

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

% *Judgment reserved on: 25th April, 2016*
Judgment pronounced on: 29th April, 2016

+ **Arb. P. No.677/2015**

ASSIGNIA-VIL JV Petitioner
Through Dr.Amit George, Adv. with Mr.Swaroop
George, Adv.

versus

RAIL VIKAS NIGAM LIMITED Respondent
Through Mr.Anil Seth, Adv. with Mr.Udit Seth,
Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By way of this order, I propose to decide the present petition filed by the petitioner under Section 11(6) read with Section 11(8) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act').

2. The brief facts as per petition are that the respondent issued an invitation for bid No.RVNL/LKO/UTR-RBL/1 on 7th March, 2012 for the work of 'Construction of Roadbed, Major and Minor Bridges, Track Lining (excluding supply of Rails and PSC Line Sleepers), General Electrical Work and S&T Works in connection with doubling between Utrahtia junction and Rae Bareli junction (65.6 Km.) on Lucknow Division of Northern Railway in Uttar Pradesh State, India' (hereinafter referred to as the 'work').

3. The petitioner submitted its technical and financial bid to the respondent for the work by its letter dated 4th May, 2012. The respondent accepted the bid of the petitioner by means of a Letter of Acceptance (hereinafter referred to as the 'LOA') dated 9th July, 2012.

4. The total contract price was stipulated as Rs.178,82,64,454.00/-. In the LOA, the respondent required the petitioner to submit performance security and mobilization advance security by means of unconditional Bank Guarantees (hereinafter referred to as 'BGs').

5. In view of LOA dated 9th July, 2012, the petitioner and the respondent entered into a formal agreement which was reduced into writing by means of the contract agreement dated 14th August, 2012.

6. The term of the contract as originally agreed between the parties was for a period for 30 months from the date of start of work plus a defect liability period of 6 months.

7. As per the petitioner, the date of start of work was subsequently stipulated by the respondent as 16th August, 2012 and the stipulated date of completion was 15th February, 2015 as there were several difficulties which were encountered on the work site which were directly attributable to the defaults and breaches of the contract by the respondent, and which led to delay in the execution of the work and the petitioner was therefore constrained to seek an extension of time (hereinafter referred to as 'EOT') from the respondent for extending the period for the completion of the work. It is alleged that despite the aforesaid difficulties being faced by the petitioner on the work site, which were a result of the acts and omissions of the respondent, the respondent always blamed the petitioner for the delay in the performance

of the contract. A termination notice was issued by the respondent to the petitioner which was later withdrawn.

The petitioner thereafter sought an EOT from the respondent for extending the period for the completion of the work by means of its letter dated 8th January, 2015. On the basis of the aforesaid application for EOT as applied for by the petitioner, the respondent extended the time for completion upto 14th August, 2016 without levy of liquidated damages, by means of its letter dated 17th March, 2015. The petitioner received a letter dated 19th May, 2015 from the respondent, alleging that the petitioner was at fault in executing the work and therefore giving a notice of termination to the petitioner of the whole of the works.

8. In response to the notice of termination dated 19th May, 2015 issued by the respondent, the petitioner by its letter dated 26th May, 2015 rebutted the allegations made by the respondent in the notice of termination and called upon the respondent to reconsider its stand. However, the respondent by its letter dated 3rd June, 2015 formally terminated the contract on patently illegal grounds and called upon the petitioner to leave the work site.

The petitioner by its letter dated 22nd June, 2015 responded to the termination of the contract by the respondent and protested the termination and called upon the respondent to revoke the same and gave the details of the loss to be suffered in view of termination.

9. The petitioner submits that after the expiry of a period of 60 days, the petitioner was left with no other option but to issue a notice of dissatisfaction dated 31st August, 2015 to the respondent stating its intention to commence arbitration on all the disputes. In the said notice of dissatisfaction, *inter alia*,

the petitioner stated that even though more than 60 days had passed from the date of receipt of the notice dated 22nd June, 2015 by the respondent, the disputes were unresolved and the petitioner also expressed its willingness to settle the disputes amicably in terms of Clause 20.2 of the contract. It was also made clear that in the event, the respondent comes forward for amicable settlement within the period stipulated under clause 20.2, the petitioner would then proceed further in the matter for appointment of Arbitrators as stipulated in clause 20.3 of the contract.

10. It is alleged by the petitioner that despite of receipt of the aforesaid notice of dissatisfaction dated 31st August, 2015, neither did the respondent settle the claims of the petitioner nor did it think fit to even initiate the process of amicable settlement. The petitioner thereafter issued a letter dated 26th October, 2015 to the respondent, *inter alia*, calling up to send a panel of five independent names to the petitioner so that an independent Arbitral Tribunal could be constituted to adjudicate the disputes between the parties.

It is mentioned in the letter that if the respondent did not do the needful within a period of 21 days, then the petitioner would be constrained to approach the Courts of law. But, there was no response from the respondent to the aforesaid letter of the petitioner. No list/panel of names for the constitution of the Arbitral Tribunal was forwarded to the petitioner. The petitioner has therefore been constrained to file the present petition.

11. Prior to the filing of the present petition, the petitioner had raised certain claims during the execution of the work in the subject contract. The said claims as per petitioner were kept pending by the respondent without any decision in the matter. Therefore, by its letter dated 11th April, 2014 the

petitioner notified the respondent that payment should be made towards the aforesaid claims. The petitioner thereafter sought for constitution of an Arbitral Tribunal to resolve the disputes, however, it is the admitted position that it was constituted pertaining to three claims alone of the petitioner. The petitioner says that even the said constitution was done without any attempt for amicable settlement, the said Arbitral Tribunal comprises of serving and retired officers of the respondent itself. Therefore by its letter dated 26th July, 2014. The petitioner has raised the said objection that any arbitration proceedings continuing without the attempt of making any settlement was premature as per the terms of arbitration clause of the contract.

12. The prayer of present petition is strongly opposed by the learned counsel for the respondent who stated that pertaining to three claims, the Arbitral Tribunal has already been constituted pursuant to invocation of Arbitration Clause by the petitioner. The petitioner had nominated its Arbitrator. The petitioner is now avoiding the arbitration proceedings without any valid reason who failed to participate in the earlier pending Arbitration. The petitioner in the said proceedings did not file statement of claim nor raised any objection on the constitution of Arbitral Tribunal under Section 13 of the Act.

13. As per Scheme of the Act, the mandate of existing Arbitral Tribunal cannot be terminated. There is no allegation of existing Tribunal being biased, not as per agreed procedure or having no jurisdiction, raised by the petitioner and even no such objection raised before the Tribunal, rather the fresh disputes of termination of contract should also be referred to the same Arbitral Tribunal.

14. It is argued on behalf of the respondent that the contention of the petitioner's counsel is that in the arbitration proceedings which are pending in respect of three claims whereby in fact the petitioner had selected its nominee Arbitrator. He submits that there is existing Arbitral Tribunal which has been appointed much before filing of the petition thus, there is no failure of procedure. The petitioner is now avoiding arbitration. Even as per law new claims can be added in the pending arbitration. The petitioner has not raised any objection/ doubt on the independence or impartiality of the Arbitral Tribunal in the pending Arbitration. Even if petitioner has any objection, it can seek recourse under Section 13 of the Act before the Arbitral Tribunal.

Counsel says that it is the practice and convention that the reference to arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specific enumerated disputes. Where "all disputes" are referred, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings (both claims and counter-claims). Therefore, it is appropriate that the present disputes may also be referred to the same Arbitral Tribunal.

15. Mr. Anil Seth, learned counsel for the respondent has suggested that the petitioner can include all new claims in the pending Arbitration, for which no objection was raised at the time of appointment at that time. In the present case, the respondent is agreeable who has given its consent for the same vide letter dated 19th November, 2015 to add/ modify any of their dispute/ claim subsequent to termination of contract for consideration of the existing Arbitral Tribunal, there being no need for fresh appointment of Arbitrators.

16. Counsel for the respondent in support of his submissions has referred Section 23(3) of the Act and submits that the additional claims in the pending arbitration can be added/ modified/changed and there is no bar in including new claims in the pending Arbitration. He has referred the following decisions in support of his arguments:-

- (i) ***State of Orissa v. Asis Ranjan Mohanty***, (1999) 9 SCC 249 (Paras 2, 3,4, 6, 7, 8,10,12)

"10. Learned counsel for the appellant also contended that once having raised nine claims before the first arbitrator, the respondent was not entitled to raise any additional claims before the second arbitrator since the second arbitrator was appointed to continue the arbitration which was pending before the first arbitrator. However, the claims which were subsequently raised pertain entirely to the construction work in question and are not outside the ambit of the arbitration clause. In the statement of claims initially filed before the first arbitrator, the respondent had expressly reserved his right to file additional claims. We do not, therefore, see any reason to hold that the respondent was not entitled to file further claims before the second arbitrator".

- (ii) ***H.L. Batra and Co v. State of Haryana***, (1999) 9 SCC 188 (Para 3,4, 6)

"4. The courts thus seem to have proceeded on the basis that the scope of the second arbitration was confined only to 30 claims which were originally filed before the first arbitrator. However, from the office order of 9-2-1979 which we have referred to and reproduced earlier, it is clear that the arbitrator has been appointed for the purpose of settling disputes between the parties. The terms of reference do not confine the second arbitration only to 30 claims. The first notice of the arbitrator dated 16-2-1979 calling upon both sides to file their claims also proceeds on the basis that the arbitration pertains to all the disputes between the parties. Therefore, the scope of the

arbitration has not been enlarged by the appellant contrary to law. The claims filed by the appellant pertained to the said contract. Therefore, these disputed claims are within the terms of reference before the arbitrator. Even the counter-claim which has been filed has been considered by the arbitrator on the same basis. Therefore, the award cannot be set aside on the ground that it is beyond the scope of arbitration or the terms of reference to arbitration.”

(iii) *Shyama Charan Agarwal & Sons v. Union of India*, (2002) 6 SCC 201 (Para 21)

"21. In our view the view taken by the High Court cannot be sustained. It is clear from the arbitration clause viz. clause 70 that all disputes between the parties to the contract (other than excepted matters) can be referred to arbitration. The Contractor did make a claim in respect of future period also. The document appointing the arbitrator would show that the arbitrator was required to decide the disputes arising between the parties. It is not possible to hold that Claim 1 insofar as it relates to future period during which the contract work continued is beyond the scope of reference or outside the ambit of arbitration clause. The aim of arbitration is to settle all the disputes between the parties and to avoid further litigation. There is no legal justification in restricting the scope of arbitration in the manner in which the High Court did. In the list of disputes which is annexed to the letter of appointment of the arbitrator, it is mentioned without any qualification or restriction as follows: (***)”

17. It is submitted by Mr. Anil Seth that the petitioner is now seeking appointment of new Arbitral Tribunal without any justified reason when Arbitral Tribunal is in session and the petitioner itself is avoiding it. The petitioner cannot take benefit of its own mistake. Mr. Seth has referred the judgment of *Kusheshwar Prasad Singh v. State of Bihar & ors*, (2007) 11 SCC 447 (Paras 15,16) which reads as under:-

"15. (***)This Court (at SCC p. 142, para 28) referred to Broom's Legal Maxims{10th Edn.}, p. 191 wherein it was stated:

"It is a maxim of law, recognized and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognized in courts of law and of equity, and indeed, admits of illustration from every branch of legal procedure."

16. It is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, "a wrongdoer ought not to be permitted to make a profit out of his own wrong".

18. In reply, Dr. Amit George, learned counsel for the petitioner stated that notwithstanding this explicit stand of the petitioner, not only did the respondent not come forward for an amicable settlement of the disputes in terms of Clause 20.2 of the General Conditions of the Contract; but on the other hand, after the illegal termination of the contract, it sought to refer an entirely new and virgin dispute pertaining to the termination of the contract to the existing Arbitral Tribunal which was admittedly constituted only for the purpose of the three claims.

It was done without the consent of the petitioner. By its letter dated 15th June, 2015, the respondent forwarded an entirely new alleged counter-claim before the Arbitral Tribunal pertaining to the alleged enhancement of the project cost, balance amount of mobilization advance, cost of PMC etc. which was coming to approximately Rs.85.69 Crores. However, there was no

response from the respondent to the letter of the petitioner dated 26th October, 2015 pertaining to the dispute relating to illegal termination of the contract with which the present petition is concerned. No list/panel of names for the constitution of the Arbitral Tribunal was forwarded to the petitioner. The petitioner has therefore been constrained to file the present petition.

19. It is submitted that with the respondent having failed to provide any list/panel for the constitution of the Arbitral Tribunal, despite a request made by the petitioner, the respondent has clearly acted contrary to the stipulated procedure. Clause 20.3 (ii) is categorical that the procedure for appointment of the arbitrators is that the respondent would forward a panel of 5 names to the petitioner and the petitioner would give his consent for any one name out of the panel to be appointed as one of the Arbitrators.

20. The main argument of the respondent is that no doubt there is already an Arbitral Tribunal in place to adjudicate the disputes pertaining to three claims raised by the petitioner. But the disputes about termination of the contract should not be referred to the same tribunal because of the reason firstly, in view of amendment of the Act, secondly, it is a distinct and complicated dispute, thirdly, there is a conflict of interest and fourthly, that the present petition has been filed after amendment. For the present dispute of termination, Arbitral Tribunal has been constituted till date for resolving the specific dispute relating to the illegal termination of the contract by the respondent and the consequences emanating therefrom. The Arbitral Tribunals are not permanent bodies having all encompassing jurisdiction but are particularly created for adjudication of specific claims/disputes. The Arbitral Tribunal that was constituted in the year 2014 was so constituted for the express purpose of considering the earlier pre-existing claims of the petitioner.

Section 21 of the Act is also crystal clear in this regard in as much as it provides that arbitration proceedings commence only when a request for that dispute to be referred to arbitration is received by the respondent.

With the request for the dispute relating to the illegal termination of the contract to be referred to arbitration being received by the respondent only after the dispatch of the letter dated 26th October, 2015 by the petitioner, there cannot be any question of the said dispute falling within the ambit of the earlier Arbitral Tribunal. Section 21 reads as under:-

"21. Commencement of arbitral proceedings- Unless otherwise agreed by the parties, the arbitral proceedings, in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

21. Let me now deal with the rival submissions of the parties as the respondent's counsel upon instruction from his client is not agreeable to the suggestion of the petitioner to constitute the independent Arbitral Tribunal in view of amended Act as well as the other legal issues raised by the learned counsel for the petitioner who submitted that in view of the circumstances in the present matter, the respondent has lost its right to appoint the Arbitral Tribunal as per contract.

22. The contract contains an arbitration clause i.e. clause 20. The relevant portions of the said clause i.e. Sub-clause 20.2 and 20.3 are reproduced here as under:-

"20.2 Amicable Settlement

In case any dispute between the Engineer and the Contractor remains unresolved, the Contractor shall, then, give notice of dissatisfaction and intention to commence arbitration to the

Employer within 28 days after the occurrence of such event of dissatisfaction. The Parties shall make attempts to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which a notice of dissatisfaction and intention to commence arbitration was given, even if no attempt at amicable settlement has been made.

20.3 Arbitration

Any dispute in respect of which amicable settlement has not been reached arising between the Employer and the Domestic or Foreign Contractor related to any matter arising out of or connected with this contract, the disputes shall be settled in accordance with the Indian Arbitration Act, 1996 and any statutory modification or re-enactment thereof.

Further, it is agreed between the parties as under:

- (i) Number of Arbitrators: The arbitral tribunal shall consist of 3 (Three) arbitrators.
- (ii) Procedure for Appointment of Arbitrators: The arbitrators shall be appointed as per following procedure:
 - (a) Employer will forward a panel of 5 names to the contractor and contractor will give his consent for any one name out of the panel to be appointed as one of the Arbitrators.
 - (b) Employer will decide the second Arbitrator out of the remaining four names in the panel as mentioned in para (a) above.
 - (c) The third Arbitrator shall be chosen by the two Arbitrators so appointed by the parties and shall act as Presiding Arbitrator. In case of failure of the two Arbitrators appointed by the parties to reach upon consensus within a period of 30 days from the appointment of the Arbitrators subsequently appointed, then,

upon the request of either or both parties, the presiding Arbitrator shall be appointed by the Managing Director, Rail Vikas Nigam Limited, New Delhi.

(iii) Qualification and Experience of Arbitrators: The arbitrators to be appointed shall have minimum qualification and experience as under:

(a) One member of the tribunal shall be necessarily a working (not below the rank of SAG) or a retired officer (retired not below the rank of SAG, age not exceeding 70 years and in reasonably good mental and physical fitness) of Indian Railway Accounts Service having experience in financial matters related to construction contracts.

(b) One member shall be a technical person having degree in Engineering and may be working (not below the rank of SAG) or retired officer (retired not below the rank of SAG, age not exceeding 70 years and in reasonably good mental and physical fitness) of any Engineering service of Indian Railways or equivalent service in RVNL, and having knowledge and experience of the Railway working.

(c) The Presiding Arbitrator shall necessarily be a serving railway/RVNL officer and he shall have same minimum qualification and experience as specified above for either of the two arbitrators.

(d) Out of 3 Arbitrators not more than one shall be a retired officer.

(iv) No person other than the persons appointed as per above procedure and having above qualification and experience shall act as arbitrator.

(v) Neither party shall be limited in the proceedings before such arbitrators to the evidence nor did arguments previously put before.

(vi) The reference to arbitration may proceed, notwithstanding that the Works shall not then be or be alleged to be complete, provided always that the obligations of the Employer, the Engineer and the Contractor shall not be altered by the reason of the arbitration being conducted during the progress of the Works. Neither party shall be entitled to suspend the Works, nor shall payment to the Contractor be continued to be made as provided by the Contract.

(vii) Arbitration proceedings shall be held at New Delhi, India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be in English."

23. It is settled law that there would be a failure of procedure necessitating recourse to Section 11(6) when a party that is bound to take steps to appoint the arbitrators refuses to so perform its obligation. The Supreme Court in ***Datar Switchgears Ltd. v. Tata Finance Ltd. and Another***, (2000) 8 SCC 151 has enunciated the law in this regard in the following words:

"An application under sub-clause (6) of Section 11 can be filed when there is a failure of the procedure for appointment of Arbitrator. 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 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 Arbitrator."

24. Once the respondent has failed to follow the procedure stipulated under Agreement, and the petitioner has thereafter approached this Court in exercise of jurisdiction under Section 11(6) of the Act, the respondent has forfeited its

right to appoint an Arbitral Tribunal of its choice comprising of its serving and retired officers.

25. The law in this regard is well settled. In the case of *Deep Trading Company v. Indian Oil Corporation and Ors.*, (2013) 4 SCC 35, the Supreme Court was concerned with a similar clause in a railways contract which provided for the appointment of an employee of the corporation as the arbitrator as being a necessary condition. The Supreme Court held that even in the event of such an arbitration clause, if the corporation forfeited its right to appoint the Arbitral Tribunal, then the Court was entitled to appoint an independent and impartial arbitrator and to give a go-bye to the terms of the arbitration clause to this extent. The relevant findings of the Supreme Court in this regard are reproduced here as under:

"19. Section 11(8) provides that Chief Justice or the designated person or institution, in appointing an arbitrator, shall have due regard to two aspects, (a) qualifications required of the arbitrator by the agreement of the parties; and (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator...

20. If we apply the legal position exposited by this Court in *Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr.* (2000) 8 SCC 151 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 that on 09.08.2004, the dealer called upon the Corporation to appoint the arbitrator in accordance with 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.

21. 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 aforesaid proposition of law was further reiterated by the Supreme Court in the case of *North Eastern Railway v. Tripple Engineering Works*, (2014) 9 SCC 288, wherein it was held as under:

"8. ...In the present case Clauses 64(3)(a)(ii) and (iii) of the General Conditions of Contract do not prescribe any specific qualification of the arbitrators that are to be appointed under the agreement except that they should be railway officers. As already noticed, even if the arbitration agreement was to specifically provide for any particular qualification(s) of an arbitrator the same would not denude the power of the Court acting Under Section 11(6), in an appropriate case to depart therefrom."

27. It is the admitted position that the present petition has been filed on the basis of the fresh cause of action as the respondent has terminated the contract between the parties. It is also undisputed fact that with regard to three claims, the arbitration proceedings were already pending. Normally, with the consent of the parties and as per settled, the reference of termination of contract should also be referred to the same Arbitral Tribunal because arbitration can be in respect of all disputes be the partly or all disputes regarding the contract as it would be convenient to the parties and it would also save time and costs of the parties in order to avoid conflict of judgments.

28. The main grievance of the petitioner is that it cannot expect to get a fair hearing from an Arbitral Tribunal that is comprised of serving officers of the respondent, which the present arbitration clause provides for, in as much as the issue involved in the subject disputes relate to the identification of responsibility for the cause of encumbrances in the performance of the work and the resulting additional cost and the present case would involve the Arbitral Tribunal fixing responsibility for the delays and defaults that plagued the execution of the work.

29. Dr. Amit George, learned counsel for the petitioner submits that it cannot be reasonably expected of a serving officer of a public-sector corporation that he or she would impute such faults to his or her very own employer, while continuing to be in the employment.

30. He submits that the assuming view of the respondent that there is already an Arbitral Tribunal in place to adjudicate the disputes arising out of the illegal termination of the contract, is incorrect in as much as no Arbitral Tribunal has been constituted till date for resolving the specific dispute relating to the illegal termination of the contract by the respondent and the consequences emanating therefrom. The Arbitral Tribunals, unlike the Courts of Law, are not permanent bodies having all encompassing jurisdiction but are particularly created for adjudication of specific claims/disputes. The Arbitral Tribunal that was constituted in the year 2014, even though prematurely, was so constituted for the express purpose of considering the earlier pre existing claims of the petitioner and its writ/jurisdiction can by no stretch of the imagination be said to automatically stretch to a future dispute that was not even in the contemplation of the parties when the Arbitral Tribunal was constituted in the year 2014. Further an Arbitral Tribunal is not constituted as

a permanent body to oversee all and sundry future disputes between the parties nor is it permanent agency for resolving the future disputes between the parties. On the other hand, an Arbitral Tribunal is constituted only for the adjudication of specific existing disputes.

In the case of *S.C.Mathur v. V.P.Punj* 1997 (2) Arb.LR 56 (Delhi), Single Judge of this Court has noted the trite principle in this regard as under:-

“13. Objections under Sections 30-33 of the Act vide I.As. No. 2967-2828/90 are by respondents No. 6 and 9 respectively, who happen to be the son and daughter-in-law of respondents No. 5 and 8. Their objections to the award are that the arbitrator cannot be the permanent agency for resolving the future disputes between the parties to the award and that his jurisdiction was limited to the disputes and differences which were pending on the date of the reference i.e. 9th October 1989. It is also their say that the award of the arbitrator is liable to be modified to the extent that the arbitrator could not vest with him the jurisdiction to deal with and adjudicate upon any dispute that may arise at a subsequent stage interse the brothers and the members of their families, etc; that the award is beyond the scope of the reference and liable to be modified to that extent. In reply, respondents No. 1, 11 to 15 and 16 to 18 have stated that there is no objection to the clarification on the award in the decree to the extent that the arbitrator cannot deal/decide future disputes. Apart from objection/no objection by respondents No. 1, 11 to 15 and 16 to 18, in law the arbitrator could not have appointed himself as permanent/future agency to resolve all future disputes that might arise between respondents No. 1, 5, 11 and 16 and their family members nor an arbitrator can be an award implementing agency. The arbitrator cannot be a permanent agency for resolving the disputes, if any, that might arise in future.”

31. Further, Section 21 of the Act is also crystal clear in this regard in as much as it provides that arbitration proceedings commence only when a

request for that dispute to be referred to arbitration is received by the respondent. With the request for the dispute relating to the illegal termination of the contract to be referred to arbitration being received by the respondent only after the dispatch of the letter dated 26th October, 2015 by the petitioner, there cannot be any question of the said dispute falling within the ambit of the earlier Arbitral Tribunal. Section 21 reads as under:

"21. Commencement of arbitral proceedings- Unless otherwise agreed by the parties, the arbitral proceedings, in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

32. There is no legal impediment for the petitioner to seek appointment of a second arbitrator to go into a dispute which is not considered in the earlier arbitration proceedings. The High Court of Karnataka in the case of ***Bruhat Bangalore Mahanagara Palike v. Serve and Volley Outdoor Advertising Private Limited*** in CMP No. 44/2012 decided on 29th May, 2013 has held as under:-

"4. Sri. Shashikiran Shetty, learned counsel for the respondent contends that once an arbitrator is appointed invoking the arbitration clause under an agreement it is not open for a petitioner to seek second arbitrator. I decline to accept this contention of learned counsel for the respondent. The Supreme Court in *Dolphin Drilling Limited v. Oil and Natural Gas Corporation Limited* (2010) 3 SCC 267 held that "In its present form Clause 28 of the agreement cannot be said to be a one time measure and it cannot be held that once an arbitration clause is invoked the remedy of arbitration is no longer available with regard to the other disputes that may arise in future." Therefore there is no legal impediment for the petitioner to seek appointment of a second arbitrator to go into a dispute which is

not considered in the earlier arbitration proceedings and which was not subject-matter then.” (emphasis supplied in bold)

33. Further, the occasion to refer the present disputes to an Arbitral Tribunal will arise in terms of Clause 20.2 of the Contract only once the disputes are specified, amicable settlement is initiated with reference thereto and then subsequently the unresolved disputes are sought to be referred to arbitration. Yet further, the present disputes all relate to the illegal termination of the contract and which are of a completely different genre and require to be adjudicated upon by an independent Arbitral Tribunal. Even otherwise, as it has consistently been the stand of the petitioner, the constitution of the Arbitral Tribunal for the earlier pre-existing claims is also in limbo in as much as the claims have not been attempted to be amicably settled in the first instance as provided for under Clause 20.2. of the Contract.

34. No doubt, the respondent has relied on certain case laws to the effect that the petitioner can refer the issue of termination of the contract to the existing Arbitral Tribunal. The petitioner cannot be forced to approach the existing Arbitral Tribunal in view of change of law as it is the prerogative of the petitioner to seek constitution of a distinct Arbitral Tribunal for adjudicating the issue of termination of the contract, once it is found that the disputes would be decided by the employee of the respondent. There is a clear circular which would apply to the facts and circumstances of the present case and it is rightly issued.

35. With regard to the arguments addressed on the issue of “all dispute” to be decided by the same Arbitral Tribunal, I do not agree with the submission of the respondent as this issue has now been settled by the Supreme Court in

the case of *Dolphin Drilling Limited v. Oil and Natural Gas Corporation Limited* (2010) 3 SCC 267 para 4,5,8,10 which reads as under:-

“4. Mr Agrawal submitted that the remedy of arbitration under Clause 28 of the agreement was a one-time measure and it could not be taken recourse to repeatedly even though the disputes may be different and unconnected to each other. The learned counsel further submitted that the arbitration was an expensive proposition and even though the respondent was liable to bear only half of the expenses, the financial burden cast by the arbitration proceedings in terms of fees for the learned arbitrators and counsel/solicitors and other incidental expenses was quite onerous. Hence, the arbitration clause in the agreement envisaged one, single arbitration for all disputes between the parties and not repeated arbitrations for different disputes arising between the parties at different times under the same agreement.

5. The gist of the respondent's objection is contained in sub-*paras (d) and (e)* of Para 4 of its counter-affidavit which are reproduced below:

“(d) The respondent would further beg leave of this Hon'ble Court to submit that in the list of dates and in the arbitration application, the petitioner did not refer to the fact that the petitioner had already invoked Clause 28 of the agreement in 2004. Pursuant to the said request for arbitration, an Arbitral Tribunal consisting of Hon'ble Mr Justice B.P. Sharaf (Retired), Hon'ble Mr Justice S.C. Pratap and Hon'ble Mr Justice A.K. Dutta (Retired) was constituted in the year 2005. The said arbitration has continued for the last more than four years. Needless to mention, the respondent has incurred heavy expenses in the arbitration which is at the concluding stage i.e. arguments have been completed and written submissions are to be filed.

(e) In view of the aforesaid invocation of Clause 28 by the petitioner, the notice issued by the petitioner on 29-1-2008 purportedly invoking the arbitration clause once again and raising further disputes was not permissible under the

contract. It is most respectfully submitted that there cannot be repeated arbitrations in relation to the very same contract. The arbitration agreement cannot be interpreted to imply that for every dispute under the contract, the parties can invoke a fresh arbitration. As per the contract, all disputes should have been referred to arbitration at one go.”

8. The plea of the respondent is based on the words “all disputes” occurring in Para 28.3 of the agreement. Mr Agrawal submitted that those two words must be understood to mean “all disputes under the agreement” that might arise between the parties throughout the period of its subsistence. However, he had no answer as to what would happen to such disputes that might arise in the earlier period of the contract and get barred by limitation till the time comes to refer “all disputes” at the conclusion of the contract. The words “all disputes” in Clause 28.3 of the agreement can only mean “all disputes” that might be in existence when the arbitration clause is invoked and one of the parties to the agreement gives the arbitration notice to the other. In its present form Clause 28 of the agreement cannot be said to be a one-time measure and it cannot be held that once the arbitration clause is invoked the remedy of arbitration is no longer available in regard to other disputes that might arise in future.

10. For the reasons aforesaid, I am unable to sustain the objection raised on behalf of the respondent. In the result, the application is allowed. The applicant has nominated Justice S.P. Bharucha, a former Chief Justice of India, as its arbitrator. Justice Mrs Sujata V. Manohar, a former Judge of this Court, is appointed arbitrator on behalf of the respondent, subject to her consent and on such terms as she may deem fit and proper.”

36. With regard to applicability of the provisions of the Act (as amended in 2015), in the present case as the arbitration clause between the parties is crystal clear that disputes would be settled in accordance with the Indian Arbitration Act, 1996 "and any statutory modification or reenactment thereof." which would encompass the amendment of 2015. Yet further, the invocation

of arbitration in the present case was resorted to by the petitioner on 26th October, 2015 by means of its letter of even date. Section 26 of the Act (as amended in 2015) states that the amended Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of the Act i.e. 23rd October, 2015. Hence, the provisions of the amended Act squarely apply to the present petition.

Thus, the earlier pendency of the separate pre-existing disputes has no bearing on the maintainability of the present petition in as much as the present petition is concerned with the distinct and separate dispute arising out of the illegal termination of the contract by the respondent.

37. In light of the aforesaid facts and circumstances in the above matter, this Court can exercise its power to appoint an independent and impartial Arbitral Tribunal and to give a go-bye to the terms of the arbitration clause between the parties as the present disputes to an Arbitral Tribunal will arise in terms of Clause 20.2 of the Contract only once the disputes are specified, amicable settlement is initiated with reference thereto and then subsequently the unresolved disputes are sought to be referred to arbitration. The present disputes all relate to the illegal termination of the contract and which are of a completely different genre and require to be adjudicated upon by an independent Arbitral Tribunal.

38. Other reason given by the petitioner that it has apprehension on the basis of certain instances of the initiating departmental proceedings against officers in relation to the discharge of their quasi-judicial duties as arbitrators as appeared from the Circular No. 2006/V-1/DAR/1/4 issued in March 2006 by the Ministry of Railways (Railway Board) which states as under:-

"In continuation of the Boards letter No. 99/V-1/ CVC1/9 dated 13th July, 1999, regarding proceedings against delinquent officials, discharging quasi-judicial functions, it is desired to initiate investigations, based on source information, into the Arbitration Cases, involving "corrupt motive" or "giving undue favour to party" in deciding the Arbitration Award."

39. It is quite evident that the respondent cannot insist on an Arbitral Tribunal comprised of its serving or retired officers in view of amended Act if the petitioner invoked the arbitration after the commencement of the Act. Thus, the petitioner is entitled to the appointment of an independent and impartial Arbitral Tribunal in as much as the respondent has forfeited its right to appoint an Arbitral Tribunal of its choice.

40. Even in view of the amendment in the Act, the party is entitled to the appointment of an independent and impartial Arbitral Tribunal as per Section 11(8) of the Act (as amended in 2015), if the party would be able to cross the hurdle of Section 26 of the Amended Act.

41. The constitution of the same Arbitral Tribunal is also opposed to the parameters of Section 12 of the Act (as amended in 2015) and for this reason also the dispute relating to the illegal termination of the contract has to be referred to an independent and impartial Arbitral Tribunal.

42. The relevant portions of Section 12 reads as under:-

"Section 12

...(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, whether financial, business, professional or other kind, 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."

"... (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".

43. The Fifth Schedule i.e. supplementary provision read with Section 12 (1)(b) mandates that the appointment made by any party which would give rise to justifiable doubts as to the independence or impartiality of arbitrator if he has relationship with the parties or counsel or the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party, the same would give rise to justifiable doubts. Similarly the Seventh Schedule read with Section 12 (5) mandates that there shall not be any arbitrator's relationship with the parties or counsel who should also not be an employee, consultant, advisor or has any other past or present business relationship with a party. If the answer is yes, the person should not be appointed as arbitrator in the said matter.

In the present case, the suggestion of the respondent to appoint its own employee who is either present employee or retired employee, the request

cannot be accepted as the arbitration is invoked after amended Act has come into operation. In case the said request is allowed, the very purpose of amending the Act would be defeated.

44. I am clear in my mind that under the Arbitration and Conciliation (Amendment) Act, 2015, if any such case is covered as referred above in earlier para which cover the supplementary provision of schedule Fifth and Seventh, under those circumstances, the Court is duty bound to secure the appointment of an independent and impartial arbitrator as per Section 12 of the Act (as amended in 2015). As the arbitration is being an employee of one of the parties would definitely give rise to justifiable doubt as to his independence and impartiality.

45. In the light of the above, the prayer made in the petition is allowed. Justice R.M. Lodha (Former Chief Justice of India), C-61, First Floor, Soami Nagar, Near Panchsheel Enclave, A-Block New Delhi-110017, also at 74, Suraj Nagar (West), Civil Lines, Jaipur-302006 (Rajasthan), (Tel. No.011-264493040), Justice R.V. Easwar (retired Judge of this Court), D-41, Hauz Khas, New Delhi, (Mob.9560899997) and Justice M.L.Mehta (retired Judge of this Court), H-34 Jungpura Extension, near Eros Cinema, New Delhi-110014, (Mob.9910384620) are appointed as Arbitrators in the matter as per clauses of the Agreement to adjudicate the dispute between the parties. Justice R.M. Lodha (Former Chief Justice of India) would be presiding member of the panel of three learned Arbitrators. Both parties would file their respective claims and counter-claims with regard to subject matter of the dispute in hand.

46. The arbitration shall take place under the aegis of Delhi International Arbitration Centre ('DAC'). The Arbitrators shall ensure the compliance of

the provisions of Arbitration and Conciliation (Amendment) Act, 2015 before commencing the arbitration. The fees of the learned Arbitrator shall be in terms of the Delhi International Arbitration Centre (Administrative Cost Arbitrator's Fees) Rules. The parties to appear before the Centre Arbitrator on 20th May, 2016 at 5.00 pm for directions.

47. The petition is accordingly disposed of. No costs.

48. Copy of this order be given *dasti* to the learned counsel for the parties and a copy thereof be delivered to all the learned Arbitrators as well as Additional Coordinator, DAC forthwith.

APRIL 29, 2016

**(MANMOHAN SINGH)
JUDGE**

