THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

ON THE 2ND DAY OF JUNE 2022

BEFORE

HON'BLE MR. JUSTICE SANDEEP SHARMA

ARBITRATION CASE NOS. 5 OF 2020 AND CONNECTED MATTER

1. ARBITRATION CASE NO. 5 OF 2020

Between:-

STATE OF HP
THROUGH
DIRECTOR,
DIRECTORATE OF ENERGY,
SHANTI BHAWAN, PHASE-III,
SECTOR-6, NEW SHIMLA-09

PETITIONER

(BY MR. SUDHIR BHATNAGAR,
ADDITIONAL ADVOCATE GENERAL)

AND

M/S BMD PVT. LTD.,
LNJ NAGAR, VILLAGE MORDI,
DISTRICT BANSWARA-327001
RAJASTHAN
THROUGH ITS
VICE PRESIDENT

RESPONDENT

(BY MR. MANISH KUMAR AND
MR. VISHAL VERMA, ADVOCATES)

2. ARBITRATION CASE NO. 6 OF 2020

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SECTOR-6, NEW SHIMLA-09

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Whether approved for reporting: Yes.

These petitions coming on for orders this day, the court passed the following:

O R D E R

Since common questions of law and facts are involved in both the petitions, same were heard together and are being disposed of by this common order.

2. By way of instant petitions, filed under sub-section (6) of S.11 of the Arbitration and Conciliation Act 1996, (hereinafter, 'Act'), prayer has been made on behalf of petitioner for appointment of an arbitrator to adjudicate the dispute in respect of Pre-Implementation Agreement (hereinafter, 'PIA') dated 26.5.2011 entered into between the respondent and the petitioner.

3. For having bird's eye view, certain undisputed facts, as emerge from the record, are that on 26.5.2011, a PIA (Annexure P-1) was signed between the petitioner and the respondent for execution of Malana-III Hydro Electric Project(30 MW) in Kullu District, Himachal Pradesh. Respondent deposited upfront premium of Rs. 6.00 Crore with the petitioner in terms of the PIA (Annexure P-1). Respondent, vide letter dated 26.8.2013, submitted a Detailed Project Report (hereinafter, 'DPR') with the petitioner as per terms of the PIA within the stipulated period but since the project was found technically and financially unviable, respondent in terms of Clause 12 of the PIA sought

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refund of upfront premium paid by it vide communication dated 21.1.2019, however, the petitioner on 3.10.2019 (Annexure P-2) i.e. nine months after the date of request for refund made by petitioner, terminated and cancelled the PIA, as a consequence of which upfront premium of Rs. 6.00 Crore deposited by respondent came to be forfeited.

4. Vide legal notice dated 30.10.2019 (Annexure P-3), respondent, while requesting the respondent for refund of upfront premium alongwith interest clearly stated that in case amount is not refunded within 15 days, notice be treated as invocation of Clause 53 of PIA. Aforesaid legal notice was duly served upon the petitioner on 5.11.2019, as is evident from Annexure R-2 annexed with the reply filed by the respondent. Since no reply/objection ever came to be given/raised by the petitioner to the aforesaid legal notice served by respondent, respondent sent a request to Justice S.N. Jha, retired Chief Justice, High Courts of Rajasthan and Jammu & Kashmir, to proceed with arbitration (Annexure P-4).

5. On 13.12.2019, petitioner sent communication to respondent, annexure P-5, raising objection to constitution of arbitral tribunal. In the aforesaid communication, petitioner apprised the respondent that neither Directorate of Energy has given its consent for the name of Justice S.N. Jha, former Chief Justice, Rajasthan and Jammu and Kashmir as sole arbitrator nor it should be taken as an implied consent on its behalf and also advised petitioner to act in accordance with provisions of Arbitration and Conciliation Act, 1996, as amended from time to time.

6. Vide notice dated 19.12.2019(Annexure P-6), above named arbitrator gave notice to both the parties in arbitration proceedings, calling upon them to

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cause their presence for preliminary hearing to be held on 21.1.2021 at 2.00 pm at his office, C/43, Lower Ground Jangpura Extension, New Delhi.

7. As has been taken note herein above, on 19.12.2019, Justice S.N. Jha had already taken cognizance of matter after being nominated as an Arbitrator by respondent in terms of Clause 53 of PIA and had issued notice to both the parties on 19.12.2019, calling upon them to appear before on 21.1.2020, however, vide communication dated 30.12.2019, annexure P-7, petitioner while admitting receipt of notice issued by the arbitrator, Justice S.N. Jha (retired), apprised the respondent that it has no other option but to approach this court against unilateral appointment of arbitrator by the respondent and also for appointment of independent and an impartial arbitrator by this court in exercise of power under S.11 (6) of the Act.

8. On 8.1.2020, though, the petitioner filed petition at hand under Section 11(6) praying therein for appointment of an arbitrator and notice in the instant petition was issued on 10.1.2020 but on 21.1.2020, petitioner appeared before arbitrator and filed an application under S.13(3) and **13(2)** of Arbitration and Conciliation Act annexing therewith a copy of order dated 10.1.2020, whereby notices were issued to the respondent in the instant proceedings.

9. Though, there was no order staying proceedings before arbitrator, yet with a view to maintain judicial propriety, arbitrator restrained from holding further proceedings awaiting outcome of the instant proceedings.

10. Mr. Sudhir Bhatnagar, learned Additional Advocate General, representing the petitioner, while fairly admitting factum with regard to dispute inter se parties, on account of forfeiture of upfront Premium deposited by petitioner in terms of PIA signed on 26.5.2011 for execution of Malana III, Hydro Electric Project in Kullu District, contended that as per clause 53 of PIA,

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(Annexure P-1), dispute inter se parties out of PIA/or interpretation thereof, is/was to be resolved by parties to agreement by mutual negotiations, failing matter is/was to be referred to arbitrator as per provisions of Arbitration and Conciliation Act and as such, action of the respondent inasmuch as unilateral appointment of Justice S.N. Jha, former Chief Justice, Rajasthan and Jammu and Kashmir as an arbitrator is not sustainable in the eye of law being contrary to the very provisions of the arbitration contained in PIA and same is not binding upon the petitioner. He further argued that the petitioner vide notice dated 30.12.2019, annexure P-7, having taken note of dispute inter se parties, itself apprised respondent with regard to its intention to approach this court under S.11(6) of the Act, for appointment of arbitrator. Mr. Bhatnagar, further submitted that once there is no dispute between parties that dispute has arisen inter se them, out of PIA, petitioner State being one of parties to the agreement has right to approach this court under S.11(6) of the Act, praying therein for appointment of independent and impartial arbitrator. While terming the appointment of Justice S.N. Jha, retired Chief Justice as an arbitrator to be contrary to provision of arbitration clause in PIA, Mr. Bhatnagar, submitted that since very appointment of arbitrator named above is not in accordance with law, notice issued by him dated 19.12.2019 (Annexure P-6) is of no consequence. Lastly, learned Additional Advocate General argued that once appointment of arbitrator unilaterally made by the respondent is/was in violation of provisions contained under the Act, petitioner is well within its right to file application under S.11(6) of Act, seeking appointment of arbitrator by High Court. To substantiate his aforesaid claim, he placed reliance upon judgment passed by Hon'ble Apex Court dated

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26.9.2019 in case **Perkins Eastman Architects Dpc** v. **Hscc (India) Limited,** 2019 (SCC Online 1517)

11. Mr. Manish Kumar and Mr. Vishal Verma, learned counsel for the respondent, while referring to reply filed by respondent, vehemently argued that once petitioner approached arbitrator in application under S. 13(3) and 13(2)of the Act, laying therein challenge to appointment of arbitrator, it is estopped from filing the petition at hand, seeking appointment of an arbitrator. He argued that till the time application filed under S. 13(3) is decided by the arbitrator, present petition under S.11(6) cannot be entertained. He further submitted that order if any passed under S. 13(3) can be laid challenge by aggrieved party under S.34 of Act but definitely not under S.11(6) of Act, which empowers Hon'ble Chief Justice to appoint arbitrator in terms of agreement if any arrived inter se parties. He argued that when petitioner itself by way of an application under S.13(3) has prayed for termination of mandate of the arbitrator, which is pending adjudication, present application deserves outright dismissal being not maintainable at this stage. While inviting attention of this Court to S.11(4) and 11(5) of the Act, learned counsel for the respondent argued that since the petitioner failed to respond within a period of thirty days, from the date of receipt of notice from the respondent with regard to appointment of arbitrator, appointment is required to be made on application of parties as per provisions contained in Sub-section (4), which clearly provides that if a party fails to appoint an arbitrator, within 30 days on receipt of other party, appointment shall be made on the application of the party. In support of his submission, learned counsel for the respondent placed reliance upon judgment rendered by Hon'ble Apex Court in **SP Singla Construction** v. **State of Himachal Pradesh** (2019) 2 SCC 488 and **Perkins**

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Eastman Architects Dpc Supra. Besides above, learned counsel for the respondent also invited attention of this court to latest judgment of Hon'ble Apex Court in **Swadesh Kumar Agarwal** v. **Dinesh Kumar Agarwal**, Civil Appeal Nos. 2935-2938 of 2022, decided on 5.5.2022, whereby Hon'ble Apex Court placing reliance upon its earlier judgment in SP Construction supra, reiterated that application under S.11 (6) of the act is not maintainable if party seeking appointment of arbitrator has subjected itself to jurisdiction of the arbitrator by filing application under S.13(3) of the Act, praying therein for termination of mandate of the arbitrator.

12. Having heard learned counsel for the parties and perused material available on record, this court finds that the facts as taken note herein above are not disputed rather, stand admitted by both the parties and as such, need not be discussed again.

13. Clause 53 of PIA (Annexure P-1) arrived inter se parties, clearly reveals that parties to PIA /IA (implementation agreement) are to make effort at first instance to resolve dispute out of PIA/IA by mutual negotiations, failing which matter is/was was to be referred to arbitrator in terms of Arbitration and Conciliation Act, 1996. As per aforesaid clause, all the dispute shall be settled within the jurisdiction of State of Himachal Pradesh.

14. In the case at hand, respondent after having remained unsuccessful in mutual negotiations, sent legal notice dated 30.10.2019 (Annexure P-3) to the petitioner intimating therein decision of respondent to invoke arbitration clause in terms of Clause 53 of the PIA. In the aforesaid notice, in para-5, respondent specifically put the petitioner to notice that in case it fails to refund the amount of upfront Premium of Rs. 6.00 Crore, then it may treat the notice as a notice invoking arbitration clause 53 of PIA dated 26.5.2011. In the aforesaid para, it

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also proposed name of Justice S.N. Jha, retired Chief Justice, Rajasthan, Jammu and Kashmir as an arbitrator.

15. It is not in dispute that said legal notice never came to be replied by the petitioner within a period of thirty days of its receipt rather, it having received notice on 5.11.2019, kept on sitting over the matter, till the time, Justice S.N. Jha appointed as arbitrator in terms of legal notice served upon petitioner by the respondent, issued notice to both the parties to appear before him on 21.1.2020.

16. On 13.12.2019 for the first time, petitioner wrote to the respondent that it has not given its consent for the name of Justice S.N. Jha, retired Chief Justice, as proposed by the respondent and it should not be taken as an implied consent on its behalf. Admittedly first communication after receipt of legal notice dated 5.11.2019, was sent by petitioner on 13.12.2019, objecting therein to the appointment of arbitrator. At this stage, it would be apt to take note of S.11 of the Act. S. 11(4) of the Act clearly provides that if the appointment procedure in sub-section (3) applies and a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him. S. 11(5) provides that failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree, the appointment shall be made, on an application of the party in accordance with the provisions contained in sub-section (4). S. 11(6) provides that where, under an

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appointment procedure agreed upon by the parties, a party fails to act as required under that procedure; or the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or a person, including an institution, fails to perform any function entrusted to him or it under that procedure, the appointment shall be made on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be.

17. Having carefully perused aforesaid provision contained under S.11(5) of the Act, this court finds force in the submission of learned counsel for the respondent that since it had proposed the name of Justice S.N. Jha as an arbitrator and the petitioner failed to respond/object to the same within 30 days, as such, there was deemed consent of the State qua aforesaid arbitrator and as such, it could not have any objection to the appointment of aforesaid arbitrator at a later stage.

18. Admittedly, in the case at hand, careful perusal of Clause 53 of PIA reveals that in the event of dispute if any inter se parties, matter is to be referred to an arbitrator to be appointed as per provisions of Arbitration and Conciliation Act, meaning thereby in case, parties are unable to reach some consensus with regard to name of the arbitrator, one of the party could approach High Court under S.11(6) of the Act seeking appointment of arbitrator but since in the case at hand, respondent had appointed Justice S.N. Jha as an arbitrator and communicated the same to the petitioner, which failed to object/respond to the same within 30 days, as such, petitioner estopped itself from laying challenge to the appointment of an arbitrator, once

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it has given deemed consent to the same, by not responding/objecting within 30 days from the receipt of communication from the respondent.

19. Another question for determination in the case at hand is that whether application under S.11(6) of Act by petitioner during pendency of application under S.13(3) and 13(4) before arbitrator appointed unilaterally by the respondent is maintainable before this Court or not?

20. Hon'ble Apex Court in **Perkins Eastman** supra, while considering application under S.11(6) formulated two basic questions for consideration i.e.

(a) Whether the arbitration in the present case would be an International Arbitration Commercial Arbitration or not?

(b) Whether a case is made out for exercise of power by the Court to make an appointment of an arbitrator?"

21. While first question is not relevant for the present case but second question has been dealt by Hon'ble Apex Court in para-14 onwards which read as under:

"14. In TRF Limited, the Agreement was entered into before the provisions of the Amending Act (Act No.3 of 2016) came into force. It was submitted by the appellant that by virtue of the provisions of the Amending Act and insertion of the Fifth and Seventh Schedules in the Act, the Managing Director of the respondent would be a person having direct interest in the dispute and as such could not act as an arbitrator. The extension of the submission was that a person who himself was disqualified and disentitled could also not nominate any other person to act as an arbitrator. The submission countered by the respondent therein was as under: -

"7.1. The submission to the effect that since the Managing Director of the respondent has become ineligible to act as an arbitrator subsequent to the amendment in the Act, he could also not have nominated any other person as arbitrator is absolutely unsustainable, for the Fifth and the Seventh Schedules fundamentally guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence and impartiality of the arbitrator. To elaborate, if any person whose relationship with the parties or the counsel or the subject-matter of dispute falls under any of the categories specified in the Seventh Schedule, he is ineligible to be appointed as an arbitrator but not otherwise.

The issue was discussed and decided by this Court as under:-

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50. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5)of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the “named sole arbitrator” and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. In this regard, our attention has been drawn to a two-Judge Bench decision in State of Orissa v. Commr. of Land Records & Settlement7. In the said case, the question arose, can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held: (SCC p. 173, para 25)

> “25. We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in Roop Chand v. State of Punjab8. In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, delegated its appellate powers vested in it under Section 21(4)to an “officer”, an order passed by such an officer was an order passed by the State Government itself and “not an order passed by any officer under this Act” within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer in his own right and not as a delegate of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate.” (emphasis in original)

51. Be it noted in the said case, reference was made to Behari Kunj Sahkari Awas Samiti v. State of U.P.9, which followed the decision in Roop Chand v. State of Punjab8. It is seemly to note here that the said principle has been followed in Indore Vikas Pradhikaran10.

52. Mr Sundaram has strongly relied on Pratapchand Nopaji11. In the said case, the three-Judge Bench applied the maxim “qui facit per alium facit per se”. We may profitably reproduce the passage: (SCC p. 214, para 9)

> “9. … The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim: “qui

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> facit per alium facit per se" (what one does through another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the "pucca adatia", or, as the High Court had held, he is clothed with the powers of an ordinary commission agent only."

> 53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to the learned counsel for the appellant, ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.
> 54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."

15. It was thus held that as the Managing Director became ineligible by operation of law to act as an arbitrator, he could not nominate another person to act as an arbitrator and that once the identity of the Managing Director as the sole arbitrator was lost, the power to nominate someone else as an arbitrator was also obliterated. The relevant Clause in said case had nominated the Managing Director himself to be the sole arbitrator and also empowered said Managing Director to nominate another person to act as an arbitrator. The Managing Director thus had two capacities under said Clause, the first as an arbitrator and the second as an appointing authority. In the present case we are concerned with only one capacity of the Chairman and Managing Director and that is as an appointing authority.

We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited4 where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in

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the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited4, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.

16. But, in our view that has to be the logical deduction from TRF Limited. Paragraph 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited

17. We must also at this stage refer to the following observations made by this Court in para 48 of its decision in Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.12, which were in the context that was obtaining before Act 3 of 2016 had come into force: -

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

> (i) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an arbitrator within 30 days from the receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief Justice or his designate will exercise power under sub-section (4) of Section 11 of the Act.

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

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

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

(v) Where the appointment procedure has been agreed between the parties, but the cause of action for invoking the jurisdiction of the Chief Justice or his designate under clauses (a), (b) or (c) of sub-section (6) has not arisen, then the question of the Chief Justice or his designate exercising power under 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

(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 Arbitration Application No.32 of 2019 Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.

(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."

18. Sub para (vii) of aforesaid paragraph 48 lays down that if there are justifiable doubts as to the independence and impartiality of the person nominated, and if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, such appointment can be made by the Court. It may also be

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noted that on the issue of necessity and desirability of impartial and independent arbitrators the matter was considered by the Law Commission in its report No.246. Paragraphs 53 to 60 under the heading "Neutrality of Arbitrators" are quoted in the Judgment of this Court in Voestapline Schienen Gmbh v. Delhi Metro Rail Corpn. Ltd.13, while paras 59 and 60 of the report stand extracted in the decision of this Court in Bharat Broadband Network Limited v. United Telecoms Limited14. For the present purposes, we may rely on paragraph 57, which is to the following effect:-

> "57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the Arbitral Tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles — even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr P.K. Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous — and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes." 14 (2019) 5 SCC 755 Arbitration Application No.32 of 2019 Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.

22. In para 16 reference is made to previous decision in **Walter Bau AG, Legal Successor of the Original Contractor, Dyckerhoff and Widmann, A.G.,** v. **Municipal Corporation of Great Mumbai and another**, (2015) 3 SCC 800 (2017) and **TRF Limited** v. **Energo Engineering Projects Limited**, (2017) 8 SCC 377 and while discussing the said judgment, emphasis was made to para 53, which was reproduced in para 18 to record that the ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee. In para 23 Hon'ble Apex Court discussed another case **Indian Oil Corpn.** V. **Raja Transport (P) Ltd.** (2009)8 SCC 520 and observed that if

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

23. Next question as put was whether the power can be exercised by this Court under Section 11 of the Act when the appointment of an arbitrator has already been made by the respondent and whether the appellant should be left to raise challenge at an appropriate stage in terms of remedies available in law. It was observed that similar issue was gone into by Hon'ble Apex Court in **Walter** supra, wherein discussion for appointment was made as under:

> "9. While it is correct that in Antrix (supra) and Pricol Limited (supra), it was opined by this Court that after appointment of an Arbitrator is made, the remedy of the aggrieved party is not under Section 11(6) but such remedy lies elsewhere and under different provisions of the Arbitration Act (Sections 12 and 13), the context in which the aforesaid view was expressed cannot be lost sight of. In Antrix (supra), appointment of the Arbitrator, as per ICC Rules, was as per the alternative procedure agreed upon, whereas in Pricol Limited (supra), the party which had filed the application under Section 11(6) of the Arbitration Act had already submitted to the jurisdiction of the Arbitrator. In the present case, the situation is otherwise.
>
> 10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law. In the present case, the agreed upon procedure between the parties contemplated the appointment of the arbitrator by second party

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> within 30 days of receipt of a notice from the first party. While the decision in Datar Switchgears Ltd. (supra) may have introduced some flexibility in the time frame agreed upon by the parties by extending it till a point of time anterior to the filing of the application under Section 11(6) of the Arbitration Act, it cannot be lost sight of that in the present case the appointment of Shri Justice A.D. Mane is clearly contrary to the provisions of the Rules governing the appointment of Arbitrators by ICADR, which the parties had agreed to abide in the matter of such appointment. The option given to the respondent Corporation to go beyond the panel submitted by the ICADR and to appoint any person of its choice was clearly not in the contemplation of the parties. If that be so, obviously, the appointment of Shri Justice A.D. Mane is non- est in law. Such an appointment, therefore, will not inhibit the exercise of jurisdiction by this Court under Section 11(6) of the Arbitration Act. It cannot, therefore, be held that the present proceeding is not maintainable in law. The appointment of Shri Justice A.D. Mane made beyond 30 days of the receipt of notice by the petitioner, though may appear to be in conformity with the law laid down in Datar Switchgears Ltd. (supra), is clearly contrary to the agreed procedure which required the appointment made by the respondent Corporation to be from the panel submitted by the ICADR. The said appointment, therefore, is clearly invalid in law."

24. Learned counsel for the respondent while relying upon aforesaid judgment stated that no such ground came to be urged in application under S. 11(6) as such, this judgment is of no help to the case of the petitioner. Hon'ble Apex Court in **S.P. Singla** supra held that when if any party is dissatisfied or aggrieved by the appointment of arbitrator in terms of the agreement by other party/parties, his remedy would be by way of petition under Section 13 of the

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1996 Act, and, thereafter while challenging the award under Section 34 of the 1996 Act.

> "18. The High Court placed reliance upon the judgment in Antrix Corporation Limited v. Devas Multimedia Private Limited (2014) 11 SCC 560 and held that when the Superintendent Engineer, Arbitration Circle was appointed as the Arbitrator in terms of the agreement (or arbitration clause), the provisions of sub-section (6) of Section 11 cannot be invoked again. The High Court further observed that in case, the other party is dissatisfied or aggrieved by the appointment of an arbitrator in terms of the agreement, his remedy would be by way of petition under Section 13 and thereafter while challenging the award under Section 34 of the 1996 Act.
>
> 19. The High Court in the impugned judgment placed reliance upon the judgment in Antrix Corporation Limited v. Devas Multimedia Private Limited (2014) 11 SCC 560 wherein the Supreme Court held as under:-
>
> "31. The matter is not as complex as it seems and in our view, once the arbitration agreement had been invoked by Devas and a nominee arbitrator had also been appointed by it, the arbitration agreement could not have been invoked for a second time by the petitioner, which was fully aware of the appointment made by the respondent. It would lead to an anomalous state of affairs if the appointment of an arbitrator once made, could be questioned in a subsequent proceeding initiated by the other party also for the appointment of an arbitrator. In our view, while the petitioner was certainly entitled to challenge the appointment of the arbitrator at the instance of Devas, it could not do so by way of an independent proceeding under Section 11(6) of the 1996 Act. While power has been vested in the Chief Justice to appoint an arbitrator under Section 11(6) of the 1996 Act, such appointment can be questioned under Section 13 thereof. In a proceeding under Section 11of the 1996 Act, the Chief Justice cannot replace one arbitrator already appointed in exercise of the arbitration agreement." ……….
>
> 33. Sub-section (6) of Section 11 of the 1996 Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of sub-section (6) may be invoked by any of the parties. Where in terms of the agreement, the arbitration clause has already been invoked by one of the parties thereto under the ICC Rules, the provisions of sub-section (6) cannot be invoked again, and, in

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case the other party is dissatisfied or aggrieved by the appointment of an arbitrator in terms of the agreement, his/its remedy would be by way of a petition under Section 13, and, thereafter, under Section 34 of the 1996 Act." In the present case, the Arbitrator has been appointed as per clause (65) of the agreement and as per the provisions of law. Once, the appointment of an arbitrator is made at the instance of the government, the arbitration agreement could not have been invoked for the second time.

20. As pointed out earlier the Arbitrator has already entered upon reference on 11.11.2013. The Arbitrator had first hearing on 07.12.2013; on which date appellant-contractor was absent. For the next date of hearing on 13.03.2014 the Arbitrator has recorded the finding that the appellant-claimant-contractor was absent without any intimation to the Tribunal. In this regard, Mr. Maninder Singh, the learned Senior Council for the appellant has drawn our attention to the letter dated 12.03.2014 sent by the appellant requesting for adjournment. Similarly, in the next date of hearings before the arbitrator namely, 03.04.2014, 25.04.2014 and 06.08.2014 the appellant-contractor did not appear; but only sent the letters requesting for adjournment. On 03.04.2014, the matter was adjourned to 25.04.2014 directing that both parties to come prepared for the next date of hearing on 25.04.2014. Similar was the order passed on 25.04.2014 that both parties have to come prepared for the next date of hearing on 06.08.2014. Since the appellant-claimant did not appear before the Arbitrator, the Arbitrator terminated the proceedings on 06.08.2014 under Section 25(a) of the 1996 Act."

25. Recently Hon'ble Apex Court in **Swadesh Kumar Agarwal** v. **Dinesh Kumar Agarwal**, Civil Appeal Nos. 2935-2938 of 2022, decided on 5.5.2022, while placing reliance upon judgment rendered by apex court in **S.P. Singla**, supra, reiterated that once parties have invoked arbitration proceedings and arbitrator has been appointed, subsequent application under S.11(6) of the

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Act, 1996, shall not be maintainable. Relevant paras of the judgment are extracted herein below:

> "8. Even otherwise, once the arbitrator was appointed by mutual consent and it was alleged that the mandate of the sole arbitrator stood terminated in view of section 14(1)(a) of the Act, 1996, the application under section 11(6) of the Act, 1996 to terminate the mandate of the arbitrator in view ofsection 14(1)(a) of the Act shall not be maintainable. Once the appointment of the arbitrator is made, the dispute whether the mandate of the arbitrator has been terminated on the grounds set out in section 14(1)(a) of the Act, shall not have to be decided in an application under section 11(6) of the Act, 1996. Such a dispute cannot be decided on an application under section 11(6) of the Act and the aggrieved party has to approach the concerned "court" as per subsection (2) of section 14 of the Act. In the case of Antrix Corporation Limited (supra) in para 31 and 33, it is observed and held as under:
>
> "31. The matter is not as complex as it seems and in our view, once the arbitration agreement had been invoked by Devas and a nominee arbitrator had also been appointed by it, the arbitration agreement could not have been invoked for a second time by the petitioner, which was fully aware of the appointment made by the respondent. It would lead to an anomalous state of affairs if the appointment of an arbitrator once made, could be questioned in a subsequent proceeding initiated by the other party also for the appointment of an arbitrator. In our view, while the petitioner was certainly entitled to challenge the appointment of the arbitrator at the instance of Devas, it could not do so by way of an independent proceeding under Section 11(6) of the 1996 Act. While power has been vested in the Chief Justice to appoint an arbitrator under Section 11(6) of the 1996 Act, such appointment can be questioned under Section 13 thereof. In a proceeding under Section 11 of the 1996 Act, the Chief Justice cannot replace one arbitrator already appointed in exercise of the arbitration agreement.
>
> 33. Subsection (6) of Section 11 of the 1996 Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of sub-section (6) may be invoked by any of the parties. Where in terms

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of the agreement, the arbitration clause has already been invoked by one of the parties thereto under the ICC Rules, the provisions of subsection (6) cannot be invoked again, and, in case the other party is dissatisfied or aggrieved by the appointment of an arbitrator in terms of the agreement, his/its remedy would be by way of a petition under Section 13, and, thereafter, under Section 34 of the 1996 Act."

9. Following the aforesaid decision in the subsequent decision of this Court in the case of S.P. Singla Constructions Private Limited (supra), it is observed and held by this Court that once the arbitrator had been appointed as per clause 65 of the agreement (in that case) and as per provisions of the law, the arbitration agreement could not have been invoked for second time.

9.1 Now so far as reliance being placed upon the decisions of this Court by learned counsel appearing on behalf of respondent No. 1 in the cases of ACC Limited (supra) and Uttar Pradesh State Bridge Corporation Limited (supra) are concerned as such there cannot be any dispute with respect to the position of law laid down by this Court in the aforesaid decisions to the effect that in case of any of the eventualities occurring as mentioned in section 14 and 15 of the Act, 1996, the mandate of the arbitrator shall stand terminated. However, the question is in a case where there is a dispute/controversy on the mandate of the arbitration being terminated on the ground set out in section 14(1)(a) of the Act, whether such a dispute shall have to be raised before the concerned "court" defined under section 2(e) of the Act or such a dispute can be considered on an application under section 11(6) of the Act? Before this Court in the aforesaid decisions such a controversy was not raised. Therefore, the aforesaid decisions shall not be of any assistance to respondents and/or the same shall not be applicable to the facts of the case on hand, while deciding the issue, whether termination of the mandate of the arbitrator on the ground mentioned under section 14(1)(a) of the Act, 1996 can be

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decided under section 14(2) or under section 11(6) of the Act, 1996.

10. It is to be noted that as such in the present case the proceedings before the concerned court under section 14(2) of the Act, 1996 at the instance of respondent No. 1 and 3 herein to terminate the mandate of the sole respondent under section 14(1)(a) of the Act were already pending before the concerned court when respondent No. 1 moved an application under section 11(6) of the Act and such a dispute was at large before the court in a proceeding under section 14(2) of the Act.

11. In view of the aforesaid discussion and for the reasons stated above, it is observed and held as under:

(i) That there is a difference and distinction between section 11(5) and section 11(6) of the Act, 1996;

(ii) In a case where there is no written agreement between the parties on the procedure for appointing an arbitrator or arbitrators, parties are free to agree on a procedure by mutual consent and/or agreement and the dispute can be referred to a sole arbitrator/arbitrators who can be appointed by mutual consent and failing any agreement referred to section 11(2), section 11(5) of the Act shall be attracted and in such a situation, the application for appointment of arbitrator or arbitrators shall be maintainable under section 11(5) of the Act and not under section 11(6) of the Act;

(iii) In a case where there is a written agreement and/or contract containing the arbitration agreement and the appointment or procedure is agreed upon by the parties, an application under section 11(6) of the Act shall be maintainable and the High Court or its nominee can appoint an arbitrator or arbitrators in case any of the eventualities occurring under section 11(6) (a) to (c) of the Act;

(iv) Once the dispute is referred to arbitration and the sole arbitrator is appointed by the parties by mutual consent and the

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arbitrator/arbitrators is/are so appointed, the arbitration agreement cannot be invoked for the second time;

(v) In a case where there is a dispute/controversy on the mandate of the arbitrator being terminated on the ground mentioned in section 14(1)(a), such a dispute has to be raised before the "court", defined under section 2(e) of the Act, 1996 and such a dispute cannot be decided on an application filed under section 11(6) of the Act, 1996.

26. Hon'ble Apex Court in S.P. Singla, while placing reliance upon earlier judgment passed in **Antrix Corporation Limited** v. **Devas Multimedia Private Ltd.** (2014) 11 SCC 560, reiterated that where the parties fail to act in terms of the procedure agreed upon by them, provisions of sub-section (6) of S.11 of the Act can be invoked by any of the parties, praying therein for appointment of arbitrator. However, where in terms of the agreement, arbitration clause has already been invoked by one of the parties thereto, provisions of sub-section (6) of S.11 cannot be invoked and in that case, the aggrieved party has remedy to file petition under S.13 of the Act before arbitrator laying therein challenge to the appointment of arbitrator by the other party in terms of the agreement. Order passed in the petition under S.13 thereafter can be laid further challenge by way of petition under S.34 of the Act.

27. In the case at hand, it is not in dispute that the respondent by way of legal notice (Annexure P-3), dated 30.12.2019, expressed its intention to invoke arbitration clause i.e. Clause 53 of the PIA. While doing so, it specifically stated in para-15 that in case the noticee did not refund the sum of Rs. 6.00 Crore deposited by it as upfront premium, legal notice may be treated as a notice invoking arbitration clause in terms of PIA dated

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26.5.2011. In the aforesaid para, respondent proposed the name of Justice S.N. Jha, retired Chief Justice, Rajasthan and Jammu & Kashmir. Though in para-16 of the legal notice, respondent stated that in case the noticee i.e. the petitioner fails to concur/agree with its proposal to appoint S.J. Jha as sole arbitrator within 30 days from the date of receipt of notice, it shall be constrained to take appropriate steps for appointment and constitution of arbitral tribunal, but, in the case at hand, petitioner kept on sleeping over the matter after expiry of 30 days. Though, in the case at hand, vide communication dated 13.12.2019, addressed to the respondent, petitioner objected to unilateral action of the respondent in as much as appointment of Justice S.N. Jha as sole arbitrator is concerned, but after having received notice dated 19.12.2019, Annexure P-6, from the sole arbitrator, it subjected itself to the jurisdiction of the above named arbitrator by filing an application under S.13 of the Act, laying therein challenge to appointment of the arbitrator. Though, none of the parties to the lis, placed on record petition filed under S.13 of the Act by the petitioner before learned arbitrator, laying therein challenge to the appointment of the arbitrator, but factum with regard to filing of an application under aforesaid provisions of law never came to be refuted by the petitioner.

28. Though, in the case at hand, petitioner specifically admitted the factum with regard to its having received notice dated 19.12.2019 Annexure P-6 from the arbitrator intimating therein factum with regard to listing of arbitration case on 21.1.2020, but at no point of time, disclosed that after having received aforesaid notice, it fled an application under S.13 of the Act, laying therein challenge to appointment of arbitrator and it is only during proceedings of the

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case at hand the factum with regard to initiation of proceedings under S.13 of the Act by the petitioner before learned arbitrator came to the notice of the Court. Learned counsel appearing for the respondent vehemently argued that once the proceedings under S. 13 of the Act are pending before learned arbitrator, petitioner is estopped from filing instant petition seeking therein appointment of arbitrator, as has been taken note herein above.

29. Hon'ble Apex Court in **Antrix** supra has categorically held that after appointment of the arbitrator, remedy available with the aggrieved party is not under S.11(6) of the Act but under different provision of the Act i.e. Ss. 12 and 13. In the case at hand, as per procedure agreed between the parties, petitioner was under obligation to appoint an arbitrator within 30 days of receipt of the notice from first party i.e. respondent. Though, Mr. Sudhir Bhatnagar, learned Additional Advocate General, while inviting attention of this Court to case decided by Hon'ble Apex Court in **Dattar Switchgrears Ltd.** v. **Tata Finance Ltd. & anr**. (2000) 8 SCC 151 argued that once appointment of arbitrator is clearly contrary to the provisions of the law governing appointment of arbitrator, application, if any, filed under S. 13(3) before the arbitrator unilaterally appointed by the respondent for termination of mandate of the arbitrator, is of no relevance.

30. This court, however, is not impressed with the aforesaid argument because, facts in **Dattar** supra were totally different from the facts of present case. In the aforesaid case, very appointment of arbitrator was found to be contrary to the provisions of the Rules governing appointment of arbitrator at ICADR which the parties had agreed to abide by in such matters. The option given to the respondent Corporation to go beyond the panel submitted by the ICADR and to appoint any person of its choice was clearly not in the

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contemplation of the parties, as such, Hon'ble Apex Court rightly found appointment of above named arbitrator to be nonest in law. Since the appointment of the arbitrator was found to be nonest in law, Supreme Court held that the party aggrieved by appointment of arbitrator is not estopped from invoking jurisdiction of this Court by filing an application under S.11(6) of the Act.

31. In the case at hand, no such ground ever came to be urged in the application filed under S.11(6) of the Act, while seeking appointment of another arbitrator, rather, the petitioner concealed material fact of its having filed application under S. 13(3) read with S.13(2) of the Act before arbitrator praying therein to terminate the mandate of the arbitrator.

32. At this stage, it would be apt to take note of S.13(2) and (3) of the Act, which read as under:

> (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."

33. Provisions of S.13(3) clearly provides that the challenge if any made to the appointment of the arbitrator shall be decided by the arbitral tribunal and in case challenge under procedure agreed by the parties under sub-section (2) is not successful, arbitral tribunal shall continue arbitration proceedings and shall made an arbitral award.

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34. In the case at hand, petitioner in communication dated 13.12.2019 addressed to the respondent, copy whereof was also marked to the arbitrator, nowhere assigned reason, if any, for not concurring with the proposal of the respondent for appointment of arbitrator but only stated it never consented for appointment of arbitrator.

35. S.13(2) provides that a party who intends to challenge appointment of 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 shall send a written statement of the reasons for the challenge to the arbitral tribunal. In the case at hand, on one hand, the petitioner subjected itself to the jurisdiction of the learned arbitrator by way of an application under S.13 of the Act, praying therein for termination of the mandate of the arbitrator and, on the other hand, approached this Court in the instant proceedings, under S. 11 of the Act, praying therein for appointment of another arbitrator, which is not permissible, as has been discussed in detail herein above.

36. Consequently, in view of detailed discussion made herein above as well as law taken into consideration, this court does not find present petitions under S.11(6) of the Act to be maintainable and the same are accordingly dismissed. All pending applications in both the petitions stand disposed of. Interim directions, if any, also stand vacated.

(Sandeep Sharma),
Judge

June 2, 2022
(vikrant)

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