IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 08.03.2021

\+ **ARB.P. 553/2020**

M/S T.K. ENGINEERING CONSORTIUM PVT. LTD. ..... Petitioner

Versus

THE DIRECTOR (PROJECTS) RITES LTD. & ANR. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Rituraj Biswas, Ms Sujaya
: Bardhan, Mr Rituraj Choudhary and
: Mr Mayan Prasad, Advocates.

For the Respondents : Mr G. S. Chaturvedi and
: Mr Shrinkar Chaturvedi, Advocates
: for RITES Ltd.
: Mr Ripu Daman Bhardwaj, CGSC
: for R-3.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner, T.K. Engineering Consortium Pvt. Ltd. (hereafter 'TKE'), is a company incorporated under the Companies Act, 1956 and is engaged in providing Road Construction and other Engineering services.

2. TKE has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act'), *inter alia*, praying that an arbitral tribunal be constituted to adjudicate disputes that have arisen between the parties in relation to the Contract Agreement dated 27.02.2017 for "*Development of Integrated Check Post at Dawki (Meghalaya) along Indo-Bangladesh Border*".

3. RITES Ltd. (hereafter 'RITES') had issued a Notice Inviting Tender (NIT) on 01.08.2016 for "*Development of Integrated Check Post at Dawki (Meghalaya) along Indo-Bangladesh Border*". TKE submitted its bid pursuant to the aforesaid tender. The same was accepted and, RITES issued a Letter of Award (LoA) dated 30.09.2016, on behalf of respondent no.3 (Land Ports Authority of India), awarding the contract to TKE. Thereafter, RITES also entered into the Contract Agreement dated 27.02.2017 (hereafter 'the Agreement').

4. TKE claims that the site in question was handed over on 18.11.2016. It immediately mobilized resources (men and machinery) and commenced excavation work. TKE claims that the execution of the works was hampered by RITES and/or for reasons attributable to it, resulting in TKE suffering losses to the extent of ₹2,37,23,39,473/-. It also claims that the work was stopped by the Border Guards of Bangladesh (BGB) as it objected to any activity within forty metres of the International Border. In addition, the forest department also objected to setting up of the camp sites. There were also substantial delays on the

part of RITES as it did not provide the necessary drawings and fronts within the stipulated time for carrying out the work.

5. On 07.01.2019, RITES issued a notice under Clause 3(ii) of the General Clauses of the Contract (GCC) of the Agreement, calling upon TKE to expedite the work failing which it would terminate the Agreement. TKE responded to the said notice by its letter dated 09.01.2019 pointing out the reasons for the delay in execution of the works.

6. Notwithstanding the above, RITES terminated the Agreement by a letter dated 17.01.2019. TKE challenged the termination letter dated 17.01.2019 before the High Court of Meghalaya by filing a petition under Article 226 of the Constitution of India, being *W.P. (C) 10/2019: M/s T.K. Engineering Consortium Pvt. Ltd. v. The Union of India & Six Others*. The said petition was dismissed by an order dated 09.09.2019. Aggrieved by the same, TKE filed a Special Leave Petition – SLP (Civil) No. 26816 of 2019 – in the Supreme Court of India. The Supreme Court, disposed of the said Special Leave Petition, by an order dated 22.11.2019 observing that "*it would be appropriate for the petitioner to avail of the alternative remedy by filing arbitration petition or civil suit, as it may be advised*". The Supreme Court also made it clear that the observations made by the High Court, while disposing of the Writ Petition, would not be taken into consideration by the arbitrator or the Civil Court, wherever the claims are filed.

7. On 07.12.2019, TKE requested the Engineer-In-Charge (EIC) to review the decision of terminating the Agreement and permit it to finish the work or in the alternative, compensate TKE for the damages incurred by it. The EIC rejected the said application by a letter dated 31.12.2019.

8. TKE sent a letter dated 08.01.2020, in terms of Clause 25(1) of the Agreement, appealing against the decision of the EIC. However, the Appellate Authority (that is, the Executive Director (B&A), RITES Ltd.) did not render a decision within a period of thirty days as contemplated under the Agreement.

9. Thereafter, by a notice dated 06.03.2020, TKE invoked the arbitration clause under the Agreement. It suggested names of three persons and, requested the Director (Projects), RITES to concur on the appointment of any one of them as an arbitrator. TKE claims that the same was necessary since RITES could not appoint an arbitrator, in view of the decision of the Supreme Court in ***Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd***.: ***Arbitration Application no. 32 of 2019, decided on 26.11.2019***.

Submissions

10. Mr Chaturvedi, learned counsel appearing for RITES opposed the present petition on, essentially, three fronts. First, he submitted that there was no notice invoking arbitration and the notice dated

06.03.2020, merely challenged the right of the Appointing Authority to appoint the arbitrator.

11. Second, he submitted that in terms of the arbitration clause, no person other than the one appointed by the Appointing Authority could act as an arbitrator. Since it is TKE's stand that the Appointing Authority could not appoint an arbitrator, the parties could not be referred to arbitration. He relied upon the decision of the Supreme Court in ***Newton Engineering and Chemicals Limited vs. Indian Oil Corporation: (2013) 4 SCC 44***, in support of his contention. He further contended that the said decision was approved by the Supreme Court in ***TRF Ltd. vs Energo Engineering Projects Ltd.: (2017) 8 SCC 377***.

12. Third, he submitted that TKE had concealed that it had approached the Meghalaya High Court and had elected to agitate the dispute before a Civil Court. Further, the High Court had also rejected TKE's claim on merit.

13. Mr Biswas, learned counsel appearing for TKE countered the aforesaid contentions. He relied upon the decision of this court in ***B.E. Billimoria & Co. Ltd v Rites Ltd. and Ors.: Arb. P. 716/2016, decided on 31.01.2017*** and submitted that the issues raised by RITES are covered by the said decision.

Reasons and conclusion

14. At the outset, it is necessary to refer to Clause 25 of the GCC, in terms of which the parties had agreed to refer the disputes arising in relation to the Agreement, to arbitration. The said Clause is set out below: -

> "**CLAUSE 25**
>
> **Settlement of Disputes & Arbitration**
>
> Except where otherwise provided in the Contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to 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 to the Contract, designs, drawings, specifications, estimates, instructions orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:
>
> 1) If the Contractor considers any work demanded of him to be outside the requirements of the Contract, or disputes any drawings, record or decision given in writing by the Engineer on any matter in connection with or arising out of the Contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Engineer-in-Charge shall give his written instructions or decision within a period

of one month from the receipt of the Contractor's letter.

If the Engineer-in-Charge fails to give his instructions or decision in writing within the aforesaid period or if the Contractor is dissatisfied with the instructions or decision of the Engineer-in-Charge, the Contractor may, within 15 days of the receipt of the Engineer-in-Charge decision, appeal to the Appellate Authority specified in Schedule 'F' who shall afford an opportunity to the Contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Appellate Authority shall give his decision within 30 days of receipt of Contractor's appeal. If the Contractor is dissatisfied with this decision, the Contractor shall within a period of 30 days from receipt of the decision, give notice to the Appointing Authority specified in Schedule 'F' for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

2) Except where the decision has become final, binding and conclusive in terms of Sub Para (1) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Appointing Authority. The selection of Arbitrator by the Appointing Authority will be governed by the fact whether the dispute is (i) between two

Public Sector Enterprises or (ii) between a Public Sector Enterprise and a Government Department or (iii) Otherwise.

In case the dispute does not fall under item (i) or (ii) of this Para the Appointing Authority, shall appoint the sole Arbitrator. Within 30 days of receipt of notice from the Contractor to refer the dispute for Arbitration, the Appointing Authority stipulated in Schedule F shall send to the Contractor a list of three serving officers of RITES of appropriate status depending on the total value of claim, who have not been connected with the work under the Contract. The Contractor shall, within 15 days of receipt of this list select and communicate to the Appointing Authority, the name of one officer from the list who shall then be appointed as the Sole Arbitrator. If the Contractor fails to communicate his selection of name within the stipulated period, the Appointing Authority shall without delay, select one officer from the list and appoint him as the Sole Arbitrator.

3) In case the dispute falls under item (i) or (ii) of Sub Para (2) above, the Appointing Authority shall refer the dispute for Arbitration by one of the Arbitrators in the Department of Public Enterprises to be nominated by the Secretary to the Govt. of India in charge of the Department of Public Enterprises. The Arbitration & Conciliation Act 1996 shall not be applicable to the Arbitration in such a case. The Award of the

Arbitrator shall be binding upon the parties to the dispute, provided however that any party aggrieved by such award may make a further reference for setting aside or revision of the Award to the Law Secretary, Department of Legal Affairs, Ministry of Law & Justice, Govt. of India. Upon such reference, the dispute shall be decided by the Law Secretary or the Special Secretary/Additional Secretary when so authorized by the Law Secretary, whose decision shall bind the parties finally and conclusively. The Parties to the dispute will share equally the cost of Arbitration as intimated by the Arbitrator. The Arbitrator shall make a speaking Award and the Award may be published on plain paper. In the event of the Sole Arbitrator dying, neglecting or refusing to act or being unable to act for any reason, it shall be lawful for the Secretary to the Govt. of India in charge of the Department of Public Enterprises to nominate another person in place of the outgoing Arbitrator to act as Sole Arbitrator. The new Arbitrator as appointed shall as far as practicable proceed from the stage where it was left by the outgoing Arbitrator.

It is a term of this Contract that the party invoking arbitration shall give a list of disputes with amount claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Appellate Authority of the appeal in the form at Annexure 'F'. It is a term of this Contract

> that "Excepted matters" or matters where the decision of the Engineer-in-Charge or any higher authority has been stipulated as "Final and Binding" in various Clauses of Contract, stand specifically excluded from the purview of Arbitration Clause.
>
> It is also a term of this Contract that no person other than a person appointed by such Appointing Authority as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all. It is also a term of this Contract that if the Contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the Contractor and the Employer shall be deemed to have been waived and absolutely barred and the Employer shall be discharged and released of all liabilities under the Contract in respect of these claims."

15. The contention that TKE has not invoked the arbitration clause is, plainly, unmerited. The notice dated 06.03.2020 clearly indicates that the same is a "*Notice of Intention to commence Arbitration under Clause 25(1) of the General Conditions of Contract*". Merely because TKE has not called upon the Appointing Authority (Executive Director of RITES) to appoint an arbitrator, but instead, suggested that RITES concurs on appointment of an arbitrator, cannot be construed to mean

that TKE has not invoked the arbitration clause. It is also relevant to note that on 13.03.2020, TKE sent another notice seeking to correct an error that had crept in the said notice inasmuch as, TKE had wrongly calculated the total amount of its claims as ₹237,23,39,473.14/- instead of ₹57,11,47,927.91/-. The said notice also clearly indicates that the earlier notice dated 06.03.2020 was a "*Notice of Intention to commence Arbitration under Clause 25(1) of GCC*".

16. Concededly, RITES had not taken any steps for ensuring that an arbitral tribunal be constituted pursuant to the notice served by TKE. In fact, it had not responded to TKE's notice dated 06.03.2020 (as corrected by a letter dated 13.03.2020). Thus, TKE cannot be faulted for preferring the present application under Section 11 of the A&C Act.

17. The next question to be addressed is whether the parties can be referred to arbitration in view of TKE's stand that the Appointing Authority, cannot appoint an arbitrator.

18. The respondents do not dispute that in view of the decision of the Supreme Court in ***TRF Ltd.*** (*supra*) and ***Perkins*** (*supra*), the Appointing Authority cannot appoint an arbitrator. Thus, the import of the contentions advanced on behalf of RITES is that in view of the aforesaid decisions, the arbitration agreement stands frustrated since the third sub-paragraph of paragraph (3) of Clause 25 of the GCC expressly provides that no person other than a person appointed by the Appointing

Authority should act as an arbitrator and, if the same is not possible, the matter cannot be referred to arbitration.

19. Clause 25 of the GCC, undisputedly, embodies an arbitration agreement and the parties have agreed to refer their disputes (except the excepted matters), to arbitration. The controversy relates to the procedure for appointment of the arbitrator under the said Clause, which provides that the matters would be referred to a Sole Arbitrator appointed by the Appointing Authority. And, the same would be from a list of three serving officers of RITES of appropriate status, as may be provided by the Appointing Authority and as selected by TKE. As mentioned above, this is no longer permissible in view of Section 12(5) of the A&C Act read with the Seventh Schedule of the A&C Act. A serving employee of RITES would be disqualified as RITES is an interested party in the disputes that have arisen and thus, its employee cannot be appointed as an arbitrator. However, this part of the arbitration clause is not inseverable and, does not in any manner dilute the agreement between the parties to refer the disputes to arbitration. Thus, the said part of the arbitration clause is required to be treated as severable and since it falls foul of Section 12(5) of the A&C Act, the procedure insofar as it requires that the disputes be referred to one of the three serving officers, as suggested by the Appointing Authority, is liable to be ignored. This was also the view of this Court in ***B.E. Billimoria & Co.*** (*supra*).

20. The next aspect of the matter is whether the disability of the appointing authority to appoint an arbitrator would frustrate the arbitration agreement.

21. After enactment of the Arbitration and Conciliation (Amendment) Act, 2015, certain persons are ineligible to act as arbitrators in circumstances that are set out in the Seventh Schedule of the A&C Act. Although such persons are ineligible to act as arbitrators, the parties can waive the said objection after disputes have arisen. Therefore, *per se*, it is not impossible for such persons to act as arbitrators. They can do so if objections to their independence and impartiality are waived of in writing, in terms of the proviso to Section 12(5) of the A&C Act.

22. The Appointing Authority is an Executive Director of RITES and in view of the decisions of the Supreme Court in ***TRF Ltd.*** (*supra*) and ***Perkins*** (*supra*), the Appointing Authority cannot appoint an arbitrator, without the written consent of TKE after disputes have arisen. However, this Court is of the view that the same does not mean that the arbitration clause itself stands nullified. The term that no person other than the person appointed by Appointing Authority should act as an arbitrator, is no longer valid, in view of the aforementioned decisions of the Supreme Court. The next limb of the said term that in case it is not possible for such person to act as an arbitrator, the matter would not be referred to arbitration is intended to ensure that the arbitration is conducted only by an arbitrator appointed by the Appointing Authority.

This term cannot be read as a standalone term but must be read in conjunction with the term of the contract requiring the Appointing Authority to appoint an arbitrator. However, since the said term has been rendered inoperative by virtue of the amendments introduced in Section 12 of the A&C Act by the Arbitration and Conciliation (Amendment) Act, 2015 as interpreted by the Supreme Court in ***TRF Ltd.*** (*supra*) and ***Perkins*** (*supra*), the said term must also considered as rendered inoperative rather than as a term that invalidates the arbitration agreement.

23. It is important to bear in mind that the decisions of the Supreme Court in ***TRF Ltd*** (*supra*) and ***Perkins*** (*supra*) were rendered in the context of the amendments to Section 12 of the A&C Act as introduced by the Arbitration and Conciliation (Amendment) Act, 2015.

24. Sub-section (1) of Section 12 of the A&C Act was substituted and Sub-section (5) of Section 12 of the A&C Act was introduced in Section 12 of the A&C Act. The said Sub-sections read as under:

> "12. Grounds for challenge.—
> (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.]

* * * * *

(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."

25. The Arbitration and Conciliation (Amendment) Act, 2015 was enacted pursuant to the recommendations made by the Law Commission of India in its Report No. 246. The said Report had, *inter alia*, highlighted the necessity to introduce statutory provisions for ensuring neutrality of arbitrators. The Law Commission of India was guided by the 'IBA Guidelines on Conflicts of Interest in International Arbitration' to set out circumstances, which would give rise to justifiable doubts as to the impartiality and independence of arbitrators. The Fifth and Seventh Schedule of the A&C Act which were introduced in the A&C Act were based on the orange and red lists of the said Guidelines.

26. The Law Commission had highlighted that independence and impartiality of arbitrators was critical to the entire process of arbitration. The legislative intent of introducing the said statutory amendments was to ensure that arbitration is conducted by an arbitral tribunal, which is not only impartial and independent but is also perceived to be such.

27. In ***Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited: (2017) 4 SCC 665***, the Supreme Court had noted the recommendations made by the Law Commission of India in its 246th Report and had explained the legislative intent of introducing the statutory amendments in Section 12 of the A&C Act. Paragraph no. 20 of the said decision encapsulates the Court's view regarding the importance of independence and impartiality of the arbitrators and Paragraph no. 25 explains the object of amending Section 12 of the A&C Act. The said paragraphs are set out below:

> "20. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed

in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in *Hashwani v. Jivraj* [*Hashwani* v. *Jivraj*, (2011) 1 WLR 1872 : 2011 UKSC 40] in the following words: (WLR p. 1889, para 45)

> "*45*. … the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties."
>
> xxxx xxxx xxxx

25. Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence and impartiality. The amended provision is enacted to identify the "circumstances" which give rise to "justifiable doubts" about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which would attract the provisions of sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act

> as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empanelled by the respondent are not covered by any of the items in the said list."

28. In ***TRF Ltd.*** (*supra*), the Supreme Court had concluded that a person who is ineligible by operation of law to act as an arbitrator would also be ineligible to nominate another person to act as an arbitrator. The said decision was founded on the express language and legislative intent of Section 12(5) of the A&C Act.

29. In ***Perkins*** (*supra*), the Supreme Court, following the decision in ***TRF Ltd.*** (*supra*) interpreted the provisions of Section 12(5) of the A&C Act, in an expansive manner and held that even in cases where the power to appoint an arbitrator was vested with the person who was otherwise ineligible to be appointed as an arbitrator, it would be impermissible for him to exercise the same in view of the ineligibility referred to in TRF Ltd. Thus, a person who is ineligible to act as an arbitrator, would also not be eligible to appoint anyone else as an arbitrator. It is relevant to refer to the following observations made by the Court in the said decision:

> "But, in a case where only one party has a right to nominate a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act III of 2016) and recognised by the decision of the Court in TRF."

30. Considered in the light of the aforesaid object of introducing the amendments under Section 12(5) of the A&C Act, the contention that the Arbitration Clause must be construed to either exist in derogation of the legislative intent or not at all, must be rejected. Considering that RITES had agreed that the subject disputes are required to be referred to arbitration, it could not be heard to contend that the said arbitration would either be conducted in a manner which may compromise the fundamental requirement of an independent and an impartial process or not at all. While the plain language of the arbitration clause does read to mean that if it is impossible for the arbitrator appointed by the Appointing Authority to act as such, the disputes would not be referred to arbitration but considering in the context of the entire clause, this term has to be construed as only adjunct to the procedure that requires the Appointing Authority to appoint an arbitrator. It must, therefore, perish if the said procedure is contrary to law. Once it is held that the Appointing Authority is ineligible to appoint an arbitrator, the adjunct to that clause that no other person should act as an arbitrator and the

arbitration must not be held without such person acting as an arbitrator, must also be held to be invalid.

31. In the present case, the Appointing Authority is concededly, ineligible to act as an arbitrator by virtue of Section 12(5) of the A&C Act. In view of the decision of the Supreme Court in ***TRF Ltd.*** (*supra*), he cannot nominate another person to act as an arbitrator. However, that cannot be construed to mean that the entire arbitration agreement would be frustrated.

32. The foundation of an arbitration agreement is the willingness of the parties to have the *inter se* disputes adjudicated by an independent and impartial arbitrator. A condition imposed that disputes cannot be referred to arbitration except on the condition that only one party retains the authority to determine the mandate of the arbitral tribunal, would militate against the said fundamental premise that arbitration is an alternate mechanism for a just and fair adjudication of disputes.

33. It is also necessary to bear in mind that the legislative policy is to encourage arbitration, thus, any interpretation that would nullify an arbitration clause must be avoided. In ***Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc. & Ors., (2013) 1 SCC 641***, the Supreme Court had expressly observed that as under:

> "96. Examined from the point of view of the legislative object and the intent of the framers of the statute, i.e., the

> necessity to encourage arbitration, the Court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious cause of action, parties and prayers."

34. In view of the legislative intent, it is necessary to construe the arbitration clause in a manner so as to sustain the same. Therefore, the terms and conditions that fall foul of the Statute must, insofar as possible, be severed.

35. It is also relevant to note that in ***Perkins*** (*supra*), the controversy also centered around an arbitration clause, which expressly provided that no person other than a person appointed by the Chairman cum Managing Director of HSCC should act as an arbitrator.

36. The controversy can also be addressed from another perspective and that is the power of the court to derogate from the procedure as contemplated under the arbitration clause.

37. In ***North Eastern Railway and Ors. v. Tripple Engineering Works: (2014) 9 SCC 288***, the Supreme Court observed that the principle that the court must appoint an arbitrator as per the contract between the parties had seen a significant erosion. The relevant extract of the said decision is set out below:

"*6*. The "classical notion" that the High Court while exercising its power under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter for short "the Act") must appoint the arbitrator as per the contract between the parties saw a significant erosion in *ACE Pipeline Contracts (P) Ltd.* v. *Bharat Petroleum Corpn. Ltd.* [*ACE Pipeline Contracts (P) Ltd.* v. *Bharat Petroleum Corpn. Ltd.*, (2007) 5 SCC 304] , wherein this Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. A more significant development had come in a decision that followed soon thereafter in *Union of India* v. *Bharat Battery Mfg. Co. (P) Ltd.* [*Union of India* v. *Bharat Battery Mfg. Co. (P) Ltd.*, (2007) 7 SCC 684] wherein following a three-Judge Bench decision in *Punj Lloyd Ltd.* v. *Petronet MHB Ltd.* [*Punj Lloyd Ltd.* v. *Petronet MHB Ltd.*, (2006) 2 SCC 638] , it was held that once an aggrieved party files an application under Section 11(6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the contract. The implication that the Court would be free to deviate from the terms of the contract is obvious.

7. The apparent dichotomy in *ACE Pipeline* [*ACE Pipeline Contracts (P) Ltd.* v. *Bharat Petroleum Corpn. Ltd.*, (2007) 5 SCC 304] and *Bharat Battery Mfg. Co. (P) Ltd.* [*Union of India* v. *Bharat Battery Mfg. Co. (P) Ltd.*, (2007) 7 SCC 684] was reconciled by a three-Judge Bench of this Court in *Northern Railway Admn., Ministry of Railway* v. *Patel Engg. Co. Ltd.* [*Northern Railway Admn., Ministry of Railway* v. *Patel Engg. Co. Ltd.*, (2008) 10 SCC 240] , wherein the jurisdiction of the High Court under Section 11(6) of the Act was sought to be emphasised by taking into account the expression "to take the necessary measure" appearing in sub-section (6) of Section 11 and by further laying down that the said

expression has to be read along with the requirement of sub-section (8) of Section 11 of the Act.

38. The aforesaid passages were referred to by the Supreme Court in its later decision in ***Union of India v. U.P. State Bridge Corpn. Ltd.: (2015) 2 SCC 52*** although in a different context. In ***Voestalpine Schienen GMBH*** (*supra*), the Supreme Court referred to various other decisions including the aforesaid decision and observed that:

> "there are a number of judgments rendered by the Supreme Court prior to amendment of Section 12 of the A&C Act "where courts have appointed the arbitrators, giving a go-by to the agreed arbitration clause in certain contingencies and situations, having regard to the provisions of unamended Section 11(8) of the Act which, inter alia, provided that while appointing the arbitrator, Chief Justice, or the person or the institution designated by him, shall have regard to the other conditions as are likely to secure the appointment of an independent and impartial arbitrator."

39. At this stage, it is also relevant to refer to the decision of the Supreme Court in ***Indian Oil Corporation Ltd. & Ors. v. M/s Raja Transport (P) Ltd.: (2009) 8 SCC 520***. The said decision was rendered in an appeal against an order passed by the Chief Justice of the Uttaranchal High Court in an application filed under Section 11(6) of the A&C Act appointing a former Judge of that Court as the Sole Arbitrator to adjudicate the disputes between the parties.

40. It is necessary to note that the said decision was rendered prior to the enactment of the Arbitration and Conciliation (Amendment) Act, 2015. The Chief Justice of the Uttaranchal High Court accepted the respondent's application for appointment of an independent arbitrator for essentially two reasons. First, that the Director (Marketing) of the appellant was an employee and it was presumed that he would not act independently or impartially. And second, that the appellant had failed to act as was required under the agreed procedure.

41. In the aforesaid context, the Supreme Court framed the following questions for its consideration:

> "(i) Whether the learned Chief Justice was justified in assuming that when an employee of one of the parties to the dispute is appointed as an arbitrator, he will not act independently or impartially?
> (ii) In what circumstances, the Chief Justice or his designate can ignore the appointment procedure or the named arbitrator in the arbitration agreement, to appoint an arbitrator of his choice?
> (iii) Whether respondent herein had taken necessary steps for appointment of arbitrator in terms of the agreement, and the appellant had failed to act in terms of the agreed procedure, by not referring the dispute to its Director (Marketing) for arbitration?"

42. Insofar as the first question is concerned, the Supreme Court held that a person being an employee of one of the parties cannot *per se* be a bar to his appointment as an arbitrator. And, the learned Chief Justice was not justified in his assumption of bias. This decision would not hold

good after the Arbitration and Conciliation (Amendment) Act, 2015 had come into force.

43. Insofar as the second question is concerned – that is, whether the Chief Justice could ignore the procedure and appoint an arbitrator of his own choice – the Court held that in cases where there is material that creates a reasonable apprehension that the person mentioned in the arbitration agreement as an 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 disputes to the named arbitrator, appoint an independent arbitrator in accordance with Section 11(8) of the A&C Act.

44. It is material to note that the arbitration agreement which fell for consideration before the Supreme Court in that case also provided that "*no person other than the Director, Marketing or a person nominating by such Director, Marketing of the Corporation as aforesaid shall act as Arbitrator*". The Court held that the said condition would interfere with the power of the Chief Justice under Section 11(8) of the A&C Act to appoint a suitable person as an arbitrator in appropriate cases. Therefore, the said portion of the clause was liable to be ignored as being contrary to the A&C Act.

45. The Supreme Court held that a Court could appoint an independent arbitrator in cases where it found that the arbitrator named

in the arbitration agreement or to be appointed as per the procedure as agreed under the arbitration agreement, would not be impartial or independent. This reasoning has resonated in several decisions delivered thereafter.

46. This principle would hold good equally in the context of the present case. After the enactment of the Arbitration and Conciliation (Amendment) Act, 2015, it is statutorily recognized that circumstances as set out in Schedule Seven of the A&C Act would render a person ineligible to act as an arbitrator on account of justifiable doubts as to his impartiality and independence. Plainly, under such circumstances, the Court would have the power under Section 11 of the A&C Act to appoint an independent and impartial arbitrator. As held in ***Indian Oil Corporation Ltd.*** (*supra*) even in cases where the arbitration agreement provides for a procedure for appointment of an arbitrator, a court could appoint an independent arbitrator if there were reasonable grounds to doubt the independence and impartiality of the named arbitrator to be appointed in accordance with the procedure as stipulated under the arbitration agreement.

47. Thus, the very term which provides that no other person other than the one appointed by the Appointing Authority should act as an arbitrator and in absence of the same, the disputes would not be referred to arbitration, must be held contrary to the basic principles on which an arbitration agreement is founded and therefore, is liable to be ignored.

48. This Court is also of the view that it is not permissible for the respondents to now contend that the parties cannot be referred to arbitration. This is because this would run contrary to their stand before the High Court of Meghalaya in ***M/s T.K. Engineering Consortium Pvt. Ltd. v. Union of India and Six Ors.: W. P. (C) No. 10/2019***.

49. TKE had filed the said petition challenging the termination letter dated 17.01.2019 issued by RITES whereby the Agreement was terminated. The said case was contested by RITES. One of the grounds on which the said petition was resisted was that there is an arbitration agreement and TKE should be relegated to contractual remedies.

50. The learned ASG appearing for the respondents in that case had referred to Clause 25 of the Agreement and had contended that the Writ Petition filed by TKE should be dismissed as it had recourse to other remedies. This contention was accepted by the High Court as is apparent from the operative part of its order dated 09.09.2019. Whilst dismissing the petition, the Court had held that TKE would be at "*liberty to take recourse to other remedies as provided in the contractual agreement*".

51. Having taken a stand that TKE should take recourse to arbitration, the respondents cannot now be permitted to contend that the arbitration clause is frustrated as the Appointing Authority cannot appoint an arbitrator in view of the decision of the Supreme Court in ***TRF Ltd*** (*supra*) and ***Perkins*** (*supra*).

52. The decision in the case of ***Newton Engineering and Chemicals Limited*** (*supra*) is also of little assistance to the respondents. In that case, the parties had agreed to refer the disputes to ED (NR) of the respondent corporation. When the disputes arose between the parties, the office of the respondent corporation (Indian Oil Corporation) had been reorganized and a post of ED (NR) did not exist. Indian Oil Corporation offered that the disputes be referred to the Director (Marketing), however, that was not acceptable to the appellant therein. It is in the aforesaid context that the Supreme Court held that the disputes could not be referred to arbitration. It is material to note that the said decision was rendered before enactment of the Arbitration and Conciliation (Amendment) Act, 2015. The Supreme Court in ***TRF Ltd.*** (*supra*) referred to the aforesaid decision and observed as under:

> "The aforesaid decision clearly lays down that it is not open to either of the parties to unilaterally appoint an arbitrator for resolution of the disputes in a situation that had arisen in the said case."

53. As per law prevailing on the date of the said decision, there was no impediment for the parties to agree that an employee of one of the parties be appointed as an arbitrator. Thus, the agreement that disputes be referred to arbitration of an officer holding the designation of ED (NR) was valid and enforceable. But as that office had ceased to exist, it was necessary for the parties to arrive at an alternative arrangement, which they were unable to do so.

54. In the facts of the present case, there is no dispute as to the existence of the arbitration agreement. As held above, TKE had invoked the said arbitration clause but the parties have been unable to concur on appointment of an arbitrator. In this view, this Court considers it apposite to allow the present petition.

55. Accordingly, it is proposed that Justice (Retd.) Pradeep Nandrajog, former Chief Justice of the High Courts of Rajasthan and Maharashtra (Mobile No.- 9818000130), be appointed as a Sole Arbitrator to adjudicate the disputes that have arisen between the parties and which fall within the scope of the arbitration clause as set out hereinbefore.

56. The arbitrator may furnish his consent and disclosure as required under Section 12(1) of the A&C Act before the next date of hearing.

57. List on 19.03.2021

VIBHU BAKHRU, J

MARCH 8, 2021
RK