ARAVALI POWER COMPANY PVT. LTD. A

v.

M/S. ERA INFRA ENGINEERING LTD.

(Civil Appeal Nos. 12627-12628 of 2017)

SEPTEMBER 12, 2017 B

[ADARSH KUMAR GOEL AND UDAY UMESH LALIT, JJ.]

Arbitration and Conciliation Act, 1996 – ss.11(6), 12 and 13 – Appointment of employee of a party as arbitrator – Challenge to – Contract between appellant-APCPL and respondent-EIEL for construction work of permanent township for a thermal power project – Disputes arose between parties – Appellant appointed its Chief Executive Officer (CEO) as the sole Arbitrator – Parties appeared before Arbitrator – However, later Respondent challenged the constitution of arbitral tribunal – Objection rejected by Arbitrator – Petition by respondent before High Court u/s.11(6) for appointing an independent arbitrator – High Court set aside the appointment of the Arbitrator already appointed by Appellant – On appeal, held: Mere fact that the arbitrator is an employee is not ipso facto *a ground to raise any presumption of bias or partiality – In the instant case, the Arbitrator was not the Engineer In-charge or the day-to-day In-charge of the work – The appointed Arbitrator was neither the Dealing Authority in regard to the Contract nor was directly sub-ordinate to the Officer(s) whose decision was the subject matter of dispute – There is nothing on record which could raise doubts about the independence or impartiality of the Arbitrator – Thus, appointment of the Arbitrator in question cannot be termed to be illegal or unenforceable – Further, the respondent itself participated in the arbitration proceedings and did not raise any challenge in terms of the procedure prescribed under the Act – No cause of action for exercise of power u/s.11(6) had arisen in the present case – High Court erred in exercising jurisdiction in the present case and it ought not to have interfered with the process and progress of arbitration – Arbitration, in pursuance of the appointment of the Arbitrator to proceed in accordance with law.* C D E F G

Arbitration and Conciliation Act, 1996 – s.12 – Grounds for challenging the appointment of arbitrator – Before 2015 Amendment H

A *Act– Contract between appellant-APCPL and respondent-EIEL – Disputes arose between parties – As per the contract, appellant appointed its Chief Executive Officer (CEO) as the sole Arbitrator on 19.08.2015 i.e. before 2015 Amendment came into force – Questioning the independence of the Arbitrator already appointed,*
B *petition filed by respondent before High Court for appointing an independent arbitrator – Held: s.12(1) as it stood before the 2015 Amendment, obliged the person approached in connection with possible appointment as an arbitrator, to disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality – It is not the case of the respondent*
C *that there had not been any fair and correct disclosure – Thus, the fact that the already appointed arbitrator happens to be an employee of one of the parties to the arbitration agreement does not by itself, before the Amendment Act came into force, render such appointment invalid and unenforceable – Further, in pre-amendment cases, the*
D *terms of the agreement ought to be adhered to and/or given effect to as closely as possible – Arbitration and Conciliation(Amendment) Act, 2015.*

Arbitration and Conciliation Act, 1996 – s.11(6) – Scheme of appointment of arbitrators – Exercise of power under – Pre and
E *post 2015 amendment – Principles enunciated – Arbitration and Conciliation(Amendment) Act, 2015.*

Disposing of the appeals, the Court

HELD: 1.1 In the present case, the contract provided for arbitration by the Project In-charge of the concerned Project,
F **and in case such Project In-charge were to be unable or unwilling to act, arbitration by any person appointed by the Chairman and Managing Director. It further provided *inter alia* that there would be no objection even if the Arbitrator had dealt with the matters to which the contract related in the course of his duties or had expressed views on all or any of the matters in dispute or**
G **difference. The fact that the named arbitrator happens to be an employee of one of the parties to the Arbitration Agreement has not by itself, before the Arbitration and Conciliation(Amendment) Act, 2015 came into force, rendered such appointment invalid and unenforceable. In pre-amendment cases, the law laid down**
H **in *Northern Railway Administration*, must be applied, in that the**

terms of the agreement ought to be adhered to and/or given effect to as closely as possible. [Paras 16, 17 and 21][512-E-G; 523-E] A

Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Ltd. (2008) 10 SCC 240 : [2008] 12 SCR 216 – held applicable.

1.2 Section 12(1), Arbitration and Conciliation Act, 1996 as it then stood before the 2015 Amendment Act came into force, obliged the person approached in connection with possible appointment as an arbitrator, to disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. In the present case, the Arbitrator undoubtedly is an employee of the Appellant-Aravali Power Company Pvt. Ltd., but so long as there is no justifiable apprehension about his independence or impartiality, the appointment could not be rendered invalid and unenforceable. Mere fact that the arbitrator is an employee is not *ipso facto* a ground to raise any presumption of bias or partiality. It is not the case that there had not been any fair and correct disclosure. All that the Respondent-M/s. Era Infra Engineering Ltd. alleged in its petition was, ".....he has himself in his official capacity in the Respondent-Company dealt with contracts of nature similar to the contract works in question....". The Respondent, while relying on the provisions of the Amendment Act had also submitted, ".... allegedly appointed individual is the Chief Executive Officer of the Respondent herein, who on account of such position also has the controlling influence over the Respondent-Company". At the same time, the High Court observed that the Arbitrator was not the Engineer In-charge or the day-to-day In-charge of the work and as a matter of fact, the Engineer In-charge was AGM (CCD-Township) who had a team of other Engineers working under him and that AGM (CCD-Township) reported to AGM (ME-CCD) who in turn reported to CEO (APCPL) i.e. the Arbitrator. The facts on record and the hierarchy do not show that the Arbitrator in the present matter was either the Dealing Authority in regard to the Contract or was directly sub-ordinate to the Officer(s) whose decision is the subject matter of dispute. In fact, the decision, which could be subject matter of dispute, was that of his subordinates. He may have dealt with contracts of nature B C D E F G H

A similar to the contract works in question but that by itself does not render the appointment invalid. Since there is nothing on record which could raise justifiable doubts about the independence or impartiality of the named Arbitrator, the appointment of the Arbitrator could not in any way be termed to be illegal or unenforceable. [Para 19][514-D-H; 515-A-C]

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Indian Oil Corporation Ltd. and Others v. Raja Transport Private Ltd. (2009) 8 SCC 520 : [2009] 13 SCR 510 – relied on.

1.3 The principles which emerge are:-

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A. In cases governed by 1996 Act as it stood before the Amendment Act came into force:-

(i) The fact that the named arbitrator is an employee of one of the parties is not *ipso facto* a ground to raise a presumption of bias or partiality or lack of independence on his part. There

D can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate to the officer whose decision is the subject-matter of the dispute.

E (ii) Unless the cause of action for invoking jurisdiction under Clauses (a), (b) or (c) of sub-section (6) of Section 11 of 1996 Act arises, there is no question of the Chief Justice or his designate exercising power under sub-section (6) of Section 11.

(iii) The Chief Justice or his designate while exercising

F power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(iv) While exercising such power under sub section (6) of Section 11, if circumstances exist, giving rise to justifiable doubts

G as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.

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B. In cases governed by 1996 Act after the Amendment Act has come into force:-

If the arbitration clause finds foul with the amended provisions, the appointment of the Arbitrator even if apparently in conformity with the arbitration clause in the agreement, would be illegal and thus the Court would be within its powers to appoint such arbitrator(s) as may be permissible. [Para 22][523-G-H; 524-A-F]

1.4 The procedure as laid down in unamended Section 12 mandated disclosure of circumstances likely to give rise to justifiable doubts as to independence and impartiality of the arbitrator. It is not the case of the Respondent that the provisions of Section 12 in unamended form stood violated on any count. In any case the provision contemplated clear and precise procedure under which the arbitrator could be challenged and the objections in that behalf under Section 13 could be raised within prescribed time and in accordance with the procedure detailed therein. The record shows that no such challenge was raised within the time and in terms of the procedure prescribed. As a matter of fact, the Respondent had participated in the arbitration and by its communication dated 04.12.2015 had sought extension of time to file its statement of claim. In the circumstances, the High Court was clearly in error in exercising jurisdiction in the present case and it ought not to have interfered with the process and progress of arbitration. The arbitration, in pursuance of the appointment of the Arbitrator on 19.08.2015, shall proceed in accordance with law. [Paras 23, 24][524-H; 525-A-C]

Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited **(2017) 4 SCC 665 – distinguished.**

ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd. **(2007) 5 SCC 304 : [2007] 4 SCR 777;** *Union of India v. Bharat Battery Manufacturing Co. (P) Ltd.* **(2007) 7 SCC 684 : [2007] 8 SCR 993;** *Union of India v. Singh Builders Syndicate* **(2009) 4 SCC 523 : [2009] 3 SCR 563;** *Denel (Proprietary) Limited v. Bharat Electronics Limited and Another* **(2010) 6 SCC 394 : [2010] 6 SCR 784;** *Datar Switchgears Ltd. v. Tata*

A *Finance Ltd.* **(2000) 8 SCC 151**; *Bhupinder Singh Bindra v. Union of India* **(1995) 5 SCC 329 : [1995] 2 Suppl. SCR 417**; *Denel (Proprietary) Limited v. Ministry of Defence* **(2012) 2 SCC 759 : [2012] 2 SCR 897**; *Union of India and Others v. Uttar Pradesh State* B *Bridge Corporation Limited* **(2015) 2 SCC 52**; *Tripple Engg. Works v. North Eastern Railway & Ors.* **(2014) 9 SCC 288 : [2014] 6 SCR 1143 – referred to.**

Case Law Reference

[2009] 13 SCR 510	**relied on**	**Para 20**
C **[2008] 12 SCR 216**	**held applicable**	**Para 20**
[2007] 4 SCR 777	**referred to**	**Para 20**
[2007] 8 SCR 993	**referred to**	**Para 20**
[2009] 3 SCR 563	**referred to**	**Para 20**
D **[2010] 6 SCR 784**	**referred to**	**Para 20**
(2000) 8 SCC 151	**referred to**	**Para 20**
[1995] 2 Suppl. SCR 417	**referred to**	**Para 20**
[2012] 2 SCR 897	**referred to**	**Para 20**
E **(2015) 2 SCC 52**	**referred to**	**Para 20**
[2014] 6 SCR 1143	**referred to**	**Para 20**
(2017) 4 SCC 665	**distinguished**	**Para 20**

F CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 12627-12628 of 2017.

From the Judgment and Order dated 29.07.2016 of the High Court of Delhi at New Delhi in O. M. P. (T) (Comm.) No. 13/2016 and Arb. P. No. 136 of 2016

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Civil Appeal Nos. 12629-12630 of 2017.

Vikas Singh, Sr. Adv., Bharat Sangal, Ms. Vernika Tomar, Ms. Dipika Kalia, Ms. Vidushi Garg, Manoj K. Singh, Prem Prakash, Advs. for the appearing parties.

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The Judgment of the Court was delivered by

UDAY UMESH LALIT, J. 1. Leave granted. These appeals challenge the common judgment and order dated 29.07.2016 passed by the High Court of Delhi at New Delhi in O.M.P. (T) (Comm.) No.13/2016 and Arbitration Petition No.136/2016.

2. Construction work of permanent township for Indira Gandhi Super Thermal Power Project at Jhajjar, Haryana was awarded to the Respondent- M/s Era Infra Engineering Ltd. on 20.05.2009 and contract dated 17.11.2009 signed thereafter broadly consisted of General Conditions of Contract (GCC) and Special Conditions of Contract (SCC). Clause 56 of the GCC stipulated arbitration between the parties in following terms:-

"56. ARBITRATION:-

Except where otherwise provided for in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other questions, claim, rights, matter or thing whatsoever in any way arising out of or relating to the contract, design, drawing, specifications, estimates, instructions, orders or these conditions of otherwise concerning the works, or the executions or failures to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the Sole Arbitration of the Project In-charge of the Project concerned of the owner, and if the Project In-charge is unable or unwilling to act, to the sole arbitration of some other persons appointed by the Chairman and Managing Director, NTPC limited (Formerly National Thermal Power Corporation Ltd) willing to act as such Arbitrator. There will be no objections, if the Arbitrator so appointed is an employee of NTPC Limited (Formerly National Thermal Power Corporation Ltd), and that he had to deal with the matters to which the contract relates and that in the course of his duties as such he had expressed views on all or any of the matters in disputes or difference. The Arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason as aforesaid at the time of such transfer, vacations of office or inability to act,

A Chairman and Managing Directors, NTPC limited (Formerly National Thermal Power Corporation Ltd.), shall appoint another person to act as Arbitrator in accordance with the terms of the contract....."

3. According to the Appellant-Aravali Power Company Pvt. Ltd., B scheduled date of completion of work was 19.05.2011 but the progress of work was quite slow which compelled the Appellant to cancel certain remaining works by its letters dated 18.07.2014, 24.10.2014, 30.06.2015 and 08.07.2015. By its letter dated 29.07.2015 the Respondent alleged that the delays in the project were not attributable to the Respondent and after setting out certain grievances, the letter thereafter sought to C invoke arbitration submitting further that arbitration be through a retired Judge of the High Court, the relevant portion of the letter being:-

"In view of the above circumstances and inaction of APCPL towards settlement of our claims/payments, we hereby invoke Arbitration Clause of the Contract Agreement request your good D self to appoint Arbitrator for settlement of our claims according to Clause 56 of GCC of the Contract Agreement.

However, we want to draw your attention to the legal point that once the order of part cancellation has been passed at the Highest Level of the Owner/Employer, hence, any forum for resolution of E dispute constituted by the said authority & particularly its subordinate is of no legal consequence. It is a well settled proposition of law that nobody can be judge in its own cause. Therefore, in light of the aforesaid settled position of law, we seek an independent arbitration, through a retired Hon'ble Judge F of the Hon'ble High Court so as to seek vindication of our grievance as mentioned in foregoing paras. Since the matter is utmost important, we hereby request that a panel of independent Arbitrators may kindly be made available to us so that we can choose from the panel. We would also be agreeable to the constitution of an Arbitral Tribunal comprising of nominee of your company; our G nominee and both the nominee arbitrators appointing the Presiding/ Umpire Arbitrator. We request that an early action in this regard may kindly be taken, in accordance with law."

4. In response, while refuting the allegations in the letter under reply, the Appellant proceeded to appoint its Chief Executive Officer as

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the sole Arbitrator on 19.08.2015 and intimated the respondent on the same day in following terms:

> "Please note that in terms of the Arbitration Clause 56 of the GCC there is no provision for selection by you of Arbitrator from any panel of Arbitrators to be offered by us. There is also no provision for formation of an Arbitral Tribunal as suggested by you. Clause 56 of the GCC envisaged the appointment of the designated officers as Arbitrator and accordingly the Chief Executives Officer APCPL on your request, has been designated as the Sole Arbitrator. The Learned Arbitrator shall inform you of the Arbitral proceedings in time."

By further communication dated 26.09.2015 the Appellant reiterated its stand taken in letter dated 19.08.2015.

5. In the meanwhile, the Arbitrator so appointed fixed the first hearing in arbitration on 07.10.2015. The parties appeared on 07.10.2015 and the proceedings show that the hearing was fixed on 09.04.2016 by which time there was to be completion of filing of statement of response to counter claim etc. The proceedings do not show any objection having been raised by the Respondent regarding continuation of the arbitration proceedings. On 04.12.2015 a letter was addressed by the Respondent to the Arbitrator seeking extension of time to file its statement of claim. It was stated, inter alia:

> "In the last-hearing held on 07.10.2015 the Claimant was given 60 days' time to file its Statement of Claim. In this connection it is to state that we need to collect some more data and files from our other offices to make the Statement of Claim. For that purpose, we need about one month further time to submit our Statement of Claim.
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> It is therefore, requested that the Ld. Sole Arbitrator may kindly grant one month further time to the Claimant to file its Statement of Claim."

According to the record, the Arbitrator granted one month's time, as prayed for.

6. On 01.01.2016, the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as "the Amendment Act") was

A gazetted and according to Section 1(2), the Amendment Act was deemed to have come into force on 23rd October, 2015.

7. For the first time on 12.01.2016, the Respondent sought to challenge the Arbitrator and raised objection regarding constitution of the arbitral tribunal as under:

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> "In reference to the above referred communications addressed by us, we hereby state that the constitution of the present arbitral tribunal is wholly invalid/void & against the settled principles of law, and on account of which Era Infra Engineering Ltd. is seeking appropriate legal remedies by approaching the Hon'ble High Court
C for appointment of an Independent Arbitral Tribunal. Accordingly, we hereby request your good self to kindly restrain yourself from assuming reference and seeking to proceed with the present alleged proceedings, till the final outcome of the above referred legal proceedings, sought to be immediately & urgently filed/preferred by Era Infra Engineering Ltd."

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8. The objection was rejected by the Arbitrator on 22.01.2016 on the ground that the Respondent had participated in the arbitral proceedings on 07.10.2015 without raising any protest. The Respondent was then intimated to attend proceedings in arbitration scheduled to be held on 16.02.2016. The Respondent however, approached the High Court of
E Delhi by filing petition under Section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "1996 Act"), registered as OMP(T)(Comm.) No.13/2016, seeking termination of the mandate of the Arbitrator. Grounds I, IV, VI, VII and VIII raised in the petition were:-

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> I It is submitted that it is a settled principle of law that nobody can be a judge in his own cause. In other words, a party to the Agreement cannot be an arbiter in his own cause. It is submitted that interest of justice and equity require that where a party to the contract disputes the committing of any breach of the condition,
G the adjudication should be by an independent person or body and not by the other party to the contract.
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> IV That without prejudice to the above, it would also be relevant to mention herein that the allegedly appointed Arbitrator namely, Shri S.K. Sinha, would also be otherwise unable to perform the functions of an independent Arbitrator, in as much as, he has

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himself, in his official capacity in the respondent-company, dealt with contracts of nature similar to the contract works in question herein (including the present contract works), on behalf of the respondent-company.

VI That it would also be worth mentioning that the Hon'ble Courts have consistently held and observed that the policy of the Government/Statutory Authorities/Pubic Sector undertakings, to provide/appoint for arbitration by an Employee Arbitrator is a vexed problem which requires reconsideration, which is more so in deference to the specific provisions of the new Act reiterating the need for an independent and impartial Arbitrator.

VII That in furtherance of the aforementioned spirit as reiterated by the Hon'ble Courts, the Act has also been suitably amended by the Legislature, whereby, inter alia, it has been expressly provided that an Arbitrator who is an Employee, Manager, Director or part of the Management or has a similar controlling influence in one of the parties to the arbitration, is a valid ground giving rise to justifiable doubts as to the independence or impartiality of an Arbitrator. Furthermore, it has also been provided that an Arbitrator's previous involvement in the case/subject matter would also be a valid ground giving rise to justifiable doubts as to the independence or impartiality of an Arbitrator.

VIII That in the present case, as brought out above, the alleged Arbitrator so appointed by the respondent herein is an employee of the respondent herein itself. In fact, the allegedly appointed individual is the Chief Executive Officer (CEO) of the respondent herein, who on account of such position also has a controlling influence over the respondent-company, against whom the petitioner herein seeks to assert its claims. In such circumstances, the said allegedly appointed arbitrator would both in law and fact be unable to perform his functions as an Arbitrator in an independent or impartial manner.

9. On the same day, another petition being Arbitration Petition No.136 of 2016 was filed by the Respondent under Section 11(6) of 1996 Act for appointing an independent arbitrator for adjudicating disputes between the parties. The cause of action, as pleaded, in the said petition was:-

A "That the cause of action for filing the present petition arose on the various dates when requests were made by the petitioner to the respondent for issuance of long outstanding payments. The cause of action further arose on 29.07.2015 when arbitration was invoked by the petitioner. The cause of action further arose, when the respondent erroneously and illegally rejected the petitioner's B request for appointment of an independent Arbitral Tribunal, which cause of action is still subsisting and continuing since the respondent has failed to make the outstanding payment and to so appoint an independent Arbitral Tribunal."

C 10. On 01.03.2016 the High Court issued notice and stayed further proceedings in arbitration. The matter was contested by the Appellant submitting, *inter alia*, that the petition under Section 14 of 1996 Act was not maintainable; that the Arbitrator was appointed strictly in terms of Clause 56 of the GCC; and that though the Respondent was informed about appointment of the Arbitrator on 19.08.2015, no steps to challenge D the appointment were undertaken within the time specified and in the manner prescribed under 1996 Act.

11. The High Court by its judgment and order under Appeal set aside the appointment of the Arbitrator and directed the Appellant to suggest names of three panel Arbitrators from different departments to E the Respondent who could thereafter choose any one of them to be the Arbitrator in the matter. It was directed that in the event of failure by the Appellant, the Respondent would be at liberty to revive the petitions, in which case the Court would appoint a sole Arbitrator from the list maintained by Delhi International Arbitration Centre. It was also observed that the Arbitrator was CEO of the Appellant and was previously involved F in cases/contract works similar to the one involved in the present case and it could not be disputed that the decisions of part cancellation were taken at the highest level of the Appellant. In the circumstances, the High Court found that the apprehension entertained by the Respondent was reasonable and not a vague or general objection. The observations G of the High Court were:-

"13. The Arbitrator, though the CEO of the respondent-Company and the Project In-charge of the Indira Gandhi Super Thermal Power Project, P.O. Jharli, Distt. Jhajjar, Haryana, was not the Engineer In-charge or the day-to-day In-charge of the work, H which was to be performed by the petitioner under the contract in

question. In fact, the Engineer In-charge for this project is AGM (CCD-Township) who is supported by Group of Engineers (Dy. Managers, Managers & Sr. Managers) working under him for execution of the work. Further, the AGM (CCD-Township) reports to AGM (ME/CCD) who in turn reports to CEO (APCPL).

37. It is common parlance oft-quoted aphorism "Not only must Justice be done; it must also be seen to be done." The reason is that rules are moral constructs that are meant to serve higher value. The amendment of 2015 emphasize that the existence of any relationship or interest of any kind is likely to give rise to justifiable doubts as to his neutrality is to be avoided or any employee, manager, director, or has past or present business or has a controlling influence, relationship with a party to the dispute should not be appointed as an Arbitrator. Similarly, it is rightly mandated in the Fifth Schedule of the Amended Act, 2015 (3 of 2016) that if the Arbitrator has within the past three years been appointed on two or more occasions by one of the parties and the Arbitrator has served within the three years in another arbitration on a related issue involving one of the parties, his appointment would give rise to justifiable doubts as to the independence or impartiality of arbitrators. No doubt, the invocation was about three months prior to amendment. But the Court has to keep in mind about the purpose and scope of the Act.

38. In the present case, no doubt, the invocation was on the basis of un-amended Act but still under Section 12 of the Act would give the similar indication. The sole Arbitrator appointed by the respondent admittedly is CEO and Executive of the respondent-Company who is also from the same office/department. In order to maintain the neutrality, or to avoid any doubt in the mind of the petitioner and the reasons given in the petition, it would be appropriate that independent sole Arbitrator should be appointed as ultimately neutral person has merely to decide the dispute between the parties. Even, the object and scope of the Act says so, that an arbitration procedure should be fair and unbias. Thus, the appointment of Mr. S.K. Sinha, CEO of the respondent Company is terminated and once the Arbitrator's appointment is terminated, the Court can consider the prayer of the petitioner."

A 12. The decision of the High Court is challenged by the Appellant and Mr. Vikas Singh, learned Senior Advocate submitted, *inter alia,* that as the appointment of the Arbitrator was completely in tune with Clause 56 of the GCC there was no occasion for the High Court to exercise any power or jurisdiction and that 1996 Act contemplated clear and definite procedure for challenging the Arbitrator, and even if such B challenge were to fail the remedy under Section 13 was specific and of different nature. In either case, according to him, the Respondent could not have approached the High Court and both the petitions ought not to have been entertained.

C 13. To the extent the High Court had directed the Appellant to submit three names from its panel of Arbitrators from which list the Respondent was to select the sole Arbitrator, the Respondent challenged that part of the Judgment by filing SLP (Civil) Nos.503-504 of 2017. Appearing for the Respondent, Mr. Manoj K. Singh, learned Advocate relied upon some decisions of this Court and submitted that an Officer D who had either dealt with the project or was directly subordinate to the Authority whose decision was the subject matter of dispute could not be an arbitrator in the matter.

14. At the outset, it must be stated that the invocation of arbitration in the present case was on 29.07.2015, the Arbitrator was appointed on E 19.08.2015 and the parties appeared before the Arbitrator on 07.10.2015, well before 23.10.2015 i.e. the date on which the Amendment Act was deemed to have come into force. The statutory provisions that would therefore govern the present controversy are those that were in force before the Amendment Act came into effect. We must mention here that both the parties have addressed their submissions on this premise.

F 15. Before we consider the present controversy, we may quote, for facility, Sections 12, 13 and 14 of 1996 Act as they stood before the Amendment Act came into force:-

"12. Grounds for challenge.—

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

(2) An arbitrator, from the time of his appointment and throughout

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the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

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

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

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

13. Challenge procedure.—

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

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

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

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

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

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

A **14. Failure or impossibility to act-**

(1) The mandate of an arbitrator shall terminate if—

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

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

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise

C agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply

D acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12."

16. In the present case Clause 56 of the GCC provides for arbitration by the Project In-charge of the concerned Project, and in case such Project In-charge were to be unable or unwilling to act, arbitration by any person appointed by the Chairman and Managing

E Director. It further provides *inter alia* that there would be no objection even if the Arbitrator had dealt with the matters to which the contract related in the course of his duties or had expressed views on all or any of the matters in dispute or difference.

F 17. The fact that the named arbitrator happens to be an employee of one of the parties to the Arbitration Agreement has not by itself, before the Amendment Act came into force, rendered such appointment invalid and unenforceable. The observations of this Court in ***Indian Oil Corporation Ltd. and Others*** v. ***Raja Transport Private Ltd.***[1] in paragraphs 28, 30, 31 and 32 are quite clear. Said paragraphs were as

G under:

"28. It is contended by the respondent that in view of the emphasis on the independence and impartiality of an arbitrator in the new Act and having regard to the basic principle of natural justice that no man should be judge in his own cause, any arbitration agreement

H [1] (2009) 8 SCC 520

to the extent it nominates an officer of one of the parties as the arbitrator, would be invalid and unenforceable.

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

"11. (8)(*a*) any qualifications required of the arbitrator by the agreement of the parties; and

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

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

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

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

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

18. In the same decision, this Court in paragraphs 34 and 35 dealt with "justifiable apprehension about the independence or impartiality" of an employee arbitrator in following terms:-

"34. The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the

A controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other Department) to the officer whose decision is the subject-matter of the dispute.

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

19. Section 12(1) as it then stood before the Amendment Act came into force, obliged the person approached in connection with possible
D appointment as an arbitrator, to disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. In the present case, the Arbitrator undoubtedly is an employee of the Appellant but so long as there is no justifiable apprehension about his independence or impartiality, the appointment could not be rendered
E invalid and unenforceable. As held in the case of ***Indian Oil Corporation Ltd.*** (supra) mere fact that the arbitrator is an employee is not *ipso facto* a ground to raise any presumption of bias or partiality. It is not the case that there had not been any fair and correct disclosure. All that the Respondent alleged in its petition seeking termination of the mandate of the Arbitrator was, ".....he has himself in his official capacity
F in the Respondent-Company dealt with contracts of nature similar to the contract works in question...." The Respondent, while relying on the provisions of the Amendment Act had also submitted, ".... allegedly appointed individual is the Chief Executive Officer of the Respondent herein, who on account of such position also has the controlling influence
G over the Respondent-Company". At the same time, the High Court observed in Paragraph 13 of the judgment under appeal that the Arbitrator was not the Engineer In-charge or the day-to-day In-charge of the work and as a matter of fact, the Engineer In-charge was AGM (CCD-Township) who had a team of other Engineers working under him and that AGM(CCD-Township) reported to AGM (ME-CCD) who in
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turn reported to CEO (APCPL) i.e. the Arbitrator. The facts on record and the hierarchy as mentioned do not show that the Arbitrator in the present matter was either the Dealing Authority in regard to the Contract or was directly sub-ordinate to the Officer(s) whose decision is the subject matter of dispute. In fact, the decision, which could be subject matter of dispute, was that of his subordinates. He may have dealt with contracts of nature similar to the contract works in question but that by itself does not render the appointment invalid. Since there is nothing on record which could raise justifiable doubts about the independence or impartiality of the named Arbitrator, in the light of the observations of this Court in ***Indian Oil Corporation Ltd.*** (supra) the appointment of the Arbitrator could not in any way be termed to be illegal or unenforceable.

20. However, number of decisions of this Court were relied upon by the Respondent in support of its submission that interference in the present case was called for. We may therefore deal with those decisions.

A. In ***Northern Railway Administration, Ministry of Railway, New Delhi*** v. ***Patel Engineering Company Ltd***[2]**.**, a Bench consisting of three learned Judges of this Court was called upon to consider the apparent conflict between two Judgments of this Court in "***ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.***[3] and ***Union of India*** v. ***Bharat Battery Manufacturing Co. (P) Ltd.***[4]". The submission made on behalf of the appellant therein as quoted in paragraph 5 was:-

> "5.....It is, therefore, submitted that before the alternative is resorted to, agreed procedure has to be exhausted. The agreement has to be given effect and the contract has to be adhered to as closely as possible. Corrective measures have to be taken first and the Court is the last resort."

The discussion in paragraphs 12, 13 and 14 of the decision was as under:-

> "12. A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/ or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The Court must first

[2] (2008) 10 SCC 240
[3] (2007) 5 SCC 304
[4] (2007) 7 SCC 684

A ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations.

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

C can be stated to be the reasonable steps required to be taken.

14. In all these cases at hand the High Court does not appear to have focused on the requirement to have due regard to the qualifications required by the agreement or other considerations necessary to secure the appointment of an independent and

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

E vulnerable. In the circumstances, we set aside the appointment made in each case, remit the matters to the High Court to make fresh appointments keeping in view the parameters indicated above."

B. In ***Union of India*** v. ***Singh Builders Syndicate***[5], an arbitral

F tribunal consisting of three serving Officers was constituted but no proceedings were actually undertaken. Thereafter, on an application preferred under Section 11, the High Court appointed a Former Judge of that High Court as the sole arbitrator. Paragraph 11 of the decision set out the question which arose for consideration and Paragraph 14 was as under:-

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"14. It was further held in ***Northern Railway*** case that the Chief Justice or his designate should first ensure that the remedies provided under the arbitration agreement are exhausted, but at the same time also ensure that the twin requirements of sub-section

H [5] (2009) 4 SCC 523

(8) of Section 11 of the Act are kept in view. This would mean that invariably the court should first appoint the arbitrators in the manner provided for in the arbitration agreement. But where the independence and impartiality of the arbitrator(s) appointed/ nominated in terms of the arbitration agreement is in doubt, or where the Arbitral Tribunal appointed in the manner provided in the arbitration agreement has not functioned and it becomes necessary to make fresh appointment, the Chief Justice or his designate is not powerless to make appropriate alternative arrangements to give effect to the provision for arbitration."

C. After dealing with cases on the point including ***Northern Railway Administration*** (supra), this Court in ***Indian Oil Corporation Ltd.*** (supra) summed up the legal position as under:-

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

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

(*i*) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an arbitrator within 30 days from the

A receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief Justice or his designate will exercise power under sub-section (4) of Section 11 of the Act.

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

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

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

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

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

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

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

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

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

Thus, as laid down in sub-para (v) of para 48, unless the cause of action for invoking jurisdiction under Clauses (a), (b) or (c) of sub-section (6) of Section 11 of 1996 Act arises, there is no question of the Chief Justice or his designate exercising power under sub-section (6) of Section 11.

D. In ***Denel (Proprietary) Limited*** v. ***Bharat Electronics Limited and Another***[6], though the arbitration agreement provided that all disputes be referred to the Managing Director or his nominee for arbitration, this Court appointed retired Judge of this Court as the sole arbitrator. The reason as is clear from paras 19 to 21 of the decision was; while invoking arbitration the appellant therein had requested the respondent for an appointment of a mutually agreed independent arbitrator but the respondent had plainly refused to refer the disputes to arbitration. Para 20 of the decision is noteworthy:-

"20. In ***Datar Switchgears Ltd.*** v. ***Tata Finance Ltd.***[7] this Court while considering the powers of the Court to appoint an arbitrator under Section 8 of the Arbitration Act, 1940, cited the decision of

[6] (2010) 6 SCC 394
[7] (2000) 8 SCC 151

A this Court in ***Bhupinder Singh Bindra*** v. ***Union of India***[8]. It was held in that case that:

> "3. It is settled law that court cannot interpose and interdict the appointment of an arbitrator, whom the parties have chosen under the terms of the contract unless legal misconduct of the
B arbitrator, fraud, disqualification, etc. is pleaded and proved. It is not in the power of the party at his own will or pleasure to revoke the authority of the arbitrator appointed with his consent. There must be just and sufficient cause for revocation."

The said principle has to abide in the normal course."

C E. Similarly, in ***Denel (Proprietary) Limited*** v. ***Ministry of Defence***[9], the relevant clause provided for sole arbitration of the Director General, Ordnance Factory, Government of India or a Government Servant appointed by him. It was observed that since no arbitrator was appointed in terms of the governing clause within the stipulated period
D the respondent had forfeited the right to make an appointment of an arbitrator. Paragraphs 21 and 24 of the decision were:-

> "21. It is true that in normal circumstances while exercising jurisdiction under Section 11(6), the Court would adhere to the terms of the agreement as closely as possible. But if the circumstances warrant, the Chief Justice or the nominee of the
E Chief Justice is not debarred from appointing an independent arbitrator other than the named arbitrator.
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> 24. It must also be remembered that even while exercising the jurisdiction under Section 11(6), the Court is required to have due regard to the provisions contained in Section 11(8) of the Act.
F The aforesaid section provides that apart from ensuring that the arbitrator possesses the necessary qualifications required of the arbitrator by the agreement of the parties, the Court shall have due regard to other considerations as are likely to ensure the appointment of an independent and impartial arbitrator. Keeping
G in view the aforesaid provision, this Court in ***Indian Oil Corpn. Ltd.***, whilst emphasizing that normally the Court shall make the appointment in terms of the agreed procedure, has observed that the Chief Justice or his designate may deviate from the same after recording reasons for the same....."

[8] (1995) 5 SCC 329

H [9] (2012) 2 SCC 759

F. In ***Union of India and Others*** v. ***Uttar Pradesh State Bridge Corporation Limited***[10], an arbitral tribunal consisting of three Gazetted Railway Officers was constituted in the year 2007 and despite four years having passed, the matter was not getting concluded. In the circumstances, while accepting the petition for setting aside the mandate of the tribunal the High Court had appointed a retired Chief Justice as the sole arbitrator. While considering the grievance that such appointment was beyond the concerned arbitration clause, this Court observed:-

> "12. 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 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 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 peremptory order was passed 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 hearing of the present appeal. 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 arbitrator being replaced". On this basis, it was the submission of Mr. Mehta, learned ASG, that the High Court should have resorted to the provision contained in Clause 64 of GCC.
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> 13. No doubt, ordinarily that would be the position. The moot question, however, is as to whether such a course of action has to be necessarily adopted by the High Court in all cases, while dealing

[10] (2015) 2 SCC 52

A with an application under Section 11 of the Act or is there room for play in the joints and the High Court is not divested of exercising discretion under some circumstances? If yes, what are those circumstances? It is this very aspect which was specifically dealt with by this Court in ***Tripple Engg. Works.***[11] Taking note of various judgments, the Court pointed out that the notion that the B High Court was bound to appoint the arbitrator as per the contract between the parties has seen a significant erosion in recent past. In paras 6 and 7 of the said decision, those judgments wherein departure from the aforesaid "classical notion" has been made are taken note of....."

C G. In ***Voestalpine Schienen GMBH*** v. ***Delhi Metro Rail Corporation Limited***[12], the relevant clause contemplated that the disputes be settled by three arbitrators from and out of a list of five engineers supplied by the respondent therein. The appellant had invoked arbitration on 14.06.2016 i.e. after the amending Act. When the list of D five persons comprising of serving officers was supplied by the respondents, an objection was taken that such procedure would lead to appointment of "illegal persons" in view of Section 12(5) read with Clause 1 of Schedule 7 of the Act. This Court considered that Section 12 of the Act was amended pursuant to the recommendations by the Law Commission which specifically dealt with the issue of "neutrality of E arbitrators", and observed that if the arbitration clause finds foul with the amended provisions, the appointment of the Arbitrator even if apparently in conformity with the arbitration clause in the agreement, would be illegal and thus the Court would be within its powers to appoint such arbitrator(s) as may be permissible. Paragraph 18 sums up this F aspect of the matter:-

"18. Keeping in mind the afore-quoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of G arbitrators. In order to achieve this, sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject-matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be

[11] (2014) 9 SCC 288

H [12] (2017) 4 SCC 665

appointed as an arbitrator. In such an eventuality i.e. when the arbitration clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of the arbitration agreement."

21. Except the decision of this Court in ***Voestalpine Schienen GMBH*** (supra) referred to above, all other decisions arose out of matters where invocation of arbitration was before the Amendment Act came into force. ***Voestalpine Schienen GMBH*** (supra) was a case where the invocation was on 14.6.2016 i.e. after the Amendment Act and the observations in Para 18 clearly show that since "the arbitration clause finds foul with the amended provisions", the Court was empowered to appoint such arbitrator(s) as may be permissible. The ineligibility of the arbitrator was found in the context of amended Section 12 read with Seventh Schedule (which was brought in by Amendment Act) in a matter where invocation for arbitration was after the Amendment Act had come into force. It is thus clear that in pre-amendment cases, the law laid down in ***Northern Railway Administration*** (Supra), as followed in all the aforesaid cases, must be applied, in that the terms of the agreement ought to be adhered to and/or given effect to as closely as possible. Further, the jurisdiction of the Court under Section 11 of 1996 Act would arise only if the conditions specified in clauses (a), (b) and (c) are satisfied. The cases referred to above show that once the conditions for exercise of jurisdiction under Section 11(6) were satisfied, in the exercise of consequential power under Section 11(8), the Court had on certain occasions gone beyond the scope of the concerned arbitration clauses and appointed independent arbitrators. What is clear is, for exercise of such power under Section 11(8), the case must first be made out for exercise of jurisdiction under Section 11(6).

22. The principles which emerge from the decisions referred to above are:-

A. In cases governed by 1996 Act as it stood before the Amendment Act came into force:-

(i) The fact that the named arbitrator is an employee of one of

A the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate to the officer whose decision is the subject-matter of the dispute.

(ii) unless the cause of action for invoking jurisdiction under Clauses (a), (b) or (c) of sub-section (6) of Section 11 of 1996 Act arises, there is no question of the Chief Justice or his designate exercising power under sub-section (6) of Section 11.

(iii) 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.

(iv) While exercising such power under sub section (6) of Section 11, If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.

B. In cases governed by 1996 Act after the Amendment Act has come into force:-

If the arbitration clause finds foul with the amended provisions, the appointment of the Arbitrator even if apparently in conformity with the arbitration clause in the agreement, would be illegal and thus the Court would be within its powers to appoint such arbitrator(s) as may be permissible.

23. The observations of the High Court in paragraphs 37-38 as quoted above show that the exercise was undertaken by the High Court, "in order to make neutrality or to avoid doubt in the mind of the petitioner" and ensure that justice must not only be done and must also be seen to be done. In effect, the High Court applied principles of neutrality and impartiality which have been expanded by way of Amendment Act, even when no cause of action for exercise of power under Section 11(6) had arisen. The procedure as laid down in unamended Section 12 mandated

disclosure of circumstances likely to give rise to justifiable doubts as to independence and impartiality of the arbitrator. It is not the case of the Respondent that the provisions of Section 12 in unamended form stood violated on any count. In any case the provision contemplated clear and precise procedure under which the arbitrator could be challenged and the objections in that behalf under Section 13 could be raised within prescribed time and in accordance with the procedure detailed therein. The record shows that no such challenge was raised within the time and in terms of the procedure prescribed. As a matter of fact, the Respondent had participated in the arbitration and by its communication dated 04.12.2015, had sought extension of time to file its statement of claim.

24. In the circumstances, the High Court was clearly in error in exercising jurisdiction in the present case and it ought not to have interfered with the process and progress of arbitration. We therefore accept the challenge raised by the Appellant and reject that raised by the Respondent. Consequently, appeals arising out of Special Leave Petition (Civil) Nos.25206-25207 of 2016 are allowed while those arising from Special Leave Petition (Civil) Nos.503-504 of 2017 stand dismissed. The arbitration, in pursuance of the appointment of the Arbitrator on 19.08.2015, shall proceed in accordance with law.

25. The appeals are disposed of in aforesaid terms, without any order as to costs.

Divya Pandey

Appeals disposed of.