under the Central Government or the Central Public Works Department or public sector undertakings. They cannot be treated as employee or consultant or advisor of the respondent DMRC. If this contention

22 (2011) 1 WLR 1872 : 2011 UKSC 40

23 *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 562 (Emmanuel Gaillard & John Savage eds., 1999) { quoting Cour de cassation [Cass.] [Supreme Court for judicial matters] *Consorts Ury v. S.A. des Galeries Lafayette*, Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France)}.

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a of the petitioner is accepted, then no person who had earlier worked in any capacity with the Central Government or other autonomous or public sector undertakings, would be eligible to act as an arbitrator even when he is not even remotely connected with the party in question, like DMRC in this case. 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. No such case is made out by the petitioner.

b **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.

c **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.

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27. As already noted above, DMRC has now forwarded the list of all 31 persons on its panel thereby giving a very wide choice to the petitioner to nominate its arbitrator. They are not the employees or ex-employees or in any way related to DMRC. In any case, the persons who are ultimately picked up as arbitrators will have to disclose their interest in terms of amended provisions of Section 12 of the Act. We, therefore, do not find it to be a fit case for exercising our jurisdiction to appoint and constitute the Arbitral Tribunal.

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28. Before we part with, we deem it necessary to make certain comments on the procedure contained in the arbitration agreement for constituting the Arbitral Tribunal. Even when there are a number of persons empanelled, discretion is with DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (though in this case, it is now done away with). Not only this, DMRC is also to nominate its arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator from the very same list i.e. from remaining three persons. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by DMRC. Secondly, with the discretion given to DMRC to choose five persons, a room for suspicion is created in the mind of the other side that DMRC may have picked up its own favourites. Such a situation has to be countenanced. We are, therefore, of the opinion that sub-clauses (b) & (c) of Clause 9.2 of SCC need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator from the whole panel.

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29. Some comments are also needed on Clause 9.2(a) of GCC/SCC, as per which DMRC prepares the panel of “serving or retired engineers of government departments or public sector undertakings”. It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is imperative that panel should be broadbased. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like Judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy, etc. Therefore, it would also be appropriate to include persons from this field as well.

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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

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- a* 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.
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31. Subject to the above, insofar as the present petition is concerned, we dismiss the same, giving two weeks' time to the petitioner to nominate its arbitrator from the list of 31 arbitrators given by the respondent to the petitioner.

- c* No costs.
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Interim order, if any, stands vacated.

In view of the above, the writ petitions pending before the Madras High Court in respect of which the transfer petitions have been moved also stands dismissed as having become infructuous.”

3.30 p.m. *b*

2. Before the proceedings could be signed, a large number of advocates appeared and submitted that there has been some confusion because of the deletion of the item from the list and on their request, in supersession of the above order, the following order is passed:

“List on Tuesday, 25-2-2014.”

Court Masters *c*

(2014) 11 Supreme Court Cases 560

(BEFORE ALTAMAS KABIR, C.J. AND S.S. NIJJAR, J.)

ANTRIX CORPORATION LIMITED .. Petitioner;

Versus

DEVAS MULTIMEDIA PRIVATE LIMITED .. Respondent. *d*

Arbitration Petition No. 20 of 2011, decided on May 10, 2013

Arbitration and Conciliation Act, 1996 — Ss. 11(6), 19, 13, 16 and 34 — One party unilaterally invoking jurisdiction of ICC purportedly under the arbitration agreement for appointment of arbitrator — Other party, if can proceed under S. 11(6) on the ground that arbitration agreement provided for reference to Senior Managements for resolution, only failing which, reference for arbitration to be made to an Arbitral Tribunal of three members with juridical seat at New Delhi and procedure to be followed by Arbitral Tribunal was to be procedure of ICC or UNCITRAL — Whether the pre-emptive unilateral invocation of jurisdiction of ICC while reference to Senior Management Teams from both companies/parties was in progress, barred the Chief Justice from appointing an arbitrator under S. 11(6) — Effect of Art. 19 of the agreement providing that rights and responsibilities would be subject to and construed in accordance with laws of India and seat of arbitration was to be in India (New Delhi) — Held, there is a clear distinction between the governing law of the agreement and law to govern the arbitration proceedings — Hence, in the facts and circumstances of the case, since the arbitrator had already been appointed by ICC, the provisions of S. 11(6) of the 1996 Act could not be invoked to challenge it by appointment of another arbitrator — Proper remedy would be by way of petition under S. 13 of 1996 Act before the arbitrator already appointed, and thereafter under S. 34 of 1996 Act — That parties agreed for procedure to be followed by Arbitral Tribunal as per ICC Rules construed as enabling appointment of arbitrator under ICC Rules (Paras 28 to 35) *e*

The only question before the Supreme Court was whether once one party has purportedly invoked a provision in the arbitration clause which provided that the procedure to be followed by the Arbitral Tribunal in deciding the arbitration reference would be that of arbitration ICC or UNCITRAL, and got an arbitrator *f*

- a* ANTRIX CORPN. LTD. v. DEVAS MULTIMEDIA (P) LTD. 561
- appointed by ICC, the aggrieved party can proceed under Section 11(6) of the 1996 Act on the plea that the invocation of ICC procedure would have arisen only after the constitution of the Arbitral Tribunal and not at any stage prior thereto; thereby raising the question of law relating to scope and ambit of powers of the Chief Justice under Section 11(6) of the Arbitration and Conciliation Act, 1996, on which issue the present matter had been referred to this larger Bench.
- b*
- The petitioner company was aggrieved by the pre-emptive unilateral move made by the respondent while it was pursuing with the respondent the first option under the arbitration agreement of referring the dispute to the Senior Management Teams of both companies. The petitioner contended that under the arbitration agreement the proper law of the contract was Indian law and the proper law of the arbitration agreement was the Arbitration and Conciliation Act, 1996. It was only on the procedure to be adopted by the Arbitral Tribunal that there was an option to adopt the procedure either of ICC or UNCITRAL. Hence the petitioner submitted that the applicable procedural law of ICC or UNCITRAL could be taken recourse to only after the constitution of the Arbitral Tribunal and not at any stage prior thereto. Further, that the agreed place of arbitration being New Delhi, the arbitration agreement would be governed by the Indian law which would be the governing law for the arbitration.
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- d*
- The respondent's main contention was that having already invoked the arbitration agreement for constitution of an Arbitral Tribunal under the ICC Rules, the objection to its constitution had to be raised before the Arbitral Tribunal itself.
- So the question before the Supreme Court was whether the arbitration agreement contemplated application of Section 11 of the 1996 Act after the ICC Rules had been invoked by one party. Further, whether Section 11 of the 1996 Act empowered the Chief Justice to constitute an Arbitral Tribunal in supersession of the Arbitral Tribunal already constituted by ICC on the unilateral move by one party. The issue also was whether constituting of the Arbitral Tribunal by ICC was contrary to the arbitration agreement.
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- Dismissing the petition, the Supreme Court held as above.
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- Som Datt Builders (P) Ltd. v. State of Punjab*, AIR 2006 P&H 124 : (2006) 3 RAJ 144, approved
- Gesellschaft Fur Biotechnologische Forschun GmbH v. Kopran Laboratories Ltd.*, (2004) 13 SCC 630, referred to
- TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd.*, (2008) 14 SCC 271; *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.*, (1998) 1 SCC 305; *NTPC v. Singer Co.*, (1992) 3 SCC 551; *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618; *Gas Authority of India Ltd. v. Ketri Construction (I) Ltd.*, (2007) 5 SCC 38; *Sudarsan Trading Co. v. Govt. of Kerala*, (1989) 2 SCC 38; *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181; *Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd.*, (2014) 11 SCC 574, cited
- Dicey: Conflict of Laws*, cited
- [Ed.]*: It is humbly submitted that the ruling herein is per incuriam the law settled by at least seven two-Judge Bench decisions on the exercise of power under Section 11 of the Arbitration and Conciliation Act, 1996, in *National Highways Authority of India v. Bumihway DDB Ltd.*, (2006) 10 SCC 763; *Union of India v. V.S. Engg. (P) Ltd.*, (2006) 13 SCC 240; *Municipal Corpn., Jabalpur v. Rajesh Construction Co.*, (2007) 5 SCC 344; *Northern Railway Admn. v. Patel Engg.*
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(2014) 11 SCC *a*

Co. Ltd., (2008) 10 SCC 240; *Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.*, (2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460; *Union of India v. Premier Files Ltd.*, (2009) 9 SCC 384 : (2009) 3 SCC (Civ) 763; *Deep Trading Co. v. Indian Oil Corpn.*, (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449. *See also* the rulings by Single Judges of the Supreme Court in *You One Engg. & Construction Co. Ltd. v. National Highways Authority of India*, (2006) 4 SCC 372; *India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd.*, (2007) 5 SCC 510; and *You One Maharia v. National Highways Authority of India*, (2007) 7 SCC 704, which lay down exactly the same proposition of law as the seven two Judge Bench decisions mentioned above. *b*

Furthermore, it is humbly submitted that this judgment confuses the clear distinction between the proper law of the arbitration agreement (*lex arbitri*) i.e. by which the arbitrator is to be appointed, and the procedure to be followed by the arbitrator in deciding the arbitral reference (*lex fori*), which is *not* the proper law of the arbitration agreement (*see* for instance Section 19 of the Arbitration and Conciliation Act, 1996). *c*

The law on the issue of exercise of power under Section 11 of the Arbitration and Conciliation Act, 1996, which is well-settled on this point, by at least the seven abovementioned two-Judge Bench decisions, is that the appointment procedure provided for in the arbitration agreement must be fully complied with, and it is only upon failure of the agreement appointment procedure that the Chief Justice acquires jurisdiction to appoint an arbitrator under Section 11(6) of the 1996 Act. Till then, if the Chief Justice has no power to override the agreement appointment procedure, it is hard to see how one of the parties can be permitted to do so unilaterally, as has been permitted and vindicated by the ruling in the present judgment. *d*

In the present case, the agreement appointment procedure (*see* para 3 of the judgment) was that the parties would first seek to resolve their disputes through their Senior Managements (the parties were still at this stage when the respondent unilaterally invoked the jurisdiction of ICC for appointment of an arbitrator), upon failure of which, reference to arbitration was to be made to an Arbitral Tribunal of three members with their seat at New Delhi. The procedure to be followed by such Arbitral Tribunal, once appointed, was to be either the ICC or UNCITRAL procedure. Nowhere does the agreement appointment procedure envisage the appointment of the arbitrator/Arbitral Tribunal by the ICC, upon unilateral invocation of ICC's jurisdiction by one of the parties, as has been done by the respondent. ICC was given no jurisdiction at all in this regard by the arbitration agreement. Rather, it is the Chief Justice under Section 11(6) of the 1996 Act who would have any such jurisdiction, and that too after failure of the agreement appointment procedure. Hence, it is humbly submitted that it was certainly open to the Court herein, under Section 11(6) of the 1996 Act, as interpreted in the abovementioned seven two-Judge Bench decisions, to set aside the illegal appointment of the arbitrator by ICC, which had no jurisdiction to do so, and either relegate the parties to comply with the agreement appointment procedure, or upon a finding that the same had failed, itself appoint an arbitrator under Section 11(6) of the 1996 Act.] *e*
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a ANTRIX CORPN. LTD. v. DEVAS MULTIMEDIA (P) LTD. (*Kabir, C.J.*) 563

Advocates who appeared in this case :

R.F. Nariman, Solicitor General (Ms Bindu Saxena, Shailendra Swarup, Ritin Rai, Ms Aparajita Swarup, K.K. Patra and Ms Neha Khattar, Advocates) for the Petitioner;

Ciccu Mukhopadhyaya, Senior Advocate [Manu Nair, Omar Ahmad, Sanjay Kumar and Anish Maheshwari (for M/s Suresh A. Shroff & Co.), Advocates] for the Respondent.

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

1. (2014) 11 SCC 574, *Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd.* 565f-g
2. (2008) 14 SCC 271, *TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd.* 566a
3. (2007) 5 SCC 38, *Gas Authority of India Ltd. v. Ketl Construction (I) Ltd.* 568h
- c 4. (2006) 11 SCC 181, *McDermott International Inc. v. Burn Standard Co. Ltd.* 569d
5. AIR 2006 P&H 124 : (2006) 3 RAJ 144, *Som Datt Builders (P) Ltd. v. State of Punjab* 573b
6. (2005) 8 SCC 618, *SBP & Co. v. Patel Engg. Ltd.* 567h, 569a, 569b-c
7. (2004) 13 SCC 630, *Gesellschaft Fur Biotechnologische Forschun GmbH v. Koprان Laboratories Ltd.* 572e
8. (1998) 1 SCC 305, *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.* 566f
- d 9. (1992) 3 SCC 551, *NTPC v. Singer Co.* 567d
10. (1989) 2 SCC 38, *Sudarsan Trading Co. v. Govt. of Kerala* 569c

The Judgment of the Court was delivered by

ALTAMAS KABIR, C.J.— An application under Section 11(4) read with Section 11(10) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”), has given rise to an important question of law relating to the scope and ambit of the powers of the Chief Justice under Section 11(6) of the said Act. In view of the importance of the question which has arisen the matter which was being heard by the delegatee of the Chief Justice, has been referred to a larger Bench for determination thereof.

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2. M/s Antrix Corpn. Ltd., the petitioner herein, a government company incorporated under the Companies Act, 1956, and engaged in the marketing and sale of products and services of the Indian Space Research Organisation (ISRO), entered into an agreement with the respondent, Devas Multimedia (P) Ltd. (hereinafter referred to as “Devas”) on 28-1-2005, for the lease of Space Segment Capacity on ISRO/Antrix S-Band Spacecraft. Article 19 of the agreement empowered the petitioner to terminate the agreement in certain contingencies. It also provided that the agreement and the rights and responsibilities of the parties thereunder would be subject to and construed in accordance with the laws of India. In other words, the domestic law would be the governing law of the agreement.

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3. Article 20 of the agreement deals specially with arbitration and provides 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

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management of both the parties to resolve the same within 3 weeks, failing which the matter would be referred to an Arbitral Tribunal comprising of three arbitrators. It was provided that the seat of arbitration would be New Delhi in India. It was also provided that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce (ICC) or UNCITRAL.

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4. On 25-2-2011, the petitioner Company terminated the agreement with immediate effect in terms of Article 7(c) read with Article 11(b) of the agreement in keeping with the directives of the Government, which it was bound to follow under Article 103 of its articles of association. By its letter dated 28-2-2011, the respondent objected to the termination. On 15-4-2011, the petitioner Company sent to the respondent Company a cheque for Rs 58.37 crores refunding the upfront capacity reservation fee received from Devas. The said cheque was, however, returned by Devas on 18-4-2011, insisting that the agreement was still subsisting.

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5. In keeping with the provisions of Article 20 of the arbitration agreement, the petitioner wrote to the respondent Company on 15-6-2011, nominating its 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, Devas unilaterally and without prior notice to the petitioner, addressed a request for arbitration to the ICC International Court of Arbitration on 29-6-2011, seeking resolution of the dispute arising under the agreement. Through the unilateral request for arbitration, Devas sought the constitution of an Arbitral Tribunal in accordance with the ICC Rules of Arbitration (hereinafter referred to as "the ICC Rules"), and nominated one Mr V.V. Veedar, Queen's counsel, as its nominee arbitrator, in accordance with the ICC Rules.

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6. According to the petitioner, it is only on 5-7-2011, that it came to learn that Devas had approached the ICC and had nominated Mr V.V. Veedar, as its nominee arbitrator, upon receipt of a copy of the respondent's request for arbitration forwarded by the ICC. By the said letter, the petitioner was also invited to nominate its nominee arbitrator.

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7. Instead of nominating its arbitrator, the petitioner, by its letter dated 11-7-2011, once again requested Devas to convene the Senior Management Team meet on 27-7-2011, in terms of the agreement. Pursuant to such request, a meeting of the Senior Management Team was held, but Devas insisted that the parties should proceed to arbitration and did not discuss the issues in accordance with Article 20(a) of the agreement. Despite the attempt to resolve the dispute through the Senior Management Team and despite the fact that Devas had already invoked the arbitration agreement by making a request for arbitration to the ICC and had also appointed its nominee arbitrator under the ICC Rules, the petitioner appointed Ms Justice Sujata V. Manohar, as its arbitrator and called upon Devas to appoint its nominee

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arbitrator within 30 days of receipt of the notice. Consequently, while Devas had invoked the jurisdiction of the ICC on 29-6-2011, the petitioner subsequently invoked the arbitration agreement in accordance with the UNCITRAL Rules on the ground that Devas had invoked the ICC Rules unilaterally, without allowing the petitioner to exercise its choice. Having invoked the arbitration agreement under the UNCITRAL Rules, the petitioner called upon the respondent to appoint its arbitrator within 30 days of receipt of the notice.

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8. On 5-8-2011, the petitioner wrote to the Secretariat of the ICC Court stating that it had appointed its arbitrator, in accordance with the agreement between the parties, asserting that in view of Article 20 of the agreement, the arbitral proceedings would be governed by the Indian law viz. the Arbitration and Conciliation Act, 1996.

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9. The respondent did not reply to the petitioner's letter dated 30-7-2011. However, the International Chamber of Commerce, by its letter dated 3-8-2011, responded to the petitioner's letter dated 30-7-2011, and indicated as follows:

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"We refer to our letter dated 18-7-2011, and remind the parties that the issues raised regarding the arbitration clause would shortly be submitted to the Court for consideration. All comments submitted by the parties will be brought to the Court's attention. In this regard, any final comments from the parties may be submitted to us by 5-8-2011.

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Should the court decide that this arbitration shall proceed pursuant to Article 6(2) of the Rules, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself."

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10. It is in such circumstances that the application under Section 11(4) read with Section 11(10) of the 1996 Act, being Arbitration Petition No. 20 of 2011, came to be filed by the petitioner, inter alia, for a direction upon Devas to nominate its arbitrator in accordance with the agreement dated 28-1-2005, and the UNCITRAL Rules, to adjudicate upon the disputes, which had arisen between the parties and to constitute the Arbitral Tribunal and to proceed with the arbitration.

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11. The said application came to be listed before one of us, Surinder Singh Nijjar, J., the designate of the Chief Justice, who was of the view¹ that the questions involved in the application were required to be heard by a larger Bench. The parties were requested to propose the questions of law to be considered by the larger Bench and the same are as follows: (SCC pp. 812-13, paras 1 & 3)

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"(1) Where the arbitration clause contemplates the application of either the ICC Rules or the UNCITRAL Rules after the constitution of the Tribunal, could a party unilaterally proceed to invoke ICC to constitute the Tribunal and proceed thereafter?"

¹ *Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd.*, (2014) 11 SCC 574

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(2) Whether the judgment of this Hon'ble Court in *TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd.*² lays down the correct law with reference to the definition of International Commercial Arbitration?

* * *

(1) Whether the jurisdiction of the Court under Section 11 extends to declaring as invalid the constitution of an Arbitral Tribunal purportedly under an arbitration agreement, especially, where the Tribunal has been constituted by an institution purportedly acting under the arbitration agreement? *b*

(2) Whether the jurisdiction of an Arbitral Tribunal constituted by an institution purportedly acting under an arbitration agreement can be assailed only before the Tribunal and in proceedings arising from the decision or award of such Tribunal and not before the Court under Section 11 of the Act? *c*

(3) Whether, once an Arbitral Tribunal has been constituted, the Court has jurisdiction under Section 11 of the Act to interfere and constitute another Tribunal? *d*

(4) Whether an arbitration between two Indian companies could be an 'international commercial arbitration' within the meaning of Section 2(1)(f) of the Act if the management and control of one of the said companies is exercised in any country other than India?

(5) Whether the petition is maintainable in the light of the reliefs claimed and whether the conditions precedent for the exercise of jurisdiction under Section 11 of the Act are satisfied or not?" *e*

12. While the matter was pending, most of the seven questions raised were resolved. However, the most important issue as to whether Section 11 of the 1996 Act could be invoked when the ICC Rules had already been invoked by one of the parties, remains to be decided.

13. On behalf of the petitioner, reliance was sought to be placed on the decision of this Court in *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.*³ wherein different laws that could apply to an arbitral relationship had been explained, namely: (SCC pp. 309-10, para 5) *f*

(i) The proper law of the underlying contract is the law governing the contract which creates the substantive rights and obligations of the parties with regard to the contract. *g*

(ii) The proper law of the arbitration agreement is the law governing the rights and obligations of the parties arising from the arbitration agreement.

(iii) The proper law of the reference is the law governing the contract which regulates the individual reference to arbitration. *h*

² (2008) 14 SCC 271

³ (1998) 1 SCC 305

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(iv) The curial law is the law governing the arbitration proceedings and the manner in which the reference has to be conducted. It governs the procedural powers and duties of the arbitrators, questions of evidence and the determination of the proper law of the contract.

b 14. It was submitted that in the instant case, the proper law of the contract is the Indian law and the proper law of the arbitration agreement is the Arbitration and Conciliation Act, 1996. Accordingly, matters relating to the constitution of the Arbitral Tribunal would be governed by Sections 10 to 15 of the 1996 Act. It was pointed out by the learned counsel that the parties had agreed that the arbitration proceedings could be conducted either in accordance with the rules and procedures of ICC or UNCITRAL. The choice of the procedure to be adopted by the Arbitral Tribunal in conducting the arbitration was left to the determination of the parties under Section 19(2) of the 1996 Act. It was submitted that the choice of the applicable procedural law could be exercised only after the constitution of the Arbitral Tribunal and not at any stage prior thereto.

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d 15. It was also submitted that in addition to the clear provision of Section 2(2) of the 1996 Act and the agreement between the parties that the place of arbitration would be New Delhi, the agreement would be expressly governed by Indian law under Article 19 of the agreement. Accordingly, as was held in *NTPC v. Singer Co.*⁴, the proper law of the contract would be the Indian law which would govern the arbitration agreement. It was submitted that the cardinal test, as suggested by Dicey in his *Conflict of Laws*, stood fully satisfied and that the governing law of the arbitration would be the law chosen by the parties, or in the absence of any agreement, the law of the country in which the arbitration is held. The learned counsel submitted that according to Dicey, the proper law of the arbitration is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so, even where the proper law of the contract is expressly chosen by the parties.

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f 16. However, as indicated hereinbefore, the question with which we are concerned is whether the arbitration agreement contemplates the application of Section 11 of the 1996 Act after the ICC Rules had been invoked by one of the parties which also appointed its nominee arbitrator. Equally important is the question whether Section 11 of the 1996 Act empowers the Chief Justice to constitute a Tribunal in supersession of the Tribunal already in the stage of constitution under the ICC Rules, notwithstanding the fact that one of the parties had proceeded unilaterally in the matter. The learned counsel for the petitioner urged that since the arbitration agreement contemplates the constitution of an Arbitral Tribunal without any reference to the ICC Rules or the ICC Court, the recourse taken by Devas to approach the ICC Court was without any basis and was contrary to the express agreement between the parties. The learned counsel also referred to the decision of this Court in *SBP & Co. v. Patel Engg. Ltd.*⁵, in this regard.

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4 (1992) 3 SCC 551

5 (2005) 8 SCC 618

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17. The learned counsel further urged that the issue as to whether once an Arbitral Tribunal has been constituted, the Chief Justice has jurisdiction under Section 11 of the 1996 Act to constitute another Tribunal, presupposes that an Arbitral Tribunal has been validly constituted and is not a Tribunal constituted by one party acting entirely in contravention of the arbitration agreement between the parties. It was contended that till such time as the question of jurisdiction was considered by the Court under Section 11, the question of a separate Tribunal being constituted by the International Chamber of Commerce did not arise. According to the learned counsel, in fact, the constitution of the Arbitral Tribunal by the ICC Court amounted to usurpation of the exclusive jurisdiction of the Chief Justice under Section 11 of the 1996 Act. It was submitted that initially the Court would have to be moved under Section 11 of the 1996 Act and it would have to examine whether it would have the jurisdiction to entertain the request and whether the condition for exercise of its powers to take necessary measures to secure the appointment of the arbitrator, at all existed. If the answer to both the issues was in the affirmative, the Court was duty-bound to appoint the arbitrator. *b*

18. On the other hand, on behalf of Devas it was submitted that the choice of an institution under whose auspices the arbitration was to be held, would have to be made once the Arbitral Tribunal had been constituted. It was contended that what was intended by the arbitration agreement was the formation of an ad hoc Tribunal which would have to follow one of the two procedures prescribed. *c*

19. It was submitted that Devas had already invoked the arbitration agreement and had sought the constitution of an Arbitral Tribunal, after having chosen its nominee arbitrator, in accordance with the ICC Rules of Arbitration. It was further submitted that since the Arbitral Tribunal had been constituted under the ICC Rules, any objection as to whether or not the Tribunal had been properly constituted would have to be raised before the Arbitral Tribunal itself. It is only in such objection that the Arbitral Tribunal would have to decide as to whether a Tribunal was required to be constituted before application of the ICC or UNCITRAL Rules, inasmuch as, according to the agreement, the claimant in the arbitration has the right to choose any of the two Rules when commencing the arbitration. *d*

20. Reliance was placed on Section 16 of the 1996 Act which incorporates the Kompetenz Kompetenz principle within its scope. Since the arbitration was to be governed by Part I of the 1996 Act, the Tribunal would have complete authority over all issues, including the validity of its constitution. *e*

21. Reference was also made to the decision of this Court in *Gas Authority of India Ltd. v. Ketji Construction (I) Ltd.*⁶, wherein the aforesaid *f*

⁶ (2007) 5 SCC 38

a ANTRIX CORPN. LTD. v. DEVAS MULTIMEDIA (P) LTD. (*Kabir, C.J.*) 569

b principle contained in Section 16 of the 1996 Act had been referred to. The learned counsel submitted that in arriving at the aforesaid decision, this Court had fully considered its decision in *SBP & Co.*⁵ It was submitted that the question regarding the validity of the constitution of the Arbitral Tribunal, upon a proper construction of Article 20 of the agreement would, therefore, have to be left for decision to the said Tribunal.

c **22.** On the question as to whether the Chief Justice or his designate would be entitled in exercise of their jurisdiction under Section 11 of the 1996 Act, to question the validity of the appointment of an Arbitral Tribunal, both the parties were ad idem that they could not. It was urged that the decision in *SBP & Co.*⁵ does not contemplate such a course of action. In this regard, reference was also made by the learned counsel for the respondent to the decision of this Court in *Sudarsan Trading Co. v. Govt. of Kerala*⁷ wherein it was held that once there is no dispute as to the contract, the interpretation thereof is for the arbitrator and not the courts, and the court cannot substitute its own decision for that taken by the learned arbitrator. It was urged that Section 5 of the 1996 Act also supports such construction as it bars any interference by the Court, except as provided in the Act. The learned counsel also submitted that as had been held by this Court in *McDermott International Inc. v. Burn Standard Co. Ltd.*⁸ after the 1996 Act came into force, it was for the party questioning the authority of the arbitrator to raise such question at the earliest point of time after the commencement of the arbitration proceedings, under Section 16 of the 1996 Act, and a decision thereupon could be challenged under Section 34 of the said Act.

e **23.** On behalf of Devas, it was also contended that the issue raised relating to jurisdiction falls outside the first category of cases, on account of the fact that the petitioner's claim that the Tribunal must be constituted first before application of either of the ICC Rules or the UNCITRAL Rules, essentially involves the question as to whether the arbitration clause excludes the applicability of the Rules prior to the constitution of the Tribunal and that the constitution of the Tribunal is, therefore, reserved for a decision under Section 11 of the 1996 Act. The learned counsel for the respondent submitted that in the facts of the case, the Chief Justice, in exercise of his power under Section 11(6) of the 1996 Act, was not entitled to question the validity of the appointment of the Arbitral Tribunal and the instant arbitration petition was liable to be dismissed.

f **24.** As indicated hereinbefore, the question which we are called upon to decide is whether when one of the parties has invoked the jurisdiction of the International Chamber of Commerce and pursuant thereto an arbitrator has already been appointed, the other party to the dispute would be entitled to proceed in terms of Section 11(6) of the 1996 Act.

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5 *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618
7 (1989) 2 SCC 38
8 (2006) 11 SCC 181

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25. In order to answer the said question, we will have to refer back to the provisions relating to arbitration in the agreement entered into between the petitioner and the respondent on 28-1-2005. Article 19 in clear terms provides that the rights and responsibilities of the parties under the agreement would be subject to and construed in accordance with the laws in India, which, in effect, means the Arbitration and Conciliation Act, 1996. Article 20 of the agreement specifically deals with arbitration and provides that disputes between the parties regarding the provisions of the agreement or the interpretation thereof, would be referred to the Senior Management of both the parties for resolution within three weeks, failing which the dispute would be referred to an Arbitral Tribunal comprising of three arbitrators. It was also provided that the seat of arbitration would be New Delhi in India and the arbitration would be conducted in accordance with the rules and procedures of the International Chamber of Commerce or UNCITRAL. *b*

26. The respondent has invoked the provisions of Article 20 of the agreement and has approached the ICC for the appointment of an Arbitral Tribunal in accordance with the rules of arbitration and, pursuant thereto, the respondent appointed its nominee arbitrator. In fact, after the respondent had invoked the arbitration clause, the petitioner came to know of the same from the respondent's request for arbitration which was forwarded by the ICC to the petitioner on 5-7-2011. By the said letter, the petitioner was also invited by the ICC to nominate its nominee arbitrator, but, as mentioned hereinbefore, instead of nominating its arbitrator, the petitioner once again requested Devas to convene the Senior Management Team meet on 27-7-2011, in terms of the agreement. Simultaneously, the petitioner appointed a former Judge of this Court, Ms Sujata V. Manohar, as its arbitrator and informed the ICC Court accordingly. However, disputes were also raised by the petitioner with the ICC that since the agreement clearly intended that the arbitration proceedings would be governed by the Indian law, which was based on the UNCITRAL model, it was not available to the respondent to unilaterally decide which of the rules were to be followed. It was only thereafter that the petitioner took recourse to the provisions of Section 11(4) of the 1996 Act, giving rise to the questions which have been set out hereinbefore in Para 11, of which only one has survived for our consideration. *c*

27. Section 11 of the 1996 Act is very clear as to the circumstances in which parties to a dispute, and governed by an arbitration agreement, may apply for the appointment of an arbitrator by the Chief Justice of the High Court or the Supreme Court. For the sake of reference, the relevant provisions of Section 11 are reproduced hereinbelow: *d*

"11. Appointment of arbitrators.—(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties. *e*

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. *f*

a ANTRIX CORPN. LTD. v. DEVAS MULTIMEDIA (P) LTD. (*Kabir, C.J.*) 571

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

b (4) If the appointment procedure in sub-section (3) applies and—

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

c (5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties—

d (a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

e a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.”

f **28.** As will be evident from the aforesaid provisions, when any of the parties to an arbitration agreement fails to act in terms thereof, on the application of the other party, the Chief Justice of the High Courts and the Supreme Court, in different situations, may appoint an arbitrator.

g **29.** In the instant case, Devas, without responding to the petitioner’s letter written in terms of Article 20 of the arbitration agreement, unilaterally addressed a request for arbitration to the ICC International Court of Arbitration for resolution of the disputes arising under the agreement and also appointed its nominee arbitrator. On the other hand, the petitioner appointed its nominee arbitrator with the caveat that the arbitration would be governed by the 1996 Act and called upon Devas to appoint its nominee arbitrator under the said provisions. As Devas did not respond to the petitioner’s letter dated 30-7-2011, the petitioner filed the application under Section 11(6) of the 1996 Act.

h **30.** In the instant case, the arbitration agreement provides that the arbitration proceedings would be held in accordance with the rules and

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procedures of the International Chamber of Commerce or UNCITRAL. Rightly or wrongly, Devas made a request for arbitration to the ICC International Court of Arbitration on 29-6-2011, in accordance with the aforesaid agreement and one Mr V.V. Veedar was appointed by Devas as its nominee arbitrator. By the letter written by the International Chamber of Commerce on 5-7-2011, the petitioner was required to appoint its nominee arbitrator, but it chose not to do so and instead made an application under Section 11(6) of the 1996 Act and also indicated that it had appointed Ms Justice Sujata V. Manohar as its arbitrator in terms of Article 20(9) of the agreement. *b*

31. The matter is not as complex as it seems and in our view, once the arbitration agreement had been invoked by Devas and a nominee arbitrator had also been appointed by it, the arbitration agreement could not have been invoked for a second time by the petitioner, which was fully aware of the appointment made by the respondent. It would lead to an anomalous state of affairs if the appointment of an arbitrator once made, could be questioned in a subsequent proceeding initiated by the other party also for the appointment of an arbitrator. In our view, while the petitioner was certainly entitled to challenge the appointment of the arbitrator at the instance of Devas, it could not do so by way of an independent proceeding under Section 11(6) of the 1996 Act. While power has been vested in the Chief Justice to appoint an arbitrator under Section 11(6) of the 1996 Act, such appointment can be questioned under Section 13 thereof. In a proceeding under Section 11 of the 1996 Act, the Chief Justice cannot replace one arbitrator already appointed in exercise of the arbitration agreement. *c*

32. It may be noted that in *Gesellschaft Fur Biotechnologische Forschung GmbH v. Kopran Laboratories Ltd.*⁹, a learned Single Judge of the Bombay High Court, while hearing an appeal under Section 8 of the 1996 Act, directed the claims/disputes of the parties to be referred to the sole arbitration of a retired Chief Justice with the venue at Bombay, despite the fact that under the arbitration agreement it had been indicated that any disputes, controversy or claim arising out of or in relation to the agreement, would be settled by arbitration in accordance with the Rules of Reconciliation of the International Chamber of Commerce, Paris, with the venue of arbitration in Bombay, Maharashtra, India. This Court held that when there was a deviation from the methodology for appointment of an arbitrator, it was incumbent on the part of the Chief Justice to assign reasons for such departure. *d*

33. Sub-section (6) of Section 11 of the 1996 Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of sub-section (6) may be invoked by any of the parties. Where in terms of the agreement, the arbitration clause has already been invoked by one of the parties thereto under the ICC Rules, the provisions of sub-section (6) cannot be invoked again, and, in case the other party is dissatisfied or aggrieved by the appointment of an arbitrator in terms *e*

⁹ (2004) 13 SCC 630 *f*

a ANTRIX CORPN. LTD. v. DEVAS MULTIMEDIA (P) LTD. (*Kabir, C.J.*) 573
of the agreement, his/its remedy would be by way of a petition under Section 13, and, thereafter, under Section 34 of the 1996 Act.

b 34. The law is well settled that where an arbitrator had already been appointed and intimation thereof had been conveyed to the other party, a separate application for appointment of an arbitrator is not maintainable. Once the power has been exercised under the arbitration agreement, there is no power left to, once again, refer the same disputes to arbitration under Section 11 of the 1996 Act, unless the order closing the proceedings is subsequently set aside. In *Som Datt Builders (P) Ltd. v. State of Punjab*¹⁰, the Division Bench of the Punjab and Haryana High Court held, and we agree with the finding, that when the Arbitral Tribunal is already seized of the disputes between the parties to the arbitration agreement, constitution of another Arbitral Tribunal in respect of those same issues which are already pending before the Arbitral Tribunal for adjudication, would be without jurisdiction.

c 35. In view of the language of Article 20 of the arbitration agreement which provided that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce or UNCITRAL, Devas was entitled to invoke the Rules of Arbitration of ICC for the conduct of the arbitration proceedings. Article 19 of the agreement provided that the rights and responsibilities of the parties thereunder would be subject to and construed in accordance with the laws of India. There is, therefore, a clear distinction between the law which was to operate as the governing law of the agreement and the law which was to govern the arbitration proceedings. 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.

d e f g 36. The arbitration petition is, therefore, dismissed. Having regard to the facts of the case, each party shall bear its own costs.

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10 AIR 2006 P&H 124 : (2006) 3 RAJ 144

PRICOL LTD. v. JOHNSON CONTROLS ENTERPRISE LTD.

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(BEFORE RANJAN GOGOI, J.)

a PRICOL LIMITED .. Petitioner;

Versus

JOHNSON CONTROLS ENTERPRISE LIMITED
AND OTHERS .. Respondents.

b Arbitration Case (C) No. 30 of 2014, decided on December 16, 2014

Arbitration and Conciliation Act, 1996 — Ss. 11(6) and (8) — Appointment of arbitrator by Court — Ambiguity in arbitration clause as to rules of institution by which arbitrator is to be appointed — Reasonable construction of arbitration clause to arrive at proper meaning — Application seeking appointment of arbitrator where arbitrator already appointed apparently in terms of arbitration clause — Maintainability

c — Cl. 30.2 in agreement providing for reference of disputes to arbitrator appointed in accordance with rules of arbitration of Singapore Chamber of Commerce — Invoking said clause, respondent approached Singapore International Arbitration Centre (SIAC) for resolution of disputes, which in turn appointed arbitrator — Objection as to said appointment of arbitrator raised before arbitrator rejected by a partial award on ground that appointment made by SIAC is valid since parties have expressly agreed that Singapore would be seat of arbitration — Contention that arbitrator appointed by SIAC is without jurisdiction since parties agreed to arbitration as per rules of Singapore Chamber of Commerce — Sustainability — Held, “Singapore Chamber of Commerce” is admittedly not an arbitration institution having its own rules for appointment of arbitrators — Hence, most reasonable construction of Cl. 30.2 would be to understand the reference to “Singapore Chamber of Commerce” as to “SIAC” — Further, parties subjected themselves to jurisdiction of arbitrator appointed by SIAC and also suffered a partial award — Hence, held, appointment of arbitrator and partial award cannot be questioned or examined in proceedings under S. 11(6) since said section empowers Chief Justice or his nominee only to appoint an arbitrator when parties fail to do so in accordance with terms agreed upon by them — Any interference would amount to sitting in appeal over said appointment and partial award, which is not permissible under S. 11(6) — Thus, application for appointment of arbitrator dismissed (Para 11)

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

Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810; *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.*, (1998) 1 SCC 305, *referred to*

Application dismissed N-D/54312/CV

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SUPREME COURT CASES

(2015) 4 SCC

Advocates who appeared in this case :

K.V. Viswanathan, Senior Advocate (Ananya Kumar, Ms Pragya Chauhan and Dheeraj Nair, Advocates) for the Petitioner;
Percival S. Billimoria, Sharan Thakur, Siddharth Barua, Vijay Kr. Paradeshi, Siddharth Thakur, Akshat Razdan, Rajat Singh, Samer V. Jalwar, Abhiroop Dutta and N. Ganpathy, Advocates, for the Respondents.

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Chronological list of cases cited

on page(s)

1. (2014) 11 SCC 560 : (2014) 4 SCC (Civ) 147, *Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd.* 181f
2. (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810, *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.* 180a-b
3. (1998) 1 SCC 305, *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.* 180b-c

b

JUDGMENT

1. The appointment of an arbitrator under the Joint Venture Agreement dated 26-12-2011 (for short “the JVA”) by and between the parties has been sought by means of the present application.

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2. There is no dispute between the parties with regard to the existence of the JVA and/or with regard to the fact that disputes and differences over the respective rights and liabilities of the parties under the JVA have surfaced. The arbitration clause under the JVA is in the following terms:

<i>“Article 30 Arbitration</i>	
30.1	If any dispute arises between any of the parties hereto during the subsistence or thereafter, in connection with the validity, interpretation, implementation or alleged material breach of any provision of this JVA or regarding any question, including the question as to whether the termination of this JVA by any party hereto has been legitimate, the parties hereto shall endeavour to settle such dispute amicably. The attempt to bring about an amicable settlement is considered to have failed as soon as one of the parties hereto, after reasonable attempts which attempt shall continue for not less than sixty (60) days, given fifteen (15) days’ notice thereof to the other party in writing.
30.2	In case of such failure, the dispute shall be referred to sole arbitrator to be mutually agreed upon by the parties. In case the parties are not able to arrive at such an arbitrator, the arbitrator shall be appointed in accordance with the rules of arbitration of the Singapore Chamber of Commerce.
30.3	The arbitration proceedings shall be held at Singapore. The arbitration proceedings shall be in English language. The award shall be substantiated in writing. The court of arbitration shall also decide on the costs of the arbitration proceedings. The award shall be binding on the disputing parties subject to applicable laws and the award shall be enforceable in any competent court of law. The provisions of this clause shall survive the termination of this JVA for any reason whatsoever.

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a	30.4	Each of the parties agree and acknowledge that damages would be inadequate to compensate for the breach of this JVA by either party, and each party shall be entitled to equitable relief by way of interim injunction or specific performance by recourse to courts/judicial forum with appropriate jurisdiction.
		<i>Article 31</i>
		<i>Governing law</i>
b	31.1	This JVA shall be governed and construed in accordance with the laws of India.”

3. There are certain facts and events which have occurred during the pendency of the present proceeding which must immediately be taken note of.

c 4. The parties are not in dispute that the “Singapore Chamber of Commerce” mentioned in Clause 30.2 of the JVA is not an arbitration institution having any rules for appointment of arbitrators. However, construing the said reference to the “Singapore Chamber of Commerce” to be one to the “Singapore International Arbitration Centre” (“SIAC”, for short), the first respondent, invoking the arbitration clause, had moved the said authority i.e. SIAC for appointment of an arbitrator. This was so done on 5-9-2014. A copy of the said notice/intimation was received by the petitioner on 11-9-2014. Thereafter, the petitioner had instituted the present proceeding on 15-9-2014. In the meantime, SIAC, exercising its powers under Section 8(2) read with Section 8(3) of the Singapore International Arbitration Act (Cap. 143A) (for short “the IAA”), had appointed one Mr Steven Y.H. Lim as the sole arbitrator.

f 5. In a preliminary meeting between the parties and the learned sole arbitrator held on 30-10-2014, it was indicated by the petitioner that it would be challenging the jurisdiction of the sole arbitrator appointed by SIAC. Accordingly, on directions of the learned sole arbitrator, there has been an exchange of written submissions on the issue of jurisdiction. A hearing on the question of jurisdiction was also held in Singapore on 18-11-2014. Thereafter, by a partial award dated 27-11-2014, the sole arbitrator had ruled that the appointment made by SIAC under the IAA is valid as the parties have expressly agreed that Singapore would be the seat of arbitration.

g 6. On behalf of the petitioner, it is contended that under Clause 31.1, the rights of the parties under the JVA are to be governed by the laws of India. Therefore, in the absence of any contrary intention, even the arbitration agreement will be governed by Indian law i.e. the Arbitration and Conciliation Act, 1996. Clause 30.3 by which the parties had agreed that “arbitration proceedings shall be held at Singapore” has to be consequently construed to mean that the seat of arbitration continues to be India and Singapore is only the venue of the hearings to be conducted in the arbitration proceedings. On the said basis, it is contended that the present application

under Section 11(6) of the Act would justify appropriate orders from the Court. It is also argued that the parties to the JVA have not excluded the application of Part I of the 1996 Act. The JVA has been signed earlier to the decision of this Court in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*¹ Therefore, the procedural law governing the conduct of the arbitration would be the law prevailing in India. a

7. It is alternatively submitted that even assuming that the seat of arbitration is Singapore, as the rights of the parties are to be governed by the Indian law, it is only the curial law of Singapore that would apply to regulate the proceedings after the appointment of the arbitrator is made and till the passing of the award. Reference in this regard is made to *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.*² On the aforesaid basis, it is claimed that the appointment of the sole arbitrator by SIAC is without jurisdiction and this Court ought to proceed to exercise its powers under Section 11(6) of the Act. b

8. In reply, the respondents submit that Clause 30.3 of the JVA makes it, ex facie, clear that the parties have agreed that the seat of arbitration would be Singapore. Though the substantive law that would govern the rights of the parties under the JVA would be the Indian law so far as the appointment of arbitrator is concerned, it is the agreed terms (Clause 30.2) which will prevail. It is submitted that on a reasonable understanding of Clause 30.2, the request of the respondents to SIAC for appointment of a sole arbitrator and the appointment made does not suffer from any infirmity. It is claimed that the “Singapore Chamber of Commerce”, not being an arbitration institution, the real intention of the parties in Clause 30.2 was to approach SIAC for appointment of an arbitrator in the event of the failure of a mutual agreement on this score. This has been so done by the respondents. c

9. The learned counsel for the respondents has also taken the Court to the past history of the dispute between the parties commencing with the grant of interim measures by the Civil Court at Coimbatore under Section 9 of the Act and the failure on the part of the petitioner to agree to the appointment of a retired Judge of the Supreme Court of India as the sole arbitrator. The said facts have been pointed out in support of the contention that the petitioner has dragged its feet in the matter so as to gain maximum advantage of the interim order granted in its favour by the Civil Court at Coimbatore. Lastly, it is submitted that the arbitrator having been appointed by SIAC in accordance with the relevant arbitration clause in the JVA and the petitioner having submitted to the jurisdiction of the arbitrator and, in fact, a partial award having been passed by the sole arbitrator on the issue of jurisdiction, the present is not a fit case for invoking the powers of this Court under Section 11(6) of the Act. d

10. On a consideration of the respective submissions made by the parties and the several precedents cited at the Bar, this Court is inclined to hold that e

1 (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810 f

2 (1998) 1 SCC 305 g

a Clause 30.2, on a reasonable and meaningful construction thereof, would mean that in case the parties are not able to name a sole arbitrator by mutual agreement, the arbitrator is to be appointed by SIAC inasmuch as the entity contemplated in Clause 30.2 i.e. “Singapore Chamber of Commerce” is admittedly not an arbitration institution having its own rules for appointment of arbitrators. Given the circumstance, the most reasonable construction of the said clause would be to understand the reference to “Singapore Chamber of Commerce” as to the “SIAC”.

b 11. From the relevant facts of the case, it is also clear that the respondents at one time had suggested the name of a retired Judge of the Supreme Court of India as the sole arbitrator, which was not agreed to by the petitioner, who in turn, was inclined to nominate another learned Judge. Be that as it may, in such a situation, the respondents by invoking Arbitration Clause 30.2 had approached SIAC for appointment of an arbitrator. This was on 5-9-2014 i.e. c before the present proceeding was instituted by the petitioner. Though the notice of the said request was served on the petitioner on 11-9-2014, no steps were taken by the petitioner to pre-empt the appointment of a sole arbitrator by SIAC. Mr Steven Y.H. Lim came to be appointed as the sole arbitrator by SIAC on 29-9-2014. The petitioner has submitted to the jurisdiction of Mr d Steven Y.H. Lim. Even if it is held that such participation, being under protest, would not operate as an estoppel, what must be acknowledged is that the appointment of the sole arbitrator made by SIAC and the partial award on the issue of jurisdiction cannot be questioned and examined in a proceeding under Section 11(6) of the Act which empowers the Chief Justice or his nominee only to appoint an arbitrator in case the parties fail to do so in e accordance with the terms agreed upon by them. To exercise the said power, in the facts and events that has taken place, would really amount to sitting in appeal over the decision of SIAC in appointing Mr Lim as well as the partial award dated 27-11-2014 passed by him acting as the sole arbitrator. Such an exercise would be wholly inappropriate in the context of the jurisdiction under Section 11(6) of the Act, a view already expressed by this Court in a f recent decision in *Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd.*³

12. For the aforesaid reasons, this application under Section 11(6) of the Act has to fail. It is, accordingly, dismissed, however, leaving it open to the petitioner to avail of such remedies as may be available to it in law.

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h 3 (2014) 11 SCC 560 : (2014) 4 SCC (Civ) 147 : (2013) 6 SCR 453

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SUPREME COURT CASES

(2015) 3 SCC

(2015) 3 Supreme Court Cases 800

(BEFORE RANJAN GOGOI, J.)

WALTER BAU AG, LEGAL SUCCESSOR, OF
THE ORIGINAL CONTRACTOR, DYCKERHOFF
AND WIDMANN A.G.

a

.. Petitioner;

Versus

MUNICIPAL CORPORATION OF GREATER
MUMBAI AND ANOTHER

.. Respondents.

b

Arbitration Petition (C) No. 35 of 2014, decided on January 20, 2015

Arbitration and Conciliation Act, 1996 — S. 11(6) — Appointment of arbitrator contrary to procedure agreed upon in arbitration agreement — Impermissibility — Strict compliance with agreement procedure by parties and institutions nominated in agreement procedure — Appointment as fait accompli, does not bar/oust jurisdiction of court unless it is in compliance with agreement procedure

c

— Held, unless appointment of arbitrator is *ex facie* valid and satisfies Court exercising jurisdiction under S. 11(6), such appointment as fait accompli is not acceptable and does not bar Court to exercise jurisdiction under S. 11(6) — In present case, non-compliance with agreement procedure by institution nominated in arbitration agreement, rendered appointment of arbitrator so appointed, invalid

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— Clause in agreement provides for appointment of one arbitrator by each party and on failure of one of the parties to do so within 30 days, International Centre for Alternative Dispute Resolution in India (ICADR) shall appoint arbitrator — On failure by respondent to appoint its arbitrator, ICADR calling on respondent to appoint its arbitrator or choose one from amongst a panel of three arbitrators — Pursuant to said communication, respondent appointing its arbitrator — Sustainability — Held, in instant case, option given to respondent to go beyond panel submitted by ICADR and to appoint any person of its choice was not procedure agreed upon — Agreed upon procedure between parties contemplated appointment of arbitrator by second party within 30 days of receipt of notice from first party and upon failure to do so, appointment of arbitrator by ICADR — Further, rules of ICADR also do not contemplate an alternative procedure giving respondent liberty to appoint arbitrator of its choice once it failed to appoint its arbitrator within agreed upon period of thirty days — Thus, held, appointment of arbitrator of its choice by respondent is contrary to provisions of rules governing appointment of arbitrators by ICADR, which parties had agreed to abide by — Contention that as arbitrator was already appointed prior to filing of present application, said appointment is not liable to be interfered in view of decision in *Datar Switchgears Ltd.*, (2000) 8 SCC 151, rejected, since said decision gives flexibility in time frame agreed upon by parties, but does not save appointments made contrary to procedure agreed upon by parties — Thus, held, appointment of arbitrator by respondent is invalid in law and hence does not bar Supreme Court from exercising powers under S. 11(6) to appoint arbitrator on behalf of respondent (Paras 9 and 10)

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WALTER BAU AG v. MUNICIPAL CORPN. OF GREATER MUMBAI 801

Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151; *Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd.*, (2014) 11 SCC 560 : (2014) 4 SCC (Civ) 147; *Pricol Ltd. v. Johnson Controls Enterprise Ltd.*, (2015) 4 SCC 177, *explained and distinguished*

a *Deep Trading Co. v. Indian Oil Corpn.*, (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449, *referred to*

N-D/54409/CV

Advocates who appeared in this case :

Shamik Sanjanwala, Kailash Pandey, Ranjeet Singh and K.V. Sreekumar, Advocates, for the Petitioner;

b Mukul Rohatgi, Attorney General, Dhruv Mehta, Senior Advocate [J.J. Xavier, Ashish Wad, Anshuman Srivastava and Ms Jayashree Wad (for M/s J.S. Wad & Co.), Advocates] for the Respondents.

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

1. (2015) 4 SCC 177, *Pricol Ltd. v. Johnson Controls Enterprise Ltd.* 805e, 805g, 806a

c 2. (2014) 11 SCC 560 : (2014) 4 SCC (Civ) 147, *Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd.* 805d-e, 805g, 806a

3. (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449, *Deep Trading Co. v. Indian Oil Corpn.* 805f-g

4. (2000) 8 SCC 151, *Datar Switchgears Ltd. v. Tata Finance Ltd.* 805f-g, 806b-c, 806e-f

JUDGMENT

d 1. Works Contract No. 3-AAA dated 20-12-2000 was executed by and between the petitioner and Municipal Corporation of Greater Mumbai (Respondent 1 herein) for execution of city tunnel rehabilitation works for the purposes of transporting the city's sewage. Disputes and differences having arisen between the parties under the said contract, the petitioner invoked the arbitration clause contained therein and by the letter dated e 24-2-2014, nominated one Shri R.G. Kulkarni as its arbitrator. By the said communication, the petitioner called upon Respondent 1 to appoint its arbitrator within 30 days of the receipt of the aforesaid letter/notice.

2. The arbitration clause in the agreement between the parties would require to be specifically noticed and, therefore, is being extracted herein below:

f "Modified sub-clause 67.3

Arbitration

Sub-clause 67.3 is modified to read as follows:

g Any dispute, in respect of which the recommendation(s), if any, of the Board has not become final and binding pursuant to sub-clause 67.1, shall be finally settled by arbitration as set forth below. The Arbitral Tribunal shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the engineer and any recommendation(s) of the Board related to the dispute:

h I. A dispute with an Indian contractor shall be finally settled by arbitration in accordance with the Indian Arbitration and Conciliation Act, 1996 or any statutory amendment thereof. The Arbitral Tribunal

shall consist of 3 arbitrators, one each to be appointed by the employer and the contractor. The third arbitrator shall be chosen by two arbitrators so appointed by the parties and shall act as presiding arbitrator. In case of failure of the two arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the presiding arbitrator shall be appointed by the International Centre for Alternative Dispute Resolution in India. For the purpose of this sub-clause, the term “Indian contractor” means a contractor who is registered in India and is a juridical person created under Indian law as well as a joint venture between such a contractor and a foreign contractor.

II. In case of a dispute with a foreign contractor, the dispute shall be finally settled in accordance with the provisions of UNCITRAL Arbitration Rules. The Arbitral Tribunal shall consist of 3 arbitrators one each to be appointed by the employer and the contractor. The third arbitrator shall be chosen by the two arbitrators so appointed by the parties, and shall act as presiding arbitrator. In case of the failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the presiding arbitrator shall be appointed by the International Centre for Alternative Dispute Resolution in India. For the purposes of this Clause 67, the term “foreign contractor” means a contractor who is not registered in India and is non-juridical person created under Indian law.

III. Neither party shall be limited in the proceedings before such tribunals to the evidence nor did arguments already put before the engineer or the Board, as the case may be, for the purpose of obtaining its/his said recommendations/decision. No such recommendations/decision shall disqualify the engineer or any of the members of the Board, as the case may be, from being called as a witness and giving evidence before the arbitrators or any matter whatsoever relevant to the dispute.

IV. Arbitration may be commenced prior to or after completion of the works, provided always that the obligations of the employer, the engineer, the contractor and the Board shall not be altered by reason of the arbitration being conducted during the progress of the works.

V. If one of the parties fails to appoint its arbitrator in pursuance of sub-clauses (i) and (ii) above, within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the International Centre for Alternative Dispute Resolution in India, both in cases of foreign contractors as well as Indian contractors, shall appoint an arbitrator. A certified copy of the order of the International Centre for Alternative Dispute Resolution in India making such an appointment shall be furnished to each of the parties.

WALTER BAU AG v. MUNICIPAL CORPN. OF GREATER MUMBAI 803

a VI. Arbitration proceedings shall be held at Mumbai, India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

b VII. The decision of the majority of the arbitrators shall be final and binding upon both parties. The cost and the expenses of arbitration proceedings will be paid as determined by the Arbitral Tribunal. However, the expenses incurred by each party in connection with the preparation, presentation, etc. of its case as also the fees and expenses paid to the arbitrator appointed by such party or on its behalf shall be borne by each party itself.”

c 3. A reading of the aforesaid clause of the agreement would go to show that after one of the parties thereto invokes the arbitration clause; appoints its arbitrator and thereafter gives notice to the other party to appoint its arbitrator, if the same is not done within 30 days or if the two arbitrators appointed by both sides fail to nominate a third arbitrator, the matter is to be referred to the International Centre for Alternative Dispute Resolution in India (for short “ICADR”). For appointment of the arbitrator on behalf of one of the parties who has failed to so act or for appointment of the third arbitrator, as may be, ICADR is governed by certain norms contained in Rules 5 and 35 of the ICADR Rules, 1996 governing the procedure for
d appointment of arbitrators.

4. The same Rules may be usefully extracted hereinbelow:

“5. *Appointment of arbitrators.*—(1) Unless otherwise agreed by the parties, a person of any nationality may be an arbitrator.

e (2) Where the arbitration agreement provides that each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the presiding arbitrator, and—

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the appointed arbitrators fail to agree on the presiding arbitrator within thirty days from the date of their appointment,

f the appointment shall be made, upon request of a party, by ICADR.

(3) In an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree, the appointment shall be made, upon request of a party, by ICADR.

(4) A decision by ICADR on a matter entrusted to it by sub-rule (2) or sub-rule (3) will be final and binding on the parties.

g (5) Upon receipt of a request under sub-rule (2) or sub-rule (3), ICADR will—

(a) make the appointment as promptly as possible,

(b) follow the procedure specified in Rule 35,

(c) have regard to—

h (i) any qualifications required of the arbitrator by the agreement of the parties;

(ii) such considerations as are likely to secure the appointment of an independent and impartial arbitrator; and

(iii) in the case of appointment of a sole or presiding arbitrator in an international commercial arbitration, the advisability of appointing a person of a nationality other than the nationalities of the parties.

* * *

35. Services as appointing authority.—(1) On receipt of a request to appoint an arbitrator in pursuance of Rule 5(2) or 5(3), ICADR will follow the following procedure—

(i) ICADR will communicate to each party a list containing the names, addresses, nationalities and a description of qualifications and experience of at least three individuals from the panel of arbitrators;

(ii) within thirty days following the receipt of the list, a party may delete any name to which he objects and after re-numbering the names in the order of his preference, return the list to ICADR;

(iii) on receipt of the list returned by the party, ICADR will appoint the arbitrator from the list taking into account the order of preference indicated by the parties;

(iv) if for any reason the appointment cannot be made according to the procedure specified in clauses (i) to (iii), ICADR may appoint the arbitrator from the panel of arbitrators.

(2) In appointing an arbitrator ICADR will have regard to the matters referred to in Rule 5(5)(c) and will carefully consider the nature of the dispute in order to include in the list, persons having appropriate professional or business experience, language ability and nationality.

(3) All appointments on behalf of ICADR will be made by the Secretary General and in his absence by such member of the Governing Council as is designated by the Chairperson:

Provided that where the Secretary General is to be appointed as the arbitrator, the appointment will be made by the Chairperson.”

5. The respondent Corporation having failed to respond to the notice dated 24-2-2014 of the petitioner, an approach was made to ICADR by the petitioner on 19-5-2014. On the basis thereof, ICADR by its letter dated 3-6-2014 called upon the respondent Corporation to make appointment of an arbitrator from a panel of three names that was furnished to the respondent Corporation *or to independently appoint an arbitrator*. The respondent Corporation pursuant to the said communication of ICADR appointed Mr Justice (Retd.) A.D. Mane as its arbitrator by communication dated 3-7-2014. Thereafter, this application/petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short “the Arbitration Act”) was filed on 21-8-2014.

6. Mr Shamik Sanjanwala, learned counsel appearing for the petitioner has submitted that the arbitration clause in the agreement read with Rules 5 and 35 of the ICADR Rules embody a procedure that was agreed upon by the parties with regard to appointment of the arbitrator(s). Clearly and evidently, the appointment of Mr Justice A.D. Mane by the respondent Corporation is

- contrary to the procedure agreed upon inasmuch as under the relevant Rules governing ICADR, the said body was required to communicate to the
- a respondent Corporation a panel of three names and it is from the said panel that the respondent Corporation was required to name its arbitrator. The Rules do not contemplate an alternative procedure giving the respondent Corporation liberty to appoint an arbitrator of his choice once the respondent Corporation failed to appoint its arbitrator within the agreed upon period of thirty days from the receipt of the notice from the petitioner. The
- b appointment of Mr Justice A.D. Mane as arbitrator is, therefore, non est, leaving it open for this Court to exercise its powers under Section 11(6) of the Act to appoint an arbitrator on behalf of the respondent Corporation. It is also pointed out that the petitioner has a serious basis to question the impartiality and independence of the arbitrator purported to be appointed by the respondent Corporation.
- c 7. Mr Mukul Rohatgi, learned Attorney General, appearing for the respondent Corporation, on the other hand, has submitted that the present petition would not be maintainable inasmuch as an arbitrator has already been appointed and any exercise of power under Section 11(6) of the Arbitration Act, at this stage, would operate as an ouster of the said arbitrator. It is submitted that the remedy of the petitioner, if any, lies elsewhere and
- d under different provisions of the Arbitration Act and not by way of an application under Section 11(6) thereof. Reliance has been placed on the decision of this Court in *Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd.*¹ and another recent pronouncement of this Court dated 16-12-2014 in *Pricol Ltd. v. Johnson Controls Enterprise Ltd.*²
- e 8. Alternatively, it has been urged by Mr Rohatgi that as the appointment of Mr Justice A.D. Mane was made before the present application/petition was filed in this Court, the said appointment would be valid in law. It is submitted that the requirement of appointment within 30 days of receipt of a notice is only in cases covered under Sections 11(4) and 11(5) of the Arbitration Act, whereas in cases falling under Section 11(2) read with Section 11(6) of the Arbitration Act, so long the appointment is made before
- f the aggrieved party concerned moves the Court under Section 11(6), such appointment will not be invalidated. In this regard, reliance has been placed on *Datar Switchgears Ltd. v. Tata Finance Ltd.*³ and *Deep Trading Co. v. Indian Oil Corpn.*⁴
- g 9. While it is correct that in *Antrix*¹ and *Pricol Ltd.*², 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.

h 1 (2014) 11 SCC 560 : (2014) 4 SCC (Civ) 147
2 (2015) 4 SCC 177
3 (2000) 8 SCC 151
4 (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449

In *Antrix*¹, appointment of the arbitrator, as per the ICC Rules, was as per the alternative procedure agreed upon, whereas in *Pricol Ltd.*², 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. a

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.*³ 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.*³, 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. b
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11. Consequently, we allow the present petition and appoint Shri Justice S.R. Sathe, a retired Judge of the Bombay High Court as the arbitrator on behalf of the respondent Corporation. Both the arbitrators shall now name the third arbitrator forthwith whereafter the arbitration proceedings will be held and concluded as expeditiously as possible. The terms of appointment of Shri Justice S.R. Sathe as the arbitrator on behalf of the respondent Corporation will be settled in consultation with the respondent Corporation. f

12. The arbitration petition is disposed of in the above terms. g

END OF VOLUME

1 *Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd.*, (2014) 11 SCC 560 : (2014) 4 SCC (Civ) 147 h
2 *Pricol Ltd. v. Johnson Controls Enterprise Ltd.*, (2015) 4 SCC 177
3 *Datar Switchgears Ltd. v. Tata Finance Ltd.*, (2000) 8 SCC 151