



Arb.O.P.(Com.Div.) Nos.141
& 333 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 28.11.2025

Coram:

THE HON'BLE MR. JUSTICE N. ANAND VENKATESH

Arbitration O.P.(Com.Div.) Nos.141 & 333 of 2023

Arb.O.P. (Com.Div.) No.141 of 2023:

M/s.China Datang Technologies
and Engineering Company Limited
rep.by its Authorized Signatory
Mr.Shakti Singh

...Petitioner

Vs

M/s.NLC India Limited

...Respondent

Arb.O.P. (Com.Div.) No.333 of 2023:

M/s.NLC India Limited by
the Chief General Manager/Contracts,
Corporate Contract Division,
Corporate Office, Neyveli-607801.
Tamil Nadu, India.

...Petitioner

Vs

M/s.China Datang Technologies
and Engineering Company Limited,
incorporated under the laws of
People's Republic of China

...Respondent



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PETITIONS under Sections 34 of the Arbitration and Conciliation Act, 1996 praying

(i) to set aside the award dated 09.11.2022 passed by the Tribunal and direct the respondent to restore the amount of the contract performance guarantee amounting to Rs.55,65,00,000/- encashed on 11.11.2022 to the petitioner (Arb.O.P.(Com.Div.) No.141 of 2023); and

(ii) to set aside the award dated 09.11.2022 passed by the Arbitral Tribunal in so far as the award of claim Nos.IV and V of the respondent for an amount of Rs.5,10,00,000/- (Rupees five crores and ten lakhs only) and the rejection of the counter claims of the petitioner (Arb.O.P.(Com.Div.) No.333 of 2023).

For Petitioner in
Arb.O.P.No.141 of 2023 &
Respondent in
Arb.O.P.No.333 of 2023

: Mr.S.Ravi, SC for
Mr.Sriram Venkatavaradan

For Respondent in
Arb.O.P.No.141 of 2023 &
Petitioner in
Arb.O.P.No.333 of 2023

: Mr.AR.L.Sundaresan, ASG
assisted by
Mr.N.Nithianandam



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COMMON ORDER

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Arb.O.P.(Com.Div.) No.141 of 2023 is a petition filed under Section 34(2)(b)(iii) of the Arbitration and Conciliation Act, 1996 (for brevity, the Act) by one M/s.China Datang Technologies and Engineering Company Limited seeking to set aside an arbitral award dated 09.11.2022 and for a direction to M/s.NLC India Limited to restore the contract performance guarantee amounting to Rs.55.65 Crores encashed on 11.11.2022.

2. Arb.O.P.(Com.Div.) No.333 of 2023 is a petition filed under Section 34(2) of the Act by the said M/s.NLC India Limited questioning the same award in so far as awarding claims IV and V in favour of the said M/s.China Datang Technologies and Engineering Company Limited and rejection of the counter claim made by said M/s.NLC India Limited were concerned.

3. For the sake of convenience, the parties will be referred to as per their respective rank before the Arbitral Tribunal.



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4. The brief facts leading to filing of the above petitions are as follows:

(i) The respondent was required to develop a lignite based thermal power station called Neyveli New Thermal Power Project consisting of two units having the capacity of 500 MW each at Neyveli. The respondent issued a tender dated 19.12.2018 and invited bids for installation of the flue gas de-sulphurisation system. The claimant also submitted its bid on 27.5.2019.

(ii) The respondent issued a letter of award dated 31.8.2019 to the claimant for the works as described in the scope of work for an amount of Rs.556,50,00,000/-. The effective date of the contract was 31.8.2019. The periods stipulated for completion of trial operation and whole of the works for the first unit of 500 MW were 27 months and 30 months respectively from the date of the letter of award. With respect to the second unit of 500 MW, the periods stipulated for completion of trial operation and whole of the works were 33 months and 36 months respectively from the date of the letter of award.

(iii) There were delays in the execution of the works and ultimately, the respondent issued a show cause notice dated 07.7.2020 to the claimant granting 30 days time to them to take



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appropriate measures to the satisfaction of the respondent, failing which, it was made clear that the contract would be terminated in terms of Clauses 10.30(i) and 10.25 of the contract.

(iv) On receipt of the said show cause notice, a reply was given by the claimant explaining as to why they were not able to mobilise their resources owing to spread of novel corona virus in China and thereafter in India and the subsequent lock downs imposed by the Government of India. The claimant also pointed out certain delays, which were attributable to the respondent. The claimant was also corresponding with the respondent regularly and had commenced the procurement activities and kept the respondent updated.

(v) The claimant, through e-mail dated 25.7.2020, intimated the respondent that they had planned to commence the construction of their site office by 29.7.2020 and requested for gate passes from the respondent. But, the respondent was not convinced with various steps that were taken by the claimant. Further, the respondent issued a letter dated 07.9.2020 terminating the contract. The respondent also invoked the contract performance guarantee and encashed the amount deposited towards it.



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(vi) Pursuant to that, the claimant filed O.A.No.493 of 2020 before this Court under Section 9 of the Act seeking to stay the invocation of the contract performance guarantee. The said original application was disposed of by a learned Single Judge of this Court on 12.10.2020. For proper appreciation, the relevant portions in the said order dated 12.10.2020 are extracted as hereunder:

"4. Considering the trajectory which this matter has taken today, short facts shorn of elaboration will suffice and it is not necessary to dilate qua factual matrix. Suffice to say that the entire matter pertains to installation of what is described as 'Flue Gas Desulphurization' ('FGD' for the sake of brevity) by the contractor to NLC pursuant to a tender floated by NLC. Contractor was the successful bidder, contractor was given a Letter of Award dated 31.08.2019 followed by a contract dated 06.03.2020 and a set of commercial conditions. These three shall hereinafter collectively be referred to as 'said contract' for the sake of convenience and clarity. This Court is informed that this Letter of Award dated 31.08.2019, contract dated 06.03.2020 and commercial conditions together constitute the contractual relationship between the contractor and NLC for FGD. This Court is informed that FGD is for two thermal power stations that are being set up



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by NLC in Neyveli. Vide said contract, time for completion of first FGD is 30 months i.e., for first Power Station and time of completion of the other FGD i.e, for second Power Station is 36 months. This Court is informed that the parties had agreed that the effective date qua said contract is 31.08.2019. Thereafter, arbitrable disputes erupted between the contractor and NLC, disputes centre around delay and invocation of Force Majeure clause. This shall collectively be referred to as 'arbitrable dispute' for the sake of convenience and this Court expresses no opinion on the merits of the arbitrable disputes. What is of significance is, there is no disputation or disagreement between the parties that the arbitration agreement between the parties, being an arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act is in the form of a clause in the said contract i.e., commercial conditions clause 10.33.3.5. There is also no disputation or disagreement that contractor issued a communication dated 29.09.2020, which according to the contractor, is the trigger notice qua arbitration. To be noted, this was preceded by exchange of communications between the contractor and NLC.

5. Learned counsel for NLC submits on instructions that a reply to, what according to contractor, is the aforementioned trigger notice,



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has been sent saying that it was premature in the light of the language in which arbitration clause is couched. However, it is clear that the applicant has demonstrated manifest intention to arbitrate, which is sine qua non for an application under Section 9 of A and C Act.

6. Learned counsel for NLC, on instructions, has now filed a memo dated 12.10.2020, which reads as follows:

*'MEMO FILED ON BEHALF OF THE 1ST
RESPONDENT*

It is respectfully submitted as follows: -

1. On instructions, it is submitted though the Arbitration Clause in the Contract contemplates Three Member Tribunal, we are agreeable to appointment of Single Member Tribunal for adjudication of the disputes between the parties.

2. The Sole Arbitrator may be appointed by this Hon'ble Court without reference to the Arbitrator appointed by the Petitioner.

Dated at Madras on this the 12 th day of October, 2020.

-Sd-

*N.Nithianandam
Counsel for the 1st Respondent'*

7. From the above memo, it becomes clear that NLC consents for appointment of a sole Arbitrator though the arbitration clause provides



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for an Arbitral Tribunal to be constituted by three Arbitrators. Learned counsel for contractor also agrees to this course and this submission is recorded. To be noted, learned counsel for NLC submits that this departure notwithstanding its reply and the mechanism in arbitration clause shall not be quoted as a precedent. Both parties also, on instructions, submit that this Court can proceed to appoint a sole Arbitrator at its discretion as there is no dispute about the existence of an arbitration agreement between the parties.

8. In the light of the trajectory which this matter has taken and in the light of the curves which this matter has taken in reaching this Court vide captioned application, this Court, noticing that there is no dispute about the existence of arbitration agreement and parties agree for appointment of a sole Arbitrator, though arbitration agreement provides for appointment of three member Arbitral Tribunal and more importantly, the parties have left the choice of sole Arbitrator to this Court, now proceeds to dispose of captioned application inter alia by appointing a sole Arbitrator. It is made clear that this Course is adopted owing to the peculiar facts of this case and peculiar trajectory this matter has taken and therefore, this order will not serve as a precedent in times to come.



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9. Before this Court does so and before this Court appoints an Arbitrator, it is necessary to deal with the interim prayer that has been sought for *inter alia* under Section 9 of the A and C Act. As already alluded to *supra*, as the applicant has demonstrated manifest intention to arbitrate, this application is entertained, this Court notices that the applicant had the benefit of an interim order from 09.09.2020 to date and therefore, this Court deems it appropriate to continue the interim order. In doing so, this Court has noticed that the interim prayer pertains to invocation and encashment of PBG. *Prima facie* case has been made out as manifest intention to arbitrate has been demonstrated. Balance of convenience also is in favour of acceding to this request as invocation/ encashment of PBG pending arbitration will tantamount to putting the cart before the horse. Irreparable legal injury determinant also buttresses the grant/continuation of interim order as this Court notices that PBG is for 10% of the value of the said contract, performance of which now forms part of arbitrable dispute.

10. Another factor, which has weighed in the minds of this Court, is that there is no disputation that PBG is valid till 2023. Counsel for contractor/ applicant submits that PBG will be kept alive not only till 2023, but for a period of 30 days post receipt of final award by both parties in the arbitral



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proceedings. This submission is recorded. To be noted, under normal circumstances, this Court would have relegated the parties to move Hon'ble Arbitrator under section 17 of A and C Act for the interim prayer to be decided on merits by Hon'ble Arbitrator, but in this case, owing to the undertaking on the part of the contractor to keep the PBG alive not only till 2023, but for a further period of 30 days post receipt of final award to be made by Hon'ble Arbitrator, in response to which learned counsel for NLC consenting that the interim order as prayed for in captioned application can operate till the end of arbitral proceedings, this Court is disposing of captioned application on the terms to be set out infra. However, considering the facts and circumstances, this Court deems it appropriate to leave it open to the parties to move the AT under Section 17 of the A and C Act even with regard to this order and undertaking, if the need arises. If such a situation arises, such an application under Section 17 of A and C Act, though obvious, will be dealt with by Hon'ble Arbitral Tribunal on its own merits and in accordance with law.

11. Learned counsel for NLC submits that original PBG bearing No.002BG01193540001 dated 20.12.2019 as amended on 16.01.2020 and valid upto 30.11.2023 for an amount of Rs.55,65,00,000/- issued by the second



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respondent has been submitted to the second respondent Bank. In the light of this order, the second respondent Yes Bank is directed to return the original PBG to first respondent NLC within a fortnight from the date of receipt of a copy of this order by the second respondent.

12. As this application is disposed of at the first listing stage, learned counsel on record on both sides shall communicate this order to the second respondent for due compliance in all aspects of the matter.

13. Though obvious it is made clear that all questions are left open to be decided by Hon'ble Arbitral Tribunal.

14. The following order is passed:

a) An interim order as prayed for in the captioned application is granted and the same shall operate till the award is passed by Hon'ble Sole Arbitrator.

b) It is open to the parties to move the Hon'ble Arbitrator under section 17 of The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), if the need arises for any relief including anything touching upon or pertaining to order granted in captioned application. If this scenario unfurls, Hon'ble Arbitrator will decide the application under section 17 of A and C Act on its own merits without being impeded in any manner by this order.



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c) Hon'ble Mrs.Justice R.Banumathi (Retd.), former Judge of Hon'ble Supreme Court of India at No.C20, Ground Floor, Defence Colony, New Delhi-110 024, (Mob:7042955477, e-mail: banumathir1955@gmail.com) is appointed as sole Arbitrator to enter upon reference, adjudicate and pass an award in the arbitrable disputes between applicant China Datang Technologies & Engineering Co. Ltd., (applicant) and first respondent NLC India Limited vide said contract, constituted by Letter of Award dated 31.08.2019, contract dated 06.03.2020 and commercial contract;

d) Hon'ble Arbitrator is free to fix fees at the discretion of Hon'ble Arbitrator;

e) The arbitral sitting/s being physical hearing or virtual hearings shall also be at the sole discretion of the Hon'ble Arbitrator."

(vii) Pursuant to the said order dated 12.10.2020, the dispute was referred to the learned Arbitrator appointed by this Court.

(viii) The claimant raised 11 claims in the claim statement filed before the learned Arbitrator for a total sum of Rs.1,46,21,88,711.20. On the contrary, apart from denying the liability, the respondent raised a counter claim for a sum of Rs.91,45,45,152/- against the claimant.

(ix) Ultimately, the learned Arbitrator concluded that the claimant would not be entitled to any of the claims except claims IV and V and



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further rendered a finding that the respondent would be entitled to invoke the contract performance guarantee to the tune of Rs.55,65,00,000/-. The respondent was directed to pay a total sum of Rs.5.10 Crores to the claimant towards claims IV and V within a period of four months from the date of the award, failing which, it was further directed that it would carry simple interest at the rate of 6% per annum till the date of realization of the amount. The learned Arbitrator also rejected the other claims made by the claimant and the counter claim made by the respondent.

(x) Aggrieved by that portion of the award to the extent of rejecting some of the claims and the counter claim respectively, both the claimant as well as the respondent have approached this Court by filing the above petitions.

5. When these petitions came up for final hearing on 05.11.2025, this Court raised a preliminary objection and passed the following order:

"This Court heard the learned Senior Counsel appearing on behalf of the petitioners and the learned Additional Solicitor General appearing on behalf of the respondents.



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2. *There is no dispute with regard to the fact that the case in hand is an International Commercial Arbitration wherein, one of the party is a foreign entity. Under normal circumstances, for appointment of Arbitrator, the parties will have to approach the Apex Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 and it is only the Apex Court which has the exclusive jurisdiction of appointing an Arbitral Tribunal insofar as the International Arbitration is concerned.*

3. *In the case in hand, the petitioner filed an application in O.A.No.493 of 2020 under Section 9 of the Act. In the course of the proceedings, it seems, both sides consented for appointment of a Sole Arbitrator. Based on the same, this Court appointed a Sole Arbitrator. The matter was thereafter referred to the Sole Arbitrator. The Sole Arbitrator has passed an Award and for those claims which were disallowed, the petitioner has filed O.P.No.141 of 2023. For those claims which were allowed and for the rejection of the counter claim, the NLC India Limited has filed O.P.No.333 of 2023.*

4. *In the course of arguments, this Court entertained a doubt as to whether an Arbitrator could have been appointed by this Court in an International Commercial Arbitration and whether the Award passed by the Sole Arbitrator suffers*



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from fundamental lack of jurisdiction. This issue was not raised by both sides, since the Arbitrator was appointed based on the consent given by both sides. This Court is raising this issue since even if the parties consent for the appointment of the Arbitrator, the Court must be vested with the jurisdiction to pass an order. If the Court does not have the jurisdiction, the fundamental question would be as to whether the parties can confer a jurisdiction to the Court, which is not available under the Arbitration and Conciliation Act, 1996.

5. In view of the above, before dealing with the case on its merits, this Court wants to first address the jurisdictional issue. Hence, this Court requested the learned Senior Counsel appearing for the private party and the learned Additional Solicitor General appearing for NLC to assist this Court to arrive at a conclusion.

6. Post these petitions under the caption 'Part Heard Cases' on 19.11.2025 at 2.15 p.m."

6. On 05.11.2025, this Court directed the learned Senior Counsel appearing on behalf of the claimant and the learned Additional Solicitor General appearing on behalf of the respondent to assist this Court on the preliminary objection that was raised by this Court itself.



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7. It must be made clear that both sides did not raise any preliminary objection regarding the jurisdiction of the learned Arbitrator to hear and decide the dispute since a learned Single Judge of this Court appointed the learned Arbitrator only after getting the consent from both sides. Therefore, obviously, both sides did not question the jurisdiction of the learned Arbitrator and it was this Court, which entertained this fundamental doubt and wanted to hear from both sides, take a decision at the outset and thereafter hear them on merits depending upon the decision to be taken by this Court on the preliminary objection regarding the jurisdiction of the learned Arbitrator to decide the dispute.

8. (a) The learned Senior Counsel appearing on behalf of the claimant brought to the notice of this Court the following judgments:

(i) of a learned Single Judge of the
Bombay High Court in ***Roptonal Ltd. Vs.
Anees Bazmee [reported in 2016 SCC
OnLine Bombay 3555];***

(ii) of the Hon'ble Apex Court in ***Amway
India Enterprises (P) Ltd. Vs.***



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**Ravindranath Rao Sindhia [reported in
2021 (8) SCC 465];**

(iii) of another learned Single Judge of
the Bombay High Court in **Adani Enterprises
Ltd. Vs. Antikeros Shipping Corporation
[reported in 2019 SCC OnLine Bombay
528];**

(iv) of the Hon'ble Apex Court in
**Hindustan Zinc Ltd. Vs. Ajmer Vidyut
Vitran Nigam Ltd. [reported in 2019 (17)
SCC 82];** and

(v) of one more learned Single Judge of
the Bombay High Court in **Aqua Labour Asia
Pacific Ltd. Vs. Arihant Ship Breathers
[reported in 2024 SCC OnLine Bombay
3556].**

(b) The learned Senior Counsel appearing on behalf of the
claimant also brought to the notice of this Court the order dated
19.3.2024 passed by another learned Single Judge of this Court in
respect of the same parties in **Arbitration O.P. (Com.Div.) No.222**



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of 2023. It was a petition that was moved by the respondent under Section 11(6) of the Act pursuant to the same contract for appointment of an arbitrator based on the earlier order dated 12.10.2020 passed by this Court in O.A.No.493 of 2020. The said original petition was dismissed by order dated 19.3.2024 on the ground that a petition would lie only before the Hon'ble Apex Court and further, liberty was granted to the respondent to approach the Hon'ble Supreme Court. The said order was not interfered by the Hon'ble Apex Court in a special leave petition that was filed by the respondent against the claimant. Further, by order dated 31.10.2025 in Arbitration Petition No.69 of 2024 filed by the respondent against the claimant, this Court has been requested to decide the pending petitions filed under Section 34 of the Act expeditiously.

(c) The learned Senior Counsel appearing on behalf of the claimant, by relying upon the above judgments, made the following submissions:

(1) The consent given by the parties for appointment of the learned Arbitrator does not confer any jurisdiction upon this Court to bind the learned Arbitrator in a case involving international commercial arbitration. Sub-Section (6) or (9) of Section 11 of the Act is not



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derogable and the question of waiver under Section 4 of the Act does not arise.

(2) There was inherent lack of jurisdiction for this Court to appoint the learned Arbitrator and the jurisdiction cannot be conferred by the parties, enabling this Court to appoint the learned arbitrator in an international commercial arbitration. The order dated 12.10.2020 passed by this Court is non-est in the eye of law. Therefore, whatever had taken place thereafter pursuant to the order dated 12.10.2020 passed by this Court also will have to be treated as non-est and lack of jurisdiction cannot be ratified at a subsequent point of time since it goes to the root of the matter.

(3) Section 34(2)(a)(v) of the Act provides for interference with the arbitral award where the composition of the Arbitral Tribunal was not in accordance with the agreement between the parties or where such agreement was not in accordance with this part (Part I).

(4) Even if an extreme view is taken to the effect that there was agreement between the parties to bind the learned Arbitrator, such an agreement will not be in accordance with Part I since, in a case involving international commercial arbitration, it is only the Hon'ble Apex Court, which can appoint an arbitral tribunal.



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9. (a) Per contra, the learned Additional Solicitor General appearing on behalf of the respondent relied upon the following judgments:

(i) of the Hon'ble Apex Court in ***Pandurang Vs. State of Maharashtra [reported in 1986 (4) SCC 436];***

(ii) of the Hon'ble Apex Court in ***State of Gujarat Vs. Savitri Devi [reported in 1996 (1) SCC 558];***

(iii) of the Hon'ble Apex Court in ***M.P.Housing & Infrastructure Development Board Vs. K.P.Dwivedi [reported in 2022 (3) SCC 783];***

(iv) of a learned Single Judge of the Kerala High Court in ***Fins Engineers and Contractors P.Ltd. rep.by its Managing Director Vs. State of Kerala rep. by the Superintending Engineer [reported in 2024 SCC OnLine Kerala 4702];*** and



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(v) of a learned Single Judge of the Delhi
High Court in ***Hala Kamel Zabal Vs. Arya
Trading Ltd. [reported in 2024 SCC
OnLine Delhi 5604].***

(b) By relying upon the above judgments, the learned Additional Solicitor General appearing on behalf of the respondent submitted as follows:

(1) The sole Arbitrator was appointed based on the consent given by the parties in an application that was filed under Section 9 of the Act.

(2) If such appointment had taken place pursuant to the application filed under Section 11 of the Act, then, obviously, lack of jurisdiction can be taken as a ground. However, there was an agreement between the parties by means of consent expressed by both parties, which was in line with the provisions of Section 7 of the Act and the same was acted upon by the learned Single Judge of this Court and the learned Arbitrator was appointed. Therefore, it cannot be said that the Court lacked jurisdiction.

(3) Consequently, the ground of waiver and acquiescence will stare at the parties, if they raise the issue of jurisdiction after having



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participated in the arbitral proceedings. The jurisdiction of the learned Arbitrator was not questioned under Section 16 of the Act and the parties, having not raised the issue of jurisdiction before the learned Arbitrator, cannot raise the said issue before the Court, which is dealing with the award in a petition filed under Section 34 of the Act.

10. This Court has carefully considered the rival submissions.

11. Section 2(1)(f) of the Act reads as follows:

"(f) 'international commercial arbitration' means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country."



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12. Section 2(1)(f) of the Act makes it clear that whatever be the transaction between the parties, if it happens to be entered into between persons, at least, one of whom is either a foreign national or habitually a resident in any country other than India or by a body corporate, which is incorporated in any country other than India or by the Government of a foreign country, the arbitration becomes an international commercial arbitration notwithstanding the fact that the individual, body corporate or Government of a foreign country referred to in Section 2(1)(f) of the Act carries on business in India through a business office in India.

13. It is not in dispute that the claimant – M/s.China Datang Technologies and Engineering Company Limited is an entity incorporated under the laws of the People's Republic of China. The dispute would, therefore, qualify as an international commercial arbitration within the meaning of Section 2(1)(f) of the Act.

14. Section 11 of the Act, in so far as it is material, reads as follows:

"11. Appointment of arbitrators. –



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(1).....

(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.

.....

(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*



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(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.

.....

(12) (a) Where the matters referred to in Sub-Sections (4), (5), (6), (7), (8) and Sub-Section (10) arise in an international commercial arbitration, the reference to the "Supreme Court or, as the case may be, the High Court" in those sub-sections shall be construed as a reference to the "Supreme Court"; and

(b) Where the matters referred to in Sub-Sections (4), (5), (6), (7), (8) and sub-section (10) arise in any other arbitration, the reference to "the Supreme Court or, as the case may be, the High Court" in those Sub-Sections shall be construed as a reference to the "High Court" within whose local limits the principal Civil Court referred to in Clause (e) of Sub-Section (1) of Section 2 is situate, and where the High Court itself is the Court referred to in that clause, to that High Court."



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15. A careful reading of the above provisions makes it abundantly clear that the power to appoint an Arbitrator in an international commercial arbitration lies exclusively with the Hon'ble Supreme Court under Sub-Section (6) of Section 11 read with Sub-Section (12)(a) of Section 11 of the said Act.

16. In the case in hand, the claimant filed O.A.No.493 of 2020 before this Court under Section 9 of the Act against the respondent and another seeking for interim protection. During the pendency of the said application, a learned Single Judge of this Court took into consideration the fact that there was no disputation about the existence of an arbitration agreement and that the parties, under the Act, had agreed for appointment of the learned Arbitrator even though the arbitration agreement provided for a three-member arbitral tribunal. Thereafter, the learned Single Judge proceeded to exercise his powers to appoint the learned Arbitrator to enter upon a reference, adjudicate and pass an award.

17. It must immediately be noticed that this is not a case where the appointment was made pursuant to a consensus made by parties



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constituting a separate agreement under Section 7 and the Court was merely recording the same. On a reading of the order passed in O.A. No.493 of 2020 dated 12.10.2020 it is clear that the actual appointment was made by this Court, which is evident from the following words "**.....is appointed as sole Arbitrator to enter upon reference, adjudicate and pass an award in the arbitrable disputes**" used in paragraph 14(c) of the order of the learned Single Judge.

18. In the aforesaid backdrop, two seminal questions arise for consideration:

(a) Whether the Commercial Division of the High Court can appoint an Arbitrator in an international commercial arbitration? and

(b) If the High Court does not possess jurisdiction to appoint an Arbitrator in an international commercial arbitration, what is the effect of an award rendered by an Arbitral Tribunal constituted pursuant to such an order?

19. The answer to the first question is no longer res integra. In **TATA Sons (P) Ltd. Vs. Siva Industries & Holdings Ltd.**



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[reported in 2023 (5) SCC 421], the Hon'ble Supreme Court
observed:

"The Supreme Court had exclusive jurisdiction to entertain the arbitration petition since the proposed arbitration between the applicant and the respondents, of whom the second respondent is a foreign party, was an international commercial arbitration in terms of Section 2(1)(f) of the Arbitration Act."

20. Once it has been held that the jurisdiction of the Hon'ble Supreme Court under Section 11, in an international commercial arbitration, is exclusive in character, it must necessarily follow that no other Court can exercise the said power. This is because the conferment of "**exclusive jurisdiction**" rules out the vesting of power with any other Court except the Hon'ble Supreme Court.

21. In **Roptonal Ltd**, a learned Single Judge of the Bombay High Court had proceeded to appoint an arbitrator in an international commercial arbitration. This order was later recalled by the High Court



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when the arbitration process had already commenced and was underway. The High Court observed thus:

"42. In my view, since one of the parties to the arbitration agreement was admittedly incorporated outside India, the arbitration being "international commercial arbitration" within the meaning of section 2(1)(f) of the Arbitration Act, the application for appointment of an arbitrator in case of any breach of the agreed procedure for appointment of an arbitrator could be filed only before the Chief Justice of India under section 11(9) when the said arbitration application (97 of 2013) came to be filed and not before the Chief Justice of this court. In my view in the facts of this case, only the Chief Justice of India or his designate could appoint an arbitrator under section 11(9) of the Arbitration Act and not Chief Justice of this court or his designate. None of the party brought these facts to the notice of the learned designate of the Chief Justice when the said order dated 12th June, 2014 was passed by the learned designate but they gave consent insofar as name of the learned arbitrator is concerned.

43. In my view even by consent of parties, the learned designate of the Chief Justice of this court could not have appointed an arbitrator under section 11(6) of the Arbitration Act in view of the arbitration being "international commercial



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arbitration" within the meaning of section 2(1)(f) of the Arbitration Act. In my view, the said order dated 12th June, 2014 passed by the learned designate of the Chief Justice suffered from inherent lack of jurisdiction and thus can be recalled by the learned designate of the Chief Justice of this court by exercising powers to have procedural review permissible under Article 215 of the Constitution of India."

22. The matter was carried on appeal to the Hon'ble Supreme Court in ***Anees Bazmee Vs. Roptonal Ltd. [reported in 2018 SCC Online SC 3945]***. The appeal was disposed by the Court as under:

*"7. In the peculiar facts of the present case, since the arbitration proceedings had gone ahead before the Arbitrator and since there is no objection either to the name of the Arbitrator or to the conduct of the proceedings, in exercise of our power, **we declare that the same Arbitrator shall continue to be the Arbitrator in the proceedings.** We must, however, observe that the arbitration so conducted shall be an "International Commercial Arbitration" **and if any exigency arises, the Court in question shall be this Court and not the High Court.** Rest of the aspects shall continue to be in terms of the*



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arbitration agreement entered into between the parties.

8. Since almost two years have elapsed after the parties had exchanged pleadings, we give liberty to the parties to file additional documents/ pleadings or to effect amendments to the existing pleadings in six weeks from today. The parties shall appear before the Arbitrator on 23.10.2018. In case the date in question is not suitable, the Arbitrator may fix such appropriate date as he thinks fit. All contentions of the parties are kept open.

9. The order passed by the High Court is thus modified to the aforementioned extent and the appeal is disposed of in aforesaid terms."

23. The aforesaid decision makes it clear that the Hon'ble Supreme Court had validated the order of appointment by exercising its power and had also made it clear that the appropriate court in case of any further exigency would be the Hon'ble Supreme Court and not the High Court. Thus, it is evident that the Hon'ble Supreme Court had approved the legal position, as set out by the Bombay High Court, that an order of appointment made by the High Court in an international commercial arbitration would suffer from an inherent lack of jurisdiction.

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24. The Hon'ble Supreme Court reached the same conclusion in ***Amway (India) Enterprises (P) Ltd.***, which was a case where the Delhi High Court had appointed a sole arbitrator in an international commercial arbitration by exercising powers under Section 11. Setting aside the order, the Hon'ble Supreme Court observed:

"16. In this view of the matter, the argument that there is no international flavour to the transaction between the parties has no legs to stand on. Indeed, an analysis of Section 2(1)(f) would show that whatever be the transaction between the parties, if it happens to be entered into between persons, at least one of whom is either a foreign national, or habitually resident in, any country other than India; or by a body corporate which is incorporated in any country other than India; or by the Government of a foreign country, the arbitration becomes an international commercial arbitration notwithstanding the fact that the individual, body corporate, or government of a foreign country referred to in Section 2(1)(f) carry on business in India through a business office in India. This being the case, it is clear that the Delhi High Court had no jurisdiction to appoint an arbitrator in the facts of this case."



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25. The aforesaid decisions make it clear that the High Court would have no jurisdiction to appoint an Arbitrator in an international commercial arbitration as the said power is within the exclusive jurisdiction of the Hon'ble Supreme Court. Resultantly, an order of the High Court, which purports to appoint an Arbitrator in an international commercial arbitration, would suffer from a complete lack of inherent jurisdiction and would be a nullity in law.

26. This now takes us to the next question. What is the effect of an award rendered by an Arbitral Tribunal constituted pursuant to an order of the High Court, which suffered from an inherent lack of jurisdiction?

27. The learned Additional Solicitor General contended that the award passed by the Arbitrator cannot be assailed on the ground of want of jurisdiction since the appointment was made only by consent with the result that waiver and estoppel would prevent the claimant from challenging the jurisdiction of the Tribunal. It was also pointed out that since the jurisdiction of the Tribunal was not challenged under



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Section 16 the same could not be challenged in a petition under Section 34.

28. Taking up the last contention of the learned Additional Solicitor first, the argument that the issue of jurisdiction cannot be raised in a petition filed under Section 34, when the same was not raised before the Tribunal under Section 16, does not really cut ice. As a matter of fact, in ***MSP Infrastructure Ltd. Vs. M.P.Road Development Corporation Ltd. [reported in 2015 (13) SCC 713]***, a Two-Judges Bench of the Hon'ble Supreme Court had initially taken the view, which is now sought to be canvassed by the learned Additional Solicitor General. In that case, it was held thus:

"13.Simply put, there is a prohibition on the party from raising a plea that the tribunal does not have jurisdiction after the party has submitted its statement of defence. The intention is very clear. So is the mischief that it seeks to prevent. This provision disables a party from petitioning a tribunal to challenge its jurisdiction belatedly, having submitted to the jurisdiction of the tribunal, filed the statement of defence, led evidence, made arguments and ultimately challenged the award under Section 34 of the



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Arbitration Act, 1996. This is exactly what has been done by the respondent Corporation. They did not raise the question of jurisdiction at any stage. They did not raise it in their statement of defence; they did not raise it at any time before the tribunal; they suffered the award; they preferred a petition under Section 34 and after two years raised the question of jurisdiction of the tribunal. In our view, the mandate of Section 34 clearly prohibits such a cause. A party is bound, by virtue of sub-section (2) of Section 16, to raise any objection it may have to the jurisdiction of the tribunal before or at the time of submission of its statement of defence, and at any time thereafter it is expressly prohibited. Suddenly, it cannot raise the question after it has submitted to the jurisdiction of the tribunal and invited an unfavourable award. It would be quite undesirable to allow arbitrations to proceed in the same manner as civil suits with all the well-known drawbacks of delay and endless objections even after the passing of a decree.

14. Shri Divan, the learned Senior Counsel for the respondent vehemently submitted that a party is entitled under the law to raise an objection at any stage as to the absence of jurisdiction of the court which decided the matter, since the order of such a court is a nullity. It is not necessary to refer to the long line of cases in this regard since, that is the law. But, it must be remembered that this



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position of law has been well settled in relation to civil disputes in courts and not in relation to arbitrations under the Arbitration Act, 1996. Parliament has the undoubted power to enact a special rule of law to deal with arbitrations and in fact, has done so. Parliament, in its wisdom, must be deemed to have had knowledge of the entire existing law on the subject and if it chose to enact a provision contrary to the general law on the subject, its wisdom cannot be doubted. In the circumstances, we reject the submission on behalf of the respondent."

29. This decision was, however, expressly cited and overruled by a Three-Judges Bench in ***Lion Engineering Consultants Vs. State of M.P. [reported in 2018 (16) SCC 758]***, wherein it was held thus:

"4. *We find merit in the contentions raised on behalf of the State. We proceed on the footing that the amendment being beyond limitation is not to be allowed as the amendment is not pressed. We do not see any bar to plea of jurisdiction being raised by way of an objection under Section 34 of the Act even if no such objection was raised under Section 16."*



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30. It follows that a plea of lack of inherent jurisdiction is open for examination in a petition under Section 34 even though the same may not have been raised before the Arbitrator under Section 16.

31. As a matter of fact, the Hon'ble Supreme Court, in **Hindustan Zinc Ltd.,** dealt with a case where an arbitrator was appointed by the State Electricity Commission under Section 86(1)(f) of the 2003 Act with the consent of the parties. Subsequently, the arbitral award was challenged under Section 34 of the Act before a Commercial Court and the Commercial Court's decision was challenged in an appeal under Section 37 of the Act wherein it was held that the State Electricity Commission had no jurisdiction to appoint the arbitrator since Section 86(1)(f) referred to disputes only between licensees and generating companies and not licensees and consumers. When the matter reached the Hon'ble Supreme Court, the contention raised was that the objection to jurisdiction could not have been raised in a proceeding under Section 37 of the Act once the parties had



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consented to arbitration earlier. Rejecting this submission, **Nariman,J**
held thus:

"We are of the view that it is settled law that if there is an inherent lack of jurisdiction, the plea can be taken up at any stage and also in collateral proceedings."

32. This decision was subsequently followed in **CGM (IPC), M.P. Power Trading Co. Ltd. Vs. Narmada Equipments (P) Ltd. [reported in 2021 (14) SCC 548]**.

33. Turning to the argument based on waiver, it is well settled that waiver of parties cannot validate an order passed by a Court, which had no inherent jurisdiction. In the decision in **Vithalbhai (P) Ltd. Vs. Union Bank of India [reported in 2005 (4) SCC 315]**, it was held thus:

"No amount of waiver or consent can confer jurisdiction on a court which it inherently lacks or where none exists."

34. The position is the same in case where the order is sought to



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be validated through the consent of parties. In the decision in

Superintendent of Taxes, Dhubri Vs. Onkarmal Nathmal Trust

[reported in 1976 (1) SCC 766], it was held thus:

"A distinction arises between the provisions which confer jurisdiction and provisions which regulate procedure. Jurisdiction can neither be waived nor created by consent."

35. Thus, the consent of parties purportedly given to this Court while passing the order dated 12.10.2020 appointing the learned Arbitrator in an application under Section 9 cannot cure what is, on the face of it, a clear case of inherent lack of jurisdiction as pointed out by the Hon'ble Supreme Court in ***Harshad Chiman Lal Modi Vs. DLF Universal Ltd. [reported in 2005 (7) SCC 791]***:

"Where a court has no jurisdiction over the subject-matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity."

36. It was, however, sought to be contended that the position



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under the Act namely the Arbitration and Conciliation Act, 1996 is different in view of Section 4 of the Act. For proper appreciation, Section 4 reads as follows:

"4. Waiver of right to object.—A party who knows that—

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."

37. Section 4 deals with waiver in two distinct contexts; they are: (a) waiver of any provision in Part I, from which, the parties may derogate or (b) any requirement under the agreement, from which, the parties may derogate. This case falls within the net of Section 4(a) and the question is whether the exclusive power of the Hon'ble Supreme Court to appoint an arbitrator in an international commercial arbitration can be waived by the consent/conduct of parties.



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38. The statutory power to appoint arbitrators is governed by

Section 11. Section 11(2) reads as follows:

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

39. The aforesaid provision makes it clear that some free play has been given to the parties in the context of "**procedure**" for appointment of arbitrators. But, the same is subject to Section 11(6) of the Act. This is an important caveat since Section 11(6) is the repository of statutory power of the High Court to appoint an Arbitrator, which, when read along with Section 11(12) in the context of international commercial arbitration, must be construed to be the Hon'ble Supreme Court. Thus, whatever else the parties may want to tinker with in the context of procedure, Section 11(2) makes it clear that the parties cannot prescribe a procedure, which derogates from the power conferred on the High Court or the Hon'ble Supreme Court under Section 11(6) of the Act. For instance, the parties cannot agree that the power to appoint an Arbitrator will vest with a Munsif Court or a District Court for that would amount to derogating from the power of appointment stipulated in Section 11(6).



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40. Thus, the Act itself makes it clear that the freedom given to the parties to design their own procedure for arbitration cannot extend to tinkering with the statutory power of the Court under Section 11(6). In other words, the power and jurisdiction conferred on the High Court or the Hon'ble Supreme Court under Section 11(6) is non-derogable.

41. In the decision in ***Soham Shah Vs. Indian Film Company Ltd. [reported in 2016 SCC OnLine Bom 147 : (2016) 3 Mah LJ 476]***, a learned Single Judge of the Bombay High Court took a similar view wherein it was held thus :

"8. Under Section 11(9) of the Arbitration and Conciliation Act, 1996, if any application for appointment of a sole or third arbitrator is required to be made in any international commercial arbitration, the Chief Justice of India or the person or institution designated by him only is empowered to appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities. The power of the Chief Justice of High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 can be exercised only in case of a domestic arbitration. Admittedly, one of the parties to the arbitration



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agreement was a body incorporated in the country other than India. The arbitration relating to disputes between such two parties would fall within the definition of the international commercial arbitration defined under Section 2(1)(f) of the Arbitration and Conciliation Act, 1996. In my view the learned designate of the Hon'ble Chief Justice of this Court thus has no jurisdiction to appoint an arbitrator in the facts of this case.

9. *In my view even if the party did not bring these facts to the notice of the learned designate of the Hon'ble Chief Justice when application under Section 11 of the Arbitration Act was heard, even by consent of parties, the learned designate of the Chief Justice of this Court could not have appointed an arbitrator in case of international commercial arbitration. The question of waiver will thus not apply to the facts of this case in view of there being inherent lack of jurisdiction.*

.....

11. *Merely because review petitioner has not raised any objection before the learned arbitrator in the written statement, the order passed by the learned designate which itself was without jurisdiction which objection can not be derogable, there would be no waiver under Section 4 of the Arbitration and Conciliation Act, 1996."*



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42. It may also be mentioned that in the decision in **Suresh Shah Vs. TCS Ltd. [reported in 2024 SCC OnLine Delhi 8552]**, a learned Single Judge of the Delhi High Court has held that the jurisdiction of the Hon'ble Supreme Court in an international commercial arbitration is non-derogable.

43. The matter may be looked at from another angle. The concept of waiver applies in the context of a "**right**" of a party. As pointed out by Sir John Romilly, M.R. in **Vyvyan Vs. Vyvyan [reported in (1861) 30 Beav 65, 74 : 54 ER 813, 817]**, '**waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights and that being so, he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim.**' This decision has been followed by the Hon'ble Supreme Court in **Manak Lal Vs. Prem Chand Singhvi [reported in AIR 1957 SC 425]**.

44. A party may consciously choose to waive a right, which he/she possesses. However, that analogy will not apply when that matter relates to the "**jurisdiction**" of the Court, which is essentially a matter



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concerning the "**power**" of the Court to take cognizance of a particular dispute. The concept of waiver will not apply to a case of inherent lack of jurisdiction as was pointed out by the Hon'ble Supreme Court in the decision in **Jagmittar Sain Bhagat Vs. Director, Health Services, Haryana [reported in 2013 (10) SCC 136]** wherein it was held as under:

"Indisputably, it is a settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the root of the cause. Such an issue can be raised at any stage of the proceedings. The finding of a court or tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Similarly, if a court/tribunal inherently lacks jurisdiction, acquiescence of party equally should not be permitted to perpetrate and perpetuate defeating of the legislative animation. The court cannot derive jurisdiction apart from the statute. In such eventuality the doctrine of waiver also does not apply. (Vide United Commercial Bank Ltd. v. Workmen [1951 SCC 364 : AIR 1951 SC 230] , Nai Bahu v. Lala Ramnarayan [(1978) 1 SCC 58 : AIR



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1978 SC 22] , *Natraj Studios (P) Ltd. v. Navrang Studios* [(1981) 1 SCC 523] and *Kondiba Dagadu Kadam v. Savitribai Sopan Gujar* [(1999) 3 SCC 722].”

45. Turning to the authorities cited by the learned Additional Solicitor General, the decision of the Delhi High Court in ***Hala Kamel Zabal*** is clearly distinguishable on facts. That was a case where the agreement between parties clearly stipulated that the arbitrator would be appointed by the Chief Justice of the Delhi High Court. On this premise, it was held that the appointment did not violate Section 34(2)(a)(v) of the Act. This Court finds that though ***Amway India Enterprises (P) Ltd.***, which also arose from the Delhi High Court, was cited before the learned Single Judge, there was no reference to the same in the discussions in the judgment.

46. The decision in ***Fins Engineers and Contractors P. Ltd.***, has no application to the facts of the present case. That was a case where an order under Section 29-A was passed by the Kerala High Court although the competent Court was the District Court, Ernakulam, which was the jurisdictional Court under Section 29-A. The



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order extending time was consequently recalled by the High Court.

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47. The decision in ***M.P.Housing and Infrastructure Development Board*** did not arise out of an international commercial arbitration and the issue of consent vis-à-vis the power of the Hon'ble Supreme Court did not really fall for consideration in this decision.

48. After the impugned award was passed by the learned Arbitrator on 09.11.2022, the respondent namely the said M/s.NLC India Limited had filed Arb.O.P.(Com.Div) No.222 of 2023 before this Court under Section 11(6) seeking to appoint the same Arbitrator to decide one of the issues with respect to which, it had reserved liberty in the first round. A learned Single Judge of this Court made a reference to paragraph 87 of the statement of defence filed before the Arbitral Tribunal, wherein the said M/s.NLC India Limited stated as under:-

"87. Apart from the above undisputed facts and due to the gross negligence and non-performance of the contract, the respondent had suffered innumerable. The claims arising out of risk and cost would be known to the respondent after materializing new domestic tender floated for the



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said works. As a result, the respondent with the leave of this Hon'ble Tribunal reserves its right to raise the said claims arises out of risk and costs as when occurs and quantified the same. The cause of action for the same is yet to arise. As such, the Respondent is entitled to reserve the right for the present."

49. The learned Single Judge dismissed Arb.O.P.(Com.Div.) No. 222 of 2023 filed under Section 11(6) by order dated 19.3.2024 holding as under:

"22. The appointment of the learned Arbitrator earlier vide order dated 12.10.2020 in OA.No.493 of 2020 was in a proceedings initiated by the respondent under Section 9. There, a consent was given by the petitioner vide Memo dated 12.10.2020, before the Court. Therefore, the Court appointed the learned Arbitrator.

23. Thus it cannot mean, this Court is bound to make an appointment under Section 11 of the Act. The concession given by the petitioner at the stage of Section 9 application filed by the respondent would not confer jurisdiction of this Court in the second round, especially when the respondent is contesting the petition under Section 11 of the Arbitration and Conciliation Act, 1996.



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24. Therefore, I am of the refraining from making any observation on merits of the petition. Suffice to state, that it is open for the petitioner to move the Hon'ble Supreme Court under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of the same Arbitrator to be the Arbitrator. Although procedural, it cannot be helped in view of the law under Section 11 of the Arbitration and Conciliation Act, 1996."

50. Pursuant to this order, the NLC has filed a petition seeking for appointment of arbitrator in Arbitration O.P.(Com.Div.) No.69 of 2024 under Section 11(6) before the Supreme Court. Thus, on their own showing, the NLC cannot now be heard to say that the jurisdictional court in the context of this case is the High Court and not the Supreme Court.

51. In the decision in **Indian Oil Corporation Ltd. Vs. Shree Ganesh Petroleum [reported in 2022 (4) SCC 463]**, it was held that an award could be set aside as being in conflict with the Public Policy of India as provided in Section 34(2)(b)(ii) of the Act when it is in patent contravention of any substantive law of India or in patent breach of the Act.



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52. In view of the above discussions, the only possible conclusion is that the order of this Court dated 12.10.2020 passed in O.A.No.493 of 2020 constituting the Arbitral Tribunal suffers from an inherent lack of jurisdiction. Resultantly, the impugned award dated 09.11.2022 passed by such a Tribunal shall be a coram-non-judice and a nullity in law.

53. In the result, both Arb.O.P.(Com.Div.) Nos.141 and 333 of 2023 are allowed. The impugned arbitral award dated 09.11.2022 passed by the learned Arbitrator is set aside in its entirety.

28.11.2025

Index : Yes
Neutral Citation : Yes

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N.ANAND VENKATESH,J

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28.11.2025