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

Judgment pronounced on: 24.12.2024

+ **FAO (COMM) 15/2021 & CM APPL.2282/2021**

M/S DHARAMVIR AND COMPANYAppellant

Through: Mr. G. L. Verma, Advocate.

versus

DELHI DEVELOPMENT AUTHORITY & ANR. Respondents

Through: Mr. Vaibhav Agnihotri, Mr. Harshit
Kiran and Mr. Abhishek Das,
Advocates.

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

SACHIN DATTA, J.

1. The present appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter '*the A&C Act*') read with Section 13 of the Commercial Courts Act, 2015, assailing the order dated 19.12.2020 passed by the District Judge (Commercial Court), North West District, Rohini Courts, Delhi whereby the application filed by the appellant under Section 34 of the A&C Act, 1996, was dismissed.

2. The arbitral award dated 17.08.2017 (published on 08.06.2018) [hereinafter referred as '*the arbitral award*'] was rendered in the context of an Agreement between the parties for the construction of a boundary wall in Vishal Bagh, Sector G-2 and G-6 at Narela. The disputes between the parties were on account of the alleged monetary entitlement of the appellant/claimant, which has been disputed by the respondent (DDA).



3. In terms of the stipulation in the arbitration agreement between the parties, an arbitrator came to be appointed on 07.05.2014 by the engineer member/DDA. This was itself pursuant to directions in Arb. P. 401/2013 filed by the appellant/claimant, which was disposed of on 17.12.2013, directing that the appointment be made in terms of the procedure set out in the arbitration agreement between the parties. Thereafter, a substituted arbitrator was appointed on 10.03.2015.

4. On coming into force of the Amendment Act of 2015 (3 of 2016) [hereinafter referred as '*the Amendment Act*'], a letter dated 06.12.2016 was sent by the appellant/claimant, seeking that an independent arbitrator be appointed as per the Amendment Act. Pursuant to the receipt of the said letter, a communication dated 03.01.2017 was issued by the Engineer Member/DDA. The said communication reads as under:-

"Whereas Sh. D.V.Raghav, SE (Arbn), DDA was appointed as Sole Arbitrator vide letter No. EM 2 (7)96/Arbn./Vol.VIII/DDA/Pt.34/374 dated 10.03.2015 in the above matter and now M/s. Dharamvir & Co. has submitted consent letter No Nil dt. 23.12.2016 addressed to the Engineer Member, DDA and similar request has been forwarded to E.E. ND-9 dt. 06.12.2016 vide which M/s. Dharamvir & Co. has requested to switch their case pending with Sh. D.V.Raghav, Sole Arbitrator to independent Arbitrator as per Arbitration and Conciliation Act 1996 as amended by The Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016).

Therefore, I, D.P.Singh, Engineer Member, DDA by powers conferred on me under Clause 25 of works Agreement, hereby appoint Shri. S.P. Banwait (Retd.), ADG, CPWD to decide as per Arbitration and Conciliation Act 1996 as amended by The Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and make his award regarding claims/disputes raised by the contractor, as shown in the Statement of Claims and further counter claims of the Department to follow, however, subject always to their admissibility under Clause 25 of works agreement. The Arbitrator shall give the reasons for the award. The list of claims/counter claims shall remain same.

This reference is without prejudice to the defense that may be raised by



the respondent regarding the tenability of the claims, on all necessary and available grounds, including those of limitations.”

5. The arbitrator, appointed in terms of the aforesaid communication, proceeded to make the impugned award dated 17.08.2017; however, a lien was purported to be exercised on the arbitral award on account of ‘unpaid costs of arbitration’. The same was referred to in the communication dated 16.08.2017, issued by the arbitrator, which records as under:

*“The aforesaid letter dated 15.07.2017 indicates the amount of money to be deposited with me in accordance with in settlement of dues. Amount payable by each party is Rs. 59,500/-. The claimant has flatly refused to make any further claimant. Accordingly, the respondent is directed to make payment on behalf of the claimant in addition to his amount share for Rs. 59,500/-. The respondent is directed to pay Rs. 1,19,000/- after which he can collect certified copy of award form me the parties interested in the award make deposited for Rs. 1,19,500/-. In case the claimant does not pay to the arbitrator, the respondent may remit the requisite payment due from the claimant and this will be reflected in the award based on which the respondent can recover Rs. 59,500/- from the claimant. **I hereby have a lien on the arbitral award for unpaid costs of arbitration and the lien will continue till the dues of the arbitrator are paid.** In addition the claimant has to make a payment of Rs. 17,250/- as clerical charges. He has refused to pay these charges. The respondent may make the payment to the tribunal on behalf of the claimant. Accordingly, the lien over the dues of the arbitrator is extended to the clerical charges and the respondent will be entitled to recover the clerical charges as mentioned here in before which will be reflected in the award.*

The lien on the award is extended to the non-payment of the clerical charges amounting to Rs.17,250/-. The respondent is entitled to recover the clerical charges from the claimant, amount being Rs.17,250/- Ordered accordingly.

The parties are informed that the limitation period starts from 18.08.2017.”

6. A communication dated 04.06.2018 came to be addressed by the appellant/claimant to the arbitrator, wherein it was stated that no award had



been received/published prior to the expiry of the time limit for the same as provided in the Amendment Act. It was also stated that “no justice can be expected” by the appellant/claimant and hence the arbitrator was requested to close the case. The relevant extract of the said communication dated 04.06.2018 is as under:

“Under instruction from and on behalf of my client M/s Dharamvir & Company, I draw your kind attention to above cited arbitration case for which your goodself were appointed as Arbitrator by Engineer Member/DDA vide his order No. F.2(7)96/Arbn/Vol-III/DDA/Pt- 22/42 dated 03.01.2017. You are aware that with the coming into force of the Amendment Act Arbitration and Conciliation Act, 2015, the time limit for arbitral award is specified as twelve months from the date on which the Arbitrator has received the notice of his appointment. However, in view of such legal provision, you were required under law to publish your award within the period so specified under law. However, till this date, no such award is received from your side. By virtue of such provisions, your office has become functus officio and any award, if passed now at this stage, would be a nullity.

My client has also good reasons to believe that no justice can be expected from the present arrangement. Hence, you are requested to close the case and take such action to record your closure with intimation to my client and to me so that further action to seek justice on the claims can be taken in accordance with law.

Kindly acknowledge and confirm accordingly within 15 days from the date of receipt of this Notice.”

7. Thereafter, a letter dated 08.06.2018 was addressed by the Delhi Development Authority (DDA) to the sole arbitrator, Mr. S. P. Banwait, along with a cheque; settling “the arbitration fee” demanded by the sole arbitrator which included the share of both the parties. Immediately thereafter, a signed copy of the award was sent to the parties by the sole arbitrator, under a covering letter dated 08.06.2018.

8. In the aforesaid conspectus, an application under Section 34 of the A&C Act was filed by the appellant/claimant, which came to be dismissed



by the impugned judgment dated 19.12.2020 (hereinafter referred as '*the impugned judgement*'). The impugned judgment rejected the contention of the appellant/claimant that the award was null and void for being incomplete as also the contention that the award has been issued beyond the period prescribed under Section 29A of the A&C Act. The impugned judgment also finds that no fault could be found with the conduct of the arbitral proceedings.

SUBMISSIONS ON BEHALF OF THE APPELLANT

9. The primary contention of the learned counsel for the appellant is that the appointment of the arbitrator was in violation of Section 12(5) of the A&C Act, 1996, as amended by the Amendment Act, read with the VIIth Schedule of the A&C Act. He submits that on account of the appointment of the arbitrator being null and void and in contravention of settled law, the resultant arbitral proceedings and the impugned judgment are *non-est*. He submits that under the provisions of the amended Act, there is a bar against the unilateral appointment of an arbitrator, and thus the constitution of the arbitral tribunal in this case was improper. In this regard, he relies upon the judgments of the Supreme Court in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd.*** (2020) 20 SCC 760; ***State of Maharashtra and Ors v. M/s. Ark Builders Pvt. Ltd.***, (2011) 4 SCC 616; ***Benarsi Krishna Committee v. Karmyogi Shelters (P) Ltd.***, (2012) 9 SCC 496 and ***Ellora Paper Mills Ltd. v. The State of Madhya Pradesh***, (2022) 3 SCC 1.

10. Reliance is also placed on the judgement in ***Ram Kumar and Anr. v. Shri Ram Transport Finance Co. Ltd.***, 2022 SCC OnLine Del 4268, wherein it has been held as under:



"This Court is of the view that the approach of the Ld. Commercial Court is flawed. Unilateral appointment of the Arbitrator by the Respondent is impermissible."

11. It is also contended that the arbitrator acted in contravention of the statute by demanding additional fee and consequently, misconducted himself.

12. It is further contended that the award is unreasoned and has been passed in contravention of the principles of natural justice, inasmuch as the appellant/claimant was denied the opportunity to requisition the relevant evidence being drawings, measurement books, cement register and other relevant site records which were relevant for the adjudication of the disputes.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

13. Learned counsel for the respondent has refuted the contentions of the learned counsel for the appellant. He submits that that the appellant's challenge to the impugned award is beyond the scope of Section 34 and 37 of the A&C Act. It is further submitted that there is no infraction of Section 29A of the A&C Act inasmuch as the impugned award was made on 17.08.2017, which is well-within the period contemplated under Section 29A of the A&C Act. It is submitted that the award was delivered to the parties beyond the statutory period of 12 months since a lien had been exercised on the award for the unpaid costs of arbitration. He submits that the same cannot be faulted.

14. It is further contended that having participated in the arbitration proceedings, it was not open to the appellant to challenge the appointment of the arbitrator. It is submitted that there was no objection *qua* any



personal bias/disqualification on the part of the arbitrator and any such objections cannot be permitted to be raised at such a belated stage.

15. It is submitted that the award is based on appreciation of the material and evidence that were placed before the arbitrator and it is not open in these proceedings to re-appraise the same. It is thus prayed that the present appeal be dismissed.

REASONING AND FINDINGS

16. At the outset, it is necessary to consider whether the unilateral appointment of the arbitrator by the respondent invalidates the impugned arbitral award. Undoubtedly, unilateral appointment of arbitrator/s is an anathema to the provisions of the A&C Act, as amended by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter the ‘Amendment Act’). The legal position in this regard has been authoritatively settled in terms of the judgments of the Supreme Court in **Perkins Eastman Architects DPC v. HSCC (India) Ltd.** (2020) 20 SCC 760, **TRF Limited v. Energo Engineering Projects Ltd**, (2017) 8 SCC 377, **Bharat Broadband Network Limited v. United Telecoms Limited.**, 2019 SCC OnLine SC 547 and **Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) [CORE]** 2024 SCC OnLine SC 3219.

17. However, the moot question that falls for consideration in the present case is whether the amended provisions of the A&C Act would apply, considering that the arbitration commenced prior to the coming into force of the Amendment Act. In this regard, Section 26 of the Amendment Act, clearly provides as under:-

“Section 26. Act not to apply to pending arbitral proceedings.



Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.”

The BCCI Case

18. The aforesaid provision of the Amendment Act came to be construed by the Supreme Court in the case of ***Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. and Ors.*** (2018) 6 SCC 287 [***‘BCCI’***]; it was held therein as under:

“37. What will be noticed, so far as the first part is concerned, which states—

“26. Act not to apply to pending arbitral proceedings.—Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree....”

is that: (1) “the arbitral proceedings” and their commencement is mentioned in the context of Section 21 of the principal Act; (2) the expression used is “to” and not “in relation to”; and (3) parties may otherwise agree. So far as the second part of Section 26 is concerned, namely, the part which reads, “... but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act” makes it clear that the expression “in relation to” is used; and the expression “the” arbitral proceedings and “in accordance with the provisions of Section 21 of the principal Act” is conspicuous by its absence.

38. That the expression “the arbitral proceedings” refers to proceedings before an Arbitral Tribunal is clear from the heading of Chapter V of the 1996 Act, which reads as follows:

“Conduct of arbitral proceedings”

The entire chapter consists of Sections 18 to 27 dealing with the



conduct of arbitral proceedings before an Arbitral Tribunal. What is also important to notice is that these proceedings alone are referred to, the expression “to” as contrasted with the expression “in relation to” making this clear. Also, the reference to Section 21 of the 1996 Act, which appears in Chapter V, and which speaks of the arbitral proceedings commencing on the date on which a request for a dispute to be referred to arbitration is received by the respondent, would also make it clear that it is these proceedings, and no others, that form the subject-matter of the first part of Section 26. Also, since the conduct of arbitral proceedings is largely procedural in nature, parties may “otherwise agree” and apply the Amendment Act to arbitral proceedings that have commenced before the Amendment Act came into force¹. In stark contrast to the first part of Section 26 is the second part, where the Amendment Act is made applicable “in relation to” arbitral proceedings which commenced on or after the date of commencement of the Amendment Act. What is conspicuous by its absence in the second part is any reference to Section 21 of the 1996 Act. Whereas the first part refers only to arbitral proceedings before an Arbitral Tribunal, the second part refers to court proceedings “in relation to” arbitral proceedings, and it is the commencement of these court proceedings that is referred to in the second part of Section 26, as the words “in relation to the arbitral proceedings” in the second part are not controlled by the application of Section 21 of the 1996 Act.

39. Section 26, therefore, bifurcates proceedings, as has been stated

¹ [Section 29-A of the Amend (sic Amended) Act provides for time-limits within which an arbitral award is to be made. In *Hitendra Vishnu Thakur v. State of Maharashtra*, (1994) 4 SCC 602 at p. 633 : 1994 SCC (Cri) 1087, this Court stated: (SCC p. 633, para 26) “26. ... (iii) Every litigant has a vested right in substantive law but no such right exists in procedural law. (iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished. (v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.” It is, inter alia, because timelines for the making of an arbitral award have been laid down for the first time in Section 29-A of the Amendment (sic Amended) Act that parties were given the option to adopt such timelines which, though procedural in nature, create new obligations in respect of a proceeding already begun under the unamended Act. This is, of course, only one example of why parties may otherwise agree and apply the new procedure laid down by the Amendment Act to arbitral proceedings that have commenced before it came into force.] **Referred as footnote 17 in Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. and Ors. (2018) 6 SCC 287**



above, with a great degree of clarity, into two sets of proceedings — arbitral proceedings themselves, and court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, “arbitral proceedings” having been subsumed in the first part cannot re-appear in the second part, and the expression “in relation to arbitral proceedings” would, therefore, apply only to court proceedings which relate to the arbitral proceedings. The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to court proceedings which have commenced on or after the Amendment Act came into force.”

19. From a reading of the judgment of the Supreme Court in **BCCI** (supra), the position which emerges is as under:-

- (i) the first part of Section 26 of the Amendment Act refers to ‘conduct of arbitral tribunal’ which have been commenced in accordance with the provision of Section 21 of the principal Act, prior to commencement of the Amendment Act.
- (ii) the expression ‘arbitral proceedings’, referred to in the first part of Section 26 of the Amendment Act, refers to proceedings governed by Section 18 to 27 of the A&C Act.
- (iii) since the conduct of arbitral proceedings is largely procedural in nature, the parties may ‘otherwise agree’ to apply the Amendment Act to arbitral proceedings that have commenced before the Amendment Act came into force.



(iv) the second part of Section 26 of the Amendment Act applies ‘in relation to’ the arbitral proceedings which commenced after the Amendment Act came into force.

(v) the application of the second part of Section 26 ‘in relation to’ the arbitration proceedings is not controlled by Section 21 of the A&C Act.

(vi) the second part would apply to Court proceedings which commenced after the Amendment Act came into force.

20. It is evident that the Court proceedings to which the second part of Section 26 of the Amendment Act would apply, include proceedings instituted for appointment of substitute arbitrator/s (in the event of a vacancy). Such proceedings are not ‘arbitral proceedings’ falling within the ambit of Sections 18 to 27 of the A&C Act. Moreover, proceedings under Section 14 and/ or Section 15 (read with Section 11) of the A&C Act would be ‘court proceedings’, and if these proceedings have been instituted or commenced after the coming into force of the Amendment Act, the amended provisions would apply thereto.

21. As a natural corollary, it follows that it would be impermissible for the court or any ‘appointing authority’ [including a person or an institution, as referred to in Section 11(6)(c) of the A&C Act] to disregard the amended provisions (after the date of commencement of the Amendment Act of 2015 (3 of 2016)) while appointing any substitute arbitrator/s.

Other Judicial precedents dealing with the applicability of the Amendment Act



22. The Supreme Court has had occasion to consider the applicability of the provisions of the Amendment Act to arbitrations which commenced prior thereto, in varying contexts, post **BCCI** (supra).

23. In **Rajasthan Small Industries Corporation Limited v. Ganesh Containers Movers Syndicate**, (2019) 3 SCC 282, the relevant arbitration clause provided for “arbitration by the managing director himself or his/her nominee for the sole arbitration”. Upon the request of the respondent, the petitioner therein appointed an arbitrator on 21.02.2005. Since the progress of the arbitration was not satisfactory, the said sole arbitrator was removed on 26.03.2009 and in his place, the Chairman-cum-Managing Director of the appellant corporation was appointed as the sole arbitrator with the consent of both the parties. Since the arbitration proceedings were protracted over a period of time, on 13.05.2015, the respondent/contractor filed an application under Section 11(6) read with Section 15 of the A&C Act before the High Court, seeking appointment of an independent sole arbitrator for adjudication of the disputes between the parties. The said application was allowed by the High Court and a former District Judge was appointed as the sole arbitrator. In the meantime, the sole arbitrator passed an *ex-parte* award on 21.01.2016.

24. Taking note of the fact that the application under Section 11(6) and 15 of the A&C Act, 1996 was filed prior to the commencement of the Amendment Act, it was held that the Amendment Act was not applicable, and that the statutory provisions that would govern the matter are those which were in force before the commencement of the Amendment Act.

25. The aforesaid case does not deal with the applicability of the amended provisions (after commencement of the Amendment Act of 2015 (3 of



2016)) for the purpose of appointing a substitute arbitrator in respect of arbitration proceedings, which were initiated prior to the Amendment Act coming into force.

26. In ***S.P. Singla Constructions Private Limited v. State of Himachal Pradesh & Another***, (2019) 2 SCC 488, the Supreme Court was concerned with a situation where pursuant to the request of the appellant therein, the Chief Engineer, H.P. PWD appointed the “Superintendent Engineer, Arbitration Circle, H.P. PWD, Solan” as the arbitrator on 30.10.2013.

27. Thereafter, the appellant preferred an Arb. P. No. 4049/2013 before the High Court under Section 11(6), 14 and 15 of the A&C Act for appointment of an independent sole arbitrator. In this context, it was held by the Supreme Court that the provisions of the amended Act (which came into effect from 23.10.2015) could not be made applicable. In that case, the arbitral proceedings had already commenced and the arbitral tribunal stood constituted prior to commencement of the amended provisions. The arbitration proceedings were terminated under Section 25(a) of the A&C Act, pursuant to which, the petition under Section 11(6) of the A&C Act came to be filed in the High Court of Himachal Pradesh which came to be dismissed. It was, *inter alia*, held by the Supreme Court as under:

“21. In the present case, the arbitrator has been appointed as per Clause (65) of the agreement and as per the provisions of law. Once, the appointment of an arbitrator is made at the instance of the Government, the arbitration agreement could not have been invoked for the second time.”

28. Since the termination of the arbitration proceedings was found to be improper, it was directed that *“In the interest of justice, in our considered view, an opportunity is to be afforded to the appellant to go before the*



departmental arbitrator (as agreed by the parties in Clause (65) of the general conditions of contract) and the proceedings of the arbitrator dated 6-8-2014 terminating the proceedings is to be set aside.”

29. This judgment does not directly deal with the applicability of the amended provisions of the A&C Act for the purpose of appointment of a substitute arbitrator.

30. In ***Union of India v. Parmar Construction Company*** (2019) 15 SCC 682, the factual context was that a notice for appointment of an arbitrator was sent on 23.12.2013. When the appellants failed to appoint an arbitrator, an application came to be filed under Section 11(6) of the A&C Act in the High Court of Rajasthan. In those proceedings, one of the issue that arose for consideration was whether the constitution of the arbitral tribunal therein was precluded on account of a “no claim/discharge certificate”. In this context, while considering whether the scope of examination was circumscribed by the amended Section 11 (6A), the following observations were made:

“27. We are also of the view that the 2015 Amendment Act which came into force i.e. on 23-10-2015, shall not apply to the arbitral proceedings which have commenced in accordance with the provisions of Section 21 of the principal Act, 1996 before the coming into force of the 2015 Amendment Act, unless the parties otherwise agree.

28. In the instant case, the request was made and received by the appellants in the appeal concerned much before the 2015 Amendment Act came into force. Whether the application was pending for appointment of an arbitrator or in the case of rejection because of no claim as in the instant case for appointment of an arbitrator including change/substitution of arbitrator, would not be of any legal effect for invoking the provisions of the 2015 Amendment Act in terms of Section 21 of the principal Act, 1996. In our considered view, applications/requests made by the respondent contractors deserve to be examined in accordance with the principal Act, 1996 without taking resort to the 2015 Amendment Act which came into force from 23-10-



2015.”

31. Importantly, even while holding in the facts of that case, that the pending Section 11 was to be decided on the basis of the unamended provisions, it was observed as under:

“44. In the present batch of appeals, independence and impartiality of the arbitrator has never been doubted but where the impartiality of the arbitrator in terms of the arbitration agreement is in doubt or where the Arbitral Tribunal appointed in terms of the arbitration agreement has not functioned, or has failed to conclude the proceedings or to pass an award without assigning any reason and it became necessary to make a fresh appointment, the Chief Justice or his designate in the given circumstances after assigning cogent reasons in appropriate cases may resort to an alternative arrangement to give effect to the appointment of independent arbitrator under Section 11(6) of the Act.”

32. Thus, the issue of the eligibility of the arbitrator/arbitral tribunal on the touchstone of Section 12(5) of the Amended A&C Act, read with the VIIth Schedule thereof, did not fall for consideration in the aforesaid case. Rather, it was expressly clarified that where there was an issue as regards impartiality of the arbitral tribunal, it was open to the Court to appoint an independent arbitrator to adjudicate the disputes between the parties.

33. In ***Union of India v. Pradeep Vinod Construction Company*** (2020) 2 SCC 464, the Supreme Court was concerned with a situation where the High Court of Delhi, *vide* judgments rendered prior to the coming into force of the Amendment Act, appointed independent arbitrator/s for adjudication of the disputes between the parties instead of directing the appointment of the arbitrator by the Railway Authorities in terms of the contractual stipulation. The Supreme Court, relying upon ***Union of India v. Parmar Construction Company*** (supra), set aside the impugned order therein and, directed that the arbitrator/s be appointed by the appellant therein in terms of the contractual



stipulation.

34. In ***Shree Vishnu Constructions v. Engineer in Chief Military Engineering Service and Others***, (2023) 8 SCC 329, the Supreme Court was concerned with a situation where the notice under Section 21 of the A&C Act was issued on 20.12.2013. The principle controversy in that case was whether there was any “accord and satisfaction” and whether the same precluded arbitration. In this context, the Court was concerned with the issue as to whether the scope of examination would be within the confines of Section 11(6A) of the A&C Act, as introduced by the Amendment Act.

35. In this context, the Supreme Court, by relying upon ***Union of India v. Parmar Construction Company*** (supra) and ***Union of India v. Pradeep Vinod Construction Company*** (supra) held that the amended act shall not apply to arbitral proceedings which have commenced prior to coming into force of the Amendment Act. It was concluded therein as under:

“27. Applying the law laid down by this Court in *Parmar Construction Co. and Pradeep Vinod Construction Co. and S.P. Singla Constructions* to the facts of the case on hand as in the present case the notice invoking arbitration clause was issued on 26-12-2013 i.e. much prior to the 2015 Amendment Act and the application under Section 11(6) of the Act has been preferred/filed on 27-4-2016 i.e. much after the Amendment Act came into force, the law prevailing prior to the 2015 Amendment Act shall be applicable and therefore the High Court has rightly entered into the question of accord and satisfaction and has rightly dismissed the application under Section 11(6) of the Act applying the principal Act, namely, the Arbitration and Conciliation Act, 1996 prevailing prior to the 2015 Amendment Act. We are in complete agreement with the view taken by the High Court. It is observed and held that in a case where the notice invoking arbitration is issued prior to the 2015 Amendment Act and the application under Section 11 for appointment of an arbitrator is made post Amendment Act, 2015, the provisions of pre-Amendment Act, 2015 shall be applicable and not the 2015 Amendment Act.”

36. Again, the Court did not examine the matter from the standpoint of



Section 12(5) of the A&C Act read with the VIIth Schedule of the Amended A&C Act.

The Ellora case

37. The issue as to whether the provisions of the Amended Act would become applicable for the purpose of re-constitution of an arbitral tribunal, even where an arbitral tribunal stood constituted prior to the commencement of the Amendment Act, came to be expressly considered by the Supreme Court in ***Ellora Paper Mills Limited Vs. State of Madhya Pradesh*** (2022) 3 SCC 1 [*‘Ellora’*]. In the said case, the High Court *vide* order dated 03.05.2000, had referred the parties to arbitration by the ‘Stationary Purchase Committee’, comprising of officers of the respondent. The SLP against the said order came to be dismissed as withdrawn on 28.09.2000. The appellant therein filed its objections before the arbitral tribunal/Stationary Purchase Committee on 12.09.2000 and also filed an application under Section 13 of the A&C Act. The said application came to be rejected by the arbitral tribunal on 02.02.2001. Aggrieved therewith, the appellant filed a writ petition before the High Court, which came to be dismissed *vide* order dated 24.01.2017 with liberty to the appellant to raise objections before the appropriate forum. Subsequently, an application under Section 14 r/w Section 11 and 15 of the A&C Act came to be filed before the High Court. In those proceedings strong reliance was placed on ***TRF Limited v. Energo Engineering Projects Ltd***, (supra) to contend that all the five officers, constituting the ‘Stationary Purchase Committee’, being employees of the respondent, had rendered themselves ineligible to continue as arbitrators. It was contended that an impartial independent arbitral



tribunal was required to be appointed by the Court.

38. The High Court rejected the aforesaid contentions relying upon the judgments of the Supreme Court in **Aravali Power Co. (P) Ltd. v. Era Infra Engg. Ltd.** (2017) 15 SCC 32; **Indian Oil Corporation Ltd. v. Raja Transport (P) Ltd.**, (2009) 8 SCC 520; **ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corporation Ltd.**, (2007) 5 SCC 304; **Union of India v. M.P. Gupta**, (2004) 10 SCC 504; **Union of India v. Parmar Construction Company** (supra); **Union of India v. Pradeep Vinod Construction Company** (supra) and **S.P. Singla Constructions Private Limited v. State of Himachal Pradesh & Anr.**, (supra). It was held by the High Court that the Amended Act was effective from 23.10.2015 and could not have retrospective operation in respect of the arbitration proceedings which have already commenced, unless the parties otherwise agree to apply the provisions of the amended Act. It was, accordingly, directed by the High Court therein that it would be open for the appellant therein to participate in the proceedings before the arbitral tribunal, that is, the “Stationary Purchase Committee”.

39. The matter was thereafter carried to the Supreme Court, which specifically took note of the submissions of the learned counsel for the respondent therein as under :

“11.3. The learned counsel appearing on behalf of the respondent has also submitted that in the facts and circumstances of the case, the decision of this Court in Jaipur Zila Dugdh Utpadak Sahkari Sangh¹³ is not applicable. It is submitted that in the said case, the arbitrator was appointed after amendment of the Arbitration Act, 2015. However, in the present case, the arbitrator was appointed approximately 20 years prior thereto and thereafter the arbitration proceedings commenced and even the appellant also participated. It is therefore contended that the amended Section 12(5) of the Arbitration Act which is brought in the



statute by way of amendment in 2015 shall not be applicable retrospectively. It is submitted that Section 12(5) of the Arbitration Act shall have to be made applicable prospectively.”

(emphasis supplied)

40. In the above conspectus, the Supreme Court held as under:-

“16. As observed hereinabove, the Arbitral Tribunal-Stationery Purchase Committee consisted of officers of the respondent State. Therefore, as per Amendment Act, 2015 sub-section (5) of Section 12 read with Seventh Schedule, all of them have become ineligible to become arbitrators and to continue as arbitrators. Section 12 has been amended by the Amendment Act, 2015 based on the recommendations of the Law Commission, which specifically dealt with the issue of "neutrality of arbitrators". To achieve the main purpose for amending the provision, namely, to provide for "neutrality of arbitrators", 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 is found to be foul with the amended provision, the appointment of the arbitrator would be beyond the pale of the arbitration agreement, empowering the Court to appoint such an arbitrator as may be permissible. That would be the effect of the non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist upon the appointment of the arbitrator in terms of the arbitration agreement.

17. It cannot be disputed that in the present case, the Stationery Purchase Committee-Arbitral Tribunal comprising of officers of the respondent State are all ineligible to become and/or to continue as arbitrators in view of the mandate of sub-section (5) of Section 12 read with Seventh Schedule. Therefore, by operation of law and by amending Section 12 and bringing on statute sub-section (5) of Section 12 read with Seventh Schedule, the earlier Arbitral Tribunal Stationery Purchase Committee comprising of the Additional Secretary, Department of Revenue as President, and: (i) Deputy Secretary, Department of Revenue, (ii) Deputy Secretary, General Administration Department, (iii) Deputy Secretary, Department of Finance, (iv) Deputy Secretary/Under-Secretary, General Administration Department, and (v) Senior Deputy Controller of Head Office, Printing as Members, has lost its mandate and such an Arbitral Tribunal cannot be permitted to continue and therefore a fresh arbitrator has to be appointed as per the Arbitration Act, 1996.”



(emphasis supplied)

41. Thus, the Supreme Court affirmed the applicability of the provisions of the amended act for the purpose of deciding a petition under Section 11, 14 & 15 of the A&C Act filed after coming into force of the Amendment Act, even though the arbitral tribunal had initially been constituted as far back as 2001. The Supreme Court concluded therein as under:-

“20. In view of the above and for the reasons stated hereinabove, the impugned judgment and order¹ passed by the High Court is contrary to the law laid down by this Court in TRF, Bharat Broadband Network and the recent decision of this Court in Jaipur Zila Dugdh Utpadak Sahkari Sangh. It is held that the earlier Arbitral Tribunal Stationery Purchase Committee comprising of the Additional Secretary, Department of Revenue as President, and: (i) Deputy Secretary, Department of Revenue, (ii) Deputy Secretary, General Administration Department, (iii) Deputy Secretary, Department of Finance, (iv) Deputy Secretary/Under Secretary, General Administration Department, and (v) Senior Deputy Controller of Head Office, Printing as Members, has lost its mandate by operation of law in view of Section 12(5) read with Seventh Schedule and a fresh arbitrator has to be appointed under the provisions of the Arbitration Act, 1996. The impugned judgment and order passed by the High Court is therefore unsustainable and deserves to be quashed and set aside.”

42. The principle of law laid down in the said judgment clearly applies to the facts of the present case as well. Thus, after coming into force of the provisions of the Amendment Act, in the event of any re-constitution of the arbitral tribunal, it is impermissible to disregard the provisions of Section 12(5), read with the VIIth Schedule of the A&C Act, as interpreted by the Supreme Court in **Perkins Eastman Architects DPC v. HSCC (India) Ltd.** (supra), **TRF Limited v. Energo Engineering Projects Ltd**, (supra), **Bharat Broadband Network Limited v. United Telecoms Limited.**, (supra).

JUDGMENTS OF THE DELHI HIGH COURT



43. In ***Triad India & Anr. v. Tribal Cooperative Marketing and Development Federation of India Limited*** 2024 SCC OnLine Del 5363, a Single Judge of this Court considered the judgment in ***Ellora*** (supra) and on the basis of paragraph 15 thereof, concluded that the decision in ***Ellora*** (supra) turned on the observation that ‘technically it cannot be said that the arbitral proceedings by the arbitral tribunal-Stationary Purchase Committee have commenced’ and it is only for this reason that the amended provisions were held to be applicable in ***Ellora*** (supra). However, the said judgment does not notice that in ***Ellora*** (supra) : (a) the arbitral tribunal stood duly constituted much prior to the commencement of the Amendment Act of 2015 (3 of 2016); (b) the arbitral tribunal, as constituted, had conducted proceedings and an application under Section 13 of the A&C Act came to be rejected by the arbitral tribunal on 2.2.2001 [as recorded in paragraph 6 of the said judgment]. It was also noticed by the Supreme Court [in paragraph 4] that further proceeding could not be held before the arbitral tribunal in view of the stay granted by the High Court from 4.5.2001 to 24.1.2017, and thereafter on account of the application under Section 14, read with sections 11 and 15 of the A&C Act.

44. Moreover, the issue that the Supreme Court proceeds to frame and answer in paragraphs 16 and 17 of the judgment is whether the ineligibility of the arbitrator/arbitral tribunal, under the amended provisions viz. Section 12(5) read with the VIIth Schedule of the A&C Act would apply “by operation of law”. The occasion to consider this issue arose since an arbitral tribunal had already been constituted well before the coming into force of the Amendment Act.



45. In ***Progressive Infotech Private Limited v. Ircon International Ltd.*** 2023 SCC OnLine Del 550, a single judge of this Court, while dealing with a petition under Section 14 r/w Section 15 of the A&C Act in the context of an arbitration which commenced prior to the coming into force of the Amendment Act, held as under:-

“21. Clause 40 of the Agreement thus, authorized the MD/Director, IRCON to appoint or substitute the Arbitrator in case of his transfer or if he vacates his office or is unable to act for any reason, from a panel of arbitrators to be approved by the Northern Railway. Thus, it is the MD of the respondent who was entitled to appoint the Arbitrator. The question is whether an appointment under such a procedure can continue and remain valid in light of the 2015 amendment.

22. The respondent has placed reliance on Aravali Power Co. (p) Ltd. v. Era Infra Engg. Ltd., (2017) 15 SCC 32 to submit that since the arbitration proceedings in the present case was initiated prior to the amendments effected in 2015, it is the un-amended act that shall be applicable. It was further observed that merely because the arbitrator happens to be an employee of the party to the arbitration, it would not by itself as per the un-amended Act, render the appointment invalid and unenforceable.

23. The implication of the 2015 amendment was examined in Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd., (2017) 4 SCC 665. It was found to be clear that the major goal of the amendment was to ensure the impartiality of arbitrators. To accomplish this, sub-section (5) of Section 12 states that notwithstanding any prior Agreement to the contrary, any person whose relationship with the parties, counsel, or the dispute fell under any of the categories listed in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In the event that the revised provision conflicts with the arbitration clause, the court would have the authority to appoint arbitrator(s) in a manner permissible under the A & C Act, 1996. Due to the non-obstante provision in Section 12(5), the opposite party can insist on the arbitrator's nomination in defiance of the arbitration agreement in case of the ineligibility of the proposed arbitrator.

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29. It may thus be concluded that the appointment of a Sole Arbitrator by one party or appointment of the Managing Director or its nominee as the Arbitrator does not meet the test of impartiality and independence and is hit by the bar of Section 12(5) of the Act and are inherently incapable of



being appointed as the Arbitrator as has been held in the various judgments. The learned Arbitrator is disqualified under Section 12 of A & C Act, 1996 to continue as an Arbitrator.”

46. In **KRR Infra Projects Pvt. Ltd. v. Union of India**, 2018 SCC OnLine Del 12418, the Court was concerned with a situation where the notice under Section 21 of the A&C Act had been issued and an arbitrator was also appointed, prior to commencement of the Amendment Act; however, upon resignation of the said arbitrator, an employee of the respondent therein was appointed as the substitute arbitrator on 27.05.2016. In this context, it was held by a learned single judge of this Court as under:-

“8. In view of the above, merely because the Arbitration Agreement had been invoked prior to the coming into force of the Amending Act and the arbitration proceedings had commenced before the earlier Arbitrator prior to coming into force of Amending Act, the respondent could not have proceeded to appoint an ineligible Arbitrator under Section 12(5) read with the Seventh Schedule of the Act after coming into force of the Amending Act. At the time of such appointment, the eligibility of the Arbitrator had to be considered in accordance with the laws applicable to such appointment, including Section 12(5) and the Seventh Schedule of the Act. The Arbitrator being a serving employee of the respondent, was ineligible to be appointed in terms of Entry 1 of the Seventh Schedule to the Act and therefore, all proceedings that were conducted by him were not in accordance with the law.”

47. In **Radhika Engineering Co. v. Telecommunication Consultants India Limited** (2024) SCC OnLine Del 4264, a petition under Section 14 r/w Section 15 of the A&C Act came to be filed in the background of the fact that the unilaterally appointed arbitrator (appointed prior to the commencement of the Amendment Act), resigned on 14.12.2023. The petition under Section 14 r/w Section 15 of the A&C Act came to be filed thereafter. Relying upon **Ellora** (supra), **Progressive Infotech Private Limited v. Ircon International Ltd.** (supra) and **KRR Infra Projects Pvt. Ltd. v. Union of India**, (supra), it was held as under:-



“15. The decision in *Aravali Power Company Private Limited (supra)* has already been considered by the coordinate Bench in *Progressive Infotech Private Limited (supra)*. Mr. Krishnan's emphasis on *Parmar Construction Company (supra)* to argue that in respect of proceedings, which were commenced prior to 2015 Amendment of the Act, the unamended Act would apply, cannot be questioned, inasmuch as once the proceedings have commenced and there is no change in the Arbitrator, the old Act would continue to apply. But in the present case, the appointment of Mr. Karnal Singh as a Sole Arbitrator has been made in January, 2024, well after the 2015 Amendment of the Act came into effect. In the opinion of this Court, though the said appointment, post 2015, is being termed as a continuation to the previous appointment, it is in fact a new substitute appointment and would require to comply with the explicit mandate of the Act including the 2015 amendments to the Act. Moreover, in *Parmar Construction Company (supra)*, from the judgment it appears that the invocation was prior to 2015 and the arbitration petition under Section 11(6) of the Act was also filed prior to 2015. Under these circumstances, the decision in *Parmar Construction Company (supra)* would not be applicable in the present case.”

48. The conclusion drawn in the judgments in ***Progressive Infotech Private Limited (supra)***, ***KRR Infra Projects Pvt. Ltd. (supra)*** and ***Radhika Engineering Co. (supra)***, is consistent with both ***BCCI (supra)*** and ***Ellora (supra)***.

(In)validity of the appointment of the arbitrator in the present case

49. In the present case, initially, Mr. S.K. Jain, Retired Senior Engineer (SE), came to be appointed by the DDA as the sole arbitrator. Upon transfer and subsequent resignation of the said arbitrator, another arbitrator, namely Mr. D.V. Raghav was appointed as the sole arbitrator on 10.03.2015. During the pendency of the arbitral proceedings before the said arbitrator, the appellant requested that an independent sole arbitrator be appointed in terms of Amendment Act.

50. Pursuant thereto, Mr. S.P. Banwait (Retd.) ADG, CPWD was



appointed as the sole arbitrator *vide* communication dated 03.01.2017 by Engineer Member, DDA. The said communication reads as under:-

“Whereas Sh. D.V.Raghav, SE (Arbn), DDA was appointed as Sole Arbitrator vide letter No. EM 2 (7)96/Arbn./Vol.VIII/DDA/Pt.34/374 dated 10.03.2015 in the above matter and now M/s. Dharamvir & Co. has submitted consent letter No Nil dt. 23.12.2016 addressed to the Engineer Member, DDA and similar request has been forwarded to E.E. ND-9 dt. 06.12.2016 vide which M/s. Dharamvir & Co. has requested to switch their case pending with Sh. D.V.Raghav, Sole Arbitrator to independent Arbitrator as per Arbitration and Conciliation Act 1996 as amended by The Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016).

Therefore, I, D.P.Singh, Engineer Member, DDA by powers conferred on me under Clause 25 of works Agreement, hereby appoint Shri. S.P. Banwait (Retd.), ADG, CPWD to decide as per Arbitration and Conciliation Act 1996 as amended by The Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and make his award regarding claims/disputes raised by the contractor, as shown in the Statement of Claims and further counter claims of the Department to follow, however, subject always to their admissibility under Clause 25 of works agreement. The Arbitrator shall give the reasons for the award. The list of claims/counter claims shall remain same.

This reference is without prejudice to the defense that may be raised by the respondent regarding the tenability of the claims, on all necessary and available grounds, including those of limitations.”

51. The replacement of Mr. D.V. Raghav as arbitrator and appointment of a substitute arbitrator, Mr. S.P. Banwait (Retd.) ADG, CPWD, was pursuant to a request made by the appellant to the effect that an independent arbitrator be appointed in terms of the Amendment Act. In the appointment letter dated 03.01.2017 itself, it is acknowledged as under:-

“M/s. Dharamvir & Co. has submitted consent letter No Nil dt. 23.12.2016 addressed to the Engineer Member, DDA and similar request has been forwarded to E.E. ND-9 dt. 06.12.2016 vide which M/s. Dharamvir & Co. has requested to switch their case pending with Sh. D.V.Raghav, Sole Arbitrator to independent Arbitrator as per



Arbitration and Conciliation Act 1996 as amended by The Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016).

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Therefore, I, D.P.Singh, Engineer Member, DDA by powers conferred on me under Clause 25 of works Agreement, hereby appoint Shri. S.P. Banwait (Retd.), ADG, CPWD to decide as per Arbitration and Conciliation Act 1996 as amended by The Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016)”

52. Thus, the parties agreed to make the Amendment Act applicable to the ongoing arbitration between the parties. The replacement/substitution of the arbitrator was also evidently occasioned due to this. The parties having opted to adopt and apply the provisions of the amended act in relation to the arbitral proceedings, it was not permissible for the Engineer Member, DDA to unilaterally appoint the sole arbitrator.

53. Further, there was also no express agreement in writing between the parties whereby the provisions of Section 12(5) of the A&C Act were waived. In the absence of an express agreement in writing in this regard, the participation of the appellant in arbitral proceedings cannot be construed as a waiver of his rights to object to the ineligibility of the arbitrator and/or object to the unilateral appointment of the sole arbitrator. In ***Bharat Broadband Network Limited*** (supra), it has been held as under:-

“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.

20. This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an "express agreement in writings. The expression "express agreement in writing" refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. Here, Section 9 of the Contract Act, 1872 becomes important. It states:

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



It is thus necessary that there be an "express" agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court as indicating an express agreement on the facts of the case is dated 17-1-2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in TRF Ltd. 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. 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.””

(emphasis supplied)



54. In **N.S. Associates Pvt. Ltd. v. The Life Insurance Corporation Of India**, 2024:DHC:8401, relying upon **Bharat Broadband Network Limited v. United Telecoms Limited** (supra), it has been held as under :

“17. I am unable to agree that the aforesaid bring about an ‘express agreement’ between the parties, as required for the purpose of waiving applicability of Clause 12(5) of the A&C Act. In **Bharat Broadband** (supra) the Supreme Court has clarified that an express agreement in writing refers to an agreement by which both the parties affirmed that despite full knowledge of the factum of ineligibility of the Arbitrator, they have full faith and confidence in the said arbitrator to continue to act as such.

18. The Supreme Court noticed that the proviso to Section 12(5) was in stark contrast with Section 4 of the A&C Act; Section 4 deals with cases of deemed waiver by conduct, whereas the proviso to Section 12(5) deals with waiver only by express agreement in writing by the parties made subsequent to the disputes having arisen between them.

19. In **Bharat Broadband** (supra) the Supreme Court expressly laid down that an express agreement in writing is quite distinct from an agreement which is to be inferred by the conduct.....

20. In the present case, the letter dated 04.12.2019 and the proceedings dated 24.12.2019 clearly do not qualify as an ‘express agreement in writing’. The petitioner seeks to infer the existence of an agreement waiving Section 12(5) of the A&C Act, based on what is stated in letter dated 04.12.2019 and recorded in the proceedings dated 24.12.2019. This is clearly impermissible inasmuch as the statutory requirement for overcoming de jure inability is “an express agreement in writing” and not an agreement to be inferred from the conduct of the parties.

21. For the aforesaid reason, the impugned award is clearly unsustainable....”

55. In **CORE** (supra), it has been held as under :-

“123. In **Bharat Broadband Network Ltd.** (supra), this Court held that the proviso to Section 12(5) requires an express agreement in writing, that is, an agreement made in words as opposed to an agreement that can be inferred by conduct. It was explained that such an agreement must



be made by both parties with full knowledge of the fact that although a particular person is ineligible to be appointed as an arbitrator, the parties still have full faith and confidence in them to continue as an arbitrator. The principle of express waiver contained under the proviso to Section 12(5) also applies to situations where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties. After the disputes have arisen, the parties can determine whether there is a necessity to waive the nemo judex rule. This balances the autonomy of parties and the principles of an independent and impartial arbitral tribunal.”

56. The record of the case does not reveal any “express agreement” between the parties, as required in terms of the legal position set out in ***Bharat Broadband Network Limited*** (supra), to waive the provisions of Section 12(5) of the A&C Act.

57. Consequently, since the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the extant position in law, Section 34(2)(a)(v) of the A&C Act² is clearly attracted in the present case. As held by the Supreme Court in ***CORE*** (supra) :-

“31.The composition of the arbitral tribunal or the arbitral procedure must not only be in accordance with the agreement of the parties but also be consistent with the mandatory standards laid down under the Arbitration Act. In case of a conflict, mandatory provisions of the Arbitration Act prevail over the arbitration agreement between the parties.”

²**Section 34. Application for setting aside arbitral award.**—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

* * *

(v) 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 a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or



Other exacerbating aspects of the arbitral proceedings and the impugned award

58. Apart from the aforesaid, there are other irregularities in the conduct of the arbitral proceedings which render the impugned award unsustainable. These are enumerated hereunder:

58.1 The learned arbitrator, despite having fixed his fee in the second hearing held on 04.03.2017, sought to enhance the same *vide* communication dated 10.07.2017. On an objection being raised in this regard, learned sole arbitrator attempted to justify the additional amount demanded on the basis of the fee structure prescribed by the Society for Affordable Redressal of Disputes (SAROD), which was not applicable at all to the agreement between the parties.

58.2 In ***Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV*** (2024) 4 SCC 481, it has been held that where the parties in the arbitration are unable to reach a consensus as to the arbitral fee, it is open to the arbitral tribunal to charge fee as per the IVth Schedule of the A&C Act which is the model fee schedule applicable to *ad-hoc* arbitrations. In this regard, reference can be made to para 128 and 129 of the judgement in ***Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV*** (supra).³

³“128. We believe that the directives proposed by the amicus curiae, with suitable modifications, would be useful in structuring how these preliminary hearings are to be conducted. Exercising our powers conferred under Article 142 of the Constitution, we direct the adoption of the following guidelines for the conduct of ad hoc arbitrations in India:—

“1. Upon the constitution of the arbitral tribunal, the parties and the arbitral tribunal shall hold preliminary hearings with a maximum cap of four hearings amongst themselves to finalise the terms of reference (the —Terms of



Referencel) of the arbitral tribunal. The arbitral tribunal must set out the components of its fee in the Terms of Reference which would serve as a tripartite agreement between the parties and the arbitral tribunal.

2. In cases where the arbitrator(s) are appointed by parties in the manner set out in the arbitration agreement, the fees payable to the arbitrators would be in accordance with the arbitration agreement. However, if the arbitral tribunal considers that the fee stipulated in the arbitration agreement is unacceptable, the fee proposed by the arbitral tribunal must be indicated with clarity in the course of the preliminary hearings in accordance with these directives. In the preliminary hearings, if all the parties and the arbitral tribunal agree to a revised fee, then that fee would be payable to the arbitrator(s). However, if any of the parties raises an objection to the fee proposed by the arbitrator(s) and no consensus can be arrived at between such a party and the tribunal or a member of the tribunal, then the tribunal or the member of the tribunal should decline the assignment.

3. Once the Terms of Reference have been finalised and issued, it would not be open for the arbitral tribunal to vary either the fee fixed or the heads under which the fee may be charged.

4. The parties and the arbitral tribunal may make a carve out in the Terms of Reference during the preliminary hearings that the fee fixed therein may be revised upon completion of a specific number of sittings. The quantum of revision and the stage at which such revision would take place must be clearly specified. The parties and the arbitral tribunal may hold another meeting at the stage specified for revision to ascertain the additional number of sittings that may be required for the final adjudication of the dispute which number may then be incorporated in the Terms of Reference as an additional term.

5. In cases where the arbitrator(s) are appointed by the Court, the order of the Court should expressly stipulate the fee that arbitral tribunal would be entitled to charge. However, where the Court leaves this determination to the arbitral tribunal in its appointment order, the arbitral tribunal and the parties should agree upon the Terms of Reference as specified in the manner set out in draft practice direction (1) above.

6. There can be no unilateral deviation from the Terms of Reference. The Terms of Reference being a tripartite agreement between the parties and the arbitral tribunal, any amendments, revisions, additions or modifications may only be made to them with the consent of the parties.

7. All High Courts shall frame the rules governing arbitrators' fees for the purposes of Section 11(14) of the Arbitration and Conciliation Act, 1996.

8. The Fourth Schedule was lastly revised in the year 2016. The fee structure contained in the Fourth Schedule cannot be static and deserves to be revised periodically. We, therefore, direct the Union of India to suitably modify the fee structure contained in the Fourth Schedule and continue to do so at least once in a period of three years.”



In the present case, the learned arbitrator sought to (a) deviate from/charge in excess of, fees fixed with the consent of the parties at the initial stage of the arbitration and (b) charge fees in variance with the prescription in the IVth Schedule, without any agreement with the parties in this regard.

58.3 In view of the controversy regarding the non-payment of the arbitral fee/costs, the arbitrator himself *vide* order dated 06.07.2017 noted that in case the demanded amount was not paid “the arbitral tribunal would be terminated in accordance with the first proviso to Section 38(2) of the A&C Act”. However, the arbitrator did not follow this course and instead proceeded to ‘sign the award’ without any further notice/intimation to the parties as to why the course, suggested in the communication dated 06.07.2017, was not being followed.

58.4 Although the award is dated 17.08.2017, a communication dated 16.08.2017 (a day prior), records that ‘I hereby sign the award on the 17th Day of August, 2017’. There is thus clear incongruity as to the manner and the date on which the award was made.

129. Conscious and aware as we are that (i) Arbitration proceedings must be conducted expeditiously; (ii) Court interference should be minimal; and (iii) Some litigants would object to even a just and fair arbitration fee, we would like to effectuate the object and purpose behind enacting the model fee schedule. When one or both parties, or the parties and the arbitral tribunal are unable to reach a consensus, it is open to the arbitral tribunal to charge the fee as stipulated in the Fourth Schedule, which we would observe is the model fee schedule and can be treated as binding on all. Consequently, when an arbitral tribunal fixes the fee in terms of the Fourth Schedule, the parties should not be permitted to object the fee fixation. It is the default fee, which can be changed by mutual consensus and not otherwise.”

(emphasis supplied)



58.5 Certain pages of the award are missing. In this regard the impugned judgment holds that ‘the same does not have effect of nullifying the award’. However, there is no rationale or justification offered for the missing pages of the award and the contents thereof are also a matter of conjecture. The absence of the complete award renders it impossible for this Court to scrutinise the same in totality.

58.6 It is notable that on 08.06.2018, the arbitrator issued a letter enclosing the award dated 17.08.2017. This was after the DDA *vide* letter sent on the same date (08.06.2018), paid the outstanding arbitration fees as demanded by the sole arbitrator, including the share of the appellant. It is noticed that in the said covering letter dated 08.06.2018 (with which the arbitral award was enclosed), the learned arbitrator has:

- (i) adverted to, and dealt with various aspects of the merits of the disputes between the parties.
- (ii) dealt with the request of the claimant for supply of the relevant site records and a copy of the technical sanction accorded by the Superintending Engineer in connection with the work.

Further, the said covering letter renders a finding to the effect that “the claimant has committed a fraud in collusion with the dishonest employees in the respondent's office by applying correction fluid on the documents relating to final bill is an indication of dishonest intention.”

It is evident that the said covering letter/communication dated 08.06.2018 seeks to add to the contents of the award which was purportedly made and finalised on 17.08.2017. This is not permissible.



The said covering letter/ communication dated 08.06.2018, also once again, raises a grouse that the appellant did not pay the fees as demanded by the arbitrator. Once the respondent/DDA had paid the fees demanded by the learned arbitrator (including the appellant's share), there was no occasion for the learned arbitrator to do so.

Furthermore, the said covering letter/communication dated 08.06.2018 purports to 'modify' the award to the extent of directing the appellant/claimant to reimburse its share of arbitral fees to the respondent alongwith interest @10 % p.a., if not paid within the period mentioned in the said communication.

58.7 The learned arbitrator denied the request of the Appellant/ Claimant regarding production of site records and the technical sanction which was accorded by the Superintending Engineer in connection with the work. It may well be that these documents may not have sufficiently advanced the claim of the appellant, however, there was no reason to deny the opportunity to the appellant/claimant to adduce such evidence, as it sought to, in support of its case.

58.8 The award renders a finding regarding tampering of the measurement book and also finds that the appellant/claimant, in collusion with the "unscrupulous persons of the department", applied correction fluid on the undertaking given by the appellant/claimant on the measurement book. The only basis for this finding is that it is the appellant/claimant who "stands to gain by such action". There is no material on record, on the basis of which, the said finding has been rendered. There appears merit in the contention of the appellant that the findings rendered in the award are coloured by the controversy regarding fee payable to the arbitrator. It is noticed that the



award itself makes the following observations, which seems to lend credence to the apprehension of the appellant/claimant in this regard:-

“The counsel for the claimant has addressed to me on 26.07.2017 which shows arrogance of the counsel and disrespect to the arbitral tribunal. In fact, the letter is contempt of the arbitral tribunal and I am considering whether to file a complaint against the counsel to the Bare Council and High Court. He lacks manners. He has objected to my fixing the fee and other charges. Moreover, he must know that I am competent to fix my fee and other charges. The other party has not objected to the fee and other charges. Therefore, the objection is rejected. The claimant and his counsel dragged the issues beyond limit which caused a lot of wastage of time and energy. In view of this situation, the fee fixed is reasonable and, the same is reiterated.”

A perusal of the email/ communication dated 26.07.2017 (referred in the above extract) addressed by counsel for the appellant/claimant to the arbitrator reveals that the same did not contain anything objectionable which warranted such sweeping observations. The said email/ communication dated 26.07.2017 reads as under:-

*“Advocate Jitender Mehta <jitendersmehta@gmail.com> Wed,
Jul, 26, 2017 at 1:55 PM*

*To: Sat Pal Banwait<spb17@hotmail.com, EE/ND-
9<northerndivision9@gmail.com>*

Dear Mr Banwait,

Refer Your Letter dated 15.07.2017

Please Note that arbitration fee as mentioned in office order of society for Affordable Redressal of Disputes are not applicable in the present case as such claimant objects to your demands for extra fee.

Your appointment as Arbitrator is not as per rules and regulations of society for Affordable Redressal of Disputes.

Claimant is Sending the Laboratory Test Report No 110188 of DDA, Quality Assurance Cell (Asian Games Village, Complex), New Delhi of the same work dated 24.01.2011 through speed post, which prima facie prove that cement register filed by the respondent in this matter is forged



and fabricated.

As per cement register, the cement register closed on 15.01.2011 however cement was send for test by respondent/DDA officials to the Laboratory on 14.01.2011 and reports comes on 24.01.2011 and as per CPWD Work Manual, Section 27.1 clause (4), the cement shall be got tested by the Engineer in Charge and shall be used on the work only after satisfactory test result therefore it prima facie proof that after the closer of the alleged cement register, 1000 more begs of cement has been brought to the site by the claimant/contractor, cement was got tested by the DDA and thereafter same had been used after 24.01.2011.

In view of the above mentioned development/documents procured by the claimant, the claimant demands a hearing of this matter.

Advocate Jitender Mehta
Delhi High Court
9871343596”

58.9 It is noticed that in the Section 34 proceedings, a reply came to be filed by the arbitrator himself, wherein it has been stated as under:

“The claimant wrote nasty letters to me and the also addressed communications to the senior heirchy of the DDA against me. He sought more hearings. But, his demand was declined because he had nothing to add to what he had submitted. He made unsuccessful attempts to thought proceedings.

2. The fact of the claimant contractor being totally uncooperative is indicated by his refusal to book the venue for holding the hearing. In fact, **he is miser, ill-mannered person who does not know the elementary courtesy.** To say that he is rouge will not be too much. He broke the decorum in one of the hearings by shouting at the Govt. Counsel and I had to tell him to see reason. He even disrupted the hearings on more than one occasion. The main aim of the claimant was that the department had ignored a part of the work alleged to have been done by him, but not measured and paid by the respondent and he even spoke un-parliamentary words against the officers. He started indulging in leveling accusations against the departmental officers.”

In the circumstances, the apprehension of the appellant/claimant that the matter has not been decided impartially/objectively, seems to be justified.



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59. For all the above reasons, the impugned award is unsustainable. It is, accordingly, set aside.

60. The appeal is allowed in the above terms. The pending application also stands disposed of.

SACHIN DATTA, J

VIBHU BAKHRU, ACJ

DECEMBER 24, 2024

dn, at