$~J

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

Judgment reserved on: 01.08.2025
Judgment pronounced on: 30.10.2025

\+ **O.M.P. (COMM) 512/2020**

JAGDISH CHAND GUPTA .....Petitioner

Through: Mr. Anish Chawla, Adv.

versus

UNION OF INDIA .....Respondent

Through: Mr. Bhagwan Swarup Shukla, CGSC with Mr. Sharwan Kumar, Mr. Yash Baraliya, Mr. Shiv Nandan Sharma, Mr Kapil Nayak, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

1. The present petition has been filed under section 34 of the Arbitration and Conciliation Act, 1996 ("***1996 Act***") seeking setting aside of the Award dated 23.01.2020 along with Supplementary Award dated 20.03.2020 passed by the Arbitral Tribunal in ARB.P/391/2012 titled as "*Sh. Jagdish Chand Gupta, Engineers and Contractors v. Union of India*".

FACTUAL BACKGROUND

2. The Northern Railway ("***respondent***") invited bids for construction of

work of design and construction of high single line B.G. Railway Bridge across Ringhal Khad from K.M. 28.620 to K.M. 28.830 on Jammu Udhampur Rail Link Project including Soil Investigations, detailed designs and construction of foundations, piers and abutments and superstructures ("***subject work***").

3. The petitioner's bid was accepted by the respondent and subsequently, the petitioner was allotted work *vide* letter dated 25.09.1995 and a written Agreement was signed between the petitioner and respondent on 13.10.1995. As per the said Agreement, the work was to be completed within the prescribed period of 18 months i.e. up to 24.03.1997 for a contract price of Rs. 5,66,09,000/-.

4. After the commencement of work, there was delay of about 7 years 2 months in completion of work and there were conflicting claims of delay, but the fact of the matter remains that time was extended on 9 occasions by the respondent to complete the work. Finally, the work was completed after the grant of the 9th extension, which was approved through the Document of Completion upon the specific request of the petitioner, extending the completion period up to 30.05.2004. The said extension was granted without levy of any penalty and without applicability of the Price Variation Clause (***"PVC"***), in terms of Clause 17(4) of the General Conditions of Contract (***"GCC"***).

5. The petitioner submitted No Claim Certificate regarding increase/decrease in quantities for the work in 2nd and final corrigendum which was sanctioned and approved on 07.01.2005 by the competent authority of the respondent and thereby the revised cost

of work as per 1st Addendum was decreased by 10.82% and came up to the tune of Rs. 5,04,79,232. On specific request of the petitioner, a completion certificate was issued on 25.08.2005.

6. Since the respondent disputed the amount paid or being payable to the petitioner, the petitioner *vide* letter dated 26.09.2005 raised total of 09 Claims, but *vide* letter dated 03.10.2005 intimated that payments submitted by Sh. R.C Chamoli be treated as cancelled. Thereafter, the petitioner claimed a total of 11 claims.

7. Subsequently, a Supplementary Agreement dated 26.10.2005 was executed and the final bill was signed by the petitioner under protest subject to the claim raised *vide* letter dated 03.10.2005. The petitioner also requested to refund the security deposit with regard to the subject work.

8. Since the amounts were not paid, the petitioner invoked the Arbitration Clause *vide* legal notice dated 27.03.2006. The respondent *vide* letter dated 28.12.2006 constituted the Arbitral Tribunal but the said Arbitral Tribunal and the respondent neglected the proceedings for more than 7 years. Hence, the petitioner approached this Court under section 11 of the 1996 Act for appointment of Sole Arbitrator. This Court directed the respondent to constitute the Arbitral Tribunal and fixed the schedule for completion of the proceedings. The Arbitral Tribunal was directed to complete the arbitration proceedings within 9-12 months if possible.

9. Thereafter, another Arbitral Tribunal was constituted on 04.09.2014 by the respondent and subsequently after hearings the arguments, the Award was reserved on 28.03.2019.

10. After a period of almost 10 months, the Arbitral Tribunal pronounced the Award dated 23.01.2020 *vide* which it allowed only Claim No. 6 to the tune of Rs. 3,58,660/- and rejected all the other claims of the petitioner. The said Award reached the petitioner on 24.02.2020 *via* speed post at Chandigarh. Subsequently, the Arbitral Tribunal on application filed under section 33 of the 1996 Act dated 16.03.2020 by the respondent, amended the Award *vide* Supplementary Award dated 20.03.2020 and reduced the amount allowed for Claim No. 6 to 1,35,265/-. Subsequently, after a delay of 04 months, the petitioner was informed about the Supplementary Award *vide* letter dated 20.07.2020.

11. Feeling aggrieved by the said Arbitral Award dated 23.01.2020 and Supplementary Award dated 20.03.2020, the petitioner has filed the present petition.

SUBMISSIONS

On Behalf of the Petitioner

12. Mr. Anish Chawla, learned counsel for the petitioner, submits that the Award passed by the Arbitral Tribunal is *void ad initio* as the members of the Arbitral Tribunal were ineligible to act as Arbitrators under section 12(5) of the 1996 Act. In this regard, reliance is placed on ***Bharat Broadband Network Limited v.United Telecom Ltd., 2019 (5) SCC 755.***

13. He further states that all the three members of the Arbitral Tribunal were employees of the respondent so they were ineligible to be appointed as Arbitrators. Therefore, all the proceedings conducted and the Award passed by them is void under section 12(5) of the 1996 Act

read with Seventh Schedule and the ineligibility goes to the root of appointment. The Arbitral Tribunal was constituted by respondent *vide* Order dated 04.09.2014 in accordance with Clause No. 64 of GCC. Subsequently, the 1996 Act, was amended and the Arbitrators who were employees of the respondent became ineligible as per Section 12(5) of the 1996 Act. As per Clause No. 64(7) of GCC, Arbitration and Conciliation (Amendment) Act, 2015 (***"Amendment Act, 2015"***) was applicable to the present arbitration.

14. Mr. Chawla, learned counsel also points out that the parties had themselves applied the provisions of Amendment Act, 2015 to the arbitration proceedings. The petitioner's application dated 15.09.2017 seeking Arbitral Tribunal to proceed *ex-parte* against the respondent on account of delay of 10 months by the respondent to file Written Synopsis and respondent's application dated 16.03.2020 filed under section 33 of the 1996 Act seeking amendment of Award dated 23.01.2020 on the ground that quantity of scrap beyond 10% has not been correctly calculated were filed under the 1996 Act as amended by the Amendment Act, 2015. By virtue of section 26 of Amendment Act, 2015, parties are free to agree on the application of the Amendment Act, 2015 to the pending proceedings. Reliance is placed on ***M/s APR Constructions Ltd. v. Union of India, MANU/KA/3682/2018.***

15. He further submits that the Arbitral Tribunal was bound by the Order dated 01.07.2014 passed by this Court *vide* which Arbitral Proceedings were to be concluded within 9 to 12 months. He points out that the Arbitral Tribunal deliberately violated the said Order and

delayed the proceedings and passed the Award after 5½ years. He also points out that the Arbitral Tribunal was bound by Section 29A of the 1996 Act to obtain the extension of time from the Court, which was not obtained. Therefore, the mandate of the Arbitral Tribunal had already terminated when the Award was passed.

16. Learned counsel further submits that the petitioner claimed Rs. 11.19 crorein totality and the Arbitral Tribunal had granted only Rs. 3.58 lakhs and subsequently reduced the amount to Rs. 1.35 lakhs on Claim No. 6 which was arbitrary and without hearing the petitioner. Award was modified by the Arbitral Tribunal on application filed by the respondent under Section 33 of the 1996 Act dated 16.03.2020 without granting any opportunity to the petitioner to reply the application and without fixing any hearing or meeting. This is in violation of section 18 and section 34(2)(a)(iii) of the 1996 Act as the petitioner was unable to present his case.

17. Reliance has been placed on ***R.S. Avtar Singh & co. v National Projects Construction Corporation, 2019 (5) SCC 755*** and ***Ssangyong Engineering & Construction Co. Ltd. v National Highways Authority of India, 2019 (15) SCC 131.***

18. Learned Counsel, also submits that while adjudicating Claim no. 2, the Arbitral Tribunal admitted that there was delay on both sides. There were delays by the respondent in providing drawings and amending the same number of times but while deciding Claim No. 9, Arbitral Tribunal attributed delay only to the petitioner. Hence, there are contradictory findings in the Award of the Arbitral Tribunal itself.

19. It is pertinent to mention that the petitioner has not mounted any

challenge on the merits of the Award, except above.

On Behalf of the Respondent

20. Mr. Bhagwan Swarup Shukla, learned CGSC appearing for the respondent supports the Award and submits that the Award does not need any further deliberations.

21. He states that section 26 of the Amendment Act, 2015 is very clear to the effect that the Amendment Act, 2015 would not apply to arbitral proceedings which had commenced prior to the commencement of the Amendment Act, 2015 i.e. on 23.10.2015, unless the parties otherwise agreed.

22. Learned counsel for the respondent also challenges that the parties had not agreed for application of the Amendment Act, 2015. It is submitted that once there was a notice invoking arbitration, the arbitration proceedings stood commenced in terms of section 21 of the 1996 Act and any amendments made to the 1996 Act subsequent to the commencement of the arbitral proceedings would not apply to the arbitral proceedings in the present case. Hence, the petition needs to be dismissed.

23. On merits, on Claim No. 6, learned counsel of the respondent submits that it is an "Excepted Matter" under Clause 63 of the GCC. The contract contains no provision requiring the respondent to supply steel in lengths as per drawings, and the steel supplied was of standard size. Under Clause 13.2 of the Special Tender Conditions, tender rates included wastage and wash-away costs, and therefore the petitioner's claim is not maintainable.

24. On Claim No. 2, learned counsel submits that the claim on account of

unutilized resources is untenable, as the works were never stopped by the respondent and the delay occurred due to the petitioner's own conduct and that under Clause 14.1 of the Special Conditions and instruction of tender, the contractor was required to make his own arrangements for service roads and paths; Clause 21.5 bars claims relating to idle machinery or similar losses; and Clause 16.2 of the GCC expressly prohibits payment of interest on earnest money, security deposit, or amounts payable to the contractor.

25. On Claim No. 9, learned counsel submits that Claim No. 9 falls within "Excepted Matters" under Clause 63 of the GCC. The claim is not maintainable since payment of PVC had already been released in accordance with the contract agreement. Petitioner is simultaneously seeking PVC payment and compensation for prolongation of contract which cannot be permitted.

ANALYSIS AND FINDINGS

26. I have heard learned counsel for the parties and perused the material available on record.

27. The principles with regard to interference by a Court under section 34 of 1996 Act against an Arbitral Award have been reiterated time and again by the Hon'ble Supreme Court and this Court.

28. The scope under section 34 of the 1996 Act is very limited and narrow as the Court does not sit in appeal over the Award or review the Award passed by the Arbitral Tribunal nor re-appreciates the evidence. (Ref. ***Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corpn. Ltd., (2024) 2 SCC 375).*** Further, it is the prerogative of the Arbitral Tribunal to interpret the terms of the

Contract and if the Arbitral Tribunal has adopted a view which is plausible, the Court is not require to interfere even if an alternate view is possible. (Ref. ***Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1).***

29. To set aside an Award, the Award must fall under any of the categories/grounds as mentioned in section 34 of the 1996 Act. One of the grounds, amongst other, pertains to public policy of India. Explanation 1 of Section 34(2)(b)(ii) of 1996 Act further provides that the Award in conflict with *inter alia*, the fundamental policy of Indian law or the most basic notions or morality or justice can be set aside.

30. In this regard, the Hon'ble Supreme Court in ***OPG Power Generation (P) Ltd. v. Enexio Power Cooling Solutions (India) (P) Ltd., (2025) 2 SCC 417*** has observed as under:-

> *"55. The legal position which emerges from the aforesaid discussion is that after "the 2015 Amendments" in Section 34(2)(b)(ii) and Section 48(2)(b) of the 1996 Act, the phrase "in conflict with the public policy of India" must be accorded a restricted meaning in terms of Explanation 1. The expression "in contravention with the fundamental policy of Indian law" by use of the word "fundamental" before the phrase "policy of Indian law" makes the expression narrower in its application than the phrase "in contravention with the policy of Indian law", which means mere contravention of law is not enough to make an award vulnerable. To bring the contravention within the fold of fundamental policy of Indian law, the award must*

contravene all or any of such fundamental principles that provide a basis for administration of justice and enforcement of law in this country.

56. Without intending to exhaustively enumerate instances of such contravention, by way of illustration, it could be said that:

(a) violation of the principles of natural justice;

(b) disregarding orders of superior courts in India or the binding effect of the judgment of a superior court; and

(c) violating law of India linked to public good or public interest, are considered contravention of the fundamental policy of Indian law.

However, while assessing whether there has been a contravention of the fundamental policy of Indian law, the extent of judicial scrutiny must not exceed the limit as set out in Explanation 2 to Section 34(2)(b)(ii).

xxxxxxxxxxx

63. As we have already noticed, the object of inserting Explanations 1 and 2 in place of earlier explanation to Section 34(2)(b)(ii) was to limit the scope of interference with an arbitral award, therefore the amendment consciously qualified the term "justice" with "most basic notions" of it. In such circumstances, giving a broad dimension to this category [In conflict with most basic notions of morality or justice.] would be deviating from the legislative intent. In our view, therefore, considering that

the concept of justice is open-textured, and notions of justice could evolve with changing needs of the society, it would not be prudent to cull out "the most basic notions of justice". Suffice it to observe, they [Most basic notions of justice.] ought to be such elementary principles of justice that their violation could be figured out by a prudent member of the public who may, or may not, be judicially trained, which means, that their violation would shock the conscience of a legally trained mind. In other words, this ground would be available to set aside an arbitral award, if the award conflicts with such elementary/fundamental principles of justice that it shocks the conscience of the Court."

(emphasis added)

Ineligibility of Arbitrators under section 12(5) of the 1996 Act

31. In the present case, the principal challenge raised by the petitioner rests upon the ineligibility of the Arbitral Tribunal under section 12(5) of the 1996 Act. As already noted, the petitioner has not impugned the Arbitral Award on its merits. The challenge is confined to the jurisdictional aspect, specifically questioning the very competence of the Arbitral Tribunal to adjudicate the dispute in view of the statutory disqualification introduced by the 2015 Amendment. Thus, the entire foundation of the petitioner's case is that the arbitral proceedings themselves stand vitiated for want of jurisdiction.

32. The Arbitral Tribunal was reconstituted on 04.09.2014 pursuant to the Order dated 01.07.2014 passed by this Court, which was before the

Amendment Act, 2015 was notified i.e. on 23.10.2015. Therefore, the question before me is that whether the Amendment Act, 2015 will apply to the arbitral proceedings in the present case thereby making Arbitral Tribunal ineligible to adjudicate the issues between the parties in the light of the fact that the members of the Arbitral Tribunal were employees of the respondent.

33. Learned counsel for the petitioner on the issue with respect to ineligibility of the Arbitrators vehemently avers that the Award passed by the Arbitral Tribunal is *void ad initio* as the members of the Arbitral Tribunal are ineligible to act as Arbitrators under section 12(5) of the 1996 Act.

34. Before delving into the settled law with regards to section 12(5) of the 1996 Act, it is pertinent to note that the arbitration clause between the parties i.e. clause 64 of the GCC, specifically provides that the Arbitration and Conciliation Act, 1996 and any "statutory modification thereof" shall govern the arbitral proceedings. The Arbitral Tribunal was constituted under this clause. Clause 64(7) of the GCC thus assumes central significance in determining whether the parties, by agreement, intended the amendments introduced in 2015 to apply to their arbitration. For the sake of perusal, Clause 64(7) of GCC is extracted below:-

> *"64(7): Subject to the provisions of the aforesaid Arbitration and Conciliation Act 1996 and the rules under and any statutory modifications thereof shall apply to the arbitration proceedings under this clause."*

35. Learned Counsel of the petitioner places reliance on ***M/s APR***

Constructions Ltd. (supra) wherein the Hon'ble Karnataka High Court dealt with a similar arbitration clause. It was held that where the arbitration clause uses the expression "statutory modification," the amendments brought to the 1996 Act, including the 2015 Amendment, would automatically apply to the arbitral proceedings unless expressly waived in writing under the proviso to section 12(5). It was emphasized that in the absence of a written waiver, the amended provisions must govern, and the appointment of ineligible arbitrators cannot be sustained. Operative portion of the said judgment is extracted below:-

> *"[39] As could be seen from the Clause 64(7) of GCC agreed upon by the parties before the commencement of the Amendment Act, 2015, Arbitration and Conciliation Act, 1996 and the Rules thereunder and, any statutory modification thereof being applicable to the arbitration proceedings, the amended Act 2015 shall apply unless the proviso to Section12(5) of the amended Act is invoked by the parties to waive of the applicability of amended Section 12(5) by an expressed agreement in writing.*
>
> *[40] Indisputably, no agreement has been entered into between the parties to waive of the applicability of the proviso to Section 12[5] of the Amended Act. For the reasons aforesaid, this Court is not prohibited in appointing the sole arbitrator to resolve the dispute between the parties as prayed for."*

36. The Bombay High Court in ***Skoda Auto Volkswagen India Private***

Limited v. Commercial Auto Products Private Limited, 2022 SCC OnLine Bom 6401 has also taken a similar view and observed that when the arbitration clause contains the phrase "any statutory modification or re-enactment thereof," it reflects the parties' understanding that all future amendments to the Act would be applicable to their arbitral relationship. Consequently, by contractual agreement, the amended provisions of the 1996 Act become applicable even to disputes arising before the amendment, unless explicitly excluded. Relevant paragraphs read as under:-

> *"22. Precisely relying upon those wordings of section 26 giving an option to the parties to invoke the amended provisions, Mr. Adwant heavil relied upon article 29 from the contract which reads thus:—*
>
> *"Article 29 - Arbitration & Jurisdiction*
>
> *The Parties shall attempt to resolve any dispute, claims & question whatsoever which shall arise under this Dealer Agreement by mutual agreement within 30 days of the receipt of notice from the concerned Party of any such dispute, claims or questions by the other Party.*
>
> *Any such disputes, claims & question whatsoever which shall arise either during the continuance of this Agreement or afterwards between the Dealer & the Company touching these presents or as to any other matter in any way relating to these presents or the affairs thereof or mutual rights, duties or liabilities under the present and which cannot be resolved by an agreement acceptable to both Parties as*

above, may be referred to a single arbitrator to be appointed by both the Parties and such arbitration shall be in accordance with & subject to the provisions of the Arbitration & Conciliation Act 1996 or any statutory modification or re-enactment there-of for the time being in force. The arbitration proceedings shall be conducted in English language and the venue for the same will be at Aurangabad only.

All matters referred to above shall be subject to laws governed in India and exclusive jurisdiction of courts in Aurangabad only.

The Parties are separate and independent legal entities. Nothing contained in this Agreement shall be deemed to constitute the Company or the Dealer as an agent, representative, partner, joint venture or employee of the other Party for any purpose."

23. The word 'modification', in our considered view clearly indicate an understanding between the parties that the provisions of the Act of 1996 as were to be amended/modified from time to were agreed to govern the arbitration proceedings that would commence between the parties.

.....

26. It is thus abundantly clear that article 29 of the contract is nothing but an agreement between the parties as regards applicability of the amendments those were to be effected in

the Act of 1996 from time to time. It is clearly in the nature of an agreement between the parties as contemplated under section 26 of the Amendment Act of 2016 which otherwise directs the provisions of the Act to be applicable only prospectively. By virtue of article 29 of the contract, it can certainly be said that all the amendments those were to be effected in the Act of 1996 were agreed to be applicable while determining the rival claims between the parties."

37. A perusal of the aforesaid two judgments make it clear that the words "statutory modification" are of wide import and signify a forward-looking intention of the parties to adopt any amendments or modifications to the governing law. In the present case, Clause 64(7) of the GCC evidences the parties' mutual understanding that subsequent legislative amendments including those introduced by the 2015 Amendment Act would apply to their arbitration. This inference is further strengthened by the conduct of the respondent, who itself invoked the amended provisions of the 1996 Act while filing an application under section 33 of the 1996 Act seeking correction of the Award. It will be relevant to reproduce the said application:-

NORTHERN RAILWAY

Office of the
Dy.Chief Engineer(Const).,
Jammu Tawi

No.19-A/cs/Dy.CE/C/JAT/ARB, Dated: 16/03/2020

Shri. Harpal Singh,
Presiding Arbitrator.
Chief Engineer/HQ
Northern Railway, Baroda House
New Delhi

IN THE MATTER OF ARBITRATION BETWEEN :

M/s Jagdish Chand Gupta,
163 Sectyor-38A, Chandigarh .... Claimants

AND

Northern Railway
(Through Dy. Chief Engineer/Const.,
Northern Railway, Jammu Tawi. .... Respondents

Sub: "Design and Construction of important high level single line B.G. Railway Bridge across Ringhal Khad from Km.28.620 & Km.28.830 on Jammu Udhampur Rail Link Project including soil investigations, detailed designs and construction of foundations, piers and abutments and superstructure".

Ref:- Award Dated 23/01/2020 (Received on 13/03/2020).

In terms of clause 33 of Arbitration and Conciliation Act 1996 as amended by The Arbitration and Conciliation(Amendent) Act 2015, the Respondent requesting for correction of award dated 23.01.2020.recieved on 13.03.2020.

In Claim No. 6, the tribunal has noted that "Total average wastage comes to 8.87% whereas wastage for 12 mm is 25.76% i.e. 8.63 MT, 16 mm is 10.27% i.e. 14.78 MT and 25 mm is 10.33% i.e. 15.46 MT which are beyond 10% . Total wastage beyond 10% in these steels comes to 15.76 +0.27 +0.33 =16.36@ 21923/- per MT.= Rs 358660.28".

While calculating the Steel for claim No. 6 the wastage for scrap and percentage of scrap mentioned are correct, but the quantity of scrap beyond 10% limit has not been calculated correctly. Correct quantity of scrap beyond 10% limit has been calculated as shown in the following table.

176

Description Steel	Net Issue (MT)	Net Consumed (MT)	Scrap (MT)	%of Scrap	Scrap beyond 10% In%	IN MT
1	2	3	4 (2-3)	5	6	7
12mm	42.137	33.507	8.63	25.76%	15.76%	5.28
16mm	158.827	144.041	14.786	10.27%	0.27%	0.39
25mm	167.264	151.604	15.660	10.33%	0.33%	0.50
Total						6.17

Thus the total payable quantity of scrap beyond 10% comes to 6.17 MT. So the amounts comes to 6.17 x 21923 per MT = Rs.1,35,265/-.

It is therefore requested to correct the award of claim No.6 accordingly please.

16/02/2020

Dy. Chief Engineer/C
N.Rly. Jammu Tawi.

Copy to :-

1) Shri Vijay Arora, Co-Arbitrator Joint GM/Mech, DFCCIL, Room No.11, 3rd Floor Pragati Maidan, Metro Building, New Delhi-1.

2) Shri Tripurash Diwedi,Co-Arbitrator Director/AIRF, Ministry of Defence, Room No.373, Vayu Bhawan, New Delhi-1

3) M/s Jagdish Chand Gupta, 163 Sector-38A, Chandigarh. 16003 6

38. On perusal and more particularly of paragraph 1, it becomes evident that the respondent itself referred to and invoked the "Arbitration and Conciliation Act, 1996 as amended by the Amendment Act, 2015." This conduct unequivocally demonstrates the parties' understanding that the Amended Act governed the proceedings, thereby satisfying the requirements of section 26 of the Amendment Act, 2015.

39. In this regard, a reference can be made to section 26 of the Amendment Act, 2015 which reads as under:-

> *"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 uncles 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"

40. Section 26 provides that the amended provisions shall not apply to arbitral proceedings commenced before 23.10.2015, *unless the parties otherwise agree*. The section, therefore, creates a clear exception where, by agreement - express or implied - the parties can choose to adopt the amended regime even for pending arbitrations. The key phrase "unless the parties otherwise agree" assumes critical importance in this case.

41. The conduct of both parties in invoking the amended provisions first by the petitioner and later by the respondent constitutes strong evidence of an implied agreement to apply the Amendment Act, 2015. The parties had, in effect, opted into the amended regime. Consequently, the arbitral proceedings must be seen in light of the 2015 Amendment and not the pre-amendment position.

42. In view of the above, the contention of the respondent that the arbitration having commenced in 2006 and the tribunal having been re-constituted in 2014, the arbitral proceedings must be governed by the unamended 1996 Act cannot be accepted. The language of clause 64(7), read with section 26 of the Amendment Act, 2015 and the conduct of the parties together, establish that the 1996 Act as amended by the Amendment Act, 2015 governs these arbitral proceedings. Accordingly, section 12(5) read with the Seventh Schedule squarely applies to the present case.

43. Having said that, I shall now proceed to consider whether the Arbitral Tribunal, comprising of Arbitrator being employee of the respondent,

would make the Award passed by the said Arbitral Tribunal, *void ab initio*.

44. The Arbitral Tribunal was reconstituted pursuant to the Clause 64 (3)(ii)(a) of the GCC which is produced as under:-

> *"In cases not covered by the clause 64(3) (a)(i), the Arbitral Tribunal shall consist of a Panel of three Gazetted Rly. Officers not below JA grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Rly. Officers of one or more departments of the Rly. which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM. Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees.*

While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA grade of other departments of the Railway for the purpose of appointment of arbitrator."

(Emphasis added)

45. On perusal, it is evident that the clause itself says that the Arbitral Tribunal shall consist of employees or retired employees of the respondent. In the present case, the Presiding Arbitrator is the employee of the respondent.

46. In this regard, it is relevant to refer to the judgment of ***Bharat Broadband (supra)*** which holds that section 12(5) of the 1996 Act mentions *de jure* ineligibility for any person whose relationship with the parties, their counsel, or the subject matter of the dispute falls within the categories specified in the Seventh Schedule and renders such a person disqualified from being appointed as an Arbitrator. The only manner in which this ineligibility can be removed is through the proviso to section 12(5), which permits the parties, subsequent to the arising of disputes, to waive the applicability of this disqualification by an express agreement in writing. Unless such an express waiver is executed, any person falling within the Seventh Schedule is ineligible to act as an Arbitrator. Relevant paragraph from the said judgment has been extracted below:-

"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."

47. Hence, it is clear that the employees of the respondent could not have acted as Arbitrators, being ineligible to act as Arbitrators under Item 1

of the Seventh Schedule which reads as under:-

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

48. Thus, the appointment of Arbitral Tribunal is *void ab initio*. Since the appointment goes to the root of the matter, the Award pronounced by an ineligible Arbitral Tribunal is also *void ab initio* and cannot be sustained as it violates the public policy of India and is patently illegal.

49. At this juncture, it will also be relevant to deal with the judgement of ***Ratnam Sudesh Iyer v. Jackie Kakubhai Shroff, (2022) 4 SCC 206.*** The said judgement is distinguishable on facts. Relevant paragraphs of the said judgment are extracted below:-

> *"29. In S.P. Singla Constructions Pvt. Ltd. v. State of Himachal Pradesh & Anr., the arbitration clause provided that the arbitration would be subject to the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof. A plea was raised that the amended provisions would apply in accordance with Section 26 of the 2015 Amendment Act. This contention was repelled by the Court which opined that such general conditions of the contract cannot be taken to be an agreement between the parties to apply the provisions of the 2015 Amendment Act. As a result, the provisions of the 2015 Amendment Act would apply only in relation to arbitral proceedings commenced on or after the date of commencement of the*

2015 amendment.

30. In a similar vein, the arbitration clause in Union of India v. Parmar Construction Company provided that "subject to the provisions of the aforesaid Arbitration and Conciliation Act, 1996 and the Rules there under and any statutory modifications thereof shall apply to the arbitration proceedings under this Clause."

Relying on this clause, a contention was sought to be raised that the 2015 Amendment Act would apply to the arbitral proceedings which had been pending on 23.10.2015.It was opined by this Court that a conjoint reading of Section 21 of the said Act and Section 26 of the 2015 Amendment Act left no manner of doubt that the provisions of the 2015 Amendment Act shall not apply to arbitral proceedings which had commenced in terms of the provisions of Section 21 of the said Act unless the parties otherwise agree. Whether the application was pending for appointment of an arbitrator or in the case of rejection because of no claim as in that case for appointment of an arbitrator including change/substitution of the arbitrator was held not to be of any legal effect for invoking the provision of the 2015 amendment. While S.P. Singla and Parmar Construction Company opined on the topic of arbitral proceedings, we may note here that the matter concerns Section 34 proceedings for setting aside the award. In this case, the Section 34 proceedings had already commenced when the

2015 Amendment Act came into effect. The court proceedings were already subject to the pre 2015 legal position. In a conspectus of the aforesaid, a generally worded clause such as Clause 9 of the Deed of Settlement cannot be said to constitute an agreement to change the course of law that the Section 34 proceedings were subject to. We may also note that a learned single Judge of the Delhi High Court in ABB India Ltd. v. Bharat Heavy Electricals Ltd., while referring to the judgment in Parmar Construction Company case, has proceeded in accordance with this Court's observations while distinguishing the judgment in Thyssen Stahlunion Gmbh. In the context of anticipating new enactments that may come into operation, it was opined that while Thyssen Stahlunion Gmbh dealt with Section 85(2)(a) of the said Act, this provision is dissimilar to Section 26 of the 2015 Amendment Act. Section 26 starts with a negative covenant which is subject to an exception in the case of an agreement between the parties, whereas the observations in Thyssen Stahlunion Gmbh were coloured by Section 85(2)(a) of the said Act which is structured differently. We refer to the same only to give our imprimatur. The relevant portion of ABB India Ltd. (supra) reads as follows:

> *"71. Besides, in Thyssen Stahlunion GMBH, there was no provision, similar to Section 26 of the 2015 Amendment Act, which is crucial to adjudication of the*

dispute in the present case. In this context, it is necessary to distinguish the structure of Section 85(2)(a) of the 1996 Act, with Section 26 of the 2015 Amendment Act. Whereas Section 85 (2)(a) of the 1996 Act made, inter alia, the 1940 Act applicable to arbitral proceedings which commenced before the coming into force of the 1996 Act, unless otherwise agreed by the parties. Section 26 of the 2015 Amendment Act starts with a negative covenant, to the effect that nothing contained in the 2015 Amendment Act – which would include the insertion of Section 12(5) of the 1996 Act – would apply to arbitral proceedings, commenced before the 2015 Amendment Act came into force, i.e. before 23rd October, 2015. This negative covenant was subject to an exception in the case of agreement, otherwise, by the parties. Structurally and conceptually, therefore, Section 26 of the 2015 Amendment Act is fundamentally different from Section 85(2)(a) of the 1996 Act, and requires, therefore, to be interpreted, keeping this distinction in mind."

50. A perusal of the above paragraphs show that the Hon'ble Supreme Court was of the view that a generally worded clause would not be construed to change the course of law as the section 34 proceedings were already pending before the Court. In the present case, the challenge is to the mechanism of the appointment of the Arbitral

Tribunal itself, which is a challenge to the root of the Arbitral proceedings. The petition under section 34, in the present case in hand, was filed after the Amendment Act, 2015 was notified and therefore the aforesaid judgment cannot be applied in the present case and the controversy in question shall be governed by amended provisions.

CONCLUSION

51. For the foregoing reasons, the petition is allowed and the Award dated 23.01.2020 along with Supplementary Award dated 20.03.2020 passed by the Arbitral Tribunal are set aside on the fundamental objection raised by the petitioner. Since the Award dated 23.01.2020 along with Supplementary Award dated 20.03.2020 are set aside, I am neither required to nor have dealt with the merits of the case. The petitioner is at liberty to initiate appropriate legal proceedings.

JASMEET SINGH, J

OCTOBER 30th, 2025/(MU)