REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5306 OF 2017
(@ S.L.P. (C) NO. 22912 OF 2016)

TRF Ltd. ... Appellant(s)

Versus

Energo Engineering Projects Ltd. ... Respondent(s)

With

CIVIL APPEAL NO. 5307 OF 2017
(@ S.L.P. (C) No. 23324 of 2016)

CIVIL APPEAL NO. 5308 OF 2017
(@ S.L.P. (C) No. 23348 of 2016)

CIVIL APPEAL NO. 5311 OF 2017
(@ S.L.P. (C) No. 14331 of 2016)

CIVIL APPEAL NO. 5309 OF 2017
(@ S.L.P. (C) No. 14226 of 2016)

J U D G M E N T

Dipak Misra, J.

In this batch of appeals, by special leave, the seminal issues that emanate for consideration are; whether the High Court, while dealing with the applications under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for brevity, "the Act"), is justified to repel the submissions of the appellants that once the person who was required to arbitrate upon the disputes arisen under the terms and conditions of the contract becomes ineligible by operation of law, he would not be eligible to nominate a person as an arbitrator, and second, a plea that pertains to statutory disqualification of the nominated arbitrator can be raised before the court in application preferred under Section 11(6) of the Act, for such an application is not incompetent. For the sake of clarity, convenience and apposite appreciation, we shall state the facts from Civil Appeal No. 5306 of 2017.

2. The respondent-company is engaged in the business of procuring bulk material handling equipment for installation in thermal power plants on behalf of its clients like National

Thermal Power Corporation (NTPC) and Moser Baer, Lanco Projects Ltd., etc. On 10th May, 2014, the respondent issued a purchase order to the appellant for the complete design, manufacturing, supply, transport to site, unloading, storage, erection, testing, commissioning and performance guarantee testing of various articles including wagon tippler, side arm charger, apron feeder, etc. To secure the performance under the purchase order, the appellant had submitted an advance bank guarantee and a performance bank guarantee.

3. As the controversy arose with regard to encashment of bank guarantee, the appellant approached the High Court under Section 9 of the Act seeking an order of restraint for encashment of the advance bank guarantee and the performance bank guarantee. As is reflectible from the impugned order, the said petitions were pending consideration when the High Court dealt with this matter. Be that as it may, the narration of the controversy under Section 9 in the impugned order or the consequences thereof is not germane to the adjudication of this case.

4. As the facts would unveil, the appellant vide letter dated 28.12.2015 invoked the arbitration in terms of Clause 33 of the General Terms and Conditions of the Purchase Order (GTCPO) seeking reference of the disputes that had arisen between the parties to an arbitrator. It was also asserted before the High Court that the appellant had objected to the procedure for appointment of arbitrator provided under the purchase order and accordingly communicated that an arbitrator be appointed *de hors* the specific terms of the purchase order. There was denial of the same by the respondent on the ground that it was contrary to the binding contractual terms and accordingly it rejected the suggestion given by the appellant and eventually by letter dated 27.1.2016 nominated an arbitrator, a former Judge of this Court, as the sole arbitrator in terms of Clause 33(d) of the purchase order. It is apt to note here that in certain cases, a former Chief Justice of a High Court was also appointed as arbitrator by the Managing Director.

5. After the appointment was made, the appellant preferred an application under Section 11(5) read with Section 11(6) of the Act for appointment of an arbitrator under Section 11(2) of the Act. The said foundation was structured on the basis that under Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) read with the Fifth and the Seventh Schedules to the amended Act, the Managing Director had become ineligible to act as the arbitrator and as a natural corollary, he had no power to nominate. The stand put forth by the appellant was controverted by the respondent before the High Court on the ground that the Fifth and the Seventh Schedules lay down the guidelines and the arbitrator is not covered under the same and even if it is so, his power to nominate someone to act as an arbitrator is not fettered or abrogated. The High Court analysed the clauses in the agreement and opined that the right of one party to a dispute to appoint a sole arbitrator prior to the amended Act had been well recognized and the amended Act does not take away such a right. According to the learned designated Judge, had the

intent of the amended Act been to take away a party's right to nominate a sole arbitrator, the same would have been found in the detailed list of ineligibility criteria enumerated under the Seventh Schedule to the Act and, therefore, the submission advanced by the appellant, the petitioner before the High Court, was without any substance. Additionally, the High Court noted that the learned counsel for the petitioner before it had clearly stated that it had faith in the arbitrator but he was raising the issue as a legal one, for a Managing Director once disqualified, he cannot nominate. That apart, it took note of the fact that the learned arbitrator by letter dated 28.1.2016 has furnished the requisite disclosures under the Sixth Schedule and, therefore, there were no circumstances which were likely to give rise to justifiable doubts as to the independence and impartiality. Finally, the designated Judge directed that besides the stipulation in the purchase order governing the parties, the court was inclined to appoint the former Judge as the sole arbitrator to decide the disputes between the parties.

6. Questioning the soundness of the order passed by the High Court, Mr. Sundaram, learned senior counsel for the appellant has raised the following contentions:

(i) The relevant clause in the agreement relating to appointment of arbitrator has become void in view of Section 12(5) of the amended Act, for the Managing Director having statutorily become ineligible, cannot act as an arbitrator and that acts as a disqualification and in such a situation to sustain the stand that his nominees have been validly appointed arbitrators would bring in an anomalous situation which is not countenanced in law.

(ii) Once the owner/employer has been declared disqualified in law, a nominee by the owner to arbitrate upon is legally unacceptable. In support of this proposition, reliance has been placed upon ***Chairman, Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd. & others***[1].

(iii) The principle embedded in the maxim ***Qui Facit Per Alium Facit Per Se*** (What one does through another is

1 (2007) 8 SCC 705

done by oneself) is attracted in the instant case. Additionally, if such liberty is granted, it will usher in the concept that an action that cannot be done or is outside the prohibited area can be done illegally by taking means to the appointment of a nominee. In this regard, the decision in ***Firm of Pratapchand Nopaji v. Firm of Kotrike Venkata Setty & Sons and others***[2] has been commended.

(iv) The status of the nominee does not take away the prohibition of ineligibility of nomination as the nominator has become ineligible to arbitrate upon. A legal issue of this nature which goes to the very root of the appointment of the arbitrator pertaining to his appointment which is *ex facie* invalid, cannot be said to be raised before the arbitral tribunal. For this purpose, inspiration has been drawn from the authority in ***Walter Bau AG, Legal Successor, of the Original Contractor, Dyckerhoff and Widmann A.G. v. Municipal Corporation of Greater Mumbai***[3].

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2 (1975) 2 SCC 208
3 (2015) 3 SCC 800

7. Mr. Chidambaram, learned senior counsel for the respondent, assisted by Mr. S.S. Shroff, resisting the aforesaid submissions, raised by the learned senior counsel for the appellant, proponed as follows:

(a) 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.

(b) The appellants have not been able to substantiate before the High Court how the appointment of the sole

arbitrator falls foul of the Seventh Schedule and in the absence of that, the appeals, being devoid of merit, deserve to be dismissed. As far as language employed in the Fifth Schedule is concerned, it is also a guide, which indicates existence of circumstances that give rise to justifiable doubts as to the arbitrator's independence and impartiality and when such a stand has been abandoned before the High Court, the impugned order is totally invulnerable.

(c) On a careful appreciation of the Fifth and Seventh Schedules of the amended Act, it is manifest that grounds provided thereunder clearly pertain to the appointed arbitrator and not relating to the appointing authority and, therefore, each and every ground/circumstance categorized under the Fifth and Seventh Schedules is to be reckoned and decided vis-à-vis the appointed arbitrator alone and not as a general principle.

(d) There is no warrant for the conclusion that an appointed arbitrator will automatically stand disqualified merely because the named arbitrator has become ineligible

to become the arbitrator, for he always has the right to nominate an independent and neutral arbitrator.

(e) The language of the purchase order does not stipulate that the Managing Director of the respondent will have the right to nominate a sole arbitrator as long as he is also qualified to act as an arbitrator. The role to act as an arbitrator and to nominate an arbitrator are in two independent spheres and hence, the authority to nominate is not curtailed.

(f) Challenge to an appointment of arbitrator under Section 13 of the Act can only be made before the Arbitral Tribunal, for despite introducing the Fifth, the Sixth and the Seventh Schedules to the amended Act under Section 12, the Legislature has consciously retained the challenge procedure under Section 13 of the Act. It is because Sections 13(2) and Section 13(3) of the Act clearly postulate that a challenge to the authority of arbitrator has to be made before the arbitral tribunal and the said procedure cannot be bypassed by ventilating the objection under

Section 11 of the Act. Any objection to be raised under the Fifth Schedule or the Seventh Schedule of the amended Act has to be raised before the arbitral tribunal. To bolster the said submission, heavy reliance has been placed on ***Antrix Corporation Limited v. Devas Multimedia Private Limited***[4].

(g) The authority relied on ***Walter Bau AG*** (supra) is not a precedent for the proposition advanced, as it was dealing with a challenge to an order of a judicial authority and not that of a court and furthermore the said decision has been distinguished in ***State of West Bengal v. Associated Contractors***[5].

8. To appreciate the contentions raised at the Bar, it is necessary to refer to the relevant clauses of the GTCPO that deals with the resolution of dispute. Clause 33 that provides resolution of disputes/arbitration reads as follows:

> "33. Resolution of dispute/arbitration
>
> a. In case any disagreement or dispute arises between the buyer and the seller under or in

4 (2014) 11 SCC 560
5 (2015) 1 SCC 32

connection with the PO, both shall make every effort to resolve it amicably by direct informal negotiation.

b. If, even after 30 days from the commencement of such informal negotiation, seller and the buyer have not been able to resolve the dispute amicably, either party may require that the dispute be referred for resolution to the formal mechanism of arbitration.

c. All disputes which cannot be settled by mutual negotiation shall be referred to and determined by arbitration as per the Arbitration and Conciliation Act, 1996 as amended.

d. Unless otherwise provided, any dispute or difference between the parties in connection with this agreement shall be referred to sole arbitration of the Managing Director of Buyer or his nominee. Venue of arbitration shall be Delhi, and the arbitration shall be conducted in English language.

e. The award of the tribunal shall be final and binding on both; buyer and seller."

9. We have reproduced the entire Clause 33 to appreciate the dispute resolution mechanism in its proper perspective. Sub-clause (c) of Clause 33 clearly postulates that if the dispute cannot be settled by negotiation, it has to be determined under the Act, as amended. Therefore, the

amended provisions do apply. Sub-clause (d) stipulates that dispute or reference between the parties in connection with the agreement shall be referred to sole arbitration of the Managing Director of the buyer or his nominee. This is the facet of the clause which is required to be interpreted and appositely dwelt upon. Prior to amendment, Section 12 read as follows:

> "12. Grounds for challenge.—
>
> (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 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."

10. Section 13 of the Act dealt with challenge procedure. After the amendment, Section 12 that deals with the grounds of challenge is as follows:

"12. Grounds for challenge.—

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, which is likely to give rise to justifiable doubts as to his independence or impartiality; and
(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.–The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.–The disclosure shall be made by such person in the form specified in the Sixth Schedule.

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

(5) 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 shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

11. We have referred to both the provisions to appreciate the change in the fundamental concept of grounds for challenge. The disclosures to be made by the arbitrator have been made specific and the disclosures are required to be made in

accordance with the Sixth Schedule to the amended Act. The Sixth Schedule stipulates, apart from others, the circumstances which are to be disclosed. We think it appropriate to reproduce the same:

> "CIRCUMSTANCES DISCLOSING ANY PAST OR PRESENT RELATIONSHIP WITH OR INTEREST IN ANY OF THE PARTIES OR IN RELATION TO THE SUBJECT-MATTER IN DISPUTE, WHETHER FINANCIAL, BUSINESS, PROFESSIONAL OR OTHER KIND, WHICH IS LIKELY TO GIVE RISE TO JUSTIFIABLE DOUBTS AS TO YOUR INDEPENDENCE OR IMPARTIALITY (LIST OUT):
>
> CIRCUMSTANCES WHICH ARE LIKELY TO AFFECT YOUR ABILITY TO DEVOTE SUFFICIENT TIME TO THE ARBITRATION AND IN PARTICULAR YOUR ABILITY TO FINISH THE ENTIRE ARBITRATION WITHIN TWELVE MONTHS (LIST OUT)"

12. Sub-section (5) of Section 12, on which immense stress has been laid by the learned counsel for the appellant, as has been reproduced above, commences with a non-obstante clause. It categorically lays down that if a 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 shall be ineligible to be appointed as an

arbitrator. There is a qualifier which indicates that parties may, subsequent to the disputes arisen between them, waive the applicability by express agreement in writing. The qualifier finds place in the proviso appended to sub-section (5) of Section 12. On a careful scrutiny of the proviso, it is discernible that there are fundamentally three components, namely, the parties can waive the applicability of the sub-section; the said waiver can only take place subsequent to dispute having arisen between the parties; and such waiver must be by an express agreement in writing.

13. At this stage, we think it appropriate to refer to the Seventh Schedule, which finds mention in Section 12(5). The Seventh Schedule has three parts, namely, (i) arbitrator's relationship with the parties or counsel; (ii) relationship of the arbitrator to the dispute; and (iii) arbitrator's direct or indirect interest in the dispute.

14. In the present case, we are concerned with the first part of the Seventh Schedule. Be it noted, the first part has 14

items. For the present controversy, the relevant items are item nos. 1, 5 and 12, which read as follows:

> "1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.
>
> xxxx xxxx
>
> 5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.
>
> xxxx xxxx
>
> 12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties."

15. We will be failing in our duty, if we do not refer to some of the aspects which find mention in the Fifth Schedule. Our attention has been drawn to item nos. 22 and 24 of the Fifth Schedule. They are as follows:

> "22. The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.
>
> xxxxx xxxxx

> 24. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties."

We have noted this for the sake of completion.

16. What is fundamentally urged, as is noticeable from the submissions of Mr. Sundaram, learned senior counsel appearing for the appellants, is that the learned arbitrator could not have been nominated by the Managing Director as the said authority has been statutorily disqualified. The submission of the respondent, per contra, is that the Managing Director may be disqualified to act as an arbitrator, but he is not deprived of his right to nominate an arbitrator who has no relationship with the respondent. Additionally, it is assiduously urged that if the appointment is hit by the Fifth Schedule or the Sixth Schedule or the Seventh Schedule, the same has to be raised before the arbitral tribunal during the arbitration proceeding but not in an application under Section 11(6) of the Act.

17. First we shall address the issue whether the Court can enter into the arena of controversy at this stage. It is not in dispute that the Managing Director, by virtue of the amended provision that has introduced sub-section (5) to Section 12, had enumerated the disqualification in the Seventh Schedule. It has to be clarified here that the agreement had been entered into before the amendment came into force. The procedure for appointment was, thus, agreed upon. It has been observed by the designated Judge that the amending provision does not take away the right of a party to nominate a sole arbitrator, otherwise the legislature could have amended other provisions. He has also observed that the grounds including the objections under the Fifth and the Seventh Schedules of the amended Act can be raised before the Arbitral Tribunal and further when the nominated arbitrator has made the disclosure as required under the Sixth Schedule to the Act, there was no justification for interference. That apart, he has also held in his conclusion that besides the stipulation of the agreement governing the parties, the Court has decided to

appoint the arbitrator as the sole arbitrator to decide the dispute between the parties.

18. In ***Northern Railway Administration, Ministry of Railways, New Delhi v. Patel Engineering Company Limited***[6], while dealing with the sub-section (6) of Section 11 and sub-section (8) of Section 11 and appreciating the stipulations in sub-sections (3) and (5), a three-Judge Bench opined that:

> "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 can be stated to be the reasonable steps required to be taken."

19. Being of this view, the Court ruled that the High Court had not focused on the requirement of having due regard to the qualification required by the agreement or other considerations necessary to secure appointment of an independent and impartial arbitrator and further ruled that it needs no reiteration that appointment of an arbitrator or

6 (2008) 10 SCC 240

arbitrators named in the arbitration agreement is not a must because while making the appointment, the twin responsibilities of sub-section (8) of Section 11 have to be kept in view, considered and taken into account. The Court further observed that if the same is not done, the appointment becomes vulnerable. In the said case, the Court set aside the appointment made by the High Court and remitted the matter to make fresh appointment keeping in view the parameters indicated therein.

20. In ***Datar Switchgears Ltd. v. Tata Finance Ltd. and another***[7], the appellant questioned the authority of the first respondent in appointing an arbitrator after a long lapse of notice period of 30 days on the foundation that the power of appointment should have been exercised within a reasonable time. It was further contended that unilateral appointment of arbitrator was not envisaged under the lease agreement and, therefore, the first respondent should have obtained the consent of the appellant and the name of the arbitrator should have been proposed to the appellant before the appointment.

7 (2000) 8 SCC 151

The Court took note of the fact that the arbitration clause in the lease agreement contemplated appointment of a sole arbitrator. The Court further took note of the fact that the appellant therein had not issued any notice to the first respondent seeking appointment of an arbitrator and it explicated that an application under Section 11(6) of the Act can be filed when there is a failure of the procedure for appointment of arbitrator. Elaborating the said concept, the Court held:

> "6. ... This failure of procedure can arise under different circumstances. It can be a case where a party who is bound to appoint an arbitrator refuses to appoint the arbitrator or where two appointed arbitrators fail to appoint the third arbitrator. If the appointment of an arbitrator or any function connected with such appointment is entrusted to any person or institution and such person or institution fails to discharge such function, the aggrieved party can approach the Chief Justice for appointment of an arbitrator."

21. After so stating, the Court adverted to the issue whether there was any real failure of the mechanism provided under the lease agreement. The Court took note of the fact that the respondent had made the appointment before the appellant

had filed the application under Section 11 of the Act though the said appointment was made beyond 30 days. It posed the question whether in a case falling under Section 11(6) of the Act, the opposite party cannot appoint an arbitrator after the expiry of 30 days from the date of appointment. Distinguishing the decisions of ***Naginbhai C. Patel v. Union of India***[8], ***B.W.L. Ltd. v. MTNL***[9] and ***Sharma & Sons v. Engineer-in-Chief, Army Headquarters, New Delhi***[10], the Court held:

> "19. So far as cases falling under Section 11(6) are concerned — such as the one before us — no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, *so far as Section 11(6) is concerned*, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but *before the first party has moved the court under Section 11*, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make

8 (1999) 2 Bom CR 189 (Bom)
9 (2000) 2 Arb LR 190
10 (2000) 2 Arb LR 31 (AP)

> appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.
>
> [Emphasis supplied]
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> 20. In the present case the respondent made the appointment before the appellant filed the application under Section 11(6) though it was beyond 30 days from the date of demand. In our view, the appointment of the arbitrator by the respondent is valid and it cannot be said that the right was forfeited after expiry of 30 days from the date of demand.
>
> 21. We need not decide whether for purposes of sub-sections (4) and (5) of Section 11, which expressly prescribe 30 days, the period of 30 days is mandatory or not."

And again:

> "23. When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. Even though rigor of the doctrine of "freedom of contract" has been whittled down by various labour and social welfare legislation, still the court has to respect the terms of the contract entered into by parties and endeavour to give importance and effect to it. When the party has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause".

22. On the aforesaid basis, the Court opined that the first respondent did not fail to follow the procedure contemplated under the agreement in appointing the arbitrator nor did it contravene the provisions of the arbitration clause. The said conclusion was arrived at as the appellant therein had really not sent a notice for appointment of arbitrator as contemplated under Clause 20.9 of the agreement which was the arbitration clause.

23. In ***Newton Engineering and Chemicals Limited v. Indian Oil Corporation Limited and others***[11], a two-Judge Bench was dealing with an arbitration clause in the agreement that provided that all disputes and differences between the parties shall be referred by any aggrieved party to the contract to the sole arbitration of E.D. (NR) of the respondent-Corporation. The arbitration clause further stipulated that if such E.D. (NR) was unable or unwilling to act as the sole arbitrator, the matter shall be referred to the sole arbitration of some other person designated by E.D. (NR) in his

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11 (2013) 4 SCC 44

place who was willing to act as sole arbitrator. It also provided that no person other than E.D. (NR) or the person designated by the E.D. (NR) should act as an arbitrator. When the disputes arose between the parties, the appellant therein wrote to the Corporation for appointment of E.D. (NR) as the sole arbitrator, as per the arbitration clause. The Corporation informed the contractor that due to internal reorganization in the Corporation, the office of the E.D. (NR) had ceased to exist and since the intention of the parties was to get the dispute settled through the arbitration, the Corporation offered to the contractor the arbitration of the substituted arbitrator, that is, the Director (Marketing). The Corporation further informed the contractor that if he agreed to the same, it may send a written confirmation giving its consent to the substitution of the named arbitrator. The contractor informed that he would like to have the arbitration as per the provisions of the Act whereby each of the parties would be appointing one arbitrator each. The Corporation did not agree to the suggestion given by the company and ultimately appointed Director (Marketing)

as the arbitrator. The contractor, being aggrieved, moved the High Court of Delhi for appointment of arbitrator under Section 11(6)(c) of the Act and the learned Single Judge dismissed the same and observed that the challenge to the appointment of the arbitrator may be raised by the contractor before the arbitral tribunal itself. Interpreting the agreement, this Court held:

> "7. Having regard to the express, clear and unequivocal arbitration clause between the parties that the disputes between them shall be referred to the sole arbitration of the ED (NR) of the Corporation and, if ED (NR) was unable or unwilling to act as the sole arbitrator, the matter shall be referred to the person designated by such ED (NR) in his place who was willing to act as sole arbitrator and, if none of them is able to act as an arbitrator, no other person should act as arbitrator, the appointment of Director (Marketing) or his nominee as a sole arbitrator by the Corporation cannot be sustained. If the office of ED (NR) ceased to exist in the Corporation and the parties were unable to reach to any agreed solution, the arbitration clause did not survive and has to be treated as having worked its course. According to the arbitration clause, sole arbitrator would be ED (NR) or his nominee and no one else. In the circumstances, it was not open to either of the parties to unilaterally appoint any arbitrator for resolution of the disputes. Sections 11(6)(c), 13 and 15 of the 1996 Act have no application in the light of the reasons indicated above.

> 8. In this view of the matter, the impugned order dated 8-11-2006 has to be set aside and it is set aside. The appointment of Respondent 3 as sole arbitrator to adjudicate the disputes between the parties is also set aside. The proceedings, if any, carried out by the arbitrator are declared to be of no legal consequence. It will be open to the contractor, the appellant to pursue appropriate ordinary civil proceedings for redressal of its grievance in accordance with law."

24. The aforesaid decision clearly lays down that it is not open to either of the parties to unilaterally appoint an arbitrator for resolution of the disputes in a situation that had arisen in the said case.

25. In ***Deep Trading Company v. Indian Oil Corporation and others***[12], the three-Judge Bench referred to clause 29 of the agreement, analysed sub-sections 1, 2, 6 and 8 of Section 11 of the Act, referred to the authorities in ***Datar Switchgears*** (supra) and ***Punj Lloyd Ltd. v. Petronet MHB Ltd.***[13] and came to hold that:

> "19. If we apply the legal position exposited by this Court in *Datar Switchgears* to the admitted facts, it will be seen that the Corporation has forfeited its right to appoint the arbitrator. It is so for the reason

12 (2013) 4 SCC 35
13 (2006) 2 SCC 638

> that on 9-8-2004, the dealer called upon the Corporation to appoint the arbitrator in accordance with the terms of Clause 29 of the agreement but that was not done till the dealer had made application under Section 11(6) to the Chief Justice of the Allahabad High Court for appointment of the arbitrator. The appointment was made by the Corporation only during the pendency of the proceedings under Section 11(6). Such appointment by the Corporation after forfeiture of its right is of no consequence and has not disentitled the dealer to seek appointment of the arbitrator by the Chief Justice under Section 11(6). We answer the above questions accordingly.
>
> 20. Section 11(8) does not help the Corporation at all in the fact situation. Firstly, there is no qualification for the arbitrator prescribed in the agreement. Secondly, to secure the appointment of an independent and impartial arbitrator, it is rather necessary that someone other than an officer of the Corporation is appointed as arbitrator once the Corporation has forfeited its right to appoint the arbitrator under Clause 29 of the agreement."

26. The Court accepted the legal position laid down in ***Newton Engineering*** (supra) and referred to ***Deep Trading Company*** (supra) and opined that as the Corporation had failed to act as required under the procedure agreed upon and did not make the appointment until the application was made under Section 11(6) of the Act, it had forfeited its right of appointment of an arbitrator. In such a circumstance the

Chief Justice or his designate ought to have exercised his jurisdiction to appoint an arbitrator under Section 11(6) of the Act. Be it noted, the three-Judge Bench also expressly stated its full agreement with the legal position that has been laid down in ***Datar Switchgears Ltd.*** (supra)

27. In ***Deep Trading Company*** (supra), the three-Judge Bench noticed as the Corporation did not agree to any of the names proposed by the appellant, and accordingly remitted the matter to the High Court for an appropriate order on the application made under Section 11(6) of the Act.

28. At this stage, it is necessary to understand the distinction between the two authorities, namely, ***Newton Engineering*** (supra) and ***Deep Trading Company*** (supra). In ***Newton Engineering*** (supra) the arbitration clause provided that no person other than ED (NR) or a person designated by the ED (NR) should act as an arbitrator. Though the Corporation appointed its Director (Marketing) as the sole arbitrator yet the same was not accepted by the contractor. On the contrary, it was assailed before the designated Judge.

The Court held that since the parties were unable to arrive at any agreed solution, the arbitration clause did not survive and the dealer was left to pursue appropriate ordinary civil proceedings for redressal of its grievance in accordance with law. In ***Deep Trading Company*** (supra) arbitration clause, as is noticeable, laid down that the dispute or difference of any nature whatsoever or regarding any right, liability, act, omission on account of any of the parties thereto or in relation to the agreement shall be referred to the sole arbitration of the Director (Marketing) of the Corporation or of some officer the Corporation who may be nominated by the Director (Marketing).

29. As the factual matrix of the said case would show, the appointing authority had not appointed arbitrator till the dealer moved the Court and it did appoint during the pendency of the proceeding. Be it noted that dealer had called upon the Corporation to appoint arbitrator on 9.8.2004 and as no appointment was made by the Corporation, he had moved the application on 6.12.2004. The Corporation appointed the

sole arbitrator on 28.12.2004 after the application under Section 11(6) was made. Taking note of the factual account, the Court opined that there was a forfeiture of the right of appointment of arbitrator under the agreement and, therefore, the appointment of the arbitrator by the Corporation during the pendency of the proceeding under Section 11(6) of the Act was of no consequence and remanded the matter to the High Court. The arbitration clause in ***Newton Engineering*** (supra) clearly provided that if the authority concerned is not there and the office ceases to exist and parties are unable to reach any agreed solution, the arbitration clause shall cease to exist. Such a stipulation was not there in ***Deep Trading Company*** (supra). That is the major distinction and we shall delineate on the said aspect from a different spectrum at a later stage.

30. At this juncture, we may also refer to a two-Judge Bench decision in ***Municipal Corpn., Jabalapur and others v. Rajesh Construction Co***[14]. In the said case the arbitration clause specifically provided that if the party invoking arbitration is the contractor, no reference order shall be

14 (2007) 5 SCC 344

maintainable unless the contractor furnishes a security deposit of a sum determined as per the table given therein. The said condition precedent was not satisfied by the contractor. Appreciating the obtaining factual score, the Court held that it has to be kept in mind that it is always the duty of the Court to construe the arbitration agreement in a manner so as to uphold the same, and, therefore, the High Court was not correct in appointing an arbitrator in a manner, which was inconsistent with the arbitration agreement. Thus, emphasis was laid on the manner of appointment which is consistent with arbitration clause that prescribes for appointment.

31. The purpose of referring to the aforesaid judgments is that courts in certain circumstances have exercised the jurisdiction to nullify the appointments made by the authorities as there has been failure of procedure or *ex facie* contravention of the inherent facet of the arbitration clause. Submission of the learned counsel for the respondent is that the authority of the arbitrator can be raised before the learned Arbitrator and for the said purpose, as stated hereinbefore, he

has placed heavy reliance upon ***Antrix Corporation Limited*** (supra). In the said case, the two-Judge Bench referred to Article 20 of the agreement which specifically dealt with arbitration and provided that in the event any dispute or difference arises between the parties as to any clause or provision of the agreement, or as to the interpretation thereof, or as to any account or valuation, or as to rights and liabilities, acts, omissions of any party, such disputes would be referred to the senior management of both the parties to resolve the same within three weeks, failing which the matter would be referred to an arbitral tribunal comprising of three arbitrators and the seat of the arbitration would be New Delhi and further that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce (ICC) or UNCITRAL. As the agreement was terminated, the petitioner therein wrote to the respondent company to nominate the senior management to discuss the matter and to try and resolve the dispute between the parties. However, without exhausting the mediation process, as

contemplated under Article 20(a) of the agreement, the respondent unilaterally and without prior notice addressed a request for arbitration to the ICC International Court of Arbitration and one Mr. V.V. Veedar was nominated as the arbitrator in accordance with ICC Rules. The correspondence between the parties was not fruitful and the petitioner filed an application under Section 11(4) read with Section 11(10) of the Act for issuance of a direction to the respondent to nominate an arbitrator in accordance with an agreement dated 28.1.2005 and the Rules to adjudicate upon the disputes which had arisen between the parties and to constitute an arbitral tribunal and to proceed with the arbitration.

32. When the matter was listed before the designate of the Chief Justice of this Court, it was referred to a larger Bench and the Division Bench, analyzing the various authorities, came to hold thus:

> "35. ... Once the provisions of the ICC Rules of Arbitration had been invoked by Devas, the proceedings initiated thereunder could not be interfered with in a proceeding under Section 11 of the 1996 Act. The invocation of the ICC Rules would, of course, be subject to challenge in

> appropriate proceedings but not by way of an application under Section 11(6) of the 1996 Act. Where the parties had agreed that the procedure for the arbitration would be governed by the ICC Rules, the same would necessarily include the appointment of an arbitral tribunal in terms of the arbitration agreement and the said Rules. Arbitration Petition no. 20 of 2011 under Section 11(6) of the 1996 Act for the appointment of an arbitrator must, therefore, fail and is rejected, but this will not prevent the petitioner from taking recourse to other provisions of the aforesaid Act for appropriate relief."

33. The said pronouncement, as we find, is factually distinguishable and it cannot be said in absolute terms that the proceeding once initiated could not be interfered with the proceeding under Section 11 of the Act. As we find, the said case pertained to ICC Rules and, in any case, we are disposed to observe that the said case rests upon its own facts.

34. Mr. Sundaram, learned senior counsel for the appellant has also drawn inspiration from the judgment passed by the designated Judge of this Court in ***Walter Bau AG*** (supra), where the learned Judge, after referring to ***Antrix Corporation Limited*** (supra), distinguished the same and

also distinguished the authority in ***Pricol Limited v. Johnson Controls Enterprise Limited***[15] and came to hold that:

> "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. …"

35. We may immediately state that the opinion expressed in the aforesaid case is in consonance with the binding authorities we have referred to hereinbefore.

36. Learned counsel for the respondent commenting on the authority in ***Walter Bau AG*** (supra) would submit that the decision rendered therein is not a precedent and for the said purpose, he has placed reliance upon ***Associated Contractors*** (supra) wherein a three-Judge Bench was dealing with a reference that gave rise to the following issue:

> "Which court will have the jurisdiction to entertain and decide an application under Section 34 of the Arbitration and Conciliation Act, 1996."

37. The three-Judge Bench was called upon to lay down the meaning of the term "court" under Section 2(1)(e) and

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15 (2015) 4 SCC 177

Section 42 of the Act. The Court came to hold that an essential ingredient of Section 42 of the Act is that an application under Part I must be made to a court. The three-Judge Bench adverted to the definition of the court under Section 2(1)(e) of the Act and opined that the definition contained in the 1940 Act spoke of civil court whereas the definition of the 1996 Act which says court to be the Principal Civil Court of original jurisdiction in a district or the High Court in exercise of original civil jurisdiction. That apart, Section 2(1)(e) further goes on to say that the court would not include any civil court of a grade inferior to such Principal Civil Court, or a Small Cause Court. The Court discussed with regard to the concept of 'court', referred to the meaning of the phrase "means and includes", reverted to the judgment in ***State of Maharashtra v. Atlanta Limited***[16] and also reproduced few passages from the seven-Judge Bench in ***SBP & Co. v. Patel Engineering Ltd.***[17] and eventually ruled:

> "24. If an application were to be preferred to a court which is not a Principal Civil Court of original

16 (2014) 11 SCC 619
17 (2005) 8 SCC 618

jurisdiction in a district or a High Court exercising original jurisdiction to decide questions forming the subject matter of an arbitration if the same had been the subject matter of a suit, then obviously such application would be outside the four corners of Section 42. If, for example, an application were to be filed in a court inferior to a Principal Civil Court, or to a High Court which has no original jurisdiction, or if an application were to be made to a court which has no subject-matter jurisdiction, such application would be outside Section 42 and would not debar subsequent applications from being filed in a court other than such court."

38. The Court summed up the conclusions as follows:

"25.(*a*) Section 2(1)(*e*) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act, 1996.

(*b*) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.

(*c*) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(*d*) Section 9 applications being applications made to a court and Section 34 applications to set aside

> arbitral awards are applications which are within Section 42.
>
> (*e*) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(*e*), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.
>
> (*f*) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.
>
> (*g*) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42".

39. Relying on the said pronouncement, it is urged by the learned senior counsel for the respondent that the authority in ***Walter Bau AG*** (supra) is not a precedent.

40. We have discussed in detail to understand the context in which judgment in ***Associated Contractors*** (supra) was delivered. Suffice it to mention that in ***Walter Bau AG*** (supra), the designated Judge only reiterated the principles which have been stated by a two-Judge or three-Judge Bench decisions

that had dealt with Section 11 of the Act. We may also hasten to make it clear that the authority in ***Associated Contractors*** (supra) deals with a different situation and it has nothing to do with the conundrum that has arisen in the instant case. We have devoted some space as the said authority was pressed into service with enormous conviction. Be it clearly stated that the said decision is only concerned with the "concept of court" in the context of Sections 42, 34, 9 and 2(1)(e) of the Act. In the present case, we are exclusively concerned with the statutory disqualification of the learned arbitrator. The principles laid down in ***Associated Contractors*** (supra) has no applicability to the case at hand and reliance placed upon the same, we are obliged to say, is nothing but a sisyphean endeavour.

41. As we are required to adjudge on the jurisdiction of the Designated Judge, we may reproduce the relevant conclusion from the majority judgment in ***SBP & Co.*** (supra). Conclusion (iv), as has been summed up in para 47 in ***SBP's*** case by the majority, reads as follow:

> "47. (iv) The Chief Justice or the Designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the Designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the Designated Judge."

42. In ***Arasmeta Captive Power Company Private Limited and another v. Lafarge India Private Limited***[18], the two-Judge Bench, though was dealing with the pregnability of the order passed by the Designated Judge pertaining to excepted matters, dealt with the submission advanced by the learned counsel for the appellant that the three-Judge Bench in ***Chloro Controls India Private Limited v. Severn Trent Water Purification Inc.***[19] has not appositely understood the principle stated in major part of the decision rendered by the

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18 (2013) 15 SCC 414
19 (2013) 1 SCC 641

larger Bench in ***SBP's*** case. In the said case, the Court, after referring to paragraphs 39 and 47(iv), stated thus:

> "18. On a careful reading of para 39 and Conclusion (iv), as set out in para 47 of SBP case, it is limpid that for the purpose of setting into motion the arbitral procedure the Chief Justice or his designate is required to decide the issues, namely, (i) territorial jurisdiction, (ii) existence of an arbitration agreement between the parties, (iii) existence or otherwise of a live claim, and (iv) existence of the conditions for exercise of power and further satisfaction as regards the qualification of the arbitrator. That apart, under certain circumstances the Chief Justice or his designate is also required to see whether a long-barred claim is sought to be restricted and whether the parties had concluded the transaction by recording satisfaction of the mutual rights and obligations or by receiving the final payment without objection."

43. It is worthy to note here that in the said case, the Court set aside the impugned order as the designated Judge had entered into the billing disputes, which he could not have. The purpose of referring to these two judgments is that apart from the fact that the Designated Judge can, at the initial stage, adjudicate upon his jurisdiction, he is also entitled to scrutinize the existence of the condition precedent for the

exercise of his power and also the disqualification of the arbitrator or arbitrators.

44. Section 11(8) of the Act, which has been introduced in 2015, reads as follows:

> "(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to—
> (a) any qualifications required of the arbitrator by the agreement of the parties; and
> (b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator."

45. We are referring to the same as learned counsel for the parties have argued at length with regard to the disclosure made by the arbitrator and that has also been referred to by the designated Judge. In this context, we may profitably refer to sub-section (6A) of Section 11 of the Act which reads as follows:

> "(6A). The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or

> sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

46. The purpose of referring to the said provision is that the amended law requires the Court to confine the examination of the existence of an arbitration agreement notwithstanding any judgment of the Supreme Court or the High Court while considering an application under Section 11(6) of the Act. As the impugned order would indicate, the learned Judge has opined that there had been no failure of procedure, for there was a request for appointment of an arbitrator and an arbitrator has been appointed. It is apt to state here that the present factual score projects a different picture altogether and we have to carefully analyse the same.

47. We are required to sit in a time machine and analyse the judgments in this regard. In ***Datar Switchgears*** (supra), it has been held that the appointment made by the respondent was invalid inasmuch as there was no proper notice by the appellant to appoint an arbitrator and before an application

under Section 11(6) of the Act was filed, the arbitrator was appointed. Relevant part of clause 20.9 of the agreement in the said case postulates thus:

> "20.9. It is agreed by and between the parties that in case of any dispute under this lease the same shall be referred to an arbitrator to be nominated by the lessor and the award of the arbitrator shall be final and binding on all the parties concerned."

The aforesaid clause lays down that the lessor shall nominate the arbitrator.

48. In ***Newton Engineering*** (supra), though the agreement has not been produced in the judgment, the Court has anaylsed in detail the purport of the arbitration clause in the agreement and ruled that the matter shall be referred to the sole arbitration of ED (NR) of the respondent Corporation and if the said authority is unable and unwilling to act, the matter shall be referred to the sole arbitration of some other person designated by ED (NR) in his place who is willing to act as a sole arbitrator. The said post had ceased to exist and as the parties intended the matter to go to arbitration, the

respondent substituted the arbitrator with the Director (Marketing) in the arbitration clause subject to the written confirmation giving the consent by the contractor. The contractor informed the Corporation that it would like to have the arbitrator appointed under the Act whereby each of the parties would be appointing one arbitrator each to which the Corporation did not accede. At that juncture the contractor moved an application under Section 11(6C) of the Act and the High Court appointed a retired Judge. Taking exception to the view of the High Court, the two-Judge Bench held, as stated earlier, that the arbitration clause postulated sole arbitrator would be ED (NR) or his nominee and no one else and, therefore, Section 11(6C) was not applicable. The Court ruled that as the parties had not been able to reach the agreed decision, the arbitration clause did not survive.

49. In ***Deep Trading Company*** (supra) while approving the view expressed in ***Newton Engineering*** (supra), the Court observed that in the said case the Court was not concerned with the question of forfeiture of the right of the Corporation

for appointment of an arbitrator and accordingly while setting aside the order sent for fresh consideration by the Chief Justice or the Designated Judge.

50. The aforesaid three cases exposit three different situations. The first one relates to non-failure of the procedure and the authority of the owner to appoint the arbitrator; the second relates to non-survival of the arbitration clause; and the third pertains to forfeiture of the right of the Corporation to appoint the sole arbitrator because of the failure to act with the procedure agreed upon by the parties in clause 29 which was the arbitration clause in the agreement. It is interesting to note that clause 29 in ***Deep Trading Company*** (supra) does not mention unlike ***Newton Engineering*** (supra) that no one else shall arbitrate upon.

51. One aspect needs to be noted. In the first and third case, the parties had not stipulated that there will be no one else who can arbitrate while in the second case, i.e., ***Newton Engineering*** (supra), such a stipulation was postulated.

52. Regard being had to the same, we have to compare and analyse the arbitration clause in the present case. Clause (c), which we have reproduced earlier, states that all disputes which cannot be settled by mutual negotiation shall be referred to and determined by arbitration as per the Act, as amended. Clause (c) is independent of Clause (d). Clause (d) provides that unless otherwise provided, any dispute or difference between the parties in connection with the agreement shall be referred to the sole arbitration of the Managing Director or his nominee.

53. 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 and others v. Commissioner of Land Records & Settlement, Cuttack and others***[20]. 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:

> "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 Punjab*. 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

20 (1998) 7 SCC 162

> 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."

54. Be it noted in the said case, reference was made to ***Behari Kunj Sahkari Awas Samiti v. State of U.P.***[21], which followed the decision in ***Roop Chand v. State of Punjab***[22]. It is seemly to note here that said principle has been followed in ***Chairman, Indore Vikas Pradhikaran*** (supra).

55. Mr. Sundaram, has strongly relied on ***Firm of Pratapchand Nopaji*** (supra). In the said case, the three-Judge Bench applied the maxim "*Qui facit per alium facit per se*". We may profitably reproduce the passage:

> "9. … The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim: "*Qui facit per alium facit per se*" (What one does through another is done by

21 (1997) 7 SCC 37
22 AIR 1963 SC 1503

> 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."

56. 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 learned counsel for the appellant, ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.

57. 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.

58. Another facet needs to be addressed. The Designated Judge in a cryptic manner has ruled after noting that the petitioner therein had no reservation for nomination of the nominated arbitrator and further taking note of the fact that there has been a disclosure, that he has exercised the power under Section 11(6) of the Act. We are impelled to think that that is not the right procedure to be adopted and, therefore,

we are unable to agree with the High Court on that score also and, accordingly, we set aside the order appointing the arbitrator. However, as Clause (c) is independent of Clause (d), the arbitration clause survives and hence, the Court can appoint an arbitrator taking into consideration all the aspects. Therefore, we remand the matter to the High Court for fresh consideration of the prayer relating to appointment of an arbitrator.

59. Resultantly, the appeals are allowed, the orders passed by the learned Single Judge are set aside and the matters are remitted to the High Court for fresh consideration. In the facts and circumstances of the case, there shall be no order as to costs.

.....J.
(Dipak Misra)

.....J.
(A.M. Khanwilkar)

New Delhi .....J.
July 03, 2017 (Mohan M. Shantanagoudar)

ITEM NO.1501 COURT NO.2 SECTION XIV
(For Judgment)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No.5306/2017

TRF LTD **Appellant(s)**

VERSUS

ENERGO ENGINEERING PROJECTS LTD **Respondent(s)**

WITH C.A. No.5309/2017
C.A. No. 5311/2017
C.A. No. 5308/2017
C.A. No. 5307/2017

Date : 03-07-2017 These appeals were called on for pronouncement of Judgment today.

For Appellant(s)
Mr. Kaushik Poddar, AOR

For Respondent(s)
Mr. S.S. Shroff, AOR

Hon'ble Mr. Justice Dipak Misra pronounced the judgment of the Bench comprising His Lordship, Hon'ble Mr. Justice A.M. Khanwilkar and Hon'ble Mr. Justice M. Shantanagoudar.

The appeals are allowed in terms of the signed reportable judgment.

(Chetan Kumar) **(H.S. Parasher)**
Court Master **Court Master**
(Signed reportable judgment is placed on the file)