

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

+ *Reserved on: 7th August 2019.*
Pronounced on: 29th August 2019.

+ ARB.P. 485/2019, I.A. 10378/2019, I.A. 10379/2019

M/S KADIMI INTERNATIONAL PVT. LTD. Petitioner

Through: Mr. Vikas Mishra, Mr. Subhankar
Sengupta, Mr. Shashwat Tripathi and
Mr. Shaleen Srivastva, Advs.

versus

M/S EMAAR MGF LAND LIMITED Respondent

Through: None

CORAM: JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J.

ARB.P. 485/2019

1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act') challenges appointment of Mr. R.S. Baswana, District and Sessions Judge (Retd.) as the sole arbitrator and further seeks appointment of an independent Arbitrator, in terms of Clause 35 of the Space Buyer Agreement dated 30th December 2008.

BRIEF FACTS

2. Petitioner- M/s Kadimi International Pvt. Ltd, is a private limited company. Respondent-M/s. Emaar MGF Land Limited, is engaged in the business of real estate. Petitioner booked, a commercial unit along with one

car parking in Respondent's project, "The Palm Square" at sector 66, Gurugram Manesar Urban Complex, Village Badshahpur, Gurugram (hereinafter 'the project'), on 17th October 2007 for a total consideration of Rs. 1,42,54,861. In pursuance thereto, Respondent vide letter dated 24th December 2007, allotted a Commercial Unit to the Petitioner. Apropos, a Office/Retail/Restaurant Space Buyers Agreement was executed between the parties on 30th December 2008 (hereinafter 'the Agreement'). However, Respondent failed to deliver the unit in terms of the Agreement, despite Petitioner having paid entire consideration amount. Thereafter, certain disputes arose between the parties regarding payment of Haryana Value Added Tax (hereinafter 'HVAT') and the Monthly Maintenance Charges (hereinafter 'MMC') and Petitioner issued a notice dated 31st January 2019 invoking Arbitration clause under the Agreement. Respondent in its reply dated 11th February 2019 expressed its inability to appoint an Arbitrator in view of moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 on account of Corporate Insolvency Resolution Process (CIRP) against the Respondent. The CIRP proceedings were set aside by the Supreme Court vide order dated 29th March 2019 in Civil Appeal No. 2302 of 2019 titled as ***Dr. Virendra Swarup Institute of Computer Studies v. Hadi Mohd. Taher Badri***. Thereafter, Petitioner sent notice dated 7th May 2019, invoking Arbitration Clause of the Agreement, requesting the Respondent to agree to appointment of an Arbitrator under the aegis of DIAC. In response to the said notice, Respondent appointed Mr. R.S. Baswana, District and Sessions Judge (Retd.) (hereinafter 'the Arbitrator') as the Sole Arbitrator, on 24th May 2019.

Case of the Petitioner

3. Petitioner has challenged the appointment of Mr. R.S. Baswana, as the Sole Arbitrator, on several grounds. Petitioner contends that, since Respondent failed to appoint the Arbitrator within 30 days of invocation of the Arbitration agreement, its right of appointment stood forfeited. Petitioner also contends that even if it is construed that invocation of the arbitration clause became valid only on 29th March 2019, i.e. after the CIRP proceedings were set aside by the Supreme Court and the period is calculated from the said date, still Respondent has failed to appoint arbitrator within the stipulated period of 30 days. Petitioner contends that if a person is found to be ineligible to be appointed as an arbitrator, then any appointment/ nomination made by such a person would also be invalid. Since Director of a company cannot act as an Arbitrator, he cannot also appoint an Arbitrator. Petitioner contends that appointment of the Arbitrator, in the present case is in contravention of Section 12(5) read with Schedule VII of the Act. He argued that as per Arbitration Clause contained in the Agreement, appointment has to be made by the Director of the Respondent Company, but consequent to the amendment of Section 12(5) of the Act, since the Director of Respondent Company cannot himself act as an Arbitrator, concomitantly any appointment made by him would also be void, non-est and in teeth of Section 12(5) of the Act. Reliance is placed on the Judgments of Supreme Court in ***TRF Ltd. v. Energo Engineering Projects Ltd.***, (2017) 8 SCC 377 and ***Bharat Broadband Network Ltd. v. United Telecoms Ltd.***, (2019) 6 SCALE 491 and Judgment of the Tripura High Court in ***Ashish Deb v. State of Tripura***, MANU/TR/0147/2019.

4. Learned Counsel for the Petitioner also argues that following the Amendment Act of 2015, the concept of party autonomy vis-à-vis appointment of an arbitrator by a party has been dispensed to the extent such autonomy affects impartiality and independence of the Arbitrator. He also urges that because the Petitioner has challenged the right of the Respondent to appoint an Arbitrator, the concept of party autonomy cannot be allowed to be used as a defense against them. Petitioner cannot be coerced to accept an Arbitrator appointed by an ineligible person, i.e. Director of Respondent Company. Under Section 11(2) of the Act, there must be an agreement between the parties on a “procedure to appoint an arbitrator” and not an agreement “on the power/authority/right to appoint the arbitrator”. Legislature never intended to confer unilateral power on a party to appoint a Sole Arbitrator. The Respondent could not have unilaterally proceeded to appoint the Sole Arbitrator and Court alone would have the authority to make an appointment, in exercise of its powers under Section 11(5) and (6) of the Act.

5. Lastly, it was contended that the conduct of the Respondent in unilaterally appointing an Arbitrator despite Petitioner's categorical objections in its letter dated 6th June 2019, raises justifiable doubts over the neutrality, independence and impartiality of the Arbitrator. Petitioner highlights the ineligibility, by contending that the Arbitrator has till date not made a disclosure as mandated under Section 12(1) of the Act and has also not entered upon reference.

Analysis and Findings:

6. The Court is not convinced with the submissions advanced by the learned Counsel for Petitioner. Petitioner is overlooking the most fundamental aspect of the matter- the wording of the Arbitration Clause contained in Clause No. 35, of the agreement, which reads as under:

“35. All or any dispute arising out of or touching upon or in relation to the terms of this Agreement or its termination, including the interpretation and validity thereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussion, failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996, or any statutory amendments, modifications or re-enactment thereof for the time being in force. **A sole Arbitrator shall be nominated by the any one of the Directors of the Company, who shall hold the arbitration proceedings at the registered office of the Company in at New Delhi or at any other place as may be decided by such Arbitrator.** The Allottee(s) hereby confirms that he shall have no objection to such appointment even if the person so appointed, as the Arbitrator, is an employee or advocate of the Company or is otherwise connected with the Company and the Allottee(s) confirms that notwithstanding such relationship /connection and the holding of hearings at the registered office of the Company in New Delhi, the Allottee(s) shall have no doubts as to the independence or impartiality of the said Arbitrator and shall not challenge the same.”

7. On a plain reading of the aforesaid clause, it is easily discernible that it does not name an arbitrator. It merely confers the right to appoint an Arbitrator to the Respondent – M/s Emmar MGF Land Limited. The clause inter alia provides that “Sole Arbitrator shall be nominated by anyone of the Directors of the Company”. This clause cannot be interpreted to mean that

parties have been referred for arbitration before the Director or that the Director has been appointed/nominated/named as an Arbitrator. Since, the right of appointment is with Respondent, which is a Company, it would have to vicariously take administrative decisions through its Directors. A Corporate Entity would have to necessarily delegate authority for its day to day functioning and conduct of business. The Directors of the Company are empowered under the provisions of the Company's Act and/or Articles of Association to conduct the affairs of the Company. In this case the right to make the appointment of an Arbitrator for and on behalf of the Respondent Company is conferred on its Directors. I am unable to read or infer the clause in the manner as Petitioner has sought to interpret. To me, it merely confers a right of appointment to Respondent and nothing more.

8. The law as interpreted and declared by the Supreme Court in **TRF Ltd.** (*supra*), is inapplicable to facts of the present case. In the said case, Arbitration clause provided as under:

“33. Resolution of dispute/arbitration

xxx

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

9. In backdrop of the aforesaid clause, question arose for consideration before the Supreme Court as to whether the Arbitrator, who is otherwise ineligible by operation of law, can nominate another as an Arbitrator. Deciding this issue, the Supreme Court held as under:

“54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. **By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator.** The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. **It is inconceivable in law that person who is statutorily ineligible can nominate a person.** Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, **once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated.** Therefore, the view expressed by the High Court is not sustainable and we say so.”

10. Certainly, this is not the situation in the case in hand. Here, the Petitioner has canvassed a different proposition, which is essentially- whether right of one party to appoint an arbitrator stands extinguished by virtue of the amended Section 12 of the Act. This question has been considered in *Bhayana Builders Pvt. Ltd. v. Oriental Structural Engineers, 2018 SCC OnLine Del 7634*, wherein a coordinate bench of this Court rejected a similar contention in the following words:

“32. As far as the judgment of the Supreme Court in *TRF Ltd.* (supra) is concerned, I have already quoted the Arbitration Agreement that came up for interpretation in that case. The Arbitration Agreement provided that the disputes shall be referred to “sole arbitration of the Managing Director of buyer or his nominee”. The Supreme Court held that in view of Section

12(5) read with Seventh Schedule of the Act, Managing Director has become ineligible for acting as an Arbitrator. The question before the Supreme Court thereafter was: the Managing Director having become ineligible, does he also become ineligible to nominate an Arbitrator in his place. The Supreme Court relying upon the judgment in *State of Orissa v. Commissioner of Land Record and Settlement*, (1998) 7 SCC 162, held that a person who is statutorily ineligible cannot nominate a person to act for him. For reaching this conclusion, the Supreme Court also relied upon the maxim of “*Qui facit per alium facit per se*” (What one does through another is done by oneself). **Therefore, the principle followed by the Supreme Court was that where a person has himself become ineligible to act an Arbitrator, he cannot delegate such power to another as such delegatee would also suffer from the same ineligibility. The judgment of the Supreme Court, in my opinion, cannot be read to say that even if the parties agree that one of the party to the Agreement shall appoint an Arbitrator, the said power has been taken away and such Agreement should be rendered void due to Section 12(5) of the Act.”**

11. Similar view has been expressed in *D.K. Gupta v. Renu Munjal*, 2017 SCC OnLine Del 12385, relevant portion whereof reads as under:

“8. However the arbitration clause pertaining to this case is on a different note. Here an arbitrator so appointed is not an employee of a party to the agreement. The arbitration clause herein rather gives a choice to one of the parties viz a lender to appoint an arbitrator. Thus perhaps is a striking difference between the two arbitration clauses viz., clause 33 of TRF Ltd.(supra) and clause 8.9.4 of the agreement dated 02.09.2013 herein. In TRF Ltd. (supra) the Managing Director of the buyer, being an employee of the buyer in a way represents the buyer itself, which is not the case here. Admittedly there exist no bar under the Act which restrains a party to appoint an Arbitrator. Rather section 11(2) of the Arbitration and Conciliation Act, 1996 empowers the parties to agree on a procedure for appointment of an

arbitrator, which exactly is the situation here.”

12. Learned Counsel has tried to distinguish facts of the present case from those of ***Bhayana Builders*** (*supra*). He contends that parties in the said case were two corporate entities who had equal negotiating power, whereas in the present case, the arbitration agreement is a typical Builder’s Buyer Agreement which is one-sided, Petitioner being a purchaser had no choice but to give his assent to the same. In support of this contention, reliance is placed upon the judgment of the Supreme Court in C.A. No. 12238 of 2018, ***Pioneer Urban Land & Infrastructure Ltd. v. Geetu Gidwani Verma***, wherein it has been held that the Courts are empowered to strike down an unfair and unreasonable contract, or a clause if a Contract is entered into between parties who are not equal in bargaining power.

13. Further, Petitioner contends that Supreme Court’s observations in ***Bharat Broadband Network Ltd.*** (*supra*), reduces application of party autonomy only to cases illustrated in paragraph 16 of the judgment, which reads as under:

"16. Thus, it will be seen that party autonomy is to be respected only in certain exceptional situations which could be situations which arise in family arbitrations or other arbitrations where a person subjectively commands blind faith and trust of the parties to the dispute, despite the existence of objective justifiable doubts regarding his independence and impartiality."

14. The abovementioned contention is devoid of merit. These observations have to be read in parlance with the observations of the Supreme Court in Para 14 and 15 of the said judgment which reads as under:

“14. From a conspectus of the above decisions, it is clear that Section 12(1), as substituted by the Arbitration and Conciliation (Amendment) Act, 2015 ["Amendment Act, 2015"], makes it clear that when a person is approached in connection with his possible appointment as an arbitrator, it is his duty to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality. The disclosure is to be made in the form specified in the Sixth Schedule, and the grounds stated in the Fifth Schedule are to serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Once this is done, the appointment of the arbitrator may be challenged on the ground that justifiable doubts have arisen Under Sub-section (3) of Section 12 subject to the caveat entered by Sub-section (4) of Section 12. The challenge procedure is then set out in Section 13, together with the time limit laid down in Section 13(2). What is important to note is that the arbitral tribunal must first decide on the said challenge, and if it is not successful, the tribunal shall continue the proceedings and make an award. It is only post award that the party challenging the appointment of an arbitrator may make an application for setting aside such an award in accordance with Section 34 of the Act.

15. Section 12(5), on the other hand, is a new provision which relates to the *de jure* inability of an arbitrator to act as such. **Under this provision, any prior agreement to the contrary is wiped out by the non-obstante Clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under the Seventh Schedule. The Sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator.** The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. **What is clear, therefore, is**

that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this Sub-section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.”

15. Moreover, the observations of the Law Commission in 246th Law Commission Report are also relevant, which reads as under:

“60.The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective “justifiable doubts” regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to section 12 (5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed section 12 (5) by an express agreement in writing. In all other cases, the general rule in the proposed section 12 (5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of section 12 (1) and in which context the High Court or the designate is to have “due regard” to the contents of such disclosure in appointing the arbitrator.”

16. Petitioner’s argument of limited party autonomy is also misconceived and untenable, the concept of party autonomy has to be understood in the

right perspective, on a conspicuous reading of the judgment in the case of *Bharat Broadband Network Ltd.* (supra), what flows is that the question before the Court in the said case was entirely different. The Court therein was deciding the question regarding maintainability of a petition, challenging the arbitrator's authority to adjudicate the disputes between the parties, on the anvil of Section 12(5) of the Act. In the said case the party who had appointed the Arbitrator, had challenged the Arbitrator's eligibility. Pertinently, the wording of arbitration clause that was the subject matter of dispute, as noted in the judgment was also entirely different, from the arbitration clause in the present case. The said clause in *Bharat broadband Network Ltd.* (supra), reads as under:

“III.20 ARBITRATION

III.20.1 In the event of any question, dispute or difference arising under the agreement or in connection therewith (except as to the matters, the decision to which is specifically provided under this agreement), **the same shall be referred to the sole arbitration of the CMD, BBNL** or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CMD, BBNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), **and if the CMD or the said officer is unable or willing to act as such, then to the sole arbitration of some other person appointed by the CMD or the said officer.** The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act 1996. There will be no object to any such appointment on the ground that the arbitrator is a Government Servant or that he has to deal with the matter to which the agreement relates or that in the course of his duties as a Government Servant/PSU Employee he has expressed his views on all or any of the matters in dispute.

The award of the arbitrator shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the CMD, BBNL or the said officer shall appoint another person to act as an arbitrator in accordance with terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors.”

17. It becomes evident by reading the aforesaid clause that Chairman cum Managing Director of one of the contracting party was named as the Arbitrator. Since, Managing Director had been rendered ineligible to act as an Arbitrator, following the decision in *TRF Ltd.* (supra) the Court held that an ineligible person could not himself appoint another Arbitrator and an appointment made by ineligible person would itself be void ab initio. In the above context, the Court decided the question (supra) which is entirely different from the question being raised in the present Petition. I also do not find merit in the contention of the Petitioner that such unilateral power of appointment has been impliedly ousted under Section 11 (2) of the Act. The language used under Section 11 (2) of the Act provides for an agreement on the procedure for appointing an Arbitrator. Petitioner’s contention is that there is no procedure for appointment of an Arbitrator agreed upon between the parties and the legislature never envisaged conferring unilateral power on a party to appoint Sole Arbitrator. The use of the word “procedure” in Section 11 (2) of the Act describes the legislature's intention to introduce sanctity, uniformity and probity to the whole process of appointment of the Arbitrator and it incorporates the agreement between the parties which includes the right/power/authority to appoint the Arbitrator. In case the

procedure prescribes one of the parties to approach another for constituting the Arbitral Tribunal, such a situation would be covered under Section 11 (2) of the Act. Thus, I am unable to infer or read the 2015 Amendment of the Act to the effect that the contracting party's right to make an appointment has been taken away. In the present case since the parties willingly agreed to confer on the Respondent the right to appoint the arbitrator, the said right cannot be curtailed by the Courts. Considering the fact that the arbitration clause in the present case does not run foul with the Amendment Act of 2015, the appointment of Arbitrator by the Respondent cannot be said to be void.

18. It is also noteworthy that the judgment of ***Bhayana Builder*** (*supra*) is presently pending challenge before the Supreme Court in SLP (C) No. 7161-7162/2018 and the Supreme Court vide order dated 21st March 2018 has issued notice to the Respondent and stayed the arbitration proceedings. Nevertheless, it cannot be said that the ratio of ***Bhayana Builder*** (*supra*) has been unsettled. I have also had occasion to consider a similar question in Arb. P. 381/2019, ***Sriram Electrical Works v. Power Grid Corporation of India Ltd***, wherein, vide order dated 9th August 2019, I have upheld the right of a contracting party to appoint an Arbitrator.

19. It should also be borne in mind that after the amendment of the Act, the Court's power and its scope of enquiry, while exercising jurisdiction under Section 11 of the Act, has been limited and restricted. The Court will exercise its power under Section 11(6)(a) of the Act, only where a party fails to act in accordance with the appointment procedure agreed between the

parties. Section 11 of the Act does not empower the Court to change the Arbitrator appointed by the parties in accordance with law. While deciding on an application under the said Section the Court has to only evaluate and examine the question regarding existence of an Arbitration agreement. It cannot embark upon the question as to whether a clause is unfair or unreasonable. If the invocation of Arbitration Clause is as per the terms of agreement between the parties it would be the endeavor of Court to first explore whether the arbitration clause contained in the agreement can be implemented, as held by the Supreme Court in the decision of ***Union of India v. Parmar Construction, 2019 SCC OnLine SC 442***, relevant portion whereof reads as under:

“41. This Court has put emphasis to act on the agreed terms and to first resort to the procedure as prescribed and open for the parties to the agreement to settle difference/disputes arising under the terms of the contract through appointment of a designated arbitrator although the name in the arbitration agreement is not mandatory or must but emphasis should always be on the terms of the arbitration agreement to be adhered to or given effect as closely as possible.”

20. The Petitioner is misreading the judgment of the Supreme Court in ***TRF Ltd.*** (supra) and ***Bharat Broadband Network Ltd.*** (supra). The 246th Law Commission's Report as well as the observations of the Supreme Court in ***Bharat Broadband Network Ltd.*** (supra) and ***TRF Ltd.*** (supra), clearly expounds the proposition which is in fact the intent of the Arbitration Act as amended by the Amendment Act of 2015. The cardinal rule which has been laid down is that if an Arbitrator himself is a party to the dispute, he cannot act as an Arbitrator and any nomination by such Arbitrator would be equally

bad in law. The independence and impartiality required in the arbitral process regardless of the agreement between the parties has been explained in that context in the case of *Bharat Broadband Network Ltd.* (supra). It is altogether another thing to say that none of the contracting party would have a right to make an appointment of an Arbitrator as there is autonomy. On this issue the agreement between the parties has to be kept in mind and in case, the parties have willingly agreed to confer such right on one of the parties to the agreement, the same has to be upheld. This Court has upheld and preserved the right of a contracting party to make an appointment, as long as it is not in conflict with or inconsistent with the Act. If the arbitration agreement is in consonance with scheme of the Act, courts would enforce it. However, if a person is named as an Arbitrator specifically or by way of designation and such a person is rendered ineligible on account of conflict with the Act, Courts would have the power to step in and make an appointment of an independent Arbitrator.

21. No doubt, Courts have now consistently proceeded to appoint an independent Arbitrator in situations where the arbitration clause is in conflict with the amended Arbitration Act. However, the unilateral right of party to appoint an Arbitrator has not been done away with. By way of Amendment Act of 2015, the legislature has not denuded or extinguished a contracting party's right to make an appointment. Only, the appointment of a person who is ineligible to be an Arbitrator under Section 12 (5) read with Schedule VII of the Act has been held to be void and the objections regarding terms of contract being unfair or unreasonable would have to be gone into during the course of Arbitration. In *TRF Ltd.* (supra), the

observations of the Court holding that the Managing Director to be ineligible to act as the Sole Arbitrator, has to be appreciated in the context of the arbitration clause therein. The judgment of Supreme Court in **TRF Ltd.** (supra) cannot be stretched or expanded so as to include such clauses that purely confer the right of appointment to one of the contracting parties.

22. Before parting, I would also like to deal with contention of the Petitioner that Supreme Court in **Bharat Broadband** (supra) has rendered the judgment of this Court in **Bhayana Builders** (supra) *per incuriam*. This argument is completely misconceived. The doctrine of *stare decisis* is not applicable. The ratio of **Bharat Broadband** (supra) is wholly different and the said judgment has been delivered in a different context following the case of **TRF** (supra). This judgment has been followed by this Court consistently whenever the Court is confronted with a clause that is in conflict with Section 12 (5) of the Act.

23. Petitioner's contention that Respondent had forfeited its right to appoint the arbitrator since it failed to make an appointment within 30 days from the date of invocation is also bereft of merit. The Petitioner has not filed the petition on the basis of the Respondent's failure to appoint the Arbitrator pursuant to the first invocation notice. It has been filed when CIRP pertaining to the Respondent came to an end and pursuant thereto the Respondent appointed the Arbitrator. Therefore, plea of failure of Respondent to make an appointment within 30 days is misconceived. Moreover, Arbitrator had been appointed prior to filing of the petition and thus it is not a case where any inaction on part of Respondent has resulted in

waiver or forfeiture of Respondent's right.

24. Respondent has appointed a retired District and Sessions Judge as an Arbitrator. If the Petitioner has any grievance regarding the impartiality and independence of the Arbitrator, the Petitioner is free to take recourse to the specific provisions contained in the Act that enable a party to challenge jurisdiction of the Arbitrator. These aspects cannot be examined in a Petition under Section 11 of the Act.

25. For the foregoing reasons, the present petition and the pending applications are dismissed.

AUGUST 29, 2019

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SANJEEV NARULA, J.