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**(2017) 03 AHC CK 0101**

**In the Allahabad High Court**

**Case No :** Arbitration And Conciliation Appl.U/s11(4) No. 69 Of 2014

M/S Aargee Engineers

APPELLANT

Vs

Era Infra Engineering Ltd.

RESPONDENT

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**Date of Decision :** 31-03-2017

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 11(4), Section 12(1)(b), Section 9

**Citation :** (2017) 4 ADJ 513 : (2017) 122 ALR 179

**Hon'ble Judges :** Ashwani Kumar Mishra, J.

**Bench :** Single Bench

**Advocate :** Anurag Khanna and Nipun Singh, Advocates, for the Applicant; Rohit Nandan Pandey, Subodh Kumar and Vikram D.Chauhan, Advocates, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

Ashwani Kumar Mishra, J.—Applicant, a Company registered under the Indian Companies Act, 1956, seeks appointment of Arbitrator, in this petition, filed under section 11(4) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act").

2. Shorn of unnecessary details, facts relevant for our purposes are that Central Public Works Department, Varanasi Region, Varanasi, through its Executive Engineer, respondent no.2, (hereinafter referred to as the "Department") awarded a contract for civil and electrical works in favour of M/s Era Infra Engineering Ltd., New Delhi, respondent no.1, (hereinafter referred to as "Principal Contractor" ) on 9.10.2009, to be carried at BHU Campus, Varanasi. A work agreement was entered into between Department and the "Principal Contractor". This agreement permitted "Principal Contractor" to engage an "Electrical Contractor", as a "Subcontractor", for carrying out electrical works.

3. The applicant being an approved class "A" CPWD contractor for electrical works was engaged as "Electrical Contractor". Three work orders were issued to

it on 24.6.2011, by the "Principal Contractor", which contained following arbitration and jurisdiction clauses:-

#### "2.6-Arbitration

a) Any disputes arising out of this Contract shall be referred to the sole arbitrator i.e. Managing Director of Era Infra Engineering Ltd. who may further appoint any person not below the rank of General Manager and there shall be no objection if arbitrator so appointed is an employee of Era Infra Engineering Ltd.

In case the Arbitrator to who the matter is originally referred get transferred or vacates his office or unable to act for any reason as aforesaid at the time of such transfer, vacation of office or inability to act, Managing Director, EIFL shall appoint another person to act as Sole Arbitrator in accordance with the provisions of Arbitration & Conciliation Act, 1996.

#### 2.7-Jurisdiction

a) This Work Order is governed by the Indian Laws for time being in force. The court of Delhi alone shall have exclusive jurisdiction in all matters arising out of this Work Order."

4. A Memo of Understanding (MOU) was executed on 28.9.2011 between the "Principal Contractor" and "Electrical Contractor", duly countersigned by the Executive Engineer of the department. This MOU was to be treated as an agreement and had following provisions relating to payment to be apportioned between "Principal Contractor" and "Electrical Contractor" as well as resolution of dispute between them. The provisions are extracted:-

"We state that M.O.U. between us will be treated as an agreement and has legality as per Indian Contract Act (amended upto date) and the Department (CPWD) can enforce all the terms and conditions of the agreement for execution of the above work. Both of us shall be responsible for the execution of work as per the agreement to the extent of this MOU allows. Both the parties shall be paid consequent to the execution as per agreement to the extent this MOU Permits. In case of any dispute, either of us will go for mediation/arbitration to the Chief Engineer (E) NZ. His decision shall be final and binding on both of us.

We have agreed as under:

1. The associated electrical contractor will execute all electrical works in the wholesome manner as per terms and conditions of the agreement. The associated electrical contractor shall be paid 80% of the value of the work by Executive Engineer (E) as per standard procedure followed by the department. Remaining 20% payment shall be paid to the main contractor simultaneously. Any type of internal transaction and mutual understanding without involving the department. Security deposit shall be deducted as per agreement. The same shall be refunded to the electrical contractor in full as per terms and conditions of the agreement.

2. The electrical contractor shall be liable for disciplinary action if he failed to discharge the action(s) and other legal action as per agreement besides forfeiture of the security deposit.

3. All the machinery and equipments, tools and tackles required for execution of the electrical works. As per agreement shall be the responsibility of the electrical contractor.

4. The site staff required for the electrical work shall be arranged by the electrical contractor as per terms and conditions of the agreement."

5. The applicant alleges that obligations imposed upon it under the contract were duly discharged, but requisite payments were not released. Instead, its bank guarantees were proposed to be invoked. This led to the applicant filing an arbitration petition under section 9 of the Act. The District Judge fixed a date for hearing of Case No.67 of 2014, while issuing notices. Ex-parte injunction was refused. Applicant approached this Court by filing Writ Petition No.1573 of 2014. A direction was issued to the court concerned to dispose of injunction matter, on the next date fixed, and not to release any amount to "Principal Contractor" in the meantime. The applicant then proceeded to invoke arbitration clause, vide its letter dated 23.6.2014, addressed to the designated Chief Engineer, who had to act as arbitrator. Following reliefs were claimed:-

"You will appreciate that in spite of all above said tortures and non receipt of our legitimate payments; we had completed all the 3 projects as per revised mutually agreed scope of work and had been given completion certificate by the concerned Executive Engineer (E)

Further CPWD also owes us Rs 1,19,96,660.46 out of short payment yet to be received by us 80% payable by your Department as per Tripartite agreement/MOU/MOM. CPWD had not released our above payment in spite of honourable High court of Allahabad order dated 30.5.2014 and release our payments payable by M/s Era Infra Engineering Ltd out of 20% payment of Rs 72,17,971.45 excluding WCT/TDS/Labor cess etc which payment had already been received by M/s Era Infra Engineering Ltd from CPWD.

Since the dispute has arisen, we therefore, as per terms request you to settle our pending payment from CPWD and M/s Era Infra Engineering Ltd including other statuaries issues and also humbly request you to appoint Arbitrator as per terms of NIT/Tripartite agreement/MOU/MOM."

6. Prior to it also a letter was sent to Department on 5.6.2014, reiterating request for appointing an arbitrator, in following words:-

"(iii) Regarding settlements of pending issues & payments, we had requested through your good selves to appoint an arbitrator asap under contract agreements once the main contractor does not pay the associated approved sub agencies."

7. In pending proceedings under section 9 the Department moved an application seeking its deletion as a party on the ground that in any inter se dispute between the applicant and "Principal Contractor", Department would have no concern. However, it is not in dispute that the designated arbitrator neither took cognizance of applicant's claim/ nor proceeded any further in the matter. The applicant thus felt aggrieved and has approached this Court for appointment of arbitrator under Section 11(4) of the Act. An amendment is also filed for substituting sub-section (6) in place of sub-section (4) of Section 11. The prayer is opposed and shall be dealt with later.

8. A counter affidavit is filed on behalf of Department and the Executive Engineer concerned, i.e. respondent no.2 & 3. Following stand is taken in para 16 & 58:-

"16. That, as per MOU, the Chief Engineer (NZ), Lucknow can mediate or arbitrate once either of the party approach to them. But he can not appoint the arbitrator. In this case, the petitioner in place of approaching to the Chief Engineer (NZ), CPWD approached to the court for their disputes. He has violated the provisions of the MOU. He is giving incorrect information that he approached to the Chief Engineer (NZ), CPWD. His letter addressed to the Chief Engineer (NZ) first time vide letter no.AEC/DKR/j164165166/ 2014 dated 30.6.2014 (at page No.742 of the petition). In the petition at page no.740, he has given the reference of his letter dated 5.6.2014. It may be noted that the petitioner in the month of May, 2014, approached the Hon"ble District Court, Varanasi for their disputes. Even he approached Hon"ble High Court Allahabad in May 2014 and got the direction on 30.05.2014. Once he already approached to the court and matter is subjudice, the CPWD cannot arbitrate as the petitioner himself violated the provision of the MOU. In the month of June, 2014, he referred the disputes to the CPWD. In these letters also, he did not referred the matter to the Chief Engineer (NZ), CPWD for mediation. The petitioner deliberately bypassed the provisions of the MoU and never requested for mediation. However, Department gave reply to these two letters.

58. That, the contents of para 42 of the arbitration petition are matters of record. The petitioner vide Annexure No.8 has given reference of letter addressed to the Chief Engineer (NZ), CPWD, dated 23.6.2014. It is belated action as the petitioner had gone to the court in the month of May 2014 vide petition before the District Court, Varanasi. And the Hon"ble High Court Allahabad. The Department vide letter no.262 dated 23.6.2014 (Annexure 3) replied the petitioner that the matter is subjudice. The Department also replied on each and every point."

9. Another affidavit is filed stating that there exists no arbitration agreement between the applicant and Department and consequently, arbitrator cannot be appointed. Names of three persons nevertheless are suggested for being appointed as arbitrator. On 26.2.2016, this Court passed following orders:-

"26.2.2016

Shri Subodh Kumar, Advocate appears for the Public Works Department. He has filed reply to the arbitration application but has failed to give a complete reply to the averment made in paragraph 42 of the application wherein the applicant has stated that a letter was sent to the C.P.W.D on 23.06.2014 requesting them to appoint Arbitrator to settle the disputes in terms of the MOU dated 28.09.2011.

Shri Subodh Kumar, learned counsel for the P.W.D prays for and is allowed two weeks" time to file a specific reply of paragraph 42 of the application. List this matter on 08.03.2016."

10. In compliance, a fresh affidavit is filed by department, para 4(d)(ii) of which reads as under:-

"Second request in the 3rd para of the letter the petitioner requested for appointment of arbitrator. It is the terms and conditions of the MOU that the CE (NZ), Lucknow will act as arbitrator. There is no provision for appointment of arbitrator. The petitioner deliberately requested for appointment of arbitrator which was not as per terms & conditions of the MOU. In place of referring the disputes to the CE (NZ), CPWD, Lucknow, the petitioner moved to Hon"ble District Court and Hon"ble High Court Allahabad in May 2014 for their disputes. The matter was subjudice before the Hon"ble Court."

11. A counter affidavit has also been filed by the "Principal Contractor" opposing this application on the grounds that (i) under the terms of agreement entered into between the applicant and "Principal Contractor", the dispute is to be referred to the sole arbitration of Managing Director of "Principal Contractor", who may further designate any person not below the rank of General Manager to act as arbitrator; (ii) the designated arbitrator has not been approached with any grievance, and therefore, the application moved is premature; (iii) clause 2.7 of the agreement dated 24.6.2011 vests exclusive jurisdiction with the courts at Delhi, and as such this Court has no territorial jurisdiction to hear the matter; (iv) that even under the MOU, a named arbitrator already exists, and application under section 11 is not maintainable; (v) that sub-section (4) of section 11 is not attracted and the amendment sought to substitute sub-section (6) is misconceived as no notice is given to principal contractor of any dispute, or for invoking arbitration clause under MOU.

12. The objections, aforesaid, are opposed by the applicant. Contention is that designated arbitrator has failed to act and as such appointment of arbitrator is warranted in the facts of the present case.

13. I have heard Sri Nipun Singh, learned counsel for the applicant, Sri Ajay Bhanot, learned senior counsel assisted by Sri V.D. Chauhan, for the principal contractor, and Sri Subodh Kumar, learned counsel for the Department and have perused the materials brought on record.

14. On the basis of submissions advanced, with reference to the materials placed, following questions arise for consideration in this application:-

- (i) Whether this Court has territorial jurisdiction to entertain this application?
- (ii) Whether applicant could be permitted to amend its application by substituting sub-section (6) in place of sub-section (4) of Section 11?
- (iii) Whether an arbitrator under section 11 could be appointed if he is already named by designation on the ground that he has failed to act?
- (iv) Whether necessary ingredients to appoint an arbitrator exists in the facts of the present case?

15. The issue relating to territorial jurisdiction is taken up first. It is urged by Sri Ajay Bhanot, learned Senior Counsel for the "Principal Contractor" that by virtue of clause 2.7 of the agreement, exclusive jurisdiction in the matter arising out of arbitration vests in the courts at Delhi, and this Court lacks territorial jurisdiction to entertain this application. Per contra, it is submitted that agreement between "Principal Contractor" and applicant, contained in clause 2.7, stood rescinded, and substituted by MOU, an agreement in itself, executed at Varanasi, which neither ousts jurisdiction of this Court nor vests exclusive jurisdiction in the courts at Delhi. It is also stated that entire cause of action relating to MOU has arisen at Varanasi and in the absence of ouster clause in the subsequent contract, territorial jurisdiction of this Court cannot be questioned.

16. Terms of agreement with reference to the applicable provisions of law needs to be examined. The first agreement between the applicant and respondent no.1 was signed at Delhi, and contained a specific clause conferring exclusive jurisdiction upon courts at Delhi alone. The relevant clauses 2.6 and 2.7 of the contract have already been extracted above, and leaves little room of doubt that parties have agreed to confer exclusive jurisdiction upon the courts at Delhi alone, in respect of dispute arising between them. It is settled that if cause of action arises within the local limits of two courts, it is open for the parties to agree to vest jurisdiction in one of such courts to the exclusion of other. Exclusive jurisdiction nevertheless cannot be conferred upon a court where no part of cause of action arises, as it is equally settled that consent cannot confer jurisdiction, if no part of cause of action arises within its limits. In the facts of the present case, agreement containing arbitration clause was signed at Delhi. Part of cause had thus arisen at Delhi, and the parties could confer exclusive jurisdiction upon the courts at Delhi. The argument of Sri Bhanot, with reference to the first agreement may have substance. However, the matter does not rest here as this is not the only agreement between the parties. The MOU dated 28.9.2011 is also an agreement, subsequent in point of time, which contains a different arbitral clause, noticed above. There is neither any ouster of jurisdiction nor the parties have resolved to vest jurisdiction in a court, to the exclusion of other. Admittedly the MOU is signed by the "Principal Contractor" and "Electrical Contractor" , and countersigned by the Executive Engineer, CPWD, at Varanasi. The contract work is to be performed at Varanasi, which falls within the territorial jurisdiction of this court. A different arbitrator is named by designation in MOU.

The signing of MOU dated 28.9.2011, subsequent to the signing of the earlier agreement dated 24.6.2011, had, in substance, resulted in parties substituting a new arbitration agreement. This was permissible in view of the provisions contained in Section 62 of the Indian Contract Act, 1872, which reads as under:-

"62. Effect of novation, rescission and alteration of contract. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

17. The arbitration agreement dated 24.6.2011 therefore stood substituted and stipulations made therein, to the extent they are at variance with the substituted arbitral agreement cannot be pressed. This Court will thus have territorial jurisdiction to entertain this application and the first question is answered accordingly.

18. Next question relates to the prayer made for amending the arbitration application. The application was filed invoking Section 11(4) of the Act. An objection was raised questioning its maintainability. Faced with this objection, an amendment has been filed under Order 6, Rule 17 of the Code of Civil Procedure readwith Chapter XXII Rule 1 of the High Court Rules, for substituting sub-section (6) in place of sub-section (4) of Section 11. Contention is that it was due to inadvertent error that sub-section (4) of Section 11 was invoked. This application is opposed questioning applicability of provisions of the Code of Civil Procedure in arbitration proceedings. It is also stated that in absence of an enabling provision, amendment cannot be allowed.

19. Section 11 provides for appointment of arbitrators. Sub-section (2) thereof provides that parties are free to agree on a procedure for appointing the arbitrator or arbitrators, subject to sub-section (6). Sub-section (3) provides that where parties fail to arrive at an agreement in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall then appoint a third arbitrator, who shall act as the presiding arbitrator. Subsection (4) of Section 11 reads as under:-

"11(4) If the appointment procedure in subsection (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 Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court]."

20. Sub-section (4) of Section 11 could be invoked in a case where each party has to appoint an arbitrator, and the arbitrators so appointed are to appoint a presiding arbitrator. In the facts of the present case, a sole arbitrator is named, and therefore sub-section (3) of Section 11 would not get attracted. Learned counsel for the applicant fairly concedes this position. Sri Nipun Singh submits

that this was an inadvertent error and that Sub-section (6) be permitted to be invoked in place of sub-section (4).

21. This application is not maintainable under Section 11(4) of the Act. In case amendment is rejected, the application would not be maintainable. The applicant would, however, be at liberty to prefer a fresh application under Section 11(6) of the Act. This would only result in multiplicity of litigation and would further cause delay in resolution of dispute. The provisions of the Code of Civil Procedure can be taken aid of for achieving the object of resolution of dispute by arbitration, unless its applicability is excluded in the Act. Public purpose would otherwise be sub-served, if multiplicity of litigation is avoided, and the claim for appointment of arbitrator is examined on merits. This Court, while exercising jurisdiction under Section 11, would also have inherent jurisdiction to evolve a procedure, which is just, reasonable and fair, and secures resolution of dispute by arbitration. By allowing application for amendment, applicant's claim for appointment of arbitrator can be examined on merits. It is otherwise settled that mere wrong mentioning of a provision would not be fatal, provided the court otherwise has jurisdiction to entertain the plea. Viewed from such aspects, I am of the opinion that application for amendment is liable to be allowed. It is ordered, accordingly.

22. It is then contended by the respondents that as arbitrator is already named by designation, an application under Section 11 would not lie. Sri Bhanot has relied upon observation of Madras High Court in M/s. Kamala Solvent v. Manipal Finance Corporation Ltd., Manipal and others, AIR 2001 Madras 440 for such proposition. Paragraphs 10 and 11 of the report is heavily relied upon, and is reproduced:-

"10. At this juncture, it would be absolutely necessary to refer to Section 11 of the Act which reads thus:

"11. Appointment of arbitrators:

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

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

(3) Failing any agreement referred to in Subsection (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 subsection (3) applies and

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

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty

days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

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

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

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

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

(c) a person, including an institution falls 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."

In the case on hand, the parties have agreed upon to appoint the 3rd respondent as arbitrator under Clause-33 of the agreement dated 301295. That being so, it is very clear as seen from Subsection (6) of Section 11 that where the agreement formulated a procedure for appointment of an arbitrator referable to Subsection (2) of Section 11, it is open to the parties to take necessary measures for enforcing the procedure laid down in the agreement for arbitration. It is crystal clear that under Subsection (6) of Section 11, the Chief Justice or his designate is not to make any appointment but to enforce or direct the party to appoint in terms of the agreement entered into between them. The Supreme Court in the decision reported in *Konkan Railway Corporation Ltd. v. Mehul Constructions Co.*, held as follows (Para5):

5. "An analysis of different subsections of Section 11 would indicate the character of the order, which the Chief Justice or his nominee passes under Subsection (6) of Section 11. Subsection (3) and Subsection (4) deal with cases, in which a party fails to appoint an arbitrator or the arbitrators fail to agree on the third arbitrator and thus seek to avoid frustration or unreasonable delay in the matter of constitution of the arbitral Tribunal. It authorises the Chief Justice of India or the Chief Justice of a High Court concerned, or any person or institution designated by him to make the appointment upon request of a party, if the other party has failed to appoint an arbitrator within thirty days from the receipt of a request to that end. Subsections (4)(5) and (6) designedly use the expression "Chief Justice" in preference to a Court or other authority as in paragraphs (3) and (4) of Article 11 of the Model Law, obviously for the reason that the Chief Justice acting in its administrative capacity, is expected to act quickly without

encroaching on the requirements that only competent persons are appointed as arbitrators. Subsection (4) does not lay down any time limit within which the Chief Justice or his nominee, designated by him, has to make the appointment. It however expects that these functionaries would act promptly. While Subsections (4) and (5) deal with removal of obstacles arising in the absence of agreement between the parties on a procedure for appointing the arbitrator or arbitrators, Subsection (6) seeks to remove obstacles arising when there is an agreed appointment procedure. These obstacles are identified in Clauses (a), (b) and (c) or Subsection (6). Subsection (6) provides a cure to these problems by permitting the aggrieved party to request the Chief Justice or any person or institution designated by him to take the necessary measure i.e., to make the appointment, unless the agreement on the appointment procedure provides other means for securing the appointment. Subsection (6) therefore, aims at removing any deadlock or undue delay in the appointment process. This being the position, It is reasonable to hold that while discharging the function under Subsection (6), the Chief Justice or his nominee will be acting in his administrative capacity and such a construction would subserve the very object of the new Arbitration Law."

11. In the above said decision, the Apex Court held that when the parties agreed upon for appointment of the arbitrator and the procedure, the Court must implement the above procedure. Thus, the above decision of the Apex Court made it clear the difference between the nature of appointment of the arbitrator under Subsections (3), (4), (5) and (6) of Section 11. The nature of order of appointment differs in the case where there is no procedure agreed upon between the parties and when the procedure had been agreed upon between the parties for the appointment of an arbitrator. In case, if an agreement is entered into between the parties provides the procedure for appointment of arbitrator, the Court has to implement the above said procedure, but not to venture upon to pass an order otherwise. That being so, it is significant to note that in the case on hand, the parties under agreement mutually agreed upon to appoint the 3rd respondent herein as sole arbitrator. Further, not content with that, the parties also agreed upon for another sole arbitrator in the event of the earlier arbitrator's refusal, neglect or incapacity etc., and that is evident under Clause 33 (a) of the agreement. Another significant aspect in this case is that a supplementary agreement also has been entered into between the parties herein on 30699 i.e., subsequent to the enforcement of the new Act (Act 26 of 1996) and the said supplementary agreement categorically mentions that except the changes mentioned relating to the reschedule of monthly payment, all other terms and conditions of the lease agreement dated 301295 shall remain in force, and binding on the parties to the said agreement. Thus it is well settled that where an arbitrator is named in the arbitration agreement, the provisions of Section 11 of the Act are not attracted and the Court will not have jurisdiction to try and decide the petition filed by a party."

23. The objection is controverted stating that there is no bar in appointing an

arbitrator, other than the named arbitrator, where the arbitrator is not impartial or has failed to act, or in any other justifiable situation. Learned counsel for the applicant has invited attention of the Court to Section 11(8), as also the amendments incorporated in Section 12(1) & (5) to contend that where appointment of named arbitrator may not sub-serve the object of appointing an impartial arbitrator, a different arbitrator can be appointed under section 11 of the Act.

24. The issue as to whether an arbitrator other than the named arbitrator could be appointed under Section 11 of the Act, and the situation warranting it, is not an issue res integra and has been a subject matter of consideration in a series of decisions. The issue got examined by Apex Court in Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Co. Ltd., (2008) 10 SCC 240. Para 11 and 12 of the judgment is reproduced:-

"11. The crucial expression in subsection (6) is "a party may request the Chief Justice or any person or institution designated by him to take the necessary measure" (underlined for emphasis). This expression has to be read along with requirement in subsection (8) that the Chief Justice or the person or an institution designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

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

25. In Indian Oil Corporation Ltd. and others v. Raja Transport Pvt. Ltd., (2009) 8 SCC 520, this question was again noticed in para 40 as under:-

"40. Where the arbitration agreement names or designates the arbitrator, the question whether the Chief Justice or his designate could appoint any other person as arbitrator, has been considered by this Court in several decisions."

26. After noticing the judgment of the Apex Court in Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corporation, (2007) 5 SCC 304, Union of India v. Bharat Battery Mfg. Co. (P) Ltd., (2007) 7 SCC 684 and Northern Railway Administration v. Patel Engineering Co. Ltd. (2008) 10 SCC 240, following principles have been laid down in para 45 of Indian Oil Corporation Ltd. (supra):-

"45. If the arbitration agreement provides for arbitration by a named Arbitrator, the courts should normally give effect to the provisions of the arbitration

agreement. But as clarified by Northern Railway Administration, where there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the Arbitrator is not likely to act independently or impartially, or if the named person is not available, then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure of referring the dispute to the named arbitrator, appoint an independent Arbitrator in accordance with section 11(8) of the Act. In other words, referring the disputes to the named arbitrator shall be the rule. The Chief Justice or his designate will have to merely reiterate the arbitration agreement by referring the parties to the named arbitrator or named Arbitral Tribunal. Ignoring the named Arbitrator/Arbitral Tribunal and nominating an independent arbitrator shall be the exception to the rule, to be resorted to for valid reasons."

27. Distinction was drawn between an arbitration agreement naming an individual as arbitrator in contradistinction to appointment of arbitrator by designation. Para 47 of the report in Indian Oil Corporation Ltd. (supra) is relevant and thus extracted:-

"47. But the position will be different where the arbitration agreement names an individual (as contrasted from someone referred to by designation) as the Arbitrator. An example is an arbitration clause in a partnership deed naming a person enjoying the mutual confidence and respect of all parties, as the Arbitrator. If such an arbitration agreement provides that there shall be no arbitration if such person is no more or not available, the person named being inextricably linked to the very provision for arbitration, the nonavailability of the named arbitrator may extinguish the very arbitration agreement. Be that as it may.

In the facts of the present case, arbitrator is named by designation and not as an individual. Limitations where individual is named as an arbitrator would thus not arise here. The principle where arbitrator is named by designation was dealt with in para 48 in following words:-

48. In the light of the above discussion, the scope of section 11 of the Act containing the scheme of appointment of arbitrators may be summarised thus:

?.....

(vi) The Chief Justice or his designate while exercising power under subsection (6) of section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else."

In Denel (Proprietary) Ltd. v. Ministry of Defence, (2012) 2 SCC 759, earlier

judgments on the issue were scanned and following observations were made in para 25 and 26 of the judgment:-

25. The material placed before the Court by the petitioner would indicate that it would not be unreasonable to entertain the belief that the arbitrator appointed by the respondent would not be independent. That being so, the appointment of Mr. Satyanarayana can not pass the test under Section 11(8) of the Act.

26. Similarly, applying the test laid down in Indian Oil Corporation Ltd. (supra), this Court in the case of Denel (Proprietary) Limited (supra) also observed that the Managing Director, Bharat Electronics Limited, which is a Government company is bound by the directions/instructions issued by his superior authority. The Court also observed that according to the pleaded case of the respondents, though it was liable to pay the amount due under the purchase order, it was not in a position to supply the dues only because of the direction issued by the Ministry of Defence, Government of India. Therefore, the Court concluded that the Managing Director may not be in a position to independently decide the dispute between the parties. Consequently, the Court proceeded to appoint an independent arbitrator."

In Bipromasz Bipron Trading SA v. Bharat Electronics Ltd. (BEL), (2012) 6 SCC 384, following observations have been made in para 48 & 49:-

"48. In view of the aforesaid observations, it would not be possible to reject the petition merely on the ground that this Court would have no power to make an appointment of an arbitrator other than the Chairman-cum-Managing Director or his designate. This Court would have the power to appoint a person other than the named arbitrator, upon examination of the relevant facts, which would tend to indicate that the named arbitrator is not likely to be impartial.

49. In this case, the petitioner had clearly pleaded that the named arbitrator is a direct subordinate of the CMD and employee of the respondent. CMD is the controlling authority of all the employees, who have been dealing with the subject matter in the present dispute and also controlling authority of the named arbitrator. Apprehending that the CMD, who had been dealing with the entire contract would not act impartially as an arbitrator, the petitioner had issued a notice on 20th May, 2011. In this notice, it was pointed out that while the entire process of the performance of the contract was going on, the CMD had issued a letter on 5th June, 2009 to the petitioner stating that as per the company's directives, all pending supplies as on that date were "put on hold". After the aforesaid communication, no communication was issued to the petitioner for supply of the goods as per the Purchase Order dated 3rd December, 2009. Even subsequently, there were difficulties when a further lot of 24 units were supplied. The detailed submissions made by the petitioner have been noticed in the earlier part of the judgment."

In San-A Tradubg Company Limited v. I.C. Textiles Limited, (2012) 7 SCC 192, the Apex Court examined a situation where the named arbitrator refused to act

and the consequences which may follow. Para 17 to 19 of the judgment are reproduced:-

"17. The submission of the learned counsel for the respondent that as the named arbitrator has refused to act as an arbitrator, the arbitration agreement itself comes to an end, cannot be accepted because Section 15 provides for a remedy for appointment of another arbitrator when the arbitrator appointed by the parties as provided in the agreement refuses to act an arbitrator. Settlement of dispute between the parties through medium of an independent person in whom both parties repose confidence is the basic foundation on which the law of arbitration stands and is founded.

18. When the agreement provides for reference of a dispute to a particular individual and such agreed arbitrator refuses to act, the next appointment could be made as agreed by the parties, but where no such procedure is prescribed authorizing appointment of another arbitrator then the agreement clause cannot operate. It, therefore, follows that in case where the arbitration clause provides for appointment of a sole arbitrator and he had refused to act, then the agreement clause stands exhausted and then the provisions of Section 15 would be attracted and it would be for the Court under Section 11(6) to appoint an arbitrator on the procedure laid down in Section 11(6) being followed unless there is an agreement in the contract where the parties specifically debar appointment of any other arbitrator in case the named arbitrator refuses to act.

19. In the present case, I do not find any such stipulation in the contract entered into between the parties where under the parties have specifically debarred appointment of a fresh arbitrator if the named arbitrator refuses to act and perform his function as arbitrator. In the absence of any specific condition debarring appointment of a fresh arbitrator, it cannot be said that the arbitration clause in the contract agreement stands obliterated on the named arbitrator's refusal to perform his function."

28. Learned counsels have referred to a recent decision of the Apex Court in *Shailesh Dhairyawan v. Mohan Balakrishna Lulla*, (2016) 3 SCC 619, where the Apex Court examined import of Section 15 of the Act. Para 12, 17 and 19 are relevant and reproduced:-

"12. Three judgments of this Court have thrown considerable light on the correct construction of Section 15(2) of the Act. In *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd.*, (2006) 6 SCC 204, the arbitration clause stated that the Managing Director of the respondent company was to appoint an arbitrator in terms of the said clause. The appointed arbitrator resigned, after which the Managing Director of the respondent company promptly appointed another arbitrator. The correctness of the second appointment was challenged in an application made by one of the parties under Section 11(5) of the Act read with section 15(2) praying that the Chief Justice of the High Court may appoint a substitute arbitrator to resolve the disputes between the parties. This application

under Section 11 was dismissed, which dismissal was upheld by a Division Bench of the High Court. This Court agreeing with the Division Bench judgment held as under:

"In our view, the learned Chief Justice and the Division Bench have rightly understood the scope of Section 15 of the Act. When the arbitrator originally appointed in terms of the arbitration agreement withdrew for health reasons, the Managing Director, as authorised originally by the arbitration agreement, promptly appointed a substitute arbitrator. It is true that in the arbitration agreement there is no specific provision authorising the Managing Director to appoint a substitute arbitrator if the original appointment terminates or if the originally appointed arbitrator withdraws from the arbitration. But, this so-called omission in the arbitration agreement is made up by the specific provision contained in Section 15(2) of the Act. The withdrawal of an arbitrator from the office for any reason is within the purview of Section 15(1) (a) of the Act. Obviously, therefore, Section 15(2) would be attracted and a substitute arbitrator has to be appointed according to the rules that are applicable for the appointment of the arbitrator to be replaced. Therefore, what Section 15(2) contemplates is an appointment of the substituted arbitrator or the replacing of the arbitrator by another according to the rules that were applicable to the appointment of the original arbitrator who was being replaced. The term "rules" in Section 15(2) obviously referred to the provision for appointment contained in the arbitration agreement or any rules of any institution under which the disputes were referred to arbitration. There was no failure on the part of the party concerned as per the arbitration agreement, to fulfil his obligation in terms of Section 11 of the Act so as to attract the jurisdiction of the Chief Justice under Section 11(6) of the Act for appointing a substitute arbitrator. Obviously, Section 11(6) of the Act has application only when a party or the person concerned had failed to act in terms of the arbitration agreement. When Section 15(2) says that a substitute arbitrator can be appointed according to the rules that were applicable for the appointment of the arbitrator originally, it is not confined to an appointment under any statutory rule or rule framed under the Act or under the scheme. It only means that the appointment of the substitute arbitrator must be done according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage. We are not in a position to agree with the contrary view taken by some of the High Courts."

17. Thus, it will be seen that in the Yash-with Constructions case this Court construed Section 15(2) liberally and held that the expression "the rules" that were applicable to the appointment of the arbitrator would include the arbitration clause or agreement itself, apart from any institutional rules or other rules which may apply. Since it was clear that the Managing Director in the aforesaid case was the appointing authority for a particular arbitrator, in case the said arbitrator appointed refuses to act, the Managing Director was stated to be the authority under the arbitration agreement that could always appoint a substitute arbitrator in terms of Section 15(2). Similar is the case in the ACC Ltd. judgment where

this Court held that despite two named arbitrators having died, substitute arbitrators could be appointed in terms of the said clause unless there is a clear prohibition or debarment that could be read on a true construction of the arbitration agreement. It found that the expression "at any time" clearly showed that the arbitration clause had no nexus with the lifetime of the named arbitrator and therefore no such prohibition could be read. It also held that the procedure agreed upon by the parties for the appointment of the original arbitrator is equally applicable to the appointment of a substitute arbitrator, even if the agreement does not specifically say so, as this is the mandate of Section 15(2) of the Act.

19. The scheme of Section 8 of the 1940 Act and the scheme of Section 15(2) of the 1996 Act now needs to be appreciated. Under Section 8(1)(b) read with Section 8(2) if a situation arises in which an arbitrator refuses to act, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in a fresh appointment, and if such appointment is not made within 15 clear days after service of notice, the Court steps in to appoint such fresh arbitrator who, by a deeming fiction, is to act as if he has been appointed by the consent of all parties. This can only be done where the arbitration agreement does not show that it was intended that the vacancy caused be not supplied. However, under Section 15(2), where the mandate of an arbitrator terminates, a substitute arbitrator "shall" be appointed. Had Section 15(2) ended there, it would be clear that in accordance with the object sought to be achieved by the Arbitration and Conciliation Act, 1996 in all cases and for whatever reason the mandate of an arbitrator terminates, a substitute arbitrator is mandatorily to be appointed. This Court, however, in the judgments noticed above, has interpreted the latter part of the Section as including a reference to the arbitration agreement or arbitration clause which would then be "the rules" applicable to the appointment of the arbitrator being replaced. It is in this manner that the scheme of the repealed Section 8 is resurrected while construing Section 15(2). The arbitration agreement between the parties has now to be seen, and it is for this reason that unless it is clear that an arbitration agreement on the facts of a particular case excludes either expressly or by necessary implication the substitution of an arbitrator, whether named or otherwise, such a substitution must take place. In fact, subsections (3) and (4) of Section 15 also throw considerable light on the correct construction of subsection (2). Under subsection (3), when an arbitrator is replaced, any hearings previously held by the replaced arbitrator may or may not be repeated at the discretion of the newly appointed Tribunal, unless parties have agreed otherwise. Equally, orders or rulings of the earlier arbitral Tribunal are not to be invalid only because there has been a change in the composition of the earlier Tribunal, subject, of course, to a contrary agreement by parties. This also indicates that the object of speedy resolution of disputes by arbitration would best be subserved by a substitute arbitrator continuing at the point at which the earlier arbitrator has left off."

29. In *Union of India v. U.P. State Bridge Corporation Ltd.* (2015) 2 SCC 52, the law on the issue was again examined. Para 12, 17, 19 and 20 of the judgment are extracted:-

"12. As is clear from the reading of Section 14, when there is a failure on the part of the Arbitral Tribunal to act and it is unable to perform its function either de jure or de facto, it is open to a party to the arbitration proceedings to approach the court to decide on the termination of the mandate. Section 15 provides some more contingencies when mandate of an arbitrator can get terminated. In the present case, the High Court has come to a categorical finding that the Arbitral Tribunal failed to perform its function, and rightly so. It is a clear case of inability on the part of the members of the Tribunal to proceed in the matter as the matter lingered on for almost four years, without any rhyme or justifiable reasons. The members did not mend their ways even when another life was given by granting three months to them. Virtually a peremptory order was passed by the High Court, but the Arbitral Tribunal remained unaffected and took the directions of the High Court in a cavalier manner. Therefore, the order of the High Court terminating the mandate of the Arbitral Tribunal is flawless. This aspect of the impugned order [*U.P. State Bridge Corpn. Ltd. v. Union of India*, 2011 SCC OnLine Pat 323 : (2011) 108 AIC 676] is not even questioned by the appellant at the time of hearing of the present appeal. However, the contention of the appellant is that even if it was so, as per the provisions of Section 15 of the Act, substitute arbitrators should have been appointed "according to the rules that were applicable to the appointment of the arbitrator being replaced". On this basis, it was the submission of Mr Mehta, learned ASG, that the High Court should have resorted to the provision contained in Clause 64 of GCC.

17. In the case of contracts between government corporations/State-owned companies with private parties/contractors, the terms of the agreement are usually drawn by the government company or public sector undertakings. Government contracts have broadly two kinds of arbitration clauses, first where a named officer is to act as sole arbitrator; and second, where a senior officer like a Managing Director, nominates a designated officer to act as the sole arbitrator. No doubt, such clauses which give the Government a dominant position to constitute the Arbitral Tribunal are held to be valid. At the same time, it also casts an onerous and responsible duty upon the persona designate to appoint such persons/officers as the arbitrators who are not only able to function independently and impartially, but are in a position to devote adequate time in conducting the arbitration. If the Government has nominated those officers as arbitrators who are not able to devote time to the arbitration proceedings or become incapable of acting as arbitrators because of frequent transfers, etc., then the principle of "default procedure" at least in the cases where Government has assumed the role of appointment of arbitrators to itself, has to be applied in the case of substitute arbitrators as well and the Court will step in to appoint the arbitrator by keeping aside the procedure which is agreed to between the parties. However, it will depend upon the facts of a particular case as to whether

such a course of action should be taken or not. What we emphasise is that Court is not powerless in this regard.

19. The appointment of the arbitrator by the Court, of its own choice, departing from the arbitration clause, is therefore not unknown and has become an acceptable proposition of law which can be termed as a legal principle which has come to be established by a series of judgments of this Court. Reasons for debating such a course of action are not far to seek and already taken note of above.

20. In the present case, we find the fact situation almost same as in *Tripple Engg. Works [North Eastern Railway v. Tripple Engg. Works, (2014) 9 SCC 288 : (2014) 5 SCC (Civ) 30]* and *Singh Builders Syndicate [Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246]*. If the contention of the appellant is allowed, it would amount to giving premium to the appellant for the fault of the Arbitral Tribunal's members who were appointed by none else but by the appellant itself. As pointed above, the appellant has not questioned the order of the High Court insofar as it has terminated the mandate of the earlier Arbitral Tribunal because of their inability to perform the task assigned to them. In such a situation, leaving the respondent at the mercy of the appellant thereby giving the power to the appellant to constitute another Arbitral Tribunal would amount to adding insult to the serious injury already suffered by the respondent because of non-conclusion of the arbitral proceedings even when the dispute was raised in the year 2007. In case, the cherished and benevolent purpose and objective of speedy resolution of the disputes by arbitral proceedings is to be accomplished, it becomes the bounden duty of the persona designata to appoint such arbitrator(s) who have sufficient time at their disposal to attend to this task assigned to them and to conclude the arbitral proceedings in a speedy manner. It is a common sight that the officers who are awfully busy in their other routine functions, because of their status and position, are made arbitrators. For them, discharge of their other duties assumes more importance (and naturally so) and their role as the arbitrators takes a back seat. This kind of behaviour showing casual approach in arbitration cases is anathema to the very genesis of arbitration. Therefore, where the Government assumes the authority and power to itself, in one sided arbitration clause, to appoint the arbitrators in the case of disputes, it should be more vigilant and more responsible in choosing the arbitrators who are in a position to conduct the arbitral proceedings in an efficient manner, without compromising with their other duties. Time has come when the appointing authorities have to take call on such aspects failing which (as in the instant case), Courts are not powerless to remedy such situations by springing into action and exercising their powers as contained in Section 11 of the Act to constitute an Arbitral Tribunal, so that interest of the other side is equally protected."

30. Sri Bhanot, submits that appointment of arbitrator has to be made in accordance with the agreement and the procedure of giving notice to the other

side needs to be followed even at the stage a claim of substitute arbitrator is raised. Attention of the Court has been invited to judgment in Huawei Technologies Company Limited v. Sterlite Technologies Limited, (2016) 1 SCC 721. Para 8 of the judgment is relied upon and is reproduced:-

"8. Clause 22.3 of the Supply Contract contemplates appointment of a sole arbitrator by the parties by mutual consent. In a situation where the original arbitrator i.e. Shri Justice S.K. Dubey had resigned himself the substitute or new arbitrator is required to be appointed according to the rules that were applicable to the appointment of the original arbitrator. This is the mandate of Section 15(2) of the Act. It was, therefore, incumbent on the petitioner to give notice and explore the possibility of naming an arbitrator by mutual consent and only on failure thereof the present application under Section 11(6) of the Act could/should have been filed. The above recourse is required to be followed by virtue of the provisions of Section 15(2) of the Act and the decision of this Court in Yash Constructions (P) Ltd. (supra). Admittedly, the same had not been followed. In these circumstances, the Court will understand the present application/arbitration petition to be premature. It is accordingly not entertained leaving it open for the petitioner to act appropriately, if so advised, in terms of the present order and thereafter seek its remedies as provided by law."

31. In light of the principles laid down, noticed above, it is by now settled that in exercise of jurisdiction under section 11 of the Act, the Court is to enforce terms of agreement for securing appointment of arbitrator. However, it is not denuded of jurisdiction to follow a different course, for justifiable cause, by giving reasons. Different contingencies requiring such departure have clearly been noticed. The ultimate object is to secure appointment of an impartial arbitrator and secure speedy resolution of dispute by way of arbitration. The argument of Sri Bhanot that application under Section 11 is not maintainable, as arbitrator is already named, thus cannot be accepted. The scheme underlying the Act has to be construed by harmoniously interpreting its provisions. It is imperative for the Court to examine qualification and impartiality of arbitrator as well as to secure speedy resolution of dispute. The terms of arbitration agreement providing for arbitrator to be named by designation cannot be read in isolation. It also cannot be construed in a manner inconsistent with the scheme of the Act. The question is answered holding that an application under Section 11(6) would lie also in a case where arbitrator is named, by designation, where (i) arbitrator named is not impartial, or (ii) he lacks required qualification, or (iii) for any other justifiable cause to secure speedy resolution of dispute, by way of a reasoned order.

32. At this juncture, it would also be relevant to deal with the argument of Sri Bhanot that it is the "court" defined under Section 2 (e) of the Act, which alone has jurisdiction to decide issues relating to failure of arbitrator to act, in view of Section 14, and that such power cannot be exercised under Section 11 of the Act. Sections 14 and 15 of the Act are reproduced:-

"14. Failure or impossibility to act.

(1) The mandate of an arbitrator shall terminate if

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of subsection (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or subsection (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or subsection (3) of section 12.

#### 15. Termination of mandate and substitution of arbitrator.

(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under subsection

(2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal."

33. A conjoint reading of various sub-sections of Section 11 of the Act has been interpreted to vest jurisdiction in the Supreme Court or High Court, as the case may be, to appoint an impartial arbitrator having requisite qualification to secure speedy resolution of dispute, by a reasoned order. Expression "necessary measure", "independent and impartial arbitrator" etc. are words of wide amplitude, and have been invoked to vest jurisdiction so as to secure object of appointment of an impartial arbitrator and to secure early resolution of dispute. Although all endeavours are to be made to implement the terms of agreement but in circumstances already noticed, and for securing end objective of early resolution of dispute by appointing an impartial arbitrator required departure can

always be made by a reasoned order.

34. It is true that if a controversy remains concerning any of the grounds referred to in Clause (a) of sub-section 1 of Section 14, unless otherwise agreed by the parties, it is the "court" defined under Section 2(e) of the Act, which would have jurisdiction to decide on termination of mandate of arbitrator. Use of expression "controversy" in Section 14(1) of the Act has an object to serve. A substantial disagreement on facts requiring adjudication has to be decided by the "court" defined under Section 2(e). This is so as such court can entertain evidence etc. in that regard. However, in cases where it is apparent on record that the arbitrator has failed to perform his functions, or for other reasons fails to act without undue delay, or where there is no substantial disagreement on termination of mandate of arbitrator, an arbitrator can be appointed exercising jurisdiction under Section 11 read with Section 15 of the Act. Such interpretation would clearly advance the cause of an early resolution of dispute by appointing an impartial arbitrator. Any different interpretation, as suggested by Sri Bhanot, would unnecessarily result in multiplicity of litigation at different forums, causing substantial delay, and would not sub-serve the object of Act.

35. Sri Nipun Singh submits that this Court may appoint an arbitrator as the named arbitrator has failed to act. It is also contended that the named arbitrator is otherwise ineligible to be appointed in view of the amendments incorporated vide Act No.3 of 2016. He further states that named arbitrator is an officer of the Department and is not expected to act impartially. Attention of the Court is invited to amendments made in Sections 11(8), 12(1) & (5) together with Fifth Schedule and Seventh Schedule for the purpose.

This argument is countered, contending that where arbitrator is already named in the agreement, prior to introduction of amending act, the provision would have no applicability. Learned counsels have laid emphasis upon the second proviso to sub-section (5) of Section 12, as was originally inserted vide Ordinance but was deleted in the amending act.

36. It would, therefore, be appropriate to notice the amendment brought in vide the Arbitration and Conciliation (Amendment) Ordinance, 2015, published on 23.10.2015, insofar as Section 12 was proposed to be amended:-

"8. In section 12 of the principal Act,?

(i) for subsection (1), the following subsection shall be substituted, namely: ?

"(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,?

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.? The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.? The disclosure shall be made by such person in the form specified in the Sixth Schedule."

(ii) after subsection (4), the following subsection shall be inserted, namely:?

"(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this subsection by an express agreement in writing.

Provided further that this subsection shall not apply to cases where an arbitrator has already been appointed on or before the commencement of the Arbitration and Conciliation (Amendment) Ordinance, 2015."

37. However, when The Arbitration and Conciliation (Amendment) Act, 2015, was published in gazette on 1.1.2016, the second proviso to sub-section (5) of Section 12 was deleted. The counsel for the applicant contends that the object of deleting second proviso is to allow amendment to operate retrospectively. Per contra, it is submitted that since arbitrator is already named, the second proviso would have no applicability in the facts of the present case.

38. Observations were made, time and again, by the Apex Court, doubting desirability of departmental persons to act as an arbitrator, where government/department is one of the signatories to the agreement. The observation made in para 38 & 39 of the judgment in Indian Oil Corporation Ltd. (supra) is apposite and thus reproduced:-

"38. Before parting from this issue, we may however refer to a ground reality. Contractors in their anxiety to secure contracts from government/statutory bodies/public sector undertakings, agree to arbitration clauses providing for employee-arbitrators. But when subsequently disputes arise, they balk at the idea of arbitration by such employee-arbitrators and tend to litigate to secure an "independent" arbitrator. The number of litigations seeking appointment of independent Arbitrator bears testimony to this vexed problem.

39. It will be appropriate if governments/statutory authorities/public sector undertaking reconsider their policy providing for arbitration by employee-arbitrators in deference to the specific provisions of the new Act reiterating the need for independence and impartiality in Arbitrators. A general shift may in

future be necessary for understanding the word "independent" as referring to someone not connected with either party. That may improve the credibility of Arbitration as an alternative dispute resolution process. Be that as it may."

39. It seems that legislature has taken note of the repeated concern expressed by the courts recommending avoidance of departmental officers to be appointed as an arbitrator. Existence of an impartial arbitrator is the soul of arbitration. It is otherwise a cardinal principle that justice should not only be done but seem to have been done. Adjudication of dispute by a person unconnected with the parties would inspire greater confidence. Keeping such considerations, Act of 1996 has been exhaustively amended vide Act 3 of 2016. Insertion of Seventh Schedule as well as amendment in sections 11 and 12 are legislative recognition of need to have impartial person to act as arbitrator. The apparent object is to secure appointment of an independent and impartial arbitrator. The prohibition imposed in appointing arbitrator viz-a-viz arbitrator's relationship with the parties or counsel has been enumerated. Sub-section (5) of section 12 begins with a non-obstante clause and provides that a person falling in the prohibited category shall be ineligible to be appointed as an arbitrator, even if any prior agreement provides to the contrary, unless parties waive its applicability by an express agreement in writing. Section 12 enumerates grounds for challenge to appointment of arbitrator. The amended sub section (1) makes it obligatory upon the arbitrator to disclose in writing any circumstances (a) which is likely to give rise to justifiable doubts as to his independence or impartiality; and (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months. Vide Explanation-1, Fifth Schedule shall be guide in the determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Sub-section (2) is important inasmuch as it provides that the arbitrator from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1), unless they have already been informed of them by him. Sub-section (5) thereafter provides that notwithstanding any prior agreement to the contrary, any person falling under the category specified in Seventh Schedule shall be ineligible to be appointed as an arbitrator.

40. Section 12, therefore, is applicable in a case where arbitrator is yet to be appointed and also applies throughout the subsistence of arbitral proceedings, in terms of sub-section (2). A harmonious construction of the provisions would go to show that even in a case where arbitrator is named, he shall have to comply with sub-section (2) of section 12 and disclose to the parties in writing any circumstances referred to in sub section (1) of section 12, unless they have already been informed of them by him. Sub-section 2 of Section 12 leaves no room of doubt that the amendments introduced vide Act 3 of 2016 would apply even to pending arbitrations, to the extent provided. It seems that it is for this reason that the second proviso to Section 12(5) contained in the ordinance was

omitted as it would have been inconsistent with sub-section (2).

41. In all pending arbitral proceedings appointment of arbitrator can be challenged on the grounds available by virtue of amended Section 12, in light of sub-section (2). The arbitrations already concluded, however, would not be open to challenge on account of amendments introduced vide Act 3 of 2016. All pending applications under Section 11 would have to be dealt with in accordance with amended Act.

42. In the facts of the present case, the applicant had approached the named arbitrator by making an application dated 23.6.2014. The prayer made in the letter was to settle applicant's pending payments from the Department and "Principal Contractor" in addition to a prayer made to appoint arbitrator. The expression used in the letter addressed to the arbitrator could have been more specific, but a prayer, in essence, was made to settle applicant's claim for payment. The mere fact that request was also made to appoint arbitrator, which was uncalled for as arbitrator was already named by designation would not mean that arbitrator had not been approached for resolution of dispute. In fact the Department was under the belief that as the proceedings under section 9 have been initiated, as such, the arbitrator cannot act. This is the specific stand taken by the Department before this Court. Such stand of department, however, is wholly misconceived. It is settled that Section 9 application could be filed even before approaching the arbitrator with a claim. Even before this Court the department's attempt was to insulate itself from any possible claim of payment only. A period of nearly three years have expired and the arbitrator has not even issued a letter acknowledging the claim raised before him. During the last nearly three years while this petition remained pending, the department or the arbitrator named never showed any inclination to adjudicate applicant's claim. On this aspect facts are not in issue. This Court, therefore, safely concludes that the arbitrator named by designation has failed to perform his function.

43. Sri Bhanot has laboured hard to resist this petition also on the ground that no notice was issued to Principal Contractor, regarding invocation of arbitration clause. This objection too has no merits. In the instant case there exists a tripartite agreement in the form of MOU. An arbitrator is named by designation. He had already been approached by applicant to resolve dispute between "Principal Contractor" and "Electrical Contractor" and to apportion payment between them as per the MOU. Notice in that regard had been given to the arbitrator named by designation. It was for the named arbitrator to proceed with resolution of conflict. The parties have otherwise been litigating their dispute under Section 9. In such circumstances, the application made for appointment of arbitrator cannot be resisted on the ground that notice of dispute/invocation of arbitration clause was not given to the Principal Contractor.

44. In the facts and circumstances, therefore, I am of the opinion that named arbitrator has clearly failed to act. Appointment of arbitrator is thus found expedient. The named arbitrator is otherwise ineligible to be appointed by virtue

of item 1 of the fifth schedule read with Section 12 (1)(b) of the Act. The applicant, in such circumstance, cannot be left remediless. Application for appointment of arbitrator is thus allowed.

45. Let Mr. Justice Sushil Harkauli, a retired Judge of this Court, R/o- 4-A, Rani Jhansi Marg, New Cantt., Allahabad, Phone No. 2422142 be appointed as an arbitrator to resolve the dispute, subject to his consent in terms of Section 11 (8) of the Arbitration and Conciliation Act. The registry is directed to obtain consent of the proposed arbitrator in terms of Section 11 (8) of the Act within two weeks.

46. List thereafter.