A UNION OF INDIA & ORS.

v.

U.P. STATE BRIDGE CORP. LTD.

(Civil Appeal No. 8860 of 2014)

B SEPTEMBER 16, 2014

[J. CHELAMESWAR AND A. K. SIKRI, JJ.]

Arbitration and Conciliation Act, 1996 – ss. 11, 14 and 15 – General Conditions of Contract, 2001 – Clause 64(1)(ii) C *– Contracts between Government Corporation-UOI with private parties-respondent – In terms of the arbitration clause dispute between the parties referred to arbitral tribunal constituted in terms of the agreement – Failure of arbitral tribunal to complete arbitral proceedings for four years –* D *Request case by respondent – High Court constituted the substitute arbitral tribunal, with the appointment of sole arbitrator – On appeal, held: General rule is that an appointment of a substitute arbitrator should be done in accordance with the provisions of the original agreement –* E *When the Government assumes the role of appointment of arbitrators to itself and the Government nominated arbitrators are incapable of acting as arbitrators, then the principle of 'default procedure' would be applied in the case of substitute arbitrators and the Court will step in to appoint the arbitrator* F *by keeping aside the procedure agreed between the parties – Courts are not powerless to remedy such situations by springing into action and exercising their powers as contained in s. 11 to constitute an Arbitral Tribunal, so that interest of the other side is equally protected.*

G **Dismissing the appeal, the Court**

HELD: 1.1 The first principle of the Arbitration and Conciliation Act, 1996 is "fair, speedy and inexpensive trial by an Arbitral Tribunal". The second principle is the H **party autonomy in the choice of procedure. This means**

that if a particular procedure is prescribed in the Arbitration Agreement which the parties have agreed to, that has to be generally resorted to. It is because of this reason, as a normal practice, the Court would insist the parties to adhere to the procedure to which they have agreed upon. This would apply even while making the appointment of substitute arbitrator and the general rule is that such an appointment of a substitute arbitrator should also be done in accordance with the provisions of the original agreement applicable to the appointment of the arbitrator at the initial stage. However, this principle of party autonomy in the choice of procedure has been deviated from in those cases where one of the parties have committed default by not acting in accordance with the procedure prescribed. [Para 18][1196-F-H; 1197-A-D]

1.2 In the case of contracts between Government Corporations/State owned companies with private parties/ contractors, the terms of the agreement are usually drawn by the Government company or public sector undertakings. Government contracts have broadly two kinds of arbitration clauses, first where a named officer is to act as sole arbitrator; and second, where a senior officer like a managing director, nominates a designated officer to act as the sole arbitrator. No doubt, such clauses which give the Government a dominant position to constitute the Arbitral Tribunal are held to be valid. At the same time, it also casts an onerous and responsible duty upon the persona designata to appoint such persons/officers as the arbitrators who are not only able to function independently and impartially, but are in a position to devote adequate time in conducting the arbitration. If the Government has nominated those officers as arbitrators who are not able to devote time to the arbitration proceedings or become incapable of acting as

A arbitrators because of frequent transfers etc., then the principle of 'default procedure' at least in the cases where Government has assumed the role of appointment of arbitrators to itself, has to be applied in the case of substitute arbitrators as well and the Court will step in
B to appoint the arbitrator by keeping aside the procedure which is agreed to between the parties. However, it would depend upon the facts of a particular case as to whether such a course of action should be taken or not. It is emphasized that Court is not powerless in this regard.
C [Para 19][1197-F-H; 1198-A-D]

1.3 Leaving the respondent at the mercy of the appellant thereby giving the power to the appellant to constitute another Arbitral Tribunal would amount to adding insult to the serious injury already suffered by
D the respondent because of non conclusion of the arbitral proceedings even when the dispute were raised in the year 2007. In case, the cherished and benevolent purpose and objective of speedy resolution of the disputes by arbitral proceedings is to be accomplished, it becomes
E the bounden duty of the persona designata to appoint such arbitrator(s) who have sufficient time at their disposal to attend to this task assigned to them and to conclude the arbitral proceedings in a speedily manner. It is a common sight that the officers who are awfully
F busy in their other routine functions, because of their status and position, are made arbitrators. For them, discharge of their other duties assumes more importance (and naturally so) and their role as the arbitrators takes a back seat. This kind of behaviour
G showing casual approach in arbitration cases is anathema to the very genesis of arbitration. Therefore, where the Government assumes the authority and power to itself, in one sided arbitration clause, to appoint the arbitrators in the case of disputes, it should be more
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vigilant and more responsible in choosing the arbitrators who are in a position to conduct the arbitral proceedings in an efficient manner, without compromising with their other duties. Time has come when the appointing authorities have to take call on such aspects failing which (as in the instant case), Courts are not powerless to remedy such situations by springing into action and exercising their powers as contained in Section 11 of the Act to constitute an Arbitral Tribunal, so that interest of the other side is equally protected. [Para 22] [1200-C-H; 1201-A-B]

North Eastern Railway v. Tripple Engineering Works **2014 (9) SCC 288;** *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd. and another* **2006 (3) Suppl. SCR 96 : (2006) 6 SCC 204 – referred to.**

Department of Economics Policy and Development of the City of Moscow v. Bankers Trust Co. **(2004) EWCA Civ 314 – referred to.**

Commercial Arbitration by Mustill and Boyd, **2001;** *Law and Practice of Arbitration and Conciliation* by **O.P. Malhotra – referred to.**

CASE LAW REFERENCE

2014 (9) SCC 288,	**referred to.**	**Para 10, 15, 18, 22.**
(2004) EWCA Civ 314	**referred to.**	**Para 16.**
2006 (3) Suppl. SCR 96	**referred to.**	**Para 18.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No(s). 8860 of 2014.

From the Judgment and Order dated 03-08-2011 of the High Court of Judicature at Patna in Request Case No. 3/2011.

A Tushar Mehta, ASG, Madhurima Mridul, Ms. Honey Kumari, S.N. Terdal, B. Krishna Prasad, Advs. for the Appellants.

Vivek Singh, Lakshmi Raman Singh, Advs. for the Respondent.

B The Judgment of the Court was delivered by

A. K. SIKRI, J.

1. Leave granted.

2. Counsel for the parties have been heard in detail in C this appeal. In order to determine the controversy that is raised in this appeal, which is filed by the Union of India, challenging the decision dated 03.08.2011 of the High Court, minimal facts which require a mention, are the following:

The appellant had entered into an agreement with the D respondent vide which contract for construction of guide bunds, foundation and substructure of Rail Bridge across river Gangaes near Digha Ghat, Patna and the said agreement contained various terms and conditions. Clause 64 (1) (ii) of the General Condition of the Contract 2001 (for short 'the E GCC'), contained an arbitration clause that is provided for deciding the dispute between the parties through arbitration by an arbitral tribunal to be constituted in terms of the said agreement.

3. Disputes arose between the parties with respect to F the said contract and on the request of the respondent an arbitral tribunal of the persons was constituted in the year 2007, in which all the members were Railway authorities. It is a matter of regret that inspite of expiry of four years, the said tribunal did not complete the arbitral proceeding and the matter kept G hanging due to transfers/ retirement/ adjournments etc.

4. The respondent felt exasperated due to the prolongation of the matter before the arbitral tribunal and chose to file Request Case No.10/2010. Even at the time of filing of that case, there was a vacancy in the Arbitral Tribunal. When

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this case was taken up by the High Court on 09.03.2011, by that time, the appellant had filled up the said vacancy. Taking note thereof, the said petition was disposed of by the High Court vide order dated 09.03.2011 giving the last chance to the Arbitral Tribunal to complete the arbitral proceeding within a period of three months with direction to hold regular sittings at Patna from the date of receipt/production of a copy of the said order. It was also stated in the order dated 09.03.2011 that if arbitration proceedings are not completed within the period fixed by the Court, the respondent would be at liberty to approach the Court again and the Court would be constrained to pass appropriate order in accordance with the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act').

5. The Arbitral Tribunal was made aware of the said order as the copy thereof was produced before it on 25.03.2011. This means that it was supposed to complete the case by 25.06.2011. However, even within the said allotted time, the proceedings were not brought to an end and, therefore, the respondent filed Request Case No.3/2011 dated 29.06.2011.

6. The appellant contested the aforesaid petition of the respondent on various grounds and also gave its own reasons because of which the Arbitral Tribunal would not complete the proceedings. It was also pointed out that though the Arbitral Tribunal was ready to hear the case of the parties and decide it finally on 22.07.2011, the respondent had informed the Tribunal of the filing of the said petition which led to the adjournment of the matter by the Tribunal.

7. The High Court took note of the various dates of hearings that are fixed by the Tribunal between 25.03.2011 and 25.06.2011 and came to the conclusion that delay caused in the arbitral proceedings was intentional. So much so, the members of the Arbitral Tribunal were continuing their dilatory tactics in deciding the matter before it since 2007 and four years had passed in the process. Tribunal had faltered even

A after giving specific directions to conclude the matter within three months and long adjournments were granted thereby violating the specific directions of the High Court. Terming this attitude of the members of the Tribunal as negligent on their part towards their duties with no sanctity for any law or for
B the orders of the High Court, the High Court allowed the petition of the respondent herein and set aside the mandate of the Tribunal with the appointment of sole arbitrator by the Court itself.

8. In the instant appeal, challenge is made to the
C aforesaid judgment of the High Court with the plea that it was not open to the High Court to appoint the sole arbitrator as it was not empowered to constitute Arbitral Tribunal of its own and, that too, contrary to the arbitration clause. Mr. Tushar Mehta, learned ASG appearing for the appellant has made a
D vehement submission, in this behalf, that no such power is vested in the High Court under the Act. His submission was that as per the scheme of the Act even if the mandate of the Arbitral Tribunal was to be terminated, fresh Tribunal could be constituted only in accordance with the arbitration agreement.
E It was thus argued that the High Court could have, at the most, directed the appellant to constitute another Arbitral Tribunal in accordance with Clause 64 of the GCC.

9. Learned counsel for the respondent, on the other hand,
F made an effervasive attempt to justify the decision of the High Court with emphatic plea that when the very purpose of arbitration is frustrated by the members of the Tribunal who, were dragging the proceedings, the Court was not powerless to travel beyond the framework of Clause 64 of the GCC and
G appoint a retired Chief Justice as the arbitrator. He referred to the specific findings of the High Court in the impugned judgment in this behalf, *inter alia,* observing as under:

> "10. The entire facts and circumstances mentioned above depict that the delay caused in the arbitral
H proceedings was intentional. The members of the arbitral

tribunal continued their dilatory tactics in deciding the arbitral proceedings since 2007 and when after about four years specific directions were given by this Court vide order dated 09.03.2011 passed in Request Case No.10 of 2011 the said authorities did not flinch for a moment in disobeying the specific direction of this Court and continued their dilatory attitude although the petitioner had produced the said order of this Court before the arbitral tribunal on 25.03.2011 and filed his pleadings and reply by 21.04.2011. Thereafter, long adjournments were granted in the arbitral proceeding violating the specific directions of this Court for holding regular sittings at Patna and even after the long date fixed by the arbitral tribunal, sometimes respondent-authorities took long adjournments to file their counter reply and most of the times one or the other member of the arbitral tribunal were not available and they saw to it that the time of three months granted by this Court vide order dated 09.03.2011 is expired. This attitude of the arbitral tribunal clearly amounts to disobedience of the specific directions of this Court vide order dated 09.03.2011 passed in Request Case No.10 of 2010.

11. All these facts also disclose a very sorry state of affairs that the members of the arbitral tribunal are inept & ineffectual by any standard, completely negligent towards their duties and having no sanctity for any law or for the orders of the High Court, which are binging upon them. All the training courses etc. imparted to them have clearly proved to be wastage of public exchequer, which comes from the hard earned money of the people. The Railways must take note of these observations and the order of this Court and act accordingly.

12. So far this case is concerned, it had already been mentioned in order dated 09.03.2011 passed by this Court in Request Case No.10 of 2010 that if the

A arbitration was not completed within three months from the date of receipt/production of a copy of the said order before the arbitral tribunal, the petitioner would be at liberty to approach this Court and if the facts claimed by the petitioner were found to be true, this Court would be
B constrained to pass appropriate orders in accordance with the Act. In the said circumstances and in view of the claim of the petitioner having been found to be proved regarding the attitude of the tribunal, this request case is allowed and the arbitral tribunal appointed by respondent-
C authorities is hereby set aside and a sole Arbitrator is appointed to decide the arbitral proceedings expeditiously without giving any undue adjournment to any of the parties."

10. He further submitted that in the case of ***North*** D ***Eastern Railway*** v. ***Tripple Engineering Works***, decided on 13.08.2014 in Civil Appeal No.6275 of 2014 (arising out of S.L.P. (C) No.20427 of 2013), in almost identical circumstances, this Court had approved the similar directions of the Patna High Court.

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11. It is not in dispute that as per Clause 64 of the GCC, three arbitrators are to be appointed, in the manner prescribed therein in case of dispute between the parties. The relevant portion of Clause 64 with which we are concerned with the
F present conditions is extracted below:

"**64. (1) (i) Demand for Arbitration** - In the event of any dispute or difference between the parties as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in
G question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the expected matters
H referred to in clause 63 of these conditions, the contractor,

after 120 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing the dispute or difference be referred to arbitration.

xx xx xx

64. (3) (a) (I) In cases where the total value of all claims in question added together does not exceed 10,00,000/- (Rupees ten lakhs only), the Arbitral Tribunal consist of a sole arbitrator who shall be either the General Manager of a gazette officer of Railway not below the grade of JA grade nominated by the General Manager in that behalf. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by Railway.

64. (3) (a) (ii) **In cases not covered by clause 64 (3) (a) (I), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below JA grade, as the arbitrators.** For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments of the Railway to the contractor who will be asked to suggest to General Manager upto 2 names out of the panel for appointment as contractor's nominee. 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. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts department. An officer of Section Grade of the Account department shall be considered of equal status to the officers in SA grade of other departments of the Railways for the purpose of appointment of arbitrators.

A 64. (3) (a) (iii) **If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/ offices or is/ are unable or unwilling to perform his functions** as arbitrator for any reason
B whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the **General Manager shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed.**
C Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator(s)."

12. At this stage, we may take note of the scheme of the Act as well, by noticing those provisions which would be
D attracted to deal with such a situation. Relevant provisions are extracted below for ready reference:

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

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

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

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

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

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15. Termination of mandate and substitution of arbitrator. - (1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate - A

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties. B

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. C

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal. D E

32. Termination of proceedings. - (1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where - F

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute, G

(b) the parties agree on the termination of the proceedings, or

(c) the arbitral tribunal finds that the continuation of the H

A proceedings has for any other reason become unnecessary or impossible.

(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings."

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13. As is clear from the reading of Section 14, when there is a failure on the part of the Arbitral Tribunal to act and it is unable to perform its function either *de jure* or *de facto*, it is open to a party to the arbitration proceedings to approach the C Court to decide on the termination of the mandate. Section 15 provides some more contingencies when mandate of an arbitrator can get terminated. In the present case, the High Court has come to a categorical finding that the Arbitral Tribunal failed to perform its function, and rightly so. It is a clear case D of inability on the part of the members of the Tribunal to proceed in the matter as the matter lingered on for almost four years, without any rhyme or justifiable reasons. The members did not mend their ways even when another life was given by granting three months to them. Virtually a pre-emptory order was passed E by the High Court, but the Arbitral Tribunal remained unaffected and took the directions of the High Court in a cavalier manner. Therefore, the order of the High Court terminating the mandate of the arbitral tribunal is flawless. This aspect of the impugned order is not even questioned by the appellant at the time of F hearing of the present appeal.

14. However, the contention of the appellant is that even if it was so, as per the provisions of Section 15 of the Act, substitute arbitrators should have been appointed "according to the rules that were applicable to the appointment of the G arbitrator being replaced". On this basis, it was the submission of Mr. Mehta, learned ASG, that High Court should have resorted to provision contained in Clause 64 of the GCC.

15. No doubt, ordinarily that would be the position. The moot question, however, is as to whether such a course of H action has to be necessarily adopted by the High Court in all

cases, while dealing with an application under Section 11 of the Act or there is a room for play in the joints and the High Court is not divested of exercising discretion under some circumstances? If yes, what are those circumstances? It is this very aspect which was specifically dealt with by this Court in ***Tripple Engineering Works*** (supra). Taking note of various judgments, the Court pointed out that the notion that the High Court was bound to appoint the arbitrator as per the contract between the parties has seen a significant erosion in recent past. In para 5 of the said decision, those judgments where departure of the aforesaid "classical notion" has been made are taken note of. It would, therefore, be useful to reproduce the said para along with paras 6 & 7 herein below:

> "5. The "classical notion" that the High Court while exercising its power Under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter for short 'the Act') must appoint the arbitrator as per the contract between the parties saw a significant erosion in ***Ace Pipeline Contracts (P) Ltd.*** v. ***Bharat Petroleum Corporation Ltd.***, (2007) 5 SCC 304 wherein this Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. A more significant development had come in a decision that followed soon thereafter in ***Union of India*** v. ***Bharat Battery Manufacturing Co. (P) Ltd.***, (2007) 7 SCC 684 wherein following a three Judges Bench decision in ***Punj Lloyd Ltd.*** v. ***Petronet MHB Ltd.***, (2006) 2 SCC 638 it was held that once an aggrieved party files an application Under Section 11 (6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the contract. The implication that the Court would be free to deviate from the terms of the contract is obvious. The apparent dichotomy in ***Ace Pipeline*** (supra) and ***Bharat Battery Manufacturing Company (P) Ltd.*** (supra) was

A reconciled by a three Judges Bench of this Court in ***Northern Railway Administration, Ministry of Railway, New Delhi*** v. ***Patel Engineering Co. Limited***, (2008) 10 SCC 240 where the jurisdiction of the High Court Under Section 11 (6) of the Act was sought to be
B emphasized by taking into account the expression "to take the necessary measure" appearing in Sub-section (6) of Section 11 and by further laying down that the said expression has to be read along with the requirement of Sub-section (8) of Section 11 of the Act. The position
C was further clarified in ***Indian Oil Corporation Limited & Ors.*** v. ***Raja Transport Private Limited***, (2009) 8 SCC 520. Paragraph 48 of the report wherein the scope of Section 11 of the Act was summarized may be quoted by reproducing Sub-paragraphs (vi) and (vii) herein
D below:

> "(vi) The Chief Justice or his designate while exercising power under Sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.
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> E
>
> (vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring
> F the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded, ignore the designated arbitrator and appoint someone else."

6. The above discussion will not be complete without reference to the view of this Court expressed in ***Union***
G ***of India*** v. ***Singh Builders Syndicate***, (2009) 4 SCC 523 wherein the appointment of a retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that the arbitration proceedings had not concluded for over a
H decade making a mockery of the process. In fact, in

paragraph 25 of the report in ***Singh Builders Syndicate*** (supra) this Court had suggested that the government, statutory authorities and government companies should consider phasing out arbitration clauses providing for appointment of serving officers and encourage professionalism in arbitration.

7. A pronouncement of late in ***Deep Trading Co.*** v. ***Indian Oil Corportation and Ors.,*** (2013) 4 SCC 35 followed the legal position laid down in ***Punj Lloyd Ltd.*** (supra) which in turn had followed a two Judges Bench decision in ***Datar Switchgears Ltd.*** v. ***Tata Finance Ltd.,*** (2000) 8 SCC 151. The theory of forfeiture of the rights of a party under the agreement to appoint its arbitrator once the proceedings under Section 11(6) of the Act had commenced came to be even more formally embedded in ***Deep Trading Company*** (supra) subject, of course, to the provisions of Section 11(8), which provision in any event, had been held in ***Northern Railway Administration*** (supra) not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction under Section 11(6) of the Act."

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

(a) The First Pillar: Three General Principles.

A (b) The Second Pillar: The General Duty of the Tribunal.

(c) The Third Pillar: The General Duty of the Parties.

(d) The Fourth Pillar: Mandatory and Semi Mandatory Provisions.

B In so far as first pillar is concerned, it contains three general principles on which the entire edifice of the said Act is structured. These principles are mentioned by an English Court in its judgment in the case of ***Department of Economics Policy and Development of the City of Moscow*** v. ***Bankers*** C ***Trust Co.***, (2004) EWCA Civ 314. In that case, Mance, L.J. succinctly summed up the objective of this Act in the following words: 'Parliament has set out, in the Arbitration Act, 1996, to encourage and facilitate a reformed and more independent, as well as private and confidential, system of consensual D dispute resolution, with only limited possibilities of court involvement where necessary in the interests of the public and of basic fairness'. Section 1 of the Act sets forth the three main principles of arbitration law *viz.*- (I) speedy, inexpensive and fair trial by an impartial tribunal; (ii) party autonomy; and E (iii) minimum court intervention. This provision has to be applied purposively. In case of doubt as to the meaning of any provision of this Act, regard should be had to these principles.

17. In the book "O.P. Malhotra on the Law and Practice of Arbitration and Conciliation" (Third Edition revised by Ms. F Indu Malhotra), it is rightly observed that Indian Arbitration Act is also based on the aforesaid four foundational pillars.

18. First and paramount principle of the first pillar is "fair, speedy and inexpensive trial by an Arbitral Tribunal". G Unnecessary delay or expense would frustrate the very purpose of arbitration. Interestingly, second principle which is recognised in the Act is the party autonomy in the choice of procedure. This means that if a particular procedure is prescribed in the Arbitration Agreement which the parties have H agreed to, that has to be generally resorted to. It is because

of this reason, as a normal practice, the Court will insist the parties to adhere to the procedure to which they have agreed upon. This would apply even while making the appointment of substitute arbitrator and the general rule is that such an appointment of a substitute arbitrator should also be done in accordance with the provisions of the original agreement applicable to the appointment of the arbitrator at the initial stage. (see ***Yashwith Constructions (P) Ltd.*** v. ***Simplex Concrete Piles India Ltd. and another***, (2006) 6 SCC 204. However, this principle of party autonomy in the choice of procedure has been deviated from in those cases where one of the parties have committed default by not acting in accordance with the procedure prescribed. Many such instances where this course of action is taken and the Court appoint the arbitrator when the persona designata has failed to act, are taken note of in para 5 of ***Tripple Engineering Works*** (supra). We are conscious of the fact that these were the cases where appointment of the independent arbitrator made by the Court in exercise of powers under Section 11 of account of 'default procedure'. We are, in the present case, concerned with the constitution of substitute Arbitral Tribunal where earlier Arbitral Tribunal has failed to perform. However, the above principle of default procedure is extended by this Court in such cases as well as is clear from the judgment in ***Singh Builders Syndicate*** (supra).

19. In the case of contracts between Government Corporations / State owned companies with private parties/ contractors, the terms of the agreement are usually drawn by the Government company or public sector undertakings. Government contracts have broadly two kinds of arbitration clauses, first where a named officer is to act as sole arbitrator; and second, where a senior officer like a managing director, nominates a designated officer to act as the sole arbitrator. No doubt, such clauses which give the Government a dominant position to constitute the Arbitral Tribunal are held to be valid. At the same time, it also casts an onerous and responsible

A duty upon the persona designata to appoint such persons/ officers as the arbitrators who are not only able to function independently and impartially, but are in a position to devote adequate time in conducting the arbitration. If the Government has nominated those officers as arbitrators who are not able B to devote time to the arbitration proceedings or become incapable of acting as arbitrators because of frequent transfers etc., then the principle of 'default procedure' at least in the cases where Government has assumed the role of appointment of arbitrators to itself, has to be applied in the case of substitute C arbitrators as well and the Court will step in to appoint the arbitrator by keeping aside the procedure which is agreed to between the parties. However, it will depend upon the facts of a particular case as to whether such a course of action should be taken or not. What we emphasise is that Court is not D powerless in this regard.

20. In ***Singh Builders Syndicate*** (supra) where pendency of arbitration proceedings for over a decade was found by this Court to be a mockery of a process. This anguish is expressed by the Court in the said judgment in the following E manner:

> "15. The object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of the F parties' choice. If the Arbitral Tribunal consists of serving officers of one of the parties to the dispute, as members in terms of the arbitration agreement, and such tribunal is made non-functional on account of the action or inaction or delay of such party, either by frequent transfers of such members of the Arbitral Tribunal or by failing to G take steps expedititiously to replace the arbitrators in terms of the arbitration agreement, the Chief Justice or his designate, required to exercise power under Section 11 of the Act, can step in and pass appropriate orders.

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16. We fail to understand why the General Manager of the Railways repeatedly furnished panels containing names of officers who were due for transfer in the near future. We are conscious of the fact that a serving officer is transferred on account of exigencies of service and transfer policy of the employer and that merely because an employee is appointed as arbitrator, his transfer cannot be avoided or postponed. But an effort should be made to ensure that officers who are likely to remain in a particular place are alone appointed as arbitrators and that the Arbitral Tribunal consisting of serving officers, decides the matter expeditiously.

17. Constituting Arbitral Tribunals with serving officers from different far-away places should be avoided. There can be no hard-and-fast rule, but there should be a conscious effort to ensure that the Arbitral Tribunal is constituted promptly and arbitration does not drag on for years and decades.

18. As noticed above, the matter has now been pending for nearly ten years from the date when the demand for arbitration was first made with virtually no progress. Having regard to the passage of time, if the Arbitral Tribunal has to be reconstituted in terms of Clause 64, there may be a need to change even the other two members of the Tribunal.

19. The delays and frequent changes in the Arbitral Tribunal make a mockery of the process of arbitration. Having regard to this factual background, we are of the view that the appointment of a retired Judge of the Delhi High Court as sole arbitrator does not call for interference in exercise of jurisdiction under Article 136 of the Constitution of India."

21. The appointment of arbitrator by the Court, of its own choice, departing from the arbitration clause, is therefore not unknown and has become an acceptable proposition of law

A which can be termed as a legal principle which has come to be established by a series of judgments of this Court. Reasons for debating such a course of action are not far to seek and already taken note of above.

B 22. In the present case, we find the fact situation almost same as in ***Tripple Engineering Works*** (supra) and ***Singh Builders Syndicate*** (supra). If the contention of the appellant is allowed, it would amount to giving premium to the appellant for the fault of the Arbitral Tribunal's members who were appointed by none else but by appellant itself. As pointed C above, the appellant has not questioned the order of the High Court in so far as it has terminated the mandate of the earlier Arbitral Tribunal because of their inability to perform the task assigned to them. In such a situation, leaving the respondent at the mercy of the appellant thereby giving the power to the D appellant to constitute another Arbitral Tribunal would amount to adding insult to the serious injury already suffered by the respondent because of non conclusion of the arbitral proceedings even when the dispute were raised in the year 2007. In case, the cherished and benevolent purpose and E objective of speedy resolution of the disputes by arbitral proceedings is to be accomplished, it becomes the bounden duty of the persona designata to appoint such arbitrator(s) who have sufficient time at their disposal to attend to this task assigned to them and to conclude the arbitral proceedings in F a speedily manner. It is a common sight that the officers who are awfully busy in their other routine functions, because of their status and position, are made arbitrators. For them, discharge of their other duties assumes more importance (and naturally so) and their role as the arbitrators takes a back seat. G This kind of behaviour showing casual approach in arbitration cases is anathema to the very genesis of arbitration. Therefore, where the Government assumes the authority and power to itself, in one sided arbitration clause, to appoint the arbitrators in the case of disputes, it should be more vigilant and more H responsible in choosing the arbitrators who are in a position

to conduct the arbitral proceedings in an efficient manner, without compromising with their other duties. Time has come when the appointing authorities have to take call on such aspects failing which (as in the instant case), Courts are not powerless to remedy such situations by springing into action and exercising their powers as contained in Section 11 of the Act to constitute an Arbitral Tribunal, so that interest of the other side is equally protected. A B

23. In view of the aforesaid, we do not find any merit in the present appeal which is dismissed with costs. C

Nidhi Jain Appeal dismissed.