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

Reserved on: 16th October,2020
Pronounced on: 2nd November,2020

\+ O.M.P. (T) (COMM.) 48/2020 & I.A. 7876/2020

ABB INDIA LIMITED ..... Petitioner
Through: Ms. Mohna M. Lal, Ms. Geetali Talukdar and Mr. Debasis Modak, Advs.

versus

BHARAT HEAVY ELECTRICALS LIMITED ..... Respondent
Through: Mr. Atul Shanker Mathur, Mr. Prabal Mehrotra and Mr. Umang Katariya, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

% J U D G M E N T

1. This petition, under Section 14(1)(a) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act"), seeks a declaration that the mandate of Mr. A. Muraleedharan, Advocate, who was appointed as sole arbitrator by the respondent, to arbitrate on the disputes between the petitioner and respondent, stands terminated *de jure*, and also calls on this Court to appoint a substitute arbitrator, to continue with the arbitral proceedings.

2. The issue in controversy is purely legal in nature. No detailed allusion to facts is, therefore, necessary.

3. In connection with three Letters of Award, dated 4th November, 2009, whereunder work was awarded, to the petitioner by the respondent, disputes arose. Clause 33.1 of the General Commercial Terms and Conditions (hereinafter referred to as "GCC"), governing the relationship between the petitioner and the respondent, provided for resolution of such disputes, and read thus:

> "33.1 In the event of any dispute or difference arising out of the execution of the Order/Contract or the respective rights and liabilities of the parties or in relation to interpretation of any provision by the Seller/Contract in any manner touching upon the Order/Contract, such dispute of difference shall (except as to any matters, the decision of which is specifically provided for therein) be referred to the arbitration of the person appointed by the competent authority of the Purchaser.
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> Subject as aforesaid, the provisions of the Arbitration and Conciliation Act, 1996 (India) or statutory modifications or re-enactments thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause."

4. The Senior Deputy General Manager (hereinafter referred to as "the Senior DGM") in the office of the respondent wrote, on 14th March, 2014, to the Executive Director of the respondent (who was the "competent authority" within the meaning of Clause 33.1 of the GCC), alleging defaults on the petitioner's part, and calling on the Executive Director (hereinafter referred to as "ED") to appoint an arbitrator to adjudicate the claims of the respondent. A copy of the letter was marked to the petitioner, as "counter party". The petitioner, *vide* response dated 15th March, 2014, denied the allegations. The ED of the respondent, thereupon, appointed Mr. Varinder Pandhi, Ex ED (HEEP) of the respondent as the sole arbitrator, to arbitrate on the

dispute. Mr. Pandhi accepted the assignment, *vide* letter dated 22nd April, 2014, whereafter Statement of Claim was filed, by the respondent, before Mr. Pandhi on 4th June, 2014, claiming ₹ 7,38,61,975.43, along with interest, from the petitioner. The petitioner filed a counterclaim, for ₹ 1,08,42,788/–, along with interest.

5. Proceedings commenced before Mr. Pandhi, and continued, till, *vide* e-mail dated 2nd May, 2017, Mr. Pandhi circulated, to the petitioner and respondent, "final issues", framed by him. It is alleged that the e-mail did not bear the signatures of Mr. Pandhi. The petitioner responded, *vide* e-mail dated 5th May, 2017, addressed to Mr. Pandhi, pointing out that the issues, as agreed between the petitioner and respondent, had not been incorporated in the list of issues framed by him. Mr. Pandhi was, therefore, requested to incorporate the said issues.

6. Mr. Pandhi responded only *vide* e-mail dated 16th April, 2018, stating that the issues framed were filed, and requesting the parties to fix a convenient date of hearing.

7. Apparently, after 16th April, 2018, there was no communication, whatsoever, from Mr. Pandhi, despite communications from the petitioner, to him, on 20th April, 2018, 23rd April, 2018 and 19th August, 2019, and from the respondent on 18th July, 2018, 7th January, 2019 and 4th May, 2019. In these circumstances, the petitioner submits that the mandate of Mr. Pandhi,

as sole arbitrator, stood terminated *de facto*, under Section 14(1)(a) of the 1996 Act. Further, *vide* letter dated 11th February, 2020, the respondent terminated the mandate of Mr. Pandhi, under Section 14(1)(a).

8. *Vide* letter dated 27th July, 2020, the respondent nominated Mr. A. Muraleedharan, Advocate, as Sole Arbitrator, to arbitrate on the disputes between the petitioner and respondent, in place of Mr. Pandhi. The letter was issued "by way of exercise of the power vested under Clause 33 of GCC". A copy was marked the petitioner.

9. The petitioner, *vide* response dated 5th August, 2020, objected to the appointment of Mr. Muraleedharan as Sole Arbitrator, relying, for the purpose, on Section 12(5) of the 1996 Act. It was pointed out, in the said response, that Clause 33.1 of the GCC made "the provisions of the Arbitration and Conciliation Act, 1996… or statutory modifications or re-enactments thereof and the rules made thereunder and for the time being in force" applicable to the arbitral proceedings. This, it was contended, resulted in all provisions of the 1996 Act, including amendments and re-enactments thereof, becoming applicable to the arbitral proceedings between the petitioner and respondent. Section 12(5) of the 1996 Act, as amended (by way of insertion) by Section 8 of the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as "the 2015 Amendment Act") was also, therefore, applicable. By application of the said amended Section 12(5), the petitioner contended that the respondent stood disabled from appointing any substitute arbitrator,

and the appointment of Mr. Muraleedharan, consequently, stood vitiated. The respondent was, therefore, requested to withdraw the letter, dated 27th July, 2020, appointing Mr. Muraleedharan as the substitute Sole arbitrator, to arbitrate on the disputes between the parties.

10. The respondent replied, *vide* communication dated 24th August, 2020, disputing the petitioner's contention, on the ground that the arbitral proceedings had commenced prior to the amendment of Section 12(5) of the 1996 Act which, therefore, was not applicable. Reliance was placed, for the said purpose, on the judgement of the Supreme Court in ***Rajasthan Small Industries Corporation Ltd v. Ganesh Containers Movers Syndicate***[1]. The appointment of Mr. Muraleedharan as the substitute Sole Arbitrator was, therefore, contended the respondent, legal and valid.

11. Aggrieved, the petitioner has moved the present petition before this Court, seeking, as noted hereinabove, a declaration that Mr. Muraleedharan could not be invested with the mandate to act as Sole arbitrator, to arbitrate on the disputes between the petitioner and respondent. As a consequential prayer, this Court has been requested to appoint a substitute Sole arbitrator, in place of Mr. Pandhi.

12. Notice was issued, in this petition, on 8th September, 2020, on which date learned counsel for both parties agreed that exchange of pleadings was not necessary, and that submission of written

[1] **(2019) 3 SCC 282**

arguments, along with oral hearing, would suffice. Resultantly, I have heard, at length, Ms. Mohna M. Lal, learned counsel for the petitioner and Mr. Atul Shanker Mathur, for the respondent. Written submissions have also been filed by both learned Counsel.

Rival Submissions

13. Relying on the judgements of the Supreme Court in ***TRF Ltd v. Energo Engineering Projects Ltd***[2], ***Bharat Broadband Network Ltd v. United Telecoms Ltd***[3]and ***Perkins Eastman Architects DPC v. HSCC (India) Ltd***[4], in conjunction with Section 12(5) of the 1996 Act, Ms. Lal submits that the respondent could not legally appoint a substitute arbitrator. The arbitration clause, in ***Rajasthan Small Industries Corporation***[1], she submits, is totally different from the arbitration clause in the present case, and renders the said decision inapplicable as a precedent in the present matter. Apropos the contention, of the respondent, that Section 12(5) would not apply as the arbitral proceedings had commenced prior to the insertion of the said provision by the 2015 Amendment Act, Ms. Lal places reliance on the judgement of the Supreme Court in ***Thyssen Stahlunion GMBH v. SAIL***[5] and of a Division Bench of this Court in ***DDA v. Bhai Sardar Singh***[6], to contend that, by making the provisions of the 1996 Act, along with statutory modifications and re-enactments thereof, for the time being in force, applicable to the agreement

[2](2017) 8 SCC 377
[3](2019) 5 SCC 755
[4]2019 SCC OnLine SC 1517
[5](1999) 9 SCC 334
[6]ILR (2004) 1 Delhi 341

between the petitioner and respondent, Clause 33.1 of the GCC, *ipso facto*, made Section 12(5) of the 1996 Act, as amended by the 2015 Amendment Act, also applicable. In this context, Ms. Lal sought to point out that Section 26 of the 2015 Amendment Act was expressly made subject to agreement, between the parties, to the contrary, as it used the expression "unless the parties otherwise agree". Ms. Lal submitted that the stipulation, in Clause 33.1 of the GCC, that the 1996 Act, with its statutory modifications and re-enactments, for the time being in force, would apply to arbitration proceedings under the said Clause, amounted to such an agreement, resulting in the 1996 Act, with all its amendments, including the Section 12(5), becoming applicable to the arbitral proceedings between the petitioner and respondent, even though they commenced prior to 23rd October, 2015. Ms Lal also places reliance on the judgements, of learned Single Judges of this Court in ***BVSR-KVR (Joint Ventures) v. Rail Vikas Nigam Ltd***[7] and ***Ashiana Infrahomes Pvt Ltd v. Adani Power Ltd***[8].

14. Responding to the submissions of Ms. Lal, Mr. Mathur, learned Counsel for the respondent, submitted that the issue in controversy stands squarely covered, in favour of the respondent, by the judgement of the Supreme Court in ***S. P. Singla Constructions (P) Ltd v. State of Himachal Pradesh***[9]. He also relied on ***U.O.I. v. Parmar Construction Company***[10] and ***Rajasthan Small Industries Corporation***[1]. He submitted that para 24 of the report in ***DDA v. Bhai***

[7]2020 (1) Arb LR 580 (Delhi)
[8]2018 (3) Arb LR 270 (Delhi)
[9](2019) 2 SCC 488
[10](2019) 15 SCC 682

Sardar Singh[6], in fact, militated against the stand being adopted by Ms Lal. Mr. Mathur submitted that the date of invocation of arbitration determined the applicability, or otherwise, of Section 12(5), and that, the present arbitration having commenced prior to 23rd October, 2015, Section 12(5) was inapplicable. No infirmity, therefore, submits Mr. Mathur, attaches to the appointment of Mr. Muraleedharan as the substitute Sole Arbitrator, in place of Mr. Pandhi.

15. Ms Lal, in rejoinder, submitted that ***DDA v. Bhai Sardar Singh***[6] in no way militated against the stands adopted by her, and relied, for the purpose, on para-24 of the judgement itself.

Analysis

16. The issue to be determined is, quite obviously, whether Section 12(5) of the 1996 Act would apply to the facts of the present case, or not.

17. Section 12(5) of the 1996 Act, as inserted by Section 8(ii) of the 2015 Amendment Act, reads thus:

> "(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 sub-section by an express agreement in writing."

18. Section 26 of the 2015 Amendment Act read as under:

> "**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."
>
> (Emphasis supplied)

19. The six judgements of the Supreme Court, addressing, specifically, the applicability of Section 12(5), in the context of the facts, and cited by one side or the other are, chronologically, ***TRF***[2], ***S.P. Singla Constructions Pvt Ltd***[9], ***Rajasthan Small Industries Corporation Ltd***[1], ***Parmar Construction Company***[10], ***Bharat Broadband Network Ltd***[3] and ***Perkins Eastman Architects DPC***[4].

20. ***TRF***[2] is not of particular relevance, as it did not address the issue of the applicability of Section 12(5), vis-à-vis the commencement of the arbitration, or the continuance thereof. The issue before the court, in that case, was quite different. The Managing Director of the respondent was appointed as sole arbitrator, to arbitrate on the disputes between the appellant and the respondent. The appellant challenged the appointment, on the ground that, the Managing Director, being ineligible to act as arbitrator, in view of Section 12(5), was also, *ipso facto*, ineligible to appoint an arbitrator. The Supreme Court was, therefore, essentially concerned with whether the inability, statutorily cast by Section 12(5), was restricted to "inability to act", or extended to "inability to appoint". The Supreme Court held that a person who had, by operation of law,

become ineligible to act as arbitrator, was also ineligible to appoint any arbitrator, as "one cannot have a building without the plinth". The appellant before the Supreme Court, therefore, succeeded. In the case before me, Mr. Mathur does not seek to contend that, as Mr. Muraleedharan was appointed by his client, the appointment was valid. The contention of Mr. Mathur is, rather, that Section 12(5) does not apply, at all, as the arbitral proceedings had commenced prior to 23rd October, 2015. ***TRF[2]*** does not concern itself with such a dispute.

21. ***S.P. Singla Constructions Pvt Ltd[9]*** is, chronologically, the next decision in sequence but, before examining the said judgement, it is necessary to take stock of the judgements of a learned Single Judge of this Court, in ***Ratna Infrastructure Projects Pvt Ltd v. Meja Urja Nigam Pvt Ltd[11]***, for reasons which will become apparent, presently.

22. Disputes arose, in ***Ratna Infrastructure Projects Pvt Ltd[11]***, in the context of a contract, dated 21st September, 2010, between the petitioner and the respondent, in that case. The arbitration clause, in the agreement between the petitioner and the respondent, read thus:

> "Except where otherwise provided for in the contract all questions and disputes relating to the meaning of the specifications designs drawings and instructions herein before mentioned and as of the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating the contract designs, drawing specifications, estimates, instructions orders or these conditions of otherwise concerning the work or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to

[11]2017 SCC OnLine Del 7808

> the sole arbitration of the General Manager of NTPC Ltd (formerly National Thermal Power Corporation Ltd), and if the General Manager is unable or unwilling to act, to the Sole Arbitration of some other person appointed by the Chairman and Managing Director, NTPC Limited (formerly National Thermal Power Corporation Ltd.) willing to act as such Arbitrator. There will be noobjection if the Arbitrator so appointed is an employee of NTPC Limited (formerly National Thermal Power Corporation Ltd.) and that he had to deal with the matters to which the contract relates and that in the course of his duties as such he had expressed views on all or any of the matters in dispute or difference. The Arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason as aforesaid at the time of such transfer vacation of office or inability to act, Chairman and Managing Director NTPC Limited (formerly National Thermal Power Corporation Ltd.) shall appoint another person to act as arbitrator in accordance with the terms of the Contract. It is also a term of this contract that no person other than a person appointed by the CMD NTPC Ltd. as aforesaid should act as arbitrator and if for any reason that is not possible the matter is not to be referred to arbitration at all.
>
> *Subject as aforesaid the provisions of Arbitration Act 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration under this Clause*."
>
> (Emphasis supplied)

Vide Amendment No. 1, the contract was amended to, *inter alia*, replace the words "Arbitration Act 1940" with the words "Arbitration and Conciliation Act 1996", in the afore-extracted arbitration clause in the GCC. The same Amendment also replaced the words "shall be referred to ... unable", in the arbitration clause, with the words "shall be referred to the Sole arbitration of the Project-in-Charge concerned of MUNPL and if the Project-in-Charge is unable…"

23. The disputes, which were initiated by the petitioner Ratna Infrastructure Projects Pvt. Ltd (hereinafter referred to as "RIPPL") were referred to arbitration, and Mr. Narsingh, Project-in-Charge of the Project, was appointed sole arbitrator. During the course of the arbitration proceedings, Mr. Narsingh ceased to be the Project-in-Charge, w.e.f. 1st June, 2016. This prompted RIPPL to contend that Mr. Narsingh could no longer continue as the sole arbitrator, as the sole arbitrator was, *per contra*, required to be the Project In charge. Applications, preferred before Mr. Narsingh, seeking his recusal as Sole Arbitrator, were rejected by him, resulting in RIPPL petitioning this Court. It was contended, by RIPPL, before this Court, that the respondent Meja Urja Nigam Pvt. Ltd. (MUNPL) ought to have appointed a substitute arbitrator, in place of Mr. Narsingh, within 30 days from 1st June, 2016. On MUNPL failing to do so, RIPPL moved this Court.

24. Three days before service of advance notice on MUNPL, Mr. Ramesh Kher, one of its General Managers, was appointed by MUNPL as the new Sole Arbitrator. RIPPL contended, however, that MUNPL had no authority to do so, in view of the law laid down by the Supreme Court in ***Datar Switchgears Ltd v. Tata Finance Ltd***[12] . It was also contended that, as the arbitration clause provided for application, to the contract, of the 1996 Act, with all its statutory modifications and re-enactments, Section 12(5) of the 1996 Act would also apply. In view thereof, the General Manager of MUNPL, it was contended, could not be appointed as Sole Arbitrator.

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[12] **(2000) 8 SCC 151**

25. Taking up, first, the issue of applicability of Section 12(5) of the 1996 Act, to the arbitral proceedings between RIPPL and MUNPL, this Court, relying on ***Thyssen Stahlunion GMBH***[5], held that the stipulation, in the arbitration clause, that the 1996 Act, with all its statutory modifications and re-enactments would apply, clearly operated to make applicable, to the arbitral proceedings, Section 12(5) of the 1996 Act. By virtue thereof, this Court held that Mr. Kher, who was serving as the General Manager of MUNPL, was disqualified from acting as sole arbitrator. This Court, therefore, interceded and appointed a retired Hon'ble Judge of the Supreme Court has the Sole Arbitrator, to arbitrate on the disputes between the parties.

26. The Single Bench of this Court, in ***Ratna Infrastructure Projects Pvt Ltd***[11], therefore, clearly held that the stipulation, in the arbitration clause, that the "1996 Act with all its modifications and re-enactments… for the time being in force" would apply, resulted in Section 12(5) of the 1996 Act (as inserted) also becoming applicable, though the provision was inserted only after the agreement had been executed between the parties.

27. Having thus noticed ***Ratna Infrastructure Projects Pvt Ltd***[11], I turn to ***S.P. Singla Constructions Pvt Ltd***[9].

28. The arbitration clause [Clause 65], of the General Conditions of Contract between the appellant and the respondent in ***S. P. Singla Constructions Pvt Ltd***[9] read as under:

"Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs drawings and instructions therein before mentioned and as to the quality of workmanship of materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract designs drawings, specification and estimates, instructions, orders or these conditions otherwise concerning the works of the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Engineer-in-Chief/Chief Engineer, Himachal Pradesh Public Works Department. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant that he had to deal with the matters to which the contract relates, and that in the course of his duties as government servant he had expressed views on all or any of the matters in dispute or different. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason that the Chief Engineer, H.P. PWD, at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by the Chief Engineer, H.P. PWD should act as arbitrator and if for any reason that is not possible, the matter is not to be claim in dispute is Rs. 50,000/- (Rupees fifty thousand) and above, the arbitrator shall give reasons for the award.

Subject as aforesaid the provision of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being shall apply to the arbitration proceeding under this clause."

(Emphasis supplied)

29. Disputes arose between the appellant S.P. Singla Constructions Pvt Ltd. (hereinafter referred to as "SPSCL") and the State of Himachal Pradesh, relating to a contract awarded to the former by the

latter. The dispute was referred, on 30th October, 2013, to the Superintendent Engineer, Arbitration Circle, H.P. PWD, Solan as the Sole Arbitrator appointed by the Chief Engineer, H.P. PWD in accordance with Clause (65). The Sole Arbitrator entered upon reference on 11th November, 2013. SPSCL remained absent from the arbitration proceedings, and defaulted in filing statement of claim, as a result of which the proceedings were terminated under Section 25(a) of the 1996 Act.

30. SPSCL petitioned the High Court, under Section 11(6) of the 1996 Act, praying for appointment of an independent arbitrator. The petition was dismissed, by the High Court, on the ground that the remedy, for any party aggrieved by the appointment of the arbitrator in terms of the agreement between the parties, was by way of a petition under Section 13 or, after passing of the Award, by way of challenge under Section 34. Reliance was placed, for so holding, on the judgement of the Supreme Court in ***Antrix Corporation Ltd v. Devas Multimedia (P) Ltd***[13]**.** The Sole Arbitrator having been appointed in accordance with Clause (65), the High Court opined that the appointment could not be challenged under Section 11(6). SPSCL appealed, against the decision, to the Supreme Court.

31. Before the Supreme Court, SPSCL argued that appointment of the Superintendent Engineer as the Sole Arbitrator was impermissible. Two reasons were cited; firstly, that the Sole Arbitrator could not be appointed by the office, but had to be appointed by name and,

[13] **(2014) 11 SCC 560**

secondly, that the appointment was in violation of Section 12(5). Reliance was placed on the judgement of this Court in ***Ratna Infrastructure Projects (P) Ltd***[11]. The first argument is of no relevance to the present controversy, though the second, undoubtedly, is.

32. The Supreme Court set out the submission, of SPSCL, on the second aspect, thus (in para 15 of the report):

> "Drawing our attention to the wordings in Clause (65) '*that the agreement is subject to any statutory modification or re-enactment thereof and the rules made thereunder and for the time being shall apply to the arbitration proceeding under this clause*' the learned Senior Counsel contended that these words would certainly attract Section 12(5) of the Act as amended with effect from 23-10-2015. In this regard, the learned Senior Counsel placed reliance upon the Delhi High Court judgment in ***Ratna Infrastructure Projects (P) Ltd. v. Meja Urja Nigam (P) Ltd., 2017 SCC OnLine Del 7808*** wherein interpreting the similar words in a contract, the Delhi High Court held that those words satisfy the requirement of Section 26 (amended Act of 2015) of there being an agreement between the parties that the Act as amended with effect from 23-10-2015 will apply …"
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> (Emphasis in original)

33. Having thus set out the contention of SPSCL, advanced before it, the Supreme Court went on, in para 16 of the report, to hold thus:

> "*Considering the facts and circumstances of the present case, we are not inclined to go into the merits of this contention of the appellant nor examine the correctness or otherwise of the above view taken by the Delhi High Court in* ***Ratna Infrastructure Projects case***; suffice it to note that *as per Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015, the provisions of the Amended Act, 2015 shall not apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the principal Act before*

the commencement of the Amendment Act unless the parties otherwise agree. In the facts and circumstances of the present case, the proviso in Clause (65) of the general conditions of the contract cannot be taken to be the agreement between the parties so as to apply the provisions of the amended Act. As per Section 26 of the Act, the provisions of the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after the date of commencement of the Amendment Act, 2015 (w.e.f. 23-10-2015). In the present case, arbitration proceedings commenced way back in 2013, much prior to coming into force of the amended Act and therefore, provisions of the amended Act cannot be invoked."

(Emphasis supplied)

34. Para 25 of the report went on to observe that "in this case, the agreement between the parties is dated 19-12-2006 and the relationship between the parties are governed by the general conditions of the contract dated 19-12-2006, the provisions of the Amendment Act, 2015 cannot be invoked."

35. The observations and findings of the Supreme Court, in ***S.P. Singla Constructions Pvt Ltd***[9], may be enumerated thus:

(i) In view of the facts and circumstances of the case before it, the Supreme Court did not enter into the merits of the contention, of SPSCL, that the concluding caveat, in Clause (65) of the GCC, made Section 12(5) of the 1996 Act applicable to the arbitral proceedings between SPSCL and the State of Himachal Pradesh. Nor did the Supreme Court examine the correctness, or otherwise, of the judgement of this Court in ***Ratna Infrastructure Projects (P) Ltd***[11].

(ii) Section 26 of the 2015 Amendment Act makes the provisions of Section 12(5) inapplicable to arbitral proceedings commenced before 23rd October, 2015.

(iii) The arbitral proceedings, between SPSCL and the State of Himachal Pradesh had commenced in 2013, much prior to 23rd October, 2015.

(iv) "In the facts and circumstances" of the case before it, the proviso in Clause (65) of the GCC could not be regarded as an "agreement between the parties", so as to make Section 12(5) applicable.

36. While examining the applicability, to the present case, of ***S.P. Singla Constructions Pvt Ltd***[9], it has to be remembered that, unlike the present case, the caveat in the arbitral Clause (65) of the GCC, in that case, made "*the Arbitration Act, 1940* or any statutory modification or re-enactment thereof… for the time being" applicable. On the strength of this clause, SPSCL was seeking, not only to make the 1996 Act applicable, but to also make, applicable, Section 12(5) of the 1996 Act, which came into effect only on 23rd October, 2015. The issue before the Supreme Court was, therefore, whether Section 12 (5) of the 1996 Act, which came into effect only on 23rd October, 2015, could be regarded as a "provision *of the Arbitration Act, 1940* or any statutory modification or re-enactment thereof ... for the time being".

37. The arbitration clause in ***Rajasthan Small Industries Corporation***[1], which is the next judgement chronologically arising for

consideration, did not specify that the Arbitration Act, 1940 or the 1996 Act, would apply. Nor did it contain any caveat, such as that which existed in ***Ratna Infrastructure Projects Pvt Ltd***[11], ***S.P. Singla Constructions Pvt Ltd***[9] or in the present case, to the effect that the statute, with future modifications, amendments, etc., would be applicable. In the circumstances, the Supreme Court merely held that, as the arbitral proceedings had commenced prior to 23rd October, 2015, Section 12(5) would not apply. How, and whether, this position would change, if the 1996 Act, with its amendments and modifications, had been made applicable, never came up for examination. This decision cannot, therefore, assist in resolution of the present controversy. The reliance, by the respondent, on the judgement in ***Rajasthan Small Industries Corporation***[1] is, therefore, misplaced.

38. ***Parmar Construction Company***[10] is a decision which considerably impacts the outcome of these proceedings. The Supreme Court, in the very first para of the judgment, delineated three issues, arising for consideration, of which the first issue was worded thus:

> "(1) The High Court was justified in invoking amended provision which has been introduced the Arbitration and Conciliation (Amendment Act), 2015 with effect from 23rd October, 2015 (hereinafter being referred to as "Amendment Act, 2015") ? "

Clearly, therefore, the very first issue, identified by the Supreme Court, as arising before it, was the issue with which we are concerned in the present case. We may turn, therefore, to the facts.

39. The relevant sub-clauses of Clause 64 of the agreement between Parmar Construction Company (hereinafter referred to as "PCC") and the UOI, which provided for the resolution of disputes by arbitration, may be reproduced thus:

> "**64. (1) Demand for Arbitration:**
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> **64.(1) (i)** In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railways of any certificate to which the contractor may claim to be entitled to, or if the Railways fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in Clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.
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> xxx
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> **64. (3) Appointment of Arbitrator:**
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> **64.(3)(a)(i)** In cases where the total value of all claims in question added together does not exceed Rs.25,00,000 (Rupees twenty-five lakhs only), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a gazetted Officer of the Railways not below JA Grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM. (Authority: Railway Board's Letter no. 2012/CEI/CT/ARB./24, Dated 22-10-2013/5-11-2013)"
>
> xxx
>
> **64.(7)** Subject to the provisions of the aforesaid Arbitration and Conciliation Act, 1996 and the Rules thereunder *and any statutory modifications thereof* shall apply to the arbitration proceedings under this Clause.
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> (Emphasis supplied)

40. PCC sent a notice, invoking arbitration, to the appellant-Union of India, for appointment of an arbitrator, on 23rd December, 2013. On the appellant failing to do so, PCC moved the Rajasthan High Court under Section 11(6).

41. The High Court rejected the petition of PCC, preferred under Section 11(6), relying, for the purpose, on Section 12(5), observing that Section 12(5), as inserted by the 2015 Amendment Act, would apply to all pending proceedings. As the arbitral proceeding, between PCC and the UoI, was pending on 23rd October, 2015 [when the Section 12(5) came into force], the High Court applied the provision and appointed a retired Judge of the High Court as the Sole Arbitrator, to arbitrate on the disputes. Aggrieved thereby, the UoI appealed to the Supreme Court.

42. The Supreme Court, in paras 26, 27 and 28 of the report rejected, in so many words, the contention of the UoI and held that, as the arbitral proceedings had commenced prior to 23rd October, 2015, Section 12(5) would not apply. Paras 26, 27 and 28, to the extent they are relevant, may be reproduced thus:

> "26. The conjoint reading of Section 21 read with Section 26 leaves no manner of doubt that the provisions of the 2015 Amendment Act shall not apply to such of the arbitral proceedings which have commenced in terms of the provisions of Section 21 of the Principal Act unless the parties otherwise agree.
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> *****

> 27. We are also of the view that the 2015 Amendment Actwhich came into force, i.e. on 23-10-2015, shall not apply to the arbitral proceedings which have commenced in accordance with the provisions of Section 21 of the principal Act, 1996 before the coming into force of 2015 Amendment Act unless the parties otherwise agree.
>
> 28. In the instant case, the request was made and received by the appellants in the appeal concerned much before the 2015Amendment Act came into force. Whether the application was pending for appointment of an arbitrator or in the case of rejection because of no claim as in the instant case for appointment of an arbitrator including change/substitution of arbitrator, would not be of any legal effect for invoking the provisions of 2015Amendment Actin terms of Section 21 of the principal Act, 1996. In our considered view, the applications/requests made by the respondent contractors deserve to be examined in accordance with the principal Act, 1996 without taking resort to the 2015Amendment Act which came into force from 23-10-2015."
>
> (Emphasis supplied)

43. ***Parmar Construction Company***[10], therefore, was categorical in holding that, in respect of arbitration proceedings which had commenced prior to 23rd October, 2015, Section 12(5) would not apply. In doing so, the Supreme Court placed reliance on ***S. P. Singla Constructions (P). Ltd.***[9].

44. It is also significant that, unlike ***S. P. Singla Constructions (P). Ltd.***[9], the caveat contained in Clause 64(7) of the agreement between the parties in ***Parmar Construction Company***[10] made the 1996 Act, and statutory modifications thereof, applicable to the arbitration proceedings between the parties. As against this, the arbitration clause in ***S. P. Singla Constructions (P). Ltd.***[9] it may be recollected, made

the 1940 Act, with its modifications, etc., applicable to the arbitral proceedings.

45. ***Parmar Construction Company***[10] is, therefore, more directly on the point, insofar as the present controversy is concerned.

46. ***Bharat Broadband Network Ltd***[3], like ***Rajasthan Small Industries Corporation Ltd***[1], involved an arbitration clause which did not contain any caveat, similar to that which was to be found in in ***Ratna Infrastructure Projects Pvt Ltd***[11]***, S. P. Singla Constructions (P). Ltd.***[9], ***Parmar Construction Company***[10]or the present case.

47. Clause 20.1 of the contract, in ***Bharat Broadband Network Ltd***[3], required disputes to be referred to the sole arbitration of the CMD of Bharat Broadband Network Limited (hereinafter referred to as "BBNL") or to the officer entrusted to perform the functions of CMD.

48. Disputes arose, resulting in invocation of the arbitration clause by the respondent-United Telecoms Limited (hereinafter referred to as "UTL") *vide* letter dated 3rd January, 2017. The CMD of BBNL appointed Mr. K.H.Khan as the Sole Arbitrator *vide* letter dated 17th January, 2017. Thereafter, consequent on the rendition of the judgment in ***TRF Ltd***[2], by the Supreme Court, on 3rd July, 2017, BBNL applied, to the Sole Arbitrator, requesting him to withdraw from the proceedings, as he had become *de jure* unable to act as arbitrator.

49. The application was rejected by the Sole Arbitrator, on 21st October, 2017, prompting BBNL, to approach this Court, under Sections 14 and 15 of the 1996 Act, for termination of the mandate of Mr. Khan and for appointment of a substitute arbitrator in his place.

50. The arbitration clause, in the agreement between BBNL and UTL, read thus:

> "**20. ARBITRATION**
>
> **20.1** In the event of any question, dispute or difference arising under the agreement or in connection therewith (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CMD, BBNL or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CMD, BBNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CMD or the said officer is unable or unwilling to act as such, then to the sole arbitration of some other person appointed by the CMD or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act 1996. There will be no objection to any such appointment on the ground that the arbitrator is a governmentservant or that he has to deal with the matter to which the agreement relates or that in the course of his duties as a governmentservant/PSU Employee he has expressed his views on all or any of the matters in dispute. The award of the arbitrator shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the CMD, BBNL or the said officer shall appoint another person to act as an arbitrator in accordance with terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors."

51. Clearly, there was, in the arbitration agreement forming subject matter of consideration in ***Bharat Broadband Network Ltd***[3], no provision, akin to the second para of Clause 33.1 of the GCC in the present case, or to similar clauses, as existed in ***Ratna Infrastructure Projects Pvt Ltd***[11], ***S. P. Singla Constructions (P). Ltd.***[9]and ***Parmar Construction Company***[10].

52. In the circumstances, the Supreme Court held that the case was squarely covered by Section 12(5) of the 1996 Act, as the arbitral proceedings had commenced after 23rd October, 2015 and that, therefore, Mr. Khan had become *de jure* unable to perform his functions as arbitrator. The High Court was, therefore, directed to appoint a substitute arbitrator with consent of parties.

53. Unlike the present case, ***Bharat Broadband Network Ltd***[3] relates to an arbitration which commenced after 23rd October, 2015 and cannot, therefore, impact the outcome of the present proceedings. Besides, as noticed hereinabove, there was no provision, in the agreement between BBNL and UTL, similar to the second paragraph of Clause 33.1 of the GCC between the present petitioner and respondent.

54. ***Perkins Eastman Architects***[4] is, similarly, of little significance, insofar as the present controversy is concerned, as the appointment of the sole arbitrator took place, in that case, on 30th July, 2019. The applicability of Section 12(5) of the 1996 Act, as inserted by the 2015

Amendment Act, was, therefore, not in dispute. The Supreme Court, following its earlier decisions, including ***TRF Ltd***[2], annulled the appointment of the arbitrator and appointed a retired Hon'ble Judge of the Supreme Court as the arbitrator, in his place.

55. The above study reveals that the facts which obtained, and the dispute which arose, in ***Parmar Construction Company***[10], were substantially akin to the facts, and the dispute, in the present case. For all intents and purposes, the arbitration clause, in that case, was also similar to the one before the petitioner and the respondent, with a caveat, akin to the caveat contained in the second paragraph of clause 33.1 of the GCC in the present case. A specific contention was taken, before the Supreme Court, that, in view of the said caveat, Section 12(5), as inserted by the 2015 Amendment Act, would apply. The Supreme Court rejected the contention and held that the benefit of the Section 12(5) of the 1996 Act was not available to PCC.

56. Reliance was placed, for this purpose, by the Supreme Court, on its earlier decision in ***S. P. Singla Constructions Pvt Ltd***[9] There, again, the dispute was similar to that in the present case. The second para of Clause (65) was similar to the caveat contained in Clause 64(7) in ***Parmar Construction Company***[10] and in the second para of Clause 33.1 of the GCC in the present case, the sole difference being that, whereas the clause in ***Parmar Construction Company***[10] and in the present case made the provisions of the 1996 Act, with statutory modifications, applicable to the arbitral proceedings, the clause in ***S. P. Singla Constructions Pvt Ltd***[9] made the provisions of the 1940

Act, along with statutory modifications and re-enactments thereof, applicable to the arbitral proceedings.

57. No doubt, in ***S. P. Singla Constructions Pvt. Ltd***[9], the Supreme Court observed, towards the commencement of para 16 of the report, that it was not inclined to go into the merits of the contentions, of SPSCL, relying the applicability of the earlier decisions of this Court in ***Ratna Infrastructure Projects Pvt Ltd***[11], or to examine the correctness of the said decision. Had the Supreme Court not chosen to enter any further observations or findings, the matter might have been different. As it is, however, the Supreme Court proceeded, in the same paragraph, to hold that the proviso to Clause 65 of the GCC in that case, could not be taken as an agreement between the parties, so as to make Section 12(5) of the 1996 Act, applicable.

58. What is said by the Supreme Court constitutes declaration of the law under Article 141 of the Constitution of India, and not what is unsaid. It is the exposition of the law, by the Supreme Court, which binds.

59. The discipline of Article 141 does not permit me, therefore, to ignore the declaration of the law, contained in para 16 of ***S.P. Singla Constructions Pvt Ltd***[9], merely because of the cautionary opening sentences in the said paragraph. The Supreme Court, in the said paragraph, categorically held that "the proviso in clause 65 of the General Conditions of Contract cannot be taken to be the agreement between the parties so as to apply the provisions of the Amended

Act". Additionally, the Supreme Court has observed, in the very same paragraph, that the applicability of Section 12(5) of the 1996 Act also stood ruled out by Section 26 of the 2015 Amendment Act, as the arbitral proceedings, had commenced in 2013, i.e., much prior to 23rd October, 2015. The Supreme Court having, in ***Parmar Construction Company***[10], found the decision in ***S.P. Singla Constructions Pvt Ltd***[9] to constitute a valuable precedent, the reliance, by the respondent, on the said decision, must be taken to be justified.

60. In any event, as already noted hereinabove, the present case is, in any event, covered by ***Parmar Construction Company***[10].

61. Ms. Lal sought to distinguish the decision in ***Parmar Construction Company***[10] on the ground that the arbitration clause in that case did not contain the words "and for the time being in force".

62. In my view, this distinction, even if semantically significant, is of no real conceptual consequence. I do not find any significant difference between a provision which makes the 1996 Act, with its statutory modifications and enactments, applicable, and, a provision which makes the 1996 Act, with its statutory modifications and enactment, for the time being in force, applicable. The expression "with its statutory modifications and enactments", or any other such like expression, itself glances towards the future. The words "for the time being in force" appear to me, to be practically in the nature of a superfluity, probably inserted *ex abundanti cautela*. It is axiomatic that only those provisions can apply, which are in force at the time of

application. A provision which has ceased to be in force cannot be made applicable, even by contract between the parties.

63. Though Ms. Lal is, strictly speaking, correct in her submission that the arbitration clause, in ***Parmar Construction Company***[10], did not contain the words "for the time being in force", the arbitration clause in ***S.P. Singla Constructions Pvt Ltd***[9] – on which ***Parmar Construction Company***[10] relied – did contain the words "and for the time being", which, quite obviously, bear the same connotation as the words "for the time being in force". This semantic distinction, to which Ms. Lal drew my especial attention, cannot, therefore, in my opinion, wish away the applicability, to the present case, of the judgment in ***Parmar Construction Company***[10]**.**

64. Ms. Lal relied on the judgment of the Supreme Court in ***Thyssen Stahlunion GMBH***[5], as well as three decisions of this Court, namely, ***DDA v. Bhai Sardar Singh***[6]**,** ***BVSR-KVR (Joint Ventures)***[7] and ***Ashiana Infrahomes Pvt Ltd***[8].

65. In ***Thyssen Stahlunion GMBH***[5], the controversy before the Supreme Court was, essentially, regarding the applicability of Section 85 of the 1996 Act, which reads thus:

> "**85. Repeal and savings.—**
>
> (1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal,—

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act."

66. Civil Appeal 61/1999, which was one of the appeals decided by ***Thyssen Stahlunion GMBH***[5], was filed by M/s Rani Construction (P) Ltd. (hereinafter referred to as "Rani Construction"). Clause 25 of the contract between Rani Construction and SAIL constituted the arbitration agreement, and contained the following recital:

> "Subject to the provisions of the contract to the contrary as aforesaid, the provisions of the Indian Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to all arbitration proceedings under this clause."

67. The Division Bench of this Court, in an appeal from the judgement of the learned Single Judge, had held that Clause 25 did not operate to make the provision of the 1996 Act applicable to the arbitral proceedings between the parties. The Supreme Court, in para 11 of the report, therefore identified one of the key issues arising before it, for consideration, as whether, by operation of the afore-extracted clause, the 1996 Act could be made applicable to the arbitral proceedings between Rani Construction and SAIL.

68. The Supreme Court was required to decide the controversy in the light of sub-sections (1) and (2)(a) of Section 85 of the 1996 Act.

69. The issue that arose before the Supreme Court (apropos Rani Construction) was whether Clause 25, in the Arbitration Agreement, amounted to agreement "otherwise" by the parties, within the meaning of Section 85(2)(a), so as to render the 1940 Act inapplicable to the arbitral proceedings. Ms. Lal relies on the following words, as contained in para 35 of the report:

> "Parties can agree to the applicability of the new Act even before the new Act comes into force and when the old Act is still holding the field. There is nothing in the language of Section 85(2)(a) which bars the parties from so agreeing. There is, however, a bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitral proceedings under the old Act have not commenced though the arbitral agreement was under the old Act. *Arbitration clause inthe contract in the case of Rani Constructions (Civil Appeal 61 of 1999) uses theexpression "for the time being in force" meaning thereby that provision of that Actwould apply to the arbitration proceedings which will be in force at the relevant time when arbitration proceedings are held.* We have been referred to two decisions - one of Bombay High Court and the other of Madhya Pradesh High Court on the interpretation ofthe expression "for the time being in force" and *we agree with them that the expression aforementioned not only refers to the law in force at the time the arbitration agreementwas entered into but also to any law that may be in force for the conduct of arbitration proceedings, which would also include the enforcement of the award as well.Expression "unless otherwise agreed" as appearing in Section 85(2)(a) of the new Actwould clearly apply in the case of Rani Construction in Civil Appeal No. 61 of 1999.Parties were clear in their minds that it would be the old Act or any statutory modification or re-enactment of that Act which would govern the arbitration.* We accept the submission of the appellant Rani Construction that parties

> could anticipate that thenew enactment may come into operation at the time the disputes arise. We have seen Section 28 of the Contract Act. It is difficult for us to comprehend that arbitration agreement could be said to be in restraint of legal proceedings. There is no substance inthe submission of respondent that parties could not have agreed to the application of the new Act till they knew the provisions thereof and that would mean that any such agreement as mentioned in the arbitration clause could be entered into only after the new Act had come into force. When the agreement uses the expressions "unlessotherwise agreed" and "law in force" it does give option to the parties to agree that new Act would apply to the pending arbitration proceedings. That agreement can be entered into even before the new Act comes into force and it cannot be said that agreement has to be entered into only after coming into force of the new Act."
>
> (Emphasis supplied)

70. Ms. Lal, seeks to draw an analogy from the opinion expressed in ***Thyssen Stahlunion GMBH***[5], to contend that the use of the expression "all statutory modifications or amendments thereof and the rules made thereunder and for the time being in force", as employed in the second para in Clause 33.1 of the GCC in the present case, would result in making Section 12(5) of the 1996 Act, as inserted by the 2015 Amendment Act, applicable to the present proceedings. The submission is superficially appealing but, on a deeper analysis, cannot be accepted. In the first place, ***Parmar Construction Company***[10] operates as a direct authority, against the petitioner, on similar facts, the only difference being that the arbitration clause did not contain the words "for the time being in force". I have already opined, hereinabove, that the absence of these words cannot dilute the applicability, to the present case, of the decision in ***Parmar Construction Company***[10].

71. Besides, in ***Thyssen Stahlunion GMBH***[5], there was no provision, similar to Section 26 of the 2015 Amendment Act, which is crucial to adjudication of the dispute in the present case. In this context, it is necessary to distinguish the structure of Section 85(2)(a) of the 1996 Act, with Section 26 of the 2015 Amendment Act. Whereas Section 85 (2)(a) of the 1996 Act made, *inter alia*, the 1940 Act applicable to arbitral proceedings which commenced before the coming into force of the 1996 Act, unless otherwise agreed by the parties. Section 26 of the 2015 Amendment Act starts with a negative covenant, to the effect that nothing contained in the 2015 Amendment Act – which would include the insertion of Section 12(5) of the 1996 Act – would apply to arbitral proceedings, commenced before the 2015 Amendment Act came into force, i.e. before 23rd October, 2015. This negative covenant was subject to an exception in the case of agreement, otherwise, by the parties. Structurally and conceptually, therefore, Section 26 of the 2015 Amendment Act is fundamentally different from Section 85(2)(a) of the 1996 Act, and requires, therefore, to be interpreted, keeping this distinction in mind.

72. In the light of ***Parmar Construction Company***[10], which was rendered in the wake of Section 26 of the 2015 Amendment Act, this Court is bound to hold that the second para of Clause 33.2 of the GCC, in the present case, cannot result in Section 12(5) of the 1996 Act, becoming applicable. ***Thyssen Stahlunion GMBH***[5] cannot, therefore, come to the aid of the petitioner.

73. The judgments of this Court in ***DDA v. Bhai Sardar Singh***[6], ***BVSR-KVR (Joint Ventures)***[7]and ***Ashiana Infrahomes Pvt Ltd***[8] were all rendered prior to ***S.P. Singla Constructions Pvt Ltd***[9] and ***Parmar Constructions Company***[10]. I do not deem it necessary, therefore, to burden this judgment with any reference to the said decisions, which have inevitably to cede place to the enunciation of the law in ***S.P. Singla Constructions Pvt Ltd***[9] and, even more significantly, in ***Parmar Constructions Company***[10].

Conclusion

74. Resultantly, I am constrained to reject the submission, of Ms. Lal, that the appointment of Mr. A. Muraleedharan, Advocate, stood vitiated on account of Section 12(5) of the 1996 Act, as inserted by the 2015 Amendment Act.

75. The petition, therefore, fails and is dismissed, with no orders as to costs.

C. HARI SHANKAR, J.

NOVEMBER 02, 2020
HJ