

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****ARBITRATION APPLICATION NO. 378 OF 2018**

Smt.Asha Jain, Proprietor M/s.D.K.Steel ...Applicant

Versus

1.Union of India

2.The General Manager, Western Railway

3.The Deputy Chief, Engineer/TS

4.The Chief Engineer/TS

5.The Director General/QAC ...Respondents

Mr.Parthiv Mehta I/b. R.R.Nair, for the Applicant.

Mr.T.J.Pandian, for Respondent nos.1 to 4.

CORAM : G.S. KULKARNI, J.

RESERVED ON: 15 January 2019

PRONOUNCED ON : 26 February 2019

ORDER:

1. By this application under Section 11 of the Arbitration and Conciliation Act,1996 (for short 'the Act'), the applicant prays for appointment of an arbitrator to adjudicate the disputes and differences between the parties arising under an agreement for manufacturing and supply of composite grooved rubber sole plates, as awarded to the applicant under an open tender as floated by the respondents-railways. The agreement is contemplated under the purchase order dated 21 February 2013 for supply of 2,14,544 number of rubber plates.

2. The case of the applicant in short is:-

(i) After issuance of the purchase order the Applicant duly manufactured the requisite quantity of CGRSP and by a letter dated 5 July 2013 called upon the respondent no.5 to carry out such inspection as required under the contract. Pursuant to the letter dated 5 July 2013 and in terms of the Purchase order an inspection was duly carried out by the respondent no.5 at the factory of the Applicant from 10 August 2013 to 20 August 2013. After such inspection the CGRSP supplied by the Applicant was found to be in conformity with the IRS specification and the requirements of the Respondent Railway. An inspection certificate dated 21 August 2013 was duly issued by the respondent no.5 certifying such fact. The material was inspected by RDSO's Engineer chemically and physically and being fully satisfied and an Inspection Certificate bearing No.M&C/POC/Dev/Insp/1114 dated 21 August 2013 was issued after being counter-signed by the a Senior Official with instructions to dispatch the material. Accordingly, full material was dispatched to Sr.Section Engineer Nagda Depot on 21 August 2013 which was received in good condition without any demur or protest. The Applicant submitted a "No Claim Certificate" on 5 December 2013 and on certification by Dy.Chief Engineer/TS that there are no dues outstanding against the applicants. The Security Deposit was released by the

respondent on 6 January 2014 and the contract was concluded after fulfillment of the terms and conditions. After a lapse of 16 (Sixteen) months of the supply, by a letter dated 29 December 2014 issued by the respondent no.1, the Applicant was informed that a few of the Composite Grooved Rubber Sole Plates supplied by the Applicant, had deformed within a short time of laying of the track and accordingly a joint inspection was proposed with (a) authorized representative of RDSO the inspecting officials and (b) authorised representative of the field unit of Sr.DEN (Co-ordn) Ratlam and (c) representative of the Applicant. Accordingly, the representative of the Applicant reached at Nagda. However, no representative of the respondent no.5 i.e. RDSO was available.

(ii) The Applicants appeared for the joint inspection held on January 15, 2015 wherein it was observed that the CGRSP supplied by the Applicant were laid incorrectly by the respondents, such fact was duly recorded in the joint inspection report which was duly signed and attested by the representative of the respondent and the Applicant. The respondent conducted a unilateral inspection on 08.05.2015 at the same place, a copy of which was forwarded to the Applicant by the RDSO under the cover of letter dated 10.09.2015. According to the applicant the contents of the unilateral report were absolutely contradictory to the joint inspection report dated 15.01.2015 and as such unilateral

inspection conducted by the respondent was illegal and contrary to the purchase order. In spite of the joint inspection held on 15.01.2015 and the same being attended by the Applicant, the Applicant was time and again called upon to attend further joint inspections. The advocates for the applicant called upon the respondent to close the instant case as admittedly the goods were laid incorrectly by the respondent, for which the Applicant could not be held responsible. By a letter dated 14/18.12.2015 the respondent once again threatened and/or compelled the Applicant to attend the joint inspection scheduled on 28.12.2015, failing which the decision to collect the sample from site will be taken unilaterally.

3. The purchase order provides that the contract shall be governed by IRS conditions as amended upto the date of opening of the tender. The case of the applicant is that the supply was effected under the said purchaser order by 21 August 2013 and a final invoice for an amount of Rs.1,06,59,864/- was raised.

4. The applicant being aggrieved by the approach of the respondent had instituted a suit before Calcutta High Court (C.S.No.340 of 2015) alongwith an injunction application. By an order dated 23 December 2015 passed by the Calcutta High Court, the respondent was restrained from taking any coercive action against the applicant. The respondent appeared in the said suit and preferred an application under Sections 5

and 8 of the Act. The said application was heard by the learned Single Judge of the Calcutta High Court, and by an order dated 13 June 2016 came to be allowed. It was held that the suit was not maintainable in view of the arbitration agreement between the parties and that the disputes in the suit are covered by the arbitration agreement. The Court in allowing the said application made the following observations:-

“..... Merely because the contract has come to an end, the arbitration clause does not automatically get perished, rendered inoperative but survives for resolution of dispute arising in respect of or with regard to or under the contract. The arbitration clause under IRS Conditions of Contract being No.2900 is express, explicit and clear that in the event of any dispute or question or difference arising under these conditions or any special condition of contract or in connection with the contract the same would be referred to a sole arbitration of a gazetted Railway Officer appointed by the General Manager. IN order to have the clear picture the arbitration clause is quote herein below:-

“ARBITRATION

- a. In any 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 top 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 Railway 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 Organisation in respect of contracts entered into by the other Organisations 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 Act, 1940 and the rule 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. The venue of arbitration shall be the place from which the acceptance note is issued or such other place as the arbitrator at his discretion may determine.

h. In this clause the authority, to appoint the arbitrator includes, if there be no such authority, the officer who is for the time being discharging the functions of that authority, whether in addition to other functions or otherwise.

... ..

On the above discussions, this Court finds the subject disputes are covered by arbitration clause and allows an application being G.A. 511 of 2016 by referring the parties to arbitration.”

5. An appeal as preferred by the applicant against the said order dated 13 June 2016 passed by the learned Single Judge also came to be rejected by the Division Bench of Calcutta High Court, by an order dated 13 April 2017, as being not maintainable.

6. When the said appeal of the applicant was pending before the Division Bench of Calcutta High Court, the respondent appointed one of their officers Mr.R.L.Rana, Chief Materials Manager (M) of Western Railway to adjudicate the disputes and differences between the parties under the purchase order dated 22 July 2013.

7. The applicants by their Advocate's letter dated 27 April 2017 objected to the appointment of Mr.Rana contending that the said appointment would be in violation of the Act and the Rules as the arbitrator so appointed by the respondent was an employee of the respondent having relationship with the railways and hence cannot be appointed as an arbitrator. The applicant accordingly suggested two names of retired Judges of Calcutta High Court one of whom could be appointed as 'independent arbitrator' to adjudicate the disputes between the parties. As there was no response, the applicant has preferred the present application praying for appointment of an arbitrator.

8. The respondent has appeared. Mr.Pandian, learned Counsel for the respondent does not dispute that the arbitrator would be required to be appointed to adjudicate the disputes and differences between the parties. However, the objection of Mr.Pandian is very peculiar. Mr.Pandian would concede that the appointment of Mr.Rana to be the

sole arbitrator as made by the respondent, is not a correct appointment and it would not satisfy the test of amended provisions of the Act and more particularly Section 11(8) read with Section 12(1) and the Seventh Schedule of the Act. Mr.Pandian however submits that he has tendered across the bar a list of 37 persons who are stated to be retired railway officers and a panel of these officers is prepared. The submission of Mr.Pandian is that one of these officers be appointed to adjudicate the disputes between the parties.

9. Mr.Pandian would thereafter submit that the arbitration agreement also stands amended as there are changes which are made by the respondent-railways in the Standard Conditions of Contract (Supply contract) 1997 (Clause 2900). The learned Counsel for the applicant has placed on record the said changes so effected by the respondent, however, he contends that the changes are not applicable unilaterally. Learned Counsel for the applicant contends that changes in the IRS conditions would not change the terms and conditions of the contract which was already entered into. For the completeness of the record, the changes are required to be noted, they read as under:-

“ Changes in Indian Railways Standard Conditions of Contract (Supply Contract),1997- (Clause 2900)

Clause no.	Existing Clause	Revised Clause No.	Revised Clause

2900(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 Organisation in respect of contracts entered into by the other organisations under the Ministry of Railways	2900(a) (i)	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, i.e., excepted matters (non-arbitrable)] the same shall be referred to the sole arbitration of an Arbitrator in terms of the Arbitration and Conciliation Act, 1996 as amended by Arbitration and Conciliation (Amendment) Act, 2015. Arbitrator shall be a person possessing qualifications laid down in para 2900(a)(ii) and shall be appointed 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/Director General (Railway Stores), in the case of contracts entered into by the Railway Board and by the Head of the Organisation in respect of contracts entered into by the other Organisations under the Ministry of Railways.
	The Gazetted Railway	2900(a)	Qualification for

	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.	(ii)	appointment as Sole Arbitrator: (a) Retired Railway Officer not below SAG level 3 years after his date of retirement. (b) Age of Arbitrator at the time of appointment shall not exceed 70 years
		2900 (a)(iii)	An Arbitrator may be appointed notwithstanding the total no. of arbitration cases in which he has been appointed in the past. Retired Railway Officer being 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.
		2900(a) (iv)	The award of the arbitrator shall be final and binding on the parties to this contract.

10. Mr.Pandian in support of his submissions has placed reliance on

the following judgments: (i) *Era Infra Engineering Ltd. Vs. Airport Authority of India*¹; (ii) *Offshore Infrastructure Ltd. Vs. Bharat Heavy Electricals Ltd. & Ors.*²; and (iii) the judgment of the Supreme Court in “*The Government of Haryana PWD Haryana (B and R) Branch vs. G.F.Toll Road Pvt.Ltd. & Ors.*”³ And (iv) *BCL Secure Premises (P) Ltd. Vs. Metro Railway, Kolkata*⁴ to contend that a retired officer could be appointed who can be an independent officer.

11. The above submissions of Mr.Pandian are opposed on behalf of the applicant. It is contended that the respondents have in fact forfeited their right to appoint an arbitrator. It is further submitted that the respondents cannot insist that a retired railway officer be now appointed, having forfeited their rights to make an appointment. Learned Counsel for the applicant in opposing the submissions of Mr.Pandian, has placed reliance on the decision of the learned Single Judge of this Court in “*Techma Engineering Enterprises Pvt. Ltd. VS. Union of India*”⁵. It is submitted that in fact the respondent in a similar situation has conceded for appointment of an independent arbitrator. Learned Counsel for the applicant also has referred to the judgment of the Supreme Court in *Union of India Vs. Bescro Ltd.*⁶ to submit that in a

1 Judgment of Delhi High Court in O.M.P.(T)(COMM) 51/2018 decided on 5/7/2018

2 Judgment of Madras High court in O.P.No.466/2016 dated 9/12/2016

3 Civil Appeal No.27/19 (arising out of SLP(c) NO.20201/18) dated 3/1/2019

4 Judgment of Calcutta High Court in A.P.No.374/17 decided on 19/7/2017

5 Arbitration application No.331 of 2018 decided on 19 October 2018.

6 Civil Appeal No.4483 of 2017 dated 27/3/2017

similar situation considering the very clause, the Supreme Court has held that there is no stipulation for appointment of Railway Officer as an arbitrator.

12. I have heard the learned Counsel for the parties as also perused the memo of application and the documents as placed on record.

13. At the outset it needs to be observed that there is no dispute in regard to the existence of an arbitration agreement between the parties as noted above. It is also not in dispute that the disputes and differences have arisen between the parties. It is also not in dispute that the respondent had made an appointment of their own officer/employee Mr.Rana as an arbitrator, which was objected by the applicant. This makes it clear, that in any event, an arbitrator is required to be appointed to adjudicate the disputes between the parties. The only question, then remains is, as to whether the contention of Mr.Pandian to appoint a retired officer of the railways, can be accepted?

14. It is quite clear that the applicant by its letter dated 27 April 2017 invoked the arbitration agreement and sought appointment of an independent arbitrator, as also forwarded two names of retired Judges of Calcutta High Court from whom a prospective arbitrator could be

appointed, who would be an independent arbitrator. There was no response to this letter by the respondent. Considering the settled principle of law as laid down by the Supreme Court in the decision in ***“Aravali Power Company Pvt. Ltd. VS. M/s.Era Infra Engineering Ltd”***⁷, it is clear that the respondents have forfeited their right to appoint an arbitrator and hence it would be now open to this Court to exercise jurisdiction under Section 11 of the Act to appoint an arbitrator. The Supreme Court in the said decision made the following observations in regard to a party forfeiting its right to make appointment of an arbitrator.:-

E. Similarly, in *Denel (Proprietary) Limited v. Ministry of Defence*⁹, the relevant clause provided for sole arbitration of the Director General, Ordnance Factory, Government of India or a (2000) 8 SCC 151 (1995) 5 SCC 329 (2012) 2 SCC 759 Government Servant appointed by him. It was observed that since no arbitrator was appointed in terms of the governing clause within the stipulated period the respondent had forfeited the right to make an appointment of an arbitrator. Paragraphs 21 and 24 of the decision were:-

“21. It is true that in normal circumstances while exercising jurisdiction under Section 11(6), the Court would adhere to the terms of the agreement as closely as possible. But if the circumstances warrant, the Chief Justice or the nominee of the Chief Justice is not debarred from appointing an independent arbitrator other than the named arbitrator.

24. It must also be remembered that even while exercising the jurisdiction under Section 11(6), the Court is required to have due regard to the provisions contained in Section 11(8) of the Act. The aforesaid section provides that apart from ensuring that the arbitrator possesses the necessary qualifications required of the arbitrator by the agreement of the parties, the Court shall have due regard to other considerations as are likely to

⁷ Civil Appeal no.12627-12628 of 2017, dated 12/9/2017

ensure the appointment of an independent and impartial arbitrator. Keeping in view the aforesaid provision, this Court in Indian Oil Corpn. Ltd, whilst emphasizing that normally the Court shall make the appointment in terms of the agreed procedure, has observed that the Chief Justice or his designate may deviate from the same after recording reasons for the same.....”

(emphasis supplied)

15. It needs to be observed that in the present case the applicant's invocation of the arbitration agreement seeking appointment of an arbitrator is by a letter dated 27 April 2017, which is after coming into force of the Amended Act (Act no.3 of 2016, with effect from 23 October 2015). Section 21 of the Act provides for commencement of arbitration proceedings from the date of the invocation of the arbitration agreement, which in the present case would be 27 April 2017 and thus there can be no doubt that the provisions of Section 12 of the Amended Act read with the Fifth and the Seventh Schedule would become applicable. It would be profitable to refer to the decision of this Court in ***“I.B. Commercial Pvt. Ltd. Vs. The Material Organization, Indian Navy & Ors.”***⁸. A similar argument was made on behalf of the respondent in the said case that a retired officer of Navy be appointed. The Court however, did not find favour to the contention so advanced by the respondent-Navy in the said case. This court considering the provisions of Section 11(8), 12(1) and Seventh Schedule of the Act as amended, made the following observations:-

⁸ Com.Arbitration Appln.no.9 of 2016, dated 7/9/2017

“6. In my considered opinion, as also in view of the clear provisions of Section 11(6) of the Act, the submission of Mr. Govilkar certainly cannot be accepted. The amended provisions of the Act contained in Section 12(1) read with Seventh Schedule are required to be noted. Section 12(1) reads thus:

"12. Grounds of 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, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality;"

7. The relevant provision under the 'Seventh Schedule' of the Act is also required to be noted, which reads thus:

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

8. Mr. Govilkar, learned counsel for the respondent no.2- Union of India has fairly stated that the proposed arbitrator as suggested by them was in the service of the Indian Navy upto 2015 and 4 of 6 however on his retirement he is now an independent person. It is not in dispute that the vessel in question was a vessel which was belonging to the Indian Navy and the decision to auction the same came to be taken in the year 2014. If these are the circumstances, then in my opinion, the amended provisions of the Act as noted above would certainly apply. The mandate of law as contained in the said amended provisions is required to be considered in letter and spirit, even if the Court, de hors the request of the respondent- Union of India, is considering to nominate Real Admiral Mr. H. Gupta (Retired). It would thus be appropriate that the Court proceeds to appoint an arbitrator in exercise of the jurisdiction required under Section 11(6) of the Arbitration and Conciliation Act."

(emphasis supplied)

16. The Supreme Court in "***TRF Ltd. Vs. Energo Engineering Projects Ltd.***"⁹ considering the amended provisions of the Act observed thus:-

9 Civil Appeal No.5306/17 @ SLP(C) no.22912./16, dated 3/7/2017

“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 as 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.” (emphasis supplied)

17. Even otherwise it clearly appears from the order dated 19 October 2018 passed by this Court (R.D.Dhanuka, J.) in Arbitration Application No.331 of 2018 (*Techma Engineering Enterprises Pvt.Ltd. Vs. Union of India*), the respondent-railway has conceded in appointing of an independent arbitrator who is not a retired employee of the railway/respondent. The said order reads thus:-

1. The matter was argued at great length by both the parties. By consent of parties, the parties have agreed to the appointment of Mr.Sarosh Barucha, a counsel of this Court as a sole arbitrator, having his address at 2nd Floor, Sawla Chambers, Fort, Mumbai -1, Mobile No.98210 34806, in place and in substitution of the arbitrator already nominated by respondent. Both the parties agree that the mandate of the learned arbitrator appointed by the respondent stands terminated. There is no dispute about the existence of the arbitration agreement. Insofar

as the authority of the General Manager of the respondent to appoint an arbitrator under the arbitration clause in question is concerned, that part of the clause is substituted by this order.

2. Learned prospective arbitrator is requested to file statement of disclosure as required under section 11(8) read with section 12(1) of the Arbitration and Conciliation Act, 1996 before this Court on the next date. The applicant is permitted to obtain such statement of disclosure from the learned prospective arbitrator and shall tender the same before this Court on or before the next date.

3. If the learned prospective arbitrator is appointed as a sole arbitrator, the fees and expenses of the learned arbitrator shall be borne by both the parties equally at the first instance.

4. Place the matter on supplementary board for directions on 30th October, 2018.”

18. The decision of the Supreme Court in *Union of India Vs. Besco Ltd.(supra)* as relied on behalf of the applicant is a decision where the Supreme Court was considering a similar arbitration clause as contained in the present case. The Supreme Court upholding the order as passed by the High Court appointing an independent arbitrator observed thus:-

“2. The short question arising for consideration in this case is whether the Chief Justice of a High Court or any person or institution designated by him, while exercising power under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”) is bound to nominate an arbitrator as specified in the agreement for arbitration. The designated Judge in the High Court took the view that the appellant has lost the mandate to appoint an arbitrator since it failed to appoint the arbitrator within the permitted time and hence nominated an independent arbitrator.

.....

8. Thus, the issue is no more res integra. Though an arbitrator is specified in the agreement for arbitration, if circumstances so warrant, the Chief Justice or the designated Judge is free to appoint an independent arbitrator, having due regard to the qualification, if any, and other aspects as required under Section 11(8) of the Act.

9. On the facts of the present case, one wonders whether the issue actually arose or not. Clause 2900 of the Standard Conditions of Contract no doubt provides that the sole arbitrator

shall be a Gazetted Railway Officer but in Clause 19.0 of the agreement dated 16.01.2012 executed between the parties, it is clearly stipulated that the contract shall be governed by the General Conditions and Special Conditions of Contract. Clause 19.0 specifically provides that "the contract shall be governed by the general conditions and special conditions of contract....".

10. Paragraph-18.0 of the General Conditions and Special Conditions of Contract, reads as follows:

"18.0 ARBITRATION:

(a) In the event of any question, dispute or difference arising under these conditions or any special condition 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 person appointed to be arbitrator, by the General Manager in the case contracts entered into by the Zonal Railways and Production Units by the member of the Railway Board concerned, in the case of contracts entered into by the Railway Board and by the head of the organizations in respect of the contracts entered into by the other organizations under the Ministry of Railways. There will be no objection if the arbitrator is a Government Servant that he had to deal with matters to which the contract relates or that in the course of his duties as a Government Servant, he has expressed view on all or any of the matters in disputes or difference. The award of the Arbitrator shall be final and binding on the parties to this contract."

11. Thus, it is clear that there is no stipulation for appointment of a Railway Officer. It can be any person. The designated Judge of the High Court has only exercised his powers in terms of the agreement by nominating an independent arbitrator."

. Thus even considering the amended arbitration clause, Mr.Pandian would not be correct to contend that a retired railway officer be appointed.

19. Mr.Pandian would also not be correct in relying on the decision of the learned Single Judge of the Delhi High Court in "*Era Infra*

Engineering Ltd. Vs. Airport Authority of India”(supra). In the said case the respondent had appointed an arbitrator and thus there was no forfeiture of rights of the respondent to appoint an arbitrator. In any case the said decision is prior to the decision of the Supreme Court in ***“Union of India Vs. Besco Ltd.”*** (supra).

20. The judgment of the Supreme Court in ***The Government of Haryana PWD Haryana (B and R) Branch vs. G.F.Toll Road Pvt.Ltd. & Ors.*** (supra) as relied by Mr.Pandian is also not applicable in the facts of the case inasmuch as in the said case also, the invocation was prior to coming into force the Amended Act (Act no.3 of 2016). The Supreme Court in paragraph 3.10 of the decision has clearly held that the case is governed by the pre-amended Act. The decision of the learned Single Judge of Calcutta High Court in ***“BCL Secure Premises (P) Ltd. Vs. Metro Railway, Kolkata”*** is also not applicable as the said case also pertained to the applicability of the pre-amended Act, though no clear reference to invocation was made out.

21. In the light of the above discussion, the application is required to be allowed. Hence the following order:-

ORDER

(I) Shri.Anil R.Mehta, Advocate of this Court, is appointed as a prospective Arbitrator to adjudicate the disputes between the parties under the agreement as contemplated under the purchase order dated 21 February 2013.

(ii) The prospective Arbitrator fifteen days before entering a reference shall make a disclosure as per requirement of Section 11(8) read with Section 12(1) of the Act,1996 and shall forward a copy to the Prothonotary and Senior Master of this Court to be placed on record of this application as also be forwarded to the parties.

(iii) At the first instance, the parties are directed to appear before the prospective Arbitrator on 11 March 2019 at a time as may be fixed by the prospective arbitrator.

(iv) All contentions of the parties on merits of the matter are expressly kept open.

(v) The application is disposed of in the above terms. No costs.

(vi) Office to forward a copy of this order to the learned Arbitrator on the following address:

Address: Prakash Chambers, Chamber No.1,
Mezanine Floor, 77, Nagindas Master Road,
Fort, Mumbai-400023

[G.S. KULKARNI, J.)