

(2020) 01 DEL CK 0044

In the Delhi High Court

Case No : Arbitration Petition No. 529 Of 2018, Miscellaneous Application No. 9704 Of 2018, O.M.P. (T) (COMM.) 58 Of 2018, Miscellaneous Application No. 9723 Of 2018

Larsen & Toubro Ltd

APPELLANT

Vs

Public Works Department

RESPONDENT

Date of Decision : 09-01-2020

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(5), 11(6), 12, 12(1), 12(1)(b), 12(3), 12(3)(a), 12(3)(b), 12(4), 12(5), 13, 13(1), 13(2), 13(3), 13(4), 14, 14(1)(a), 14(2), 15(2), 21, 34

Arbitration and Conciliation (Amendment) Act, 2015 — Section 26

Citation : (2020) 266 DLT 403

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Nakul Dewan, Nooreen Sarna, Sunil Malhotra, Rajat Malhotra, Ramesh Singh, Sanjoy Ghose, Chirayu Jain, Rhishabh Jetley

Judgement

Rajiv Shakdher, J

Prefatory Facts:

1. These are two petitions filed by Larsen and Tourbo Ltd. (hereafter referred to as "L&T") against the Public Works Department of the Government of NCT of Delhi (hereafter referred to as "PWD").
2. The first petition i.e. ARB. P. 529/2018, is preferred under Section 11(6) read with Section 11(5) of the Arbitration and Conciliation Act, 1996 (hereafter referred to as the "1996 Act"). The second petition i.e. OMP(T)(COMM) 58/2018, is preferred under Section 14(2) read with Section 14(1)(a) of the 1996 Act.
3. In essence, the reliefs sought for by L&T via the captioned petitions is that the mandate of the incumbent arbitrator i.e. Mr. Anil Kumar Verma, be terminated and that this Court should substitute his appointment with a sole arbitrator. Qua the issue of appointment of an arbitrator, an alternate plea has also been made,

which is, that the procedure for appointment of an arbitrator as incorporated under Clause 25 of the General Conditions of Contract ('GCC') be disregarded and a three-member arbitral tribunal be constituted qua the disputes obtaining between the parties.

4. Before I proceed to adjudicate upon the issues which have arisen in the captioned petitions, it may be necessary to, briefly, advert to the backdrop in which the instant petitions have been filed.

Backdrop:

5. On 13.10.2014, L&T and the PWD entered into an agreement (pursuant to a Notice Inviting Tender [NIT] issued by the latter) concerning the construction of a 700-bed hospital which was to be located in Sector-9, Dwarka, New Delhi. The value of the contract, which had to be executed on a turnkey basis and also involved rendering maintenance and operational services for 5 years, was pegged at Rs.545,11,42,992. The subject works had to be completed, as per the agreement, by 26.6.2016.

6. It appears that certain disputes arose between L&T and the PWD during 2014-16. Consequently, L&T, on 23.9.2016, took recourse to the disputes resolution clause i.e. clause 25 of the GCC. Accordingly, a petition in the form of letter dated 23.9.2016 was filed, in this behalf, with the Superintending Engineer, PWD (hereafter referred to as "SE").

6.1 Since the SE failed to act in the matter within the prescribed time, L&T escalated the matter and approached the Principal Chief Engineer for redressal of its grievance via a petition/letter dated 3.2.2017 which, inter alia, concerned "reimbursement of additional cost incurred due to differing site conditions".

6.2 However, before the Principal Chief Engineer could rule on the appeal, the Chief Project Manager(Health) (who, I am told, is equivalent to the SE) vide communication dated 11.5.2017 rejected the claims made by L&T.

7. Since the Principal Chief Engineer had not rendered a decision to the petitioner's appeal within the prescribed period, L&T, it appears, decided to escalate the matter to the next level and, consequently, preferred an appeal, on 6.11.2017, with the Disputes Resolution Committee (DRC). The appeal, preferred with the DRC, met with the same fate. The DRC rejected the petitioner's claims on 11.5.2018. This decision, though, was communicated to L&T only on 21.5.2018.

8. Faced with this situation, L&T shot off a Notice Of Dissatisfaction dated 14.6.2018 ("NOD") to the PWD qua the decision rendered by the DRC. Besides this, via the NOD, L&T also triggered the arbitral process incorporated in Clause 25(i) of the GCC and, in this behalf, furnished the information, as mandated, in terms of the proforma provided in appendix XV of the GCC.

8.1 Pertinently, in the NOD, L&T asserted that while the agreement between the

parties concerning adjudication of disputes via arbitration survived, the procedure for appointment of the arbitral tribunal, as provided in Clause 25 of the GCC, had been rendered invalid on account of the amendments brought about in the 1996 Act via the Arbitration and Conciliation (Amendment) Act, 2015(Act No. 3 of 2016) [hereafter referred to as '2015 Amendment Act']. Reference in this behalf was made to Section 12(5) and the 5th and 7th Schedules which stood incorporated in the 1996 Act pursuant to the enactment of the 2015 Amendment Act.

8.2 Furthermore, L&T also suggested the constitution of a three-member arbitral tribunal for adjudication of inter se disputes having regard to the past practice adopted by the PWD vis-à-vis contract having a value above Rs.100 crore. In this context, L&T suggested the name of its nominee-arbitrator and called upon the PWD to appoint its nominee; so that the two nominees could mutually agree on the appointment of the presiding arbitrator.

8.3 It may also be relevant to note that L&T, in the NOD, also alluded to the fact that if the PWD was not agreeable to the constitution of a three-member arbitral tribunal and instead insisted on appointment of a sole arbitrator, a sole arbitrator could be appointed only by consensus since its right to choose a sole arbitrator had been lost in view of the enactment of the 2015 Amendment Act. In this behalf, it was suggested that its nominee could also be appointed as the sole arbitrator. In the alternative, L&T suggested that the PWD could appoint any retired judge either of the High Court or the Supreme Court of India as the sole arbitrator.

9. The PWD responded to the NOD by communicating to L&T vide letter dated 5.7.2018 the appointment of Sh. Anil Kumar Verma,(retired) Special Director General, CPWD, as the sole arbitrator.

9.1 Pertinently, via the Letter of Appointment ('LOA'), while the learned arbitrator was called upon to render an award qua the claims/disputes adverted to in the statement enclosed therewith, he was, curiously, also directed not to entertain in future any request of L&T concerning modification of claims or lodgement of additional claims.

10. Backed by the LOA, the learned arbitrator vide communication dated 11.7.2018 informed the parties that he had decided to fix a hearing in the matter at the designated time and venue on 27.7.2018. With this communication, the learned arbitrator also enclosed a disclosure statement, as required under the provisions of section 12(1)(b) of the 1996 Act.

10.1 This communication was followed by another communication dated 12.7.2018 whereby a corrigendum was issued by the learned arbitrator vis-à-vis the disclosure statement. The corrigendum sought to bring about a correction qua the case number of one of the matters in which Mr. Verma had been appointed as an arbitrator in the past.

11. Since L&T was not happy with the appointment of Mr. Verma as the sole arbitrator, it once again, wrote to the Principal Chief Engineer, PWD on 21.7.2018. In this letter, while reiterating the assertions made in its earlier letter dated 14.6.2018, L&T sought to highlight that the PWD had failed to act fairly in appointing Mr. Verma as an arbitrator in the matter. L&T, in particular, stressed that the Principal Chief Engineer (i.e. the appointing authority) had failed to act impartially, fairly, and with requisite neutrality.

11.1 The letter ended with the assertion that L&T had decided to disregard Mr. Verma's appointment as an arbitrator and that the Principal Chief Engineer was no longer empowered to appoint an arbitrator in the matter.

12. In response to L&T's letter dated 21.7.2018, the PWD wrote a letter dated 24.7.2018. Via this letter, the PWD, inter alia, conveyed to L&T that its objections qua neutrality and impartiality of the appointed arbitrator i.e. Mr. Verma, could, at best, give rise to "justifiable doubts" as contemplated in the 5th Schedule appended to the 1996 Act and, therefore, it would have to follow the procedure prescribed under Section 13 to challenge his appointment.

12.1 However, the PWD realizing that it had made a mistake in issuing a diktat to the learned arbitrator that he should not entertain any request that may be made on behalf of L&T in future qua modification of its existing claims and/or lodgement of additional claims ?it issued a corrigendum on the same date i.e. 24.7.2018 wherein this aspect was redacted from the LOA.

13. Notably, immediately after issuance of the aforementioned letter dated 21.7.2018, L&T approached this Court via the captioned petitions for redressal of its grievances.

14. Upon notice being issued in the petitions, replies were filed by the PWD, which were followed by rejoinders being filed on behalf of L&T.

Submissions of counsel:

15. Arguments on behalf of L&T were addressed by Mr. Nakul Diwan, Senior Advocate, assisted by Mr. Rajat Malhotra while submissions on behalf of the PWD were made by Mr. Ramesh Singh, Senior standing counsel, and Mr. Sanjoy Ghose.

16. On behalf of L&T, broadly, the following submissions were made:-

(i) Clause 25 of the GCC envisaged a mandatory pre-arbitration dispute resolution mechanism which, inter alia, required intercession of the Chief Engineer who was also designated under the very same clause as the authority for constituting the Arbitral Tribunal. The fact that the Chief Engineer performs two roles, having diametrically opposite purpose and object, opens up the appointment process to a possibility of bias.

(ii) An arbitration agreement which confers on one of the disputants the unilateral right to constitute an arbitral tribunal almost always is imbued with an implied term which requires the party having such power to act in a manner

which is fair, impartial, and neutral.

(ii)(a) The argument that the Chief Engineer (i.e. the appointing authority) had not acted in a manner which was fair, impartial, and/or neutral, was sought to be supported by adverting to the following aspects:

(ii)(a.1) The LOA issued by the Principal Chief Engineer directed the learned Arbitrator not to entertain any request made by L&T in future concerning modification of its claims or lodgment of additional claims. A corrigendum was issued in this behalf only on 24.07.2018, albeit, after L&T had filed the section 11 petition on 23.07.2018.

(ii)(a.2) Mr. Verma, who had retired from CPWD only 3 years ago, has been appointed by the PWD as an arbitrator on four occasions in the past one year. Out of the four appointments made three appointments were made even before Mr. Verma had completed three years from the date of his retirement.

(ii)(a.3) The methodology followed by the PWD for empanelling arbitrators was neither impartial nor neutral. The panel from which Mr. Verma was chosen consisted of a total of five (5) retired officers of CPWD/PWD. More pertinently, the terms of empanelment bring to fore the fact that persons empanelled were expected to carry a bias in favour of the PWD. In this behalf, the following clauses found in the format application for empanelment framed by the PWD were adverted to:-

"14.1 I hereby declare that

(i) xxxxx

(ii) xxxxx

(iii) xxxxx

(iv) xxxxx

(v) I will not take employment anywhere without permission of PWD, Delhi while being on the panel of [the] arbitrator."

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"Eligibility Criteria

1. The officers who had retired not earlier than 7 years i.e. 1st July 2010 as

i. Chief Engineer (Civil) or Chief Engineer (Electrical) in the rank of Grade Pay Rs. 10,000/-or above in the Departments or Ministries of the Central Government with three years regular service in the relevant grade.

ii. The officers in group A of Central Govt. or Delhi Govt. with grade pay Rs. 10,000/- or above and minimum [of] 3 years experience in handling works contracts.

2. The Officer to be empanelled should not have taken any commercial employment and have not appeared before any Arbitrator for CPWD/PWD Delhi or DDA in favour of any party and against the Govt."

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"Terms and Conditions:-

The following terms and conditions shall apply to the empanelled arbitrators:

1. xxxxxxxxx

2. The empanelled arbitrator shall not have more than 5 cases of PWD Delhi in hand at a time. He will inform all the Chief Engineers of the Zones for which he has been empanelled as when the pending cases with him are 5 in nos. He will also inform them when the pending cases have dropped below 5 so that the department can send such cases again to him till it reaches 5."

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"Methodology for Empanelment:-

1. xxxx

2. xxxx

3. xxxx

4. xxxx (i)xxx (ii)xxx (iii)xxx

(a) Xxx

(b) Xxx

(c) All other things being equal, the person who have [sic:has] retired from the higher post in CPWD/PWD shall be given preference strictly as per their seniority (departmental) amongst the equals."

(iii) Based on the aforesaid, the contention raised was that the PWD had a deep and pervasive control over the panel of arbitrators and the conditions of empanelment were akin to employer-employee or business relationship and, hence, any appointment made from such a panel fails the test of fairness, impartiality, and neutrality.

(iv) The appointing authority has a fiduciary obligation to act fairly when constituting an arbitral tribunal. In this behalf, reliance was placed on Article 6(7) of the UNCITRAL Arbitration Rules, 2010. "The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties".

(v) The PWD cannot be allowed to take corrective measures by changing the

terms of appointment of an arbitrator once a petition under Section 11 of the 1996 Act has been filed.

(vi) If the grounds of ineligibility mentioned in the 7th Schedule appended to the 1996 Act are attracted then those very grounds can form the basis for moving a petition under Section 14 of the 1996 Act for terminating the mandate of such an arbitrator. In this behalf, reliance was placed on Entry 1 of the 7th Schedule.

(vii) Furthermore, since Mr. Verma's appointment as an arbitrator had taken place from a panel of five (5) former employees of CPWD/PWD who had an indirect or direct connection with the PWD, his mandate was liable to be terminated. The argument was that the panel consisted of only retired officers who were either past employees of the PWD or its parent organization i.e. CPWD and, consequently, resulted in a very limited choice in terms of independent and neutral persons available for appointment as arbitrators.

(viii) The learned arbitrator was, in any event, de facto, incapable of rendering an award within the time prescribed under the 1996 Act. The incumbent arbitrator was involved in 16 arbitrations besides the case at hand. The incumbent arbitrator thus was incapable of discharging his mandate in the instant case in a time-bound manner. In this behalf, reliance was placed on the following extract of the UNCITRAL Analytical Commentary on the Draft Text of the Model Law (travaux préparatoires) under Article 14 "It is submitted that in judging whether an arbitrator failed to act the following considerations may be relevant. Which action was expected or required of him in the light of the arbitration agreement and the specific procedural situation? If he has not done anything in this regard, has the delay been so inordinate as to be unacceptable in the light of the circumstances, including technical difficulties and the complexity of the case? If he has done something and acted in a certain way, did his conduct fall clearly below the standard of what may reasonably be expected from an arbitrator? Amongst the factors influencing the level of expectation are the ability to function efficiently and expeditiously and any special competence or other qualifications required of the arbitrator by [the] agreement of the parties."

16.1 In support of the aforestated submissions reliance was placed on the following judgments: -

(i) TRF Ltd. v Energo Engineering Projects Ltd., (2017) 8 SCC 377.

(ii) Nabha Power Limited v Punjab State Power Corporation Limited and Anr., (2018) 11 SCC 508 [para 49].

(iii) Union of India and Ors. v Uttar Pradesh State Bridge Corporation Limited, (2015) 2 SCC 52 [para 17].

(iv) Voestalpine Schienen GmbH v Delhi Metro Rail Corporation Ltd., (2017) 4 SCC 665 [para 19]

(v) Alcove Industries Ltd. v Oriental Structural Engineers Ltd., ILR (2008) I Delhi

1113 [para 78]

(vi) Interstate Constructions v NPCC Limited, 2004 (78) DRJ 240 [para 5].

(vii) Datar Switchgears Ltd. v TATA Finance, (2000) 8 SCC 151 [para 19].

(viii) Punj Lloyd Ltd. v Petronet MHB Ltd., (2006) 2 SCC 638 [para 5]

(ix) Kidde India Ltd. v Bharat Heavy Electricals Ltd., 2013 SCC OnLine Del 3062 [para 12]

(x) HRD Corporation v GAIL(India) Limited, (2018) 12 SCC 471 [para 12]

17. On the other hand, Mr. Ramesh Singh made the following submissions:

(i) The argument advanced on behalf of L&T that the Principal Chief Engineer could not act as an authority for constituting an arbitral tribunal as he also discharged the role of an adjudicator had been rendered academic because before the Principal Chief Engineer could act on the appeal preferred by L&T on 03.02.2017, the SE vide order dated 11.05.2017 rejected the petition preferred by L&T, on 23.09.2016. Therefore, the principle enunciated in TRF Ltd. case would have no application in the instant matter.

(ii) L&T instead of filing an appeal with the Principal Chief Engineer against the order of the SE dated 11.05.2017 preferred an appeal to the DRC which rejected the same on 11.5.2018. Although the multi-tier pre-arbitration process provided in Clause 25 of the GCC is mandatory, the same can be bypassed and/or waived. Thus, the decision of the SE cannot be treated as the decision of the Principal Chief Engineer's. L&T, in the instant case, has chosen to bypass the Principal Chief Engineer and approach the DRC directly. In effect, the Principal Chief Engineer did not, in this case, act as an adjudicator and thus there was no impediment in his acting as appointing authority.

(iii) The decision of the Supreme Court in TRF Ltd. case does not apply to the instant case given the fact in that case the appointing authority could act as an arbitrator who, in any event, was ineligible as he was an employee of one of the parties to the dispute whereas in the instant case, the Principal Chief Engineer was required to act as an adjudicator as a part of the pre-arbitration process and not as an arbitrator. Furthermore, even if the Chief Engineer's role as an adjudicator is equated to that of an arbitrator his disqualification would kick-in only if he had acted as an adjudicator.

(iv) Section 12(5) and the 7th Schedule of the 1996 Act would have no applicability in the instant case for the reason that both the agreement obtaining between the parties and the first request for adjudication which was the subject matter of communication dated 16.10.2015 pre-dated the enforcement of the 2015 Amendment Act. Since the dispute resolution mechanism contemplated a multi-tier adjudication process, the commencement of this process should be treated as the relevant date for considering the applicability of the 2015 Amendment Act. The date on which the request for arbitration is triggered, the

same cannot be treated as the date for commencement of arbitration proceedings under Section 21 of the 1996 Act in situations where multi-tier dispute resolution clause is involved as it could lead to the claims being barred by statute of limitation in case the pre-arbitration adjudicatory process were to take longer than expected.

(v) Even if it is assumed that the ratio of the judgement in TRF Ltd. case is applicable in the instant case, the captioned petitions filed under Sections 11 and 14 of the 1996 Act would not lie given the provisions of sub-clause (ii) of Clause 25 of the GCC. Clause 25(ii) of the GCC provides that where no Chief Engineer is available, then, the role of the appointing authority can be fulfilled by the Additional Director General of the concerned region of the CPWD and if no Additional Director General is available, then, the said obligation of appointing the sole arbitrator can be discharged by the Director General of Works, CPWD.

(v)(a) In this behalf, it is important to note that sub-clause (ii) of Clause 25 also provides that no person other than the appointee of the Chief Engineer or the Additional Director General or Director General of Works can act as an arbitrator and if for any reason, none of these three authorities are in a position to appoint an arbitrator, the matter cannot be referred at all to arbitration.

(vi) Since the incumbent arbitrator i.e. Mr.Verma, was appointed in consonance with the procedure prescribed under Clause 25 of GCC he cannot be replaced by another arbitrator.

(vii) The appointment of the incumbent i.e. Mr. Verma is not hit by either Entry 1 of the 7th Schedule or Entry 31 of the 5th Schedule of the 1996 Act. The learned arbitrator is neither an employee nor a consultant nor an advisor to the PWD. The learned arbitrator is a retired employee of the CPWD, who retired beyond the prohibited period of three years prescribed in Entry 31 of the 5th Schedule.

(viii) Since the appointment of Mr.Verma does not fall foul of any of the provisions or any of the entries contained in the 7th Schedule, the request for his replacement cannot be made in the instant proceedings. If at all L&T wishes to press its request for replacing the incumbent arbitrator, it would be required to follow the procedure as prescribed under Section 13 of the 1996 Act.

(ix) Furthermore, even if it is assumed that the incumbent arbitrator can be removed and then substituted by another arbitrator, the new arbitrator can only be appointed as per the procedure prescribed under Clause 25 of the GCC. In this behalf, reliance was placed on the provisions of Section 15(2) of the 1996 Act. It was emphasized that Section 14 of the 1996 Act only dealt with the substitution of an arbitrator and not as to who would be the appointing authority.

17.1 In support of his submissions, reliance was placed on the following judgments:

(i) MK Shah Engineers & Contractors v. State of Madhya Pradesh (1999) 2 SCC 594 [Para 14, 18].

- (ii) Judgement dated 21.2.2019, passed in OMP (T)(Comm) 101&105/2017, titled Bhayana Builders Pvt. Ltd v Oriental Structural Engineers Pvt. Ltd.
- (iii) Judgement dated 25.2.2019, passed in Arb.P. 133/2019, titled Geeta Poddar v Satya Developers Pvt. Ltd.
- (iv) Rajasthan Small Industries Corporation Ltd. v. Ganesh Containers Movers Syndicate, (2019) 3 SCC 282.
- (v) Newton Engineering & Chemicals Ltd. v. Indian Oil Corporation Ltd. & Ors., (2013) 4 SCC 44 [Para 7,8].
- (vi) State of West Bengal v Associated Contractors, (2015) 1 SCC 32.
- (vii) Antrix Corporation Ltd. v Devas Multimedia, (2014) 11 SCC 560.
- (viii) Era Infra Engineering Ltd. v. Airport Authority of India, 2018 (5) Arb.LR 39 [Para 11,13].

Analysis and Reasons:

18. Having heard the learned counsel for the parties and perused the record, what has emerged is as follows:

- (i) L&T and the PWD entered into a turnkey agreement on 13.10.2014 qua which disputes arose between them.
- (ii) L&T took recourse to the mandatory pre-arbitration adjudicatory process provided for settlement of disputes in sub-clause (i) of Clause 25 of the GCC.
- (iii) The first step in that behalf was taken by L&T by filing a petition with the Chief Project Manager(Health) who is equivalent to a SE on 23.09.2016. This petition was not disposed of by the SE within one month as prescribed in Clause 25(i) of the GCC.
- (iv) Consequently, L&T filed an appeal with the Principal Chief Engineer on 03.02.2017 in terms of Clause 25(i) of the GCC. The Principal Chief Engineer failed to render a decision within thirty (30) days as per the provisions of Clause 25(i) of the GCC. While the appeal was pending, the SE (though he had become functus officio), rendered a decision on the L&T's petition dated 23.09.2016.
- (v) L&T, it appears, chose to ignore the decision rendered by the SE on 11.05.2017 and proceeded to prefer an appeal with the DRC on 06.11.2017. The DRC rejected L&T's appeal on 11.05.2018, which was communicated to it on 21.05.2018.
- (vi) L&T via NOD dated 14.06.2018, inter alia, sought reference of disputes to an arbitral tribunal in terms of Clause 25(i) of the GCC even while bringing to the notice of the PWD that with the onset of the 2015 Amendment Act, the procedure for constitution of the arbitral tribunal had to align with the newly incorporated provisions which found mentioned in Section 12(5) and 5th & 7th

Schedules of the 1996 Act. Notwithstanding this assertion, L&T, as required, under the provisions of Clause 25(i) of the GCC submitted the details sought for under appendix XV of the very same clause.

(vii) The PWD, however, disregarded the assertions made by L&T concerning the flaw in the procedure adopted by it up until the enforcement of the 2015 Amendment Act and via LOA dated 05.07.2018 communicated the appointment of Mr. Verma, (retired) Special Director General, CPWD as the sole arbitrator.

(viii) The learned Arbitrator vide communication dated 11.07.2018 fixed the hearing on 27.07.2018. With this communication, the learned arbitrator annexed a disclosure statement which was corrected via a corrigendum dated 12.07.2018.

(ix) L&T reasserted its objections to the appointment of Mr. Verma as the arbitrator vide communication dated 21.07.2018 which were repelled by the PWD save and except qua one aspect vide letter dated 24.07.2018.

Issues:

19. Given the foregoing, in my view, the following issues arise for consideration:

(I) Will the provisions of Section 12 read with 5th and 7th Schedule (which were incorporated in the 1996 Act pursuant to the enactment of the 2015 Amendment Act) apply to the instant case in view of the fact that the agreement obtaining between the parties predated the enforcement of the 2015 Amendment Act?

(II) Was the incumbent arbitrator (i.e. Mr. Verma) ineligible for appointment in terms of the provisions of Section 12(5) read with Entry 1 of the 7th Schedule of the 1996 Act?

(III) Can the appointment of the incumbent arbitrator (i.e. Mr. Verma), assuming it falls foul of Entry 31 of the 5th Schedule of the 1996 Act be terminated without following the procedure prescribed for challenge under Sections 12 and 13 of the 1996 Act?

(IV) Can the mandate of the incumbent arbitrator (i.e. Mr. Verma) be terminated under Section 14(1)(a) of the 1996 Act on the ground that he is as a matter of law (i.e. de jure) unable to perform his functions on account of the appointment procedure being skewed in favour of the PWD? If so, while substituting the incumbent arbitrator with another arbitrator will the same procedure as prescribed in Clause 25(i) of the GCC would have to be followed?

(V) If the mandate of the incumbent arbitrator (i.e. Mr. Verma) were to be terminated under Section 14(1)(a), can the Court appoint a new arbitrator by exercising its powers under Section 11(6) of the 1996 Act?

Issue no. I

20. In this behalf, one may look to the language of Section 26 of the 2015 Amendment Act, which reads as follows: "26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions

of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

20.1 The first part of the aforementioned provision i.e. Section 26 of the 2015 Amendment Act, makes it clear that nothing stated in the said Act would apply to arbitration proceedings commenced in accordance with provisions of Section 21 of the principal Act [read unamended 1996 Act]. Thus, if Section 21 notice was issued after the 2015 Amendment Act was brought into force (i.e. after 23.10.2015) then plainly the said Act would apply.

20.2 In this case, the NOD or the notice triggering arbitration was issued on 14.06.2018. Therefore, in my opinion, the 2015 Amendment Act would apply; the argument advanced to the contrary by Mr. Ramesh Singh cannot be accepted.

20.3 To my mind, if the assertion made on behalf of the PWD are accepted, it would mean that the provisions incorporated in the 1996 Act by the 2015 Amendment Act to ensure that arbitration proceedings are not clouded, inter alia, by doubts cast on account of past conduct or association of arbitrators would be set to naught.

20.4 It can be no one's case that the object of adjudication whether via Court or through a duly constituted arbitral tribunal should not be conducted by impartial and independent persons.

20.5 The PWD in support of its plea that the 2015 amendment act would not be applicable has relied upon the judgment of the Supreme Court in Rajasthan Industries Corporation Ltd. case. The feature which distinguishes that case from the case at hand is that not only did the agreement entered into between the parties predated the enforcement of the 2015 Amendment Act i.e. 23.10.2015 but also the arbitration proceedings, in that case, had commenced before the said date. The Supreme Court noted in Rajasthan Industries Corporation Ltd. case that the agreement between the parties was executed on 28.01.2000 and the arbitration proceedings had commenced way back in 2009.

20.6 On the other hand, the Supreme Court in a more recent judgment rendered in Central Organization for Railway Electrification Vs ECI-SPIC-SMO-MCML (JV) A joint Venture Company, 2019 SCC OnLine SC 1635 took into account the amendments made in the 1996 Act pursuant to the 2015 Amendment Act in view of the admitted position that even though the agreement between parties was executed on 20.09.2010, the demand for arbitration was made on 27.07.2018, that is, after 23.10.2015 which was the date when the 2015 Amendment Act was brought into force.

20.7 Although the Court in its ultimate analysis concluded that the arbitrator appointed by the appellant in that case did not fall foul of the provisions of Section 12(5) of the 1996 Act, it did not disregard the applicability of the said provision merely on the ground that the agreement between the parties predated

enforcement of the 2015 Amendment Act.

20.8 The facts which have emerged in this case would show while the agreement between the parties was arrived at on 13.10.2014, the NOD which, inter alia, contained the demand for arbitration was triggered only on 14.06.2018. The submission advanced by Mr. Singh that the provisions of Section 12(5) and the 7th Schedule would not apply on account of the contents of the communication dated 16.10.2015 addressed by L&T to the Executive Engineer, PWD on the ground that this communication constituted the first request for adjudication is completely untenable for the following reasons:

20.9 Firstly, the letter dated 16.10.2015 only brought to fore the grievance of L&T and thus sought a "judicious review" of the arrangement obtaining between the parties, albeit, on the administrative side and not by way of the pre-arbitration adjudicatory mechanism outlined in clause 25(i) of the GCC. 20.10 Secondly, for this communication to be construed as the first request for adjudication it had to be addressed to the SE in the first instance in terms of clause 25(i) of the GCC. Therefore, if this communication is taken out of the way then, concededly, the first demand for arbitration was made only on 14.6.2018 which was well beyond the date when the 2015 Amendment Act was brought into force.

20.11 Thus, I have no difficulty in concluding that Section 12(5) and the provisions of the 7th Schedule appended to the 1996 Act will apply in the instant case.

Issue No. II

21. There can be no doubt that notwithstanding the agreement obtaining between the parties which would include the provisions contained in clause 25(i) of the GCC, if the arbitrator appointed by the PWD is ineligible in terms of the provisions of the 7th Schedule, then his mandate would stand terminated under Section 14(1)(a) of the 1996 Act. The reason being that such an arbitrator will be deemed as having become unable to perform his functions as per law. In other words, in terms of clause (a) of subsection(1) of Section 14 he would become de jure unable to perform his functions. [See Voestalpine Schienen GMBH v Delhi Metro Rail Corporation Limited, (2017) 4 SCC 665 and Bharat Broadband Network Limited v. United Telecoms Limited, (2019) 5 SCC 755].

21.1 That being said, what one needs to address is: whether the incumbent arbitrator's appointment falls foul of Entry 1 of the 7th Schedule.

21.2 Entry 1 reads as follows:-

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

22. The facts obtaining in the present case establish that Mr. Verma is a retired Special Director of the CPWD. He is neither an employee nor a consultant nor an

advisor of the PWD. Mr. Verma has been appointed as an arbitrator by the PWD in the past but has had no business relationship with the PWD in the past or the present. Therefore, to my mind, Mr. Anil Kumar Verma's appointment cannot be held as having fallen foul of Entry 1 of the 7th Schedule of the 1996 Act.

Issue No. III

23. In my view, the answer to this issue lies in a bare reading of the provisions of Sections 12 and 13 of the 1996 Act. Section 12(1) makes it incumbent upon the person who is approached for being appointed as an arbitrator to disclose in writing any circumstances which would give rise to justifiable doubts as to his independence or impartiality and whether such circumstances would affect his ability to devote sufficient time to arbitration to complete the entire arbitral proceedings within the prescribed time limit. The person concerned with regard to the first aspect is to bear in mind the provisions of the 5th Schedule while ascertaining for himself as to whether his appointment could give rise to justifiable doubts as regards his independence or impartiality to act as an arbitrator.

23.1 Once the person concerned makes such an assessment, he is required to make a disclosure to that effect in the form specified in the 6th Schedule. The grounds for challenging the appointment of the arbitrator are prescribed in Section 12(3). The two grounds available are those prescribed in clause (a) and (b) of subsection (3) of Section 12, that is, whether circumstances exist which could give rise to justifiable doubts as to his independence or impartiality or he does not possess the requisite qualifications agreed to by the parties.

23.2 Subsection (4) of Section 12 gives a right even to a party who may have appointed or participated in the appointment of the arbitrator to challenge his appointment if he can demonstrate that he became aware of the grounds of the challenge after the appointment was made.

23.3 The procedure for laying a challenge to the appointment of the arbitrator as per Section 13(1) can either be that which is agreed upon by the parties subject to the caveat provided in subsection (4) of Section 12 or can be mounted before the arbitrator in terms of Section 13(2) by lodging a written statement of reasons for challenge with the arbitrator within fifteen days of acquiring knowledge of the constitution of the arbitral tribunal or of the circumstances referred to in Section 12 (3).

23.4 In such circumstances, the arbitrator is obliged to decide the challenge made to his appointment unless he withdraws from his office or the opposite party agrees to the challenge (See Section 13(3) of the 1996 Act).

23.5 However, Section 13(4) provides that if the challenge is repelled, then, the arbitral proceedings should continue and the concerned tribunal should accordingly render an award.

23.6 In such circumstances, leeway is given to the aggrieved party whose

challenge is repelled to raise grounds available for challenging the appointment of the arbitrator in terms of Section 13(5) under Section 34 once an award is rendered in the matter.

24. Therefore, in the instant case, assuming that L&T is right (an aspect on which I would not like to comment upon at this juncture) that the incumbent arbitrator's appointment falls foul of Entry 31 of the 5th Schedule, the remedy if any, that would be available to L&T would be which finds mention in Sections 12 and 13 of the 1996 Act. Thus, this issue is answered accordingly.

Issue Nos. IV and V

25. Qua this issue one would have to advert to the appointment procedure provided in Clause 25(i) of the GCC. A plain perusal of sub-clause(i) of clause 25 shows that it has a mandatory pre-arbitration dispute resolution mechanism incorporated therein. The mandatory nature of this mechanism is evident upon reading the following part of the clause: "It is a term of contract that each party invoking arbitration must exhaust the aforesaid mechanism of settlement of claims/disputes prior to invoking arbitration.

(i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with the decision of the Chief Engineer, the contractor may within 30 days from the receipt of the Chief Engineer decision, appeal before the Dispute Redressal Committee (DRC) along with a list of disputes with amounts claimed in respect of each such dispute and giving reference to the rejection of his disputes by the Chief Engineer. The Dispute Redressal Committee (DRC) shall give his decision within a period of 90 days from the receipt of Contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F'. If the Dispute Redressal Committee (DRC) fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC), then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal

Committee (DRC), give notice to the Chief Engineer for appointment of arbitrator on prescribed proforma as per Appendix XV, failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

It is a term of contract that each party involving arbitration must exhaust the aforesaid mechanism of settlement of claims/disputes prior to invoking arbitration. (Added vide OM No. DG/MAN/255 Dt. 23.05.2011)

(Added vide OM No. DG/MAN/255 Dt. 23.05.2011) (emphasis is mine)

25.1 The pre-arbitration adjudicatory procedure that precedes the aforesaid extract required the contractor to approach the SE in the first instance. The SE was required to render a decision within one month of the request being made. In case the SE failed to render a decision within the prescribed time or rendered a decision with which the contractor was dissatisfied, a right accrued to the contractor to lodge an appeal within 15 days of receipt of the SE's decision.

25.2 If an appeal is lodged by the contractor the Chief Engineer is required to afford an opportunity of hearing to the Contractor, if he so desires, and give the contractor an opportunity to place on record evidence in support of his appeal. The Chief Engineer is required to render a decision within 30 days of receipt of the contractor's appeal.

25.3 In case the decision rendered in the appeal by the Chief Engineer did not satisfy the contractor, the Contractor is conferred with the right to prefer an appeal to the DRC within 30 days of Chief Engineer's decision in the appeal.

25.4 The DRC was required to render a decision in the appeal preferred before it within 90 days.

25.5 In the eventuality of the DRC failing to give its decision within the period of 90 days or decision rendered by the DRC was adverse to the interest of either party (i.e. the contractor or the employer), then, either party had the right to serve a notice on the Chief Engineer within 30 days for appointment of an arbitrator. The notice had to be issued in the format prescribed in appendix XV of clause 25 of the GCC.

26. The facts which have emerged in this case demonstrate that the SE, when approached on 23.9.2016, did not render a decision within one month as prescribed under Clause 25(i) of the GCC. Resultantly, L&T preferred an appeal with the Principal Chief Engineer on 3.2.2017. The Principal Chief Engineer also did not render a decision within 30 days. However, the SE, it appears, woke up to his obligation and disposed of the petition pending before him on 11.5.2017. Via this order, the SE rejected the petition preferred by L&T.

26.1 Clearly, by this time, as noted hereinabove, the SE had been rendered functus officio.

26.2 Since the Principal Chief Engineer did not render a decision in the appeal lodged with him, L&T preferred an appeal with the DRC on 6.11.2017. The DRC

rejected the petitioner's appeal on 11.5.2018; a decision which was communicated to L&T only on 21.5.2018.

27. L&T has questioned and, in my view, rightly the procedure prescribed for appointment of the arbitrator on the ground that the appointing authority is none other than the principal Chief Engineer who is designated as the first appellate authority in the pre-arbitration adjudicatory process provided in Clause 25(i) of the GCC. The argument advanced on behalf of the PWD that, in this particular case, the principal Chief Engineer's impartiality as to the appointee could not be questioned as he factually did not rule on the appeal is flawed for two reasons. Firstly, the Principal Chief Engineer wears two hats. He is required to act both as an adjudicator and the authority which is charged with the duty of appointing an arbitrator. His roles are such that there is every likelihood of his appointee would not have been perceived as being an impartial arbitrator. Second, the procrastination displayed by the Principal Chief Engineer, in not disposing of the appeal within the prescribed period had lent credence, at least ostensibly, to the charge that his appointment was neither fair nor impartial. At times not rendering a decision is worse than rendering a decision in the matter.

27.1 As a matter of fact, clause 25(i) of the GCC provided for an appeal to the DRC only if a decision was rendered by the Principal Chief Engineer unlike the appeal which could be lodged with him (i.e. the Principal Chief Engineer) even when the SE failed to render a decision within one month of the petition being filed. Therefore, the fact that the Principal Chief Engineer did not render a decision, because of the frame of clause 25(i) of the GCC, L&T would have been in flux as to whether or not to prefer an appeal with DRC.

27.2 Thus, the submission made on behalf of the PWD on this score cannot be accepted.

28. Besides this, the more serious cause for concern is the manner in which arbitrators are empanelled by the PWD. There are four specific clauses which have been adverted to on behalf of L&T which form part of the application for empanelment prescribed by the PWD, which according to L&T ensure that the empanelled persons carry an inherent bias in favour of the PWD or, to put it more plainly, allegiance to the PWD. Out of the four clauses referred to by L&T, two clauses are particularly problematic.

"10. Pl. attach separate undertakings for the following:

(i)xxxxx

(ii) That the applicant has not appeared for private party and against the government interest before any Arbitrator of PWD/CPWD or DDA

(iii) xxxxx"

xxxxxxx

"Eligibility Criteria:

1. xxxxxxx

(i) xxxxx

(ii) xxxxx

2. The Officer to be empanelled should not have taken any commercial employment and have not appeared before any Arbitrator for CPWD/PWD Delhi or DDA in favour of any party and against the Govt

3. xxxxx

4. xxxxx

5. xxxxx"

(emphasis is mine)

28.1 Both these clauses demonstrate that the PWD is desirous of empanelling those persons for appointment as arbitrators who have not appeared against the Government. It is not disputed by the PWD that the incumbent arbitrator was empanelled under the same empanelment procedure which prescribed the aforementioned conditions for being empanelled.

28.2 Given the above, in my opinion, there is weight in the argument that the procedure for empanelment is skewed in favour of the PWD. The persons who are empanelled, which includes the incumbent arbitrator, are required to display a certain kind of trait or be imbued with attributes that are antithetical to the appointment of an impartial and an independent arbitrator.

28.3 Since the appointment procedure is inherently tilted in favour of the PWD, which does not allow for the appointment of an independent and impartial arbitrator, in my opinion, the provisions of Section 14(1)(a) of the 1996 Act would get attracted. In my view, the disablement of an arbitrator under clause (a) of subsection (1) of Section 14 takes within its fold not only the ineligibility criteria prescribed under the 7th Schedule but also those aspects which although do not fall within the ambit of the entries set out in 7th Schedule but lend support to the plea, as in this case, that the appointee-arbitrator would be anything but impartial and/or independent.

28.4 The other argument advanced on behalf of the PWD that even if this Court were to agree to the termination of the mandate of the incumbent arbitrator, the Court would have to allow for the PWD to appoint a substitute arbitrator is based on the following pleas:

(i) Section 15(2) prescribes that when the mandate of an arbitrator is terminated, the substitute arbitrator can only be appointed according to the rules that were applicable qua the appointment of the arbitrator who is being replaced.

(ii) That clause 25(ii) of the GCC provides that if no Chief Engineer is available, then, the role of the appointing authority can be fulfilled by the Additional

Director of the concerned region of the CPWD, and if no Additional Director General is available, then, this role can be fulfilled by the Director General of Works, CPWD.

28.5 In support of aforesaid pleas, it is also sought to be argued that if the PWD is not given the right to appoint an arbitrator via any of the three officers named above, then, the dispute cannot be referred at all to arbitration.

29. In my view, the aforesaid submissions advanced on behalf of the PWD are untenable for the following reason:

29.1 Section 15(2) which requires the appointment of a substitute arbitrator according to the rules that applied to the arbitrator being replaced is founded on the premise that rules of appointment ensure that the appointee-arbitrator has, in the very least, ostensible attributes of being fair and impartial. As discussed above, both the procedure for appointment and the conditions of empanelment are such that they are likely to create an impression that the appointee-arbitrator is neither fair nor independent nor impartial. The fact that the Principal Chief Engineer who is one of the adjudicators is given the power to appoint an arbitrator itself rails against the principle of impartiality and independence. These principles are further eroded on account of the conditions prescribed by the PWD for empanelling persons who are interested in being appointed as arbitrators qua matter concerning the PWD. 29.2 As noted above, the conditions prescribed for empanelment seek almost a declaration of allegiance to the Government. Therefore, since the rules of appointment through up a pre-configured panel comprising persons having a particular profile, the appointment of a substitute cannot be made as per the procedure prescribed in clause 25(i) of the GCC. Besides this, the argument advanced that the role of the Chief Engineer could be fulfilled by the Additional Director General or Director General of Works is also untenable for the following reasons.

29.3 Firstly, these officers can step in only if no Chief Engineer is available. It is no one's case that the Chief Engineer's post is vacant.

29.4 Secondly, both the Additional Director General or the Director General of Works would have the same panel available to them which is available to the Chief Engineer.

30. Therefore, to ensure that an impartial and independent arbitrator is appointed in the matter, I can do one of the two things. One could be to persuade the PWD to rejig its appointment procedure and thus broad base its panel of arbitrators i.e. follow the Voestalpine path. However, if the PWD were called upon to do so, it would not only have to delink the appointing authority from the adjudicatory authority but would also have to reframe its application for empanelment by redacting conditions which tend to degrade the attributes of impartiality and/or independence which are expected of the appointee-arbitrator. This is an exercise that can, perhaps, be carried out by the PWD with regard to future appointments.

30.1 The other option available to me, which is more practical, and, at this juncture, would hasten the process of appointment of an independent and impartial arbitrator, is to take recourse to the provisions of Section 11(6) of the 1996 Act. This power has been exercised by Courts even prior to the 2015 Amendment Act in the interest of appointing an impartial and independent arbitrator by veering away from the procedure agreed to between the parties. Qua this Courts have given greater weight to the object of achieving an impartial resolution of disputes obtaining between parties as against the principle of party autonomy. (See Indian Oil Corporation Limited v Raja Transport Pvt. Limited, (2009) 8 SCC 520 and Union of India versus U.P State Bridge Corporation Limited, (2015) 2 SCC 52).

30.2 The aforementioned judgements have been cited with the approval of the Supreme Court in Voestalpine Schienen GMBH v Delhi Metro Rail Corporation Limited, (2017) 4 SCC 665.

31. Before I conclude, I may only indicate that it would be in the interest of the PWD to reframe clause 25(i) of the GCC to the extent it confers the power of constituting an arbitral tribunal on the Chief Engineer who also acts as the first appellate authority in the mandatory pre-arbitration adjudicatory process. In this context, the PWD also should revisit its enplanement applications which have been found problematic as noted in the discussion carried out hereinabove. The PWD would do well to broad base its panel so that its catchment area includes not only retired government and public sector officials but also judges, bureaucrats, lawyers etcetera having relevant domain expertise.

31.1 In this regard, it would do well to follow the directions issued by the Supreme Court in Voestalpine Schienen GMBH v Delhi Metro Rail Corporation Limited in paragraph 29 at page 690 of the report (2017) 4 SCC 665.

Decision:

32. Thus, for the foregoing reasons, I am inclined to terminate the mandate of the incumbent arbitrator i.e. Mr. Anil Kumar Verma and appoint instead Hon'ble Mr. Justice A.K.Sikri, former judge of the Supreme Court (Cell No.: 09818000300) as the arbitrator. It is ordered accordingly.

32.1 The learned arbitrator before entering upon reference shall file a declaration as prescribed under Section 12 of the 1996 Act. The learned arbitrator will be paid his fees as per the 4th Schedule of the 1996 Act.

32.2 The arbitration proceedings will continue from the stage where they are presently positioned.

32.3 It is made clear, though, that mere fact that Mr.Anil Kumar Verma's mandate is terminated in no way would reflect on his conduct.

33. There shall, however, be no order as to costs.

34. All pending applications shall stand closed.