

HIGH COURT OF CHHATTISGARH, BILASPUR

Arbitration Application No.34 of 2014

Order reserved on: 28-7-2017

Order delivered on: 11-8-2017

M/s. Orissa Concrete and Allied Industries Limited, 53, Industrial Area, Bhanpuri, PO Birgaon, Raipur – 493 221, Chhattisgarh, Having its Registered Office at 3, Gokhale Road, Kolkata, West Bengal, Through Mr. P.K. Dhande (Law Officer) duly authorized by the applicant Company to file the instant application, S/o Late Shri P.M. Dhande, Aged about 52 years, R/o 48/2, Radhika Nagar, Supela, Bhilai Nagar, Police Station Supela, Distt. Durg, Chhattisgarh.

---- Applicant

Versus

1. Union of India, Through the Principal Secretary, Ministry of Railways, Rail Bhawan, New Delhi.
2. South East Central Railway, Though its General Manager (Engineering), GM's Building, Bilaspur, Chhattisgarh.
3. Principal Chief Engineer, South East Central Railway, GM's Building, Bilaspur, Chhattisgarh.
4. Chief Engineer (TS & HQ), South East Central Railway, GM's Building, Bilaspur, Chhattisgarh.

---- Non-applicants

For Applicant:	Mr. Kishore Shrivastava, Senior Advocate with Mr. Kapil Jain, Mr. Abhijeet Shrivastava and Mr. Sumesh Bajaj, Advocates.
For Non-applicants:	Mr. Abhishek Sinha and Ms. S. Harshita, Advocates.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. Invoking the jurisdiction of this Court under Section 11 (6) of the Arbitration and Conciliation Act, 1996, read with the Scheme for

Appointment of Arbitrators by the Chief Justice Chhattisgarh High Court, 2002, this application has been filed for appointment of arbitrator, by the applicant herein.

2. Brief facts essential to adjudicate the application are as under: -

2.1) The applicant is a company registered under the provisions of the Indian Companies Act, 1956. The non-applicant South East Central Railway (SECR) floated a tender for manufacture and supply of Prestressed Mono-Block Concrete Line Sleepers (Pre-Tensioned Type) for Broad Gauge (1673 mm) from existing RDSO Certified Concrete Sleeper Manufacturing Plants. It was processed in which the applicant also participated and purchase order was issued in favour of the applicant on 17-10-2013. Agreement was entered into on 19-12-2013. Supply was made by the applicant but, in between, dispute arose between the parties leading to invocation of arbitration clause by the applicant in terms of arbitration clause contained in clause 2900, by letter dated 14-10-2014 which was duly received by the non-applicant authorities and when arbitrator was not appointed, again the request was reiterated on 4-11-2014. When arbitrator was not appointed, this application was filed for appointment of impartial and independent arbitrator, before this Court.

2.2) On notice being issued, the non-applicant SECR has filed its reply stating inter alia that the application as framed and filed is not maintainable as it is premature having been filed on 13-11-

2014 even before the expiry of 30 days. It has further been pleaded that they have appointed arbitrator on 21-11-2014 which is apparent from Annexure R-1 filed with the return which is a communication addressed by the Deputy General Manager (G), SECR to the arbitrator for adjudicating the arbitral dispute. It has also been pleaded that the arbitration clause, as agreed between the parties is a conditional arbitration clause, either the arbitration has to be by a person appointed by the authority i.e. the General Manager and has to be a Gazetted Railway Officer, and if for some reason if it is not possible, then the dispute would not be referred for arbitration at all. The arbitration clause would not survive and stand frustrated and then the applicant would be at liberty to avail the remedy under the regular civil law and will have to approach the jurisdictional court, as the remedy of arbitration in such situation would stand extinguished.

3. Rejoinder has been filed by the applicant stating inter alia that between the applicant and the non-applicants, identical dispute arose in Patna High Court and the Patna High Court in same facts situation has allowed the application for appointment of arbitrator and that will bind upon the non-applicants herein. In that case also, the application was filed within 30 days from the date of serving notice for appointment of arbitrator.
4. Mr. Kishore Shrivastava, learned Senior Advocate appearing for the applicant, would submit as under: -

4.1) Making of application on 30th day i.e. before the expiry of the period of 30 days would be of no consequence so as to the maintainability of application for appointment of arbitrator, as the non-applicants are said to have appointed arbitrator on 21-11-2014 after service of notice from this Court to the non-applicants which clearly shows that the application is not premature. The application can be said to have been filed on 14-11-2014.

4.2) Once the application for appointment of arbitrator is filed, the non-applicants' right for appointment of arbitrator ceases.

4.3) The arbitration clause contained in clause 2900 of the agreement is in two parts, one is settlement of dispute by arbitration and second part is appointment of sole arbitrator which shall be Gazetted Railway Officer and therefore, second part is separable from first part. Drawing my attention to Section 12(1) of the Arbitration and Conciliation Act, 1996, as unamended, learned Senior Counsel would argue that arbitrator has to be independent and impartial.

4.4) The Arbitration and Conciliation Act, 1996 has been amended with effect from 23-10-2015 in which sub-section (5) has been inserted in Section 12 and under Section 12(5), the Seventh Schedule has been enacted. Section 12(5) of the Act of 1996 clearly states that notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of

the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator and therefore the Gazetted Railway Officer to be appointed as arbitrator by virtue of clause 2900 of the agreement, would fall within clause 1 of the Seventh Schedule enacted under Section 12(5) of the Act of 1996 and shall be ineligible to act as arbitrator. Therefore, an impartial and independent person has to be appointed as arbitrator.

4.5) By virtue of the provisions contained in Section 11(8) of the Act, 1996, even otherwise, once application is made before this Court under Section 11(6) then the Court in exercise of power conferred under Section 11(6) read with Section 11(8) can appoint independent arbitrator excluding the named arbitrator in the agreement.

4.6) The order of the non-applicants appointing arbitrator on 21-11-2014 has not been communicated at all to the applicant till this date or at least before the application for appointment of arbitrator was filed before this Court on 13-11-2014. Even otherwise, the order of appointment is 21-11-2014 that has not been filed, only a communication by the Deputy General Manager (G), SECR which has been addressed to the said arbitrator has been filed. Unless the order of appointment is communicated to the applicant it cannot be said that the appointment of arbitrator has been made and it has come into force requiring the applicant to enter into reference for resolving

the dispute by way of arbitration.

4.7) Alternatively, he would submit that if the case of the non-applicants is accepted as it is that arbitrator has been appointed on 21-11-2014, then by virtue of the amendment contained in Section 29-A(4) of the Act, 1996, award has to be delivered within a period of 12 months from the date of arbitral award and unless it is extended by the Court under Section 29-A(2), which having not been, the mandate of the arbitrator would stand terminated by operation of law as contained in sub-section (4) of Section 29-A of the Act, 1996.

5. Mr. Abhishek Sinha, learned counsel appearing for the non-applicants SECR while vehemently opposing the submissions made by the learned Senior Advocate for the applicant, would contend as under: -

5.1) The required waiting period of 30 days for making application for appointment of arbitrator is imperative and unless the application is not made prior to the expiry of 30 days, the application as framed and filed is premature and is liable to be rejected on this count alone.

5.2) The arbitration agreement as contained in clause 2900 of the agreement is a conditional arbitration agreement and if the officer of the SECR cannot be appointed as arbitrator, then the matter cannot be referred to arbitration at all in view of sub-clause (f) of clause 2900. Reliance has been placed upon a

decision of the Supreme Court in the matter of **Newton Engineering and Chemicals Limited v. Indian Oil Corporation Limited and others**¹.

5.3) Since in the present case, notice for appointment of arbitrator has been served on 14-10-2014 and proceeding having been commenced with appointment of arbitrator on 21-11-2014 by virtue of Section 26 of the Amended Act of 2015, the provisions of old Act would apply and the provisions of the new Act including Section 12(5) and the Seventh Schedule would not apply. Therefore, the applicant cannot take the advantage of Section 12 (5) of the Act of 1996.

5.4) Only the named arbitrator i.e. Gazetted Railway Officer can be appointed as arbitrator.

6. Learned Senior Counsel making rejoinder submission to the submissions made by learned counsel for the non-applicants, would submit that Section 12(5) of the Act of 1996 is quite indicative of the legislative intent that impartial arbitrator has to be appointed by the court and person named in the Seventh Schedule shall be eligible to be appointed as arbitrator. At the most, it can be said that there is conflict between Section 26 of the Act of 1996 and Section 12 (5) of the Amended Act, but Section 12 (5) would prevail as it is quite indicative of the legislative intent to supersede the prior agreement entered into between the parties. Therefore, Section 12 (5) of the Act of 1996

¹ (2013) 4 SCC 44

would even apply to the agreement which has been entered into prior to coming into force of the the provisions of the Amended Act of 2015.

7. I have heard learned counsel for the parties and also considered their rival submissions made herein-above and gone through the record with utmost circumspection.
8. Clause 2900 of the contract provides for arbitration clause which reads as under:-

“2900. Arbitration

(a) In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this contract (except as to any matters the decision of which is specially provided for by these or the Special conditions) the same shall be referred to the sole arbitration of a Gazetted Railway Officer appointed to be the arbitrator, by the general Manager in the case of contracts entered into by the Zonal Railways and Production Units; by any Member of the Railway Board, in the case of contracts entered into by the Railway Board and by the Head of the Organization in respect of contracts entered into by the other Organizations under the Ministry of Railways. The Gazetted Railway Officer to be appointed as arbitrator however will not be one of those who had an opportunity to deal with the matters to which the contract relates or who in the course of their duties as railway servant have expressed views on all or any of the matters under dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract.

(b) In the event of the arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, or his award being set aside by the court for any reason, it shall be lawful for the authority appointing the arbitrator to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.

(c) It is further a term of this contract that no person other than the person appointed by the authority as aforesaid should act as arbitrator and that if for any reason that is not possible, the matter is not to be referred to arbitration at all.

(d) The arbitrator may from time to time with the consent of all the parties to the contract enlarge the time for making the award.

(e) Upon every and any such reference the assessment of the cost incidental to the reference and award respectively shall be in the discretion of the arbitrator.

(f) Subject as aforesaid, the Arbitration and Conciliation Act, 1996 and the rules there under and any statutory modifications thereof for the time being in force shall be deemed to apply to the arbitration proceedings under this clause.

(g) & (h) **** **** ****”

9. In order to judge the dispute raised at the Bar, it would be necessary to refer Section 11 of the Act, 1996 which reads as under:-

“11. Appointment of arbitrators.-

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and-

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to-

(a) any qualifications required of the arbitrator by the agreement of the parties; and

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

(9) to (12) ***

***”

10. A plain reading of Section 11 (4) and 11 (5) of the Act, 1996 would show that if one party demands appointment of an arbitrator and the other party does not appoint any arbitrator within thirty days of such demand, the right to appointment at the instance of one of the parties does not get automatically forfeited. If the non-applicants make an appointment even after 30 days of demand but the applicant has not moved the Court under Section 11 of the Act, that action on the part of the non-applicants would be sufficient. In other words, in cases arising under Section 11(4) and 11(5), if the non-applicants have not made an appointment within thirty days of demand, right to make an appointment of an arbitrator is not forfeited but continues, but such appointment shall be made before the other party files the application under Section 11 seeking appointment of an arbitrator before the High Court. It is only then the right of the non-applicants ceases. But so far as the period of 30 days is concerned, it is not mentioned in sub-section (6). The period of limitation is only provided in sub-sections (4) and (5).

11. A three judge Bench of the Supreme Court, in the case of **Punj Lloyd Ltd. v. Petronet MHB Ltd.**², has held: once notice period of thirty days has expired and the party has moved the Hon'ble Chief Justice of the High Court under Section 11 (6) of the Act, the other party loses his right to appoint an arbitrator on the

² (2006) 2 SCC 638

basis of arbitral agreement.

12. The Supreme Court, in the above case, while taking the above view, had relied on the judgment of its own rendered in the case of **Datar Switchgears Ltd. v. Tata Finance Ltd.**³. In paragraph 19 of the judgment, the Supreme Court has observed as under:

“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 [do] 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*, [which] 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 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.”

13. The Supreme Court, in the case of **Ace Pipeline Contracts (P) Ltd, v. Bharat Petroleum Corpn. Ltd.**⁴ has observed in para 10 of its judgment as under:-

“10. But in sub-section (6), where, the procedure has already been agreed upon by the parties, as in the present case, and in that event, if a party fails to act as required under that procedure or the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure or a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may in that event, request the Chief Justice or

3 (2000) 8 SCC 151

4 (2007) 5 SCC 304

a person or an institution designated by him to make necessary measures, unless the agreement on the appointment procedure provides other means for appointment of arbitrator. Therefore, so far as the period of thirty days is concerned, it is not mentioned in sub-section (6). The period of limitation is only provided under sub-sections (4) and (5) of Section 11. As such, as per the statute, the period of limitation of thirty days cannot be invoked under sub-section (6) of Section 11 of the Act.”

Somewhat different view was expressed by the Supreme Court in the case of **Union of India v. Bharat Battery Mfg. Co. (P) Ltd.**⁵.

14. Looking to difference of opinion of two co-ordinate Benches of the Supreme Court, the matter was referred to three Judge Bench in **Northern Railways Administration, Ministry of Railway v. Patel Engineering Company Limited**⁶, wherein the Supreme Court in paras 12 and 14 of its judgment has observed as under:-

“12. A bare reading of the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to and/or given effect as closely as possible. In other words, the Court may ask to do what has not been done. The Court must first ensure that the remedies provided for are exhausted. It is true as contended by Mr. Desai, that it is not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations.

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

5 (2007) 7 SCC 684

6 (2008) 10 SCC 240

secure the appointment of an independent and impartial arbitrator. It needs no reiteration that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements of sub-section (8) of Section 11 have to be kept in view, considered and taken into account. If it is not done, the appointment becomes vulnerable. In the circumstances, we set aside the appointment made in each case, remit the matters to the High Court to make fresh appointments keeping in view the parameters indicated above.”

15. The present case falls under Section 11(6) of the Act. The period of thirty days is not mentioned in sub-section (6). The period of limitation is only provided under sub-sections (4) and (5) of Section 11 of the Act. As such, as per the Act, 1996 the limitation of thirty days period cannot be applied while considering application under sub-section (6) of Section 11 of the Act.

16. The contention of learned counsel for the non-applicants would be that the application is premature as it has been filed before the expiry of thirty days holding that, the request for appointment of arbitrator was made on 14-10-2014 to the non-applicants, which was received on same day by the non-applicants, and the application for appointment of arbitrator was filed before the court on 13-11-2014 *i.e.* on thirtieth day, but the fact remains that arbitrator was not appointed by the non-applicants till filing of application for appointment of arbitrator and once the application under Section 11(6) is filed, the non-applicants lose their right to appoint arbitrator, thereafter and appointment has to be made by

this Court exercising powers under Section 11(6) of the Act.

17. The non-applicants have also taken a plea that the arbitrator was appointed and order appointing arbitrator was duly communicated to the applicant. The facts of the case would show that Deputy General Manager of SECR on 21.11.2014 communicated to Shri Vipra Das Naskar, CEDE/SECR that General Manager, SECR has appointed him as sole arbitrator for adjudicating the subject claims and disputes and the copy has been endorsed to the applicant. It is only communication issued by General Manager to the said officer and it is not an order appointing arbitrator to adjudicate the dispute arisen between the parties. No such order appointing sole arbitrator has been brought on record to establish that the non-applicants have in fact and actually appointed arbitrator pursuant to the request made by the applicant. Only memo dated 21-11-2014, which has been issued after filing the arbitration application before this Court on 13-11-2014, has been placed on record. Even otherwise, the memo dated 21-11-2014 is after the applicant has filed this application for appointment of arbitrator. Therefore, the submission raised on behalf of the non-applicants in this regard that the application for appointment of arbitrator is premature, deserves to be rejected.
18. Sub-section (8) of Section 11 of the Act clearly provides that Chief Justice or his designate while making an appointment of arbitrator shall have due regard to the qualification required of

the arbitrator by the agreement of the parties; and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

19. Prior to the Amendment Act, 2015 came into force, the Supreme Court in the matter of **Bihar State Mineral Development Corporation and another v. Encon Builders (I) (P) Ltd.**⁷

dealing with bias of named arbitrator held as under:-

“17. There cannot be any doubt whatsoever that an arbitration agreement must contain the broad consensus between the parties that the disputes and differences should be referred to a domestic tribunal. The said domestic tribunal must be an impartial one. It is a well-settled principle of law that a person cannot be a judge of his own cause. It is further well settled that justice should not only be done but manifestly seen to be done.

18. Actual bias would lead to an automatic disqualification where the decision-maker is shown to have an interest in the outcome of the case. Actual bias denotes an arbitrator who allows a decision to be influenced by partiality or prejudice and thereby deprives the litigant of the fundamental right to a fair trial by an impartial tribunal.

31. As the acts of bias on the part of the second appellant arose during execution of the agreement, the question as to whether the respondent herein entered into the agreement with his eyes wide open or not takes a back seat. An order which lacks inherent jurisdiction would be a nullity and, thus, the procedural law of waiver or estoppel would have no application in such a situation.”

20. The applicant's demand for appointment of arbitrator *dehors* the arbitration clause is based on Section 12(5) of the Act of 1996 which has been brought into statute book *w.e.f.* from 12-10-2015 by Amendment Act, 2015.

⁷ (2003) 7 SCC 418

21. The Act of 1996 suffered amendment by the Arbitration and Conciliation (Amendment) Act, 2015 and Section 12(5) was inserted with effect from 12-10-2015 which reads as under:-

“12. Grounds for challenge.-

(1) to (4)

(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.

Sub-section (5) of Section 12 contains a non obstante clause.

The Seventh Schedule enacted under Section 12(5) states as under:-

“1. The arbitrator is employee, consultant, advisor or has any other past or present business relationship with a party.

.....”

22. In a very recent decision in the matter of **M/s. Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd.**⁸ Their Lordships of the Supreme Court considered the amendment so made in the Section 12(5) of the Act. The Supreme Court framed the question for consideration as under:-

“13. ... that the moot question is as to whether panel of arbitrators prepared by the respondent violates the amended provisions of Section 12 of the Act. ...”

The Supreme Court held as under: -

“14. It is a well known fact that the Arbitration and Conciliation Act, 1996 was enacted to consolidate and amend the law relating to domestic arbitration, inter alia, commercial arbitration and enforcement of foreign arbitral awards etc. It is also an accepted position that while enacting the said Act, basic structure of UNCITRAL Model Law was kept in mind. This became necessary in the wake of globalization and the adoption of policy of liberalisation of Indian economy by the Government of India in the early 90s. This model law of UNCITRAL provides the framework in order to achieve, to the maximum possible extent, uniform approach to the international commercial arbitration. Aim is to achieve convergence in arbitration law and avoid conflicting or varying provisions in the arbitration Acts enacted by various countries. Due to certain reasons, working of this Act witnessed some unpleasant developments and need was felt to smoothen out the rough edges encountered thereby. The Law Commission examined various shortcomings in the working of this Act and in its first Report, i.e., 176th Report made various suggestions for amending certain provisions of the Act. This exercise was again done by the Law Commission of India in its Report No. 246 in August, 2004 suggesting sweeping amendments touching upon various facets and acting upon most of these recommendations, Arbitration Amendment Act of 2015 was passed which came into effect from October 23, 2015.”

23. Their Lordships concluded the effect of non obstante clause contained in sub-section (5) of Section 12 as under:-

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

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

24. Their Lordships while considering the object of inserting Section 12(5) of the Act have held that provision has been brought condition of neutrality in appointment of arbitrator and observed in paragraph 19 as under:-

“19. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in *Jivraj v. Hashwani* (2011) UKSC 40 in the following words:

“the dominant purpose of appointing an arbitrator is the impartial resolution of dispute between the parties in accordance with the

terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.”

25. Finally, Their Lordships concluded as under:-

“23. ... The amended provision puts an embargo on a person to act as an arbitrator, who is the employee of the party to the dispute. It also deprives a person to act as an arbitrator if he had been the consultant or the advisor or had any past or present business relationship with DMRC. No such case is made out by the Petitioner.

24. Section 12 has been amended with the objective to induce neutrality of arbitrators, viz., their independence and impartiality. The amended provision is enacted to identify the 'circumstances' which give rise to 'justifiable doubts' about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, Seventh Schedule mentions those circumstances which would attract the provisions of Sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empaneled by the Respondent are not covered by any of the items in the said list.”

26. Applying the principle of law to the facts of the case, it is *quite*

vivid that as per the arbitration clause, the sole arbitrator to be appointed by the General Manager necessarily will be the Gazetted Railway Officer, which clearly falls within clause (1) of Seventh Schedule of the Act of 1996 and thereby his appointment is hit by Section 12(5) of the Act of 1996, therefore, the named arbitrator of the arbitration clause cannot be appointed as an arbitrator following the principle of law laid down by the Supreme Court in **M/s. Voestalpine Schienen GMBH** (supra).

27. Therefore, in exercise of my power conferred under Section 11(6) of the Act of 1996, I hereby appoint Hon'ble Mr. Justice Dhirendra Mishra, Tilak Nagar, Bilaspur as a sole arbitrator to adjudicate the arbitral dispute between the parties. Registry is directed to communicate this order to Hon'ble Mr. Justice Dhirendra Mishra, Tilak Nagar, Bilaspur to comply with Section 12 of the Act of 1996 and to enter upon reference to adjudicate the dispute in accordance with the Act of 1996.

28. The arbitration application is allowed to the extent indicated herein-above. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge