IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/PETN. UNDER ARBITRATION ACT NO. 130 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE BELA M. TRIVEDI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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ESCORT SECURITY AND PERSONNEL SERVICES
Versus
DEENDAYAL PORT TRUST

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Appearance:
PRATEEK S BHATIA(8629) for the Petitioner(s) No. 1
VATSAL S PARIKH(7452) for the Petitioner(s) No. 1
MR NIRAL R MEHTA(3001) for the Respondent(s) No. 1
NOTICE SERVED BY DS(5) for the Respondent(s) No. 2

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CORAM: **HONOURABLE MS. JUSTICE BELA M. TRIVEDI**

Date : 30/04/2021
CAV JUDGMENT

1. The Arbitration Petition has been filed by the petitioner, invoking Section 11(6) and Section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the said Act"), mainly praying for the following reliefs as contained in paragraph 33

of the petition:-

> "(B) Your Lordships may be pleased to quash and set aside the appointment of respondent No.2 as Sole Arbitrator to adjudicate the disputes between the petitioner and respondent No.1;
>
> (C) Your Lordships may be pleased to appoint any former Judge of the Hon'ble High Court or the Hon'ble Supreme Court as Sole Arbitrator to constitute the Arbitral Tribunal and adjudicate disputes between the parties under the aforesaid contract;"

2. The short facts necessary for deciding the present petition are that in response to the tenders floated by the respondent No.1 on 2.3.2016 inviting bids for the work of engagement of Security Personnel (Civilians) for various departments `of the respondent No.1 organization for a period of 2 years, the petitioner had submitted their bid, which was accepted by the respondents, by awarding a contract by way of letter of award dated 21.6.2016 for the strength of 120 Work Personnel (Annexure-P/1). As per the contract, the petitioner was required to deploy security staff at various departments and various locations of the respondent No.1 and to pay wages to such employees. However, certain disputes arose as regards the non-compliance of the contract. According to the petitioner, the respondent No.1 was required to verify the attendance and release the monthly bills of wages to the security personnel, however, despite the repeated requests made by the petitioner, the respondent No.1 did not carry out the verification, nor cleared the monthly bills to be paid to the petitioner. The petitioner thereafter received a letter from the respondent No.1 on 16.12.2016 alleging that there was a non-compliance of payments of weekly wages to the security personnel. The correspondences ensued between the parties in that regard.

Ultimately, the respondent No.1 on 29.6.2017 issued a Notice to the petitioner calling upon him to show cause as to why the contract should not be terminated on the grounds mentioned therein. The petitioner gave a reply to the said show-cause notice denying the allegations made in the same. However, thereafter on 14.8.2017 the respondent No.1 issued a Notice for termination of the contract and forfeited the amount of performance guarantee as well as the detention money.

3. The petitioner, therefore, on 9.10.2017 gave a Notice, calling upon the respondent No.1 to appoint an Arbitrator to resolve the disputes between them, in terms of Clause 64 of the contract entered into between them. The respondent No.1, on the receipt of the said notice appointed the respondent No.2 as the Sole Arbitrator to adjudicate the disputes between the parties and communicated to the petitioner vide the letter dated 22.12.2017. The respondent No.1 thereafter on 1.6.2018 addressed a communication to the petitioner stating that the respondent No.2 had quoted Rs.1,20,000/- as his arbitration fees for conducting the arbitration proceedings, and sought the consent from the petitioner to pay 50% of the arbitration fees. The petitioner on 7.6.2017 replied to the said letter, agreeing to pay 50% of the arbitration fees and requested the respondent No.1 to do the needful. The respondent No.1 thereafter on 4.8.2018 addressed a communication to the petitioner appointing the respondent No.2 as the Sole Arbitrator to adjudicate the disputes between them. According to the petitioner, the power to appoint an Arbitrator unilaterally having been taken away by virtue of coming into force of the Arbitration (Amendment) Act 2015, the appointment of the

respondent No.2, was in contravention of the said provisions. The petition, therefore, has been filed for quashing and setting aside the said appointment and for appointment of Sole Arbitrator to adjudicate the disputes between the parties under the contract in question.

4. In the affidavit-in-reply filed on behalf of the respondent No.1, it has been contended that the petition suffered from suppression of material facts. According to the respondent No.1, the petitioner had not disclosed the fact that he had participated in the arbitration proceedings without raising any objection. In fact, the petitioner himself had requested for the arbitration proceedings as per Clause 64 of the contract. It has also been contended that the petitioner himself had consented for the name of the Arbitrator and had also willingly agreed to make payment of part of his fees. The respondent No.1, therefore, had appointed the respondent No.2 as an Arbitrator, who is an independent person, in view of Clause 64 of the contract agreement. Before the Arbitrator also, the petitioner had appeared, however, failed to submit the charter of claim and the supporting evidence, despite sufficient opportunities were granted to the petitioner. When the Arbitrator had shown his displeasure about the casual approach of the petitioner, the present petition has been filed, which is not maintainable.

5. The learned Advocate Mr. Prateek Bhatia appearing for the petitioner made the following submissions:-

(i) From the bare reading of the Clause 64 of the contract agreement it is clear that the said clause was inserted without taking into consideration the effect of the Amendment in the Act made in 2015, inasmuch as Clause 64 of the contract provided that the disputes between the parties shall be referred to the Chairman for sole arbitration by himself or by any officer appointed by him.

(ii) The power of one party to be an Arbitrator or to nominate Sole Arbitrator in a dispute in whose outcome he is interested, has been taken away by the Arbitration and Conciliation (Amendment) Act, 2015, which came into force on 23.10.2015. By virtue of Sub-section (5) of Section 12 read with 7th Schedule of the Act, the Chairman of the respondent No.1 had become ineligible to be appointed as Sole Arbitrator by operation of law and when the Chairman had become ineligible to act as an Arbitrator, he could not have nominated the respondent No.2 as the Sole Arbitrator to adjudicate the disputes between the parties.

(iii) Where a person has become ineligible to be appointed as an Arbitrator, Section 14(1) of the Act gets attracted, which provides that the mandate of an Arbitrator shall terminate and he shall be substituted by another Arbitrator, if he becomes *de jure* or *de facto* unable to perform his functions. In the instant case, the respondent No.1, who falls under the category specified in the 7th Schedule was ineligible to be appointed as an Arbitrator in view of Section 12(5) of the said Act, and therefore, he could not have appointed the respondent No.2 as an Arbitrator.

(iv) Reliance is placed on the various decisions of the Supreme Court in case of **TRF Limited Vs. Energo Engineering Projects Limited, reported in (2017) 8 SCC 377**, in case of **Bharat Broadband Network Limited Vs. United Telecoms Limited, reported in (2019) 5 SCC 755**, in case of **Walter Bau Au Legal Services Ltd. Vs. Municipal Corporation of Greater Mumbai, reported in (2015) 3 SCC 800**, and in case of **Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Limited, reported in 2019 SCC Online SC 1517**. Reliance is also placed on the decision of the Delhi High Court in case of **Proddatur Cable TV Digi Services Vs. Siti Cable Network Limited (in OMP(T) (COMM.) No.109 of 2019 and I. A No.17896 of 2019 dated 20.1.2020)**, as also on **246 Law Commission** Report to buttress his submissions.

(v) Distinguishing the judgement relied upon by the learned Advocate for the respondent No.1 in case of **Central Organization for Railway Electrification vs. M/s. ECI-SPIC-SMO-MCML (JV), A Joint Venture Company, reported in (2019) SCC Online SC 1635,** Mr.Bhatia submitted that the said decision has no application to the facts of the present case inasmuch as in the instant case, the respondent No.1 had appointed the respondent No.2 as a Sole Arbitrator without giving choice of names from the panel and without making any modification/amendment in the clause pertaining to arbitration so as to bring it in accordance with the Arbitration (Amendment) Act of 2015 as was done in case of **Central Organization for Railway**

Electrification (supra). Even otherwise correctness of the said judgement having been doubted by the Coordinate Bench of the Supreme Court having equal strength, the issue has been referred to the Larger Bench in case of **Union of India vs. M/s.Tansia Construction Pvt. Ltd. (order dated 11.01.2021 in SLP (C) No. 12670 of 2020)**.

(vi) As per the legal position settled by the Supreme Court in catena of judgements, the High Court has the jurisdiction under Section 11(6) of the said Act to nullify the appointments made by the authorities when there is a failure of procedure or where the appointment is *ex facie* invalid or where there is *ex facie* contravention of the provisions of the Arbitration Clause.

6. The learned Advocate Mr.Niral Mehta appearing for the respondent No.1 made the following submissions:-

(i) The petition filed under Section 11(6) of the said Act, is not maintainable, as an independent Arbitrator has already been appointed, at the request made by the petitioner and after following the appointment procedure agreed upon by the parties. When such appointment is not hit by Schedule 7 of the said Act, no cause of action could be said to have arisen for invoking Section 11(6) of the said Act.

(ii) Section 14 would come into play only when the Arbitrator becomes *de jure* or *de facto* unable to perform his functions, however, in the instant case the Arbitrator

appointed at the request of the petitioner is neither ineligible nor disqualified as per 7th Schedule.

(iii) The agreement entered into between the parties is after the Amendment of the Act i.e. after 2015 and the parties had willingly agreed to the procedure for the appointment of the Arbitrator as per Clause 64 of the contract. The petitioner having requested to appoint the Arbitrator pursuant to the said clause of the agreement and having appeared before the Arbitrator without raising any objection whatsoever, the petitioner had waived the applicability of Sub-section (5) of Section 12, even if the said provision is held to be applicable to the facts of the present case.

(iv) The respondent No.2 Arbitrator does not fall under any of the categories envisaged under the 7th Schedule, and therefore, Section 12(5) also would not get attracted.

(v) The petitioner has failed to challenge the appointment of the Arbitrator within the prescribed time limit of 15 days after being aware of the constitution of the Arbitral Tribunal as required under Section 13(2) of the said Act, rather the petitioner had participated in the proceedings, and therefore also, the jurisdiction under Section 11(6) of the said Act could not be invoked.

(vi)The judgement relied upon by the learned Advocate for the petitioner in case of **Bharat Broadband Network Limited (supra)** and in case of **TRF Limited Vs. Energo Engineer Projects Limited (supra)**, are distinguishable,

inasmuch as in the said cases, the agreement was entered into between the parties prior to the Amendment of 2015, whereas in the present case, agreement/contract has been entered into post Amendment. In case of **Central Organization for Railway Electrification (supra)**, it has been held *inter alia* that the appointment of the Arbitrator should be in terms of the agreement entered into between the parties and that the clause contained in the General Conditions of contract could not be ignored.

7. Before appreciating the rival contentions raised by the learned Advocates for the parties, it would be beneficial to reproduce the relevant part of Arbitration Clause 64 as contained in the agreement entered into between the parties:

> "64. Arbitration Clause:-
>
> Except where otherwise provided in the contract all questions and
>
> (i) disputes relating to the meaning of the specifications, designs, drawings and instructions here in 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 any other thing what so ever, in any way arising out of or relating to the contract, design, drawings, specifications, estimates, instructions, orders or to the conditions or otherwise concerning the works or regarding the execution or failure to execute the same whether arising during the progress of work or after the completion thereof as described here in after shall be referred to the Chairman for sole arbitration by himself or by any officer appointed by him.
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> (ii) It will be no objection to any such appointment that the arbitrator is an employee of the Board of the

> Government, that he had to deal with the matter to which the contract relates and that in course of his duties as an employee of the Board or the Government, he had expressed views on all or any of the matters in dispute or of different. The arbitrator, who has been dealing with the arbitration case, being transferred or vacating his office or in the event of his death or being unable to act for any reason, the Chairman then holding the office shall arbitrate himself or appoint any officer to act as arbitrator.
>
> (iii) It is also a term of the contract that no person other than the Chairman himself or any officer appointed by him shall act as arbitrator."

8. It would be also beneficial to refer to some of the relevant provisions contained in the Act. Section 11 pertains to the appointment of the Arbitrators and Sub-section (6) thereof pertains to the powers of the Supreme Court or the High Court, as the case may be, to take necessary measure for securing the appointment. Sub-section (6) of Section 11 reads as under:-

> 11.**Appointment of arbitrators.-**
>
> (1) to (5) xxx
>
> (6) Where, under an appointment procedure agreed upon by the parties,—
>
> (a) a party fails to act as required under that procedure; or
>
> (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
>
> (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,
>
> a party may request [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

9. Section 12 of the Act pertains to the grounds for challenging the appointment of Arbitrator. It may be noted that before the parties entered into the agreement, Sub-section (5) of Section 12 was amended as per the Act 3 of 2016, which came into force w.e.f. 23.10.2015. The said amended Sub-section (5) of Section 12 reads as under:-

> "12. **Grounds for challenge.-**
>
> (1) to (4) xxx
>
> (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."

10. Section 13 of the Act pertains to the procedure for challenging an Arbitrator. The relevant Sub-sections (1), (2) and (3) of Section 13 read as under:-

> **"13.** Challenge procedure.—
>
> (1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.
> (2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.
>
> (3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees

to the challenge, the arbitral tribunal shall decide on the challenge."

11. Sub-section (1) and (2) of Section 14 being relevant are reproduced as under:-

"**14. Failure or impossibility to act.—**

(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if-
(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

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

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

12. At the outset, it may be noted that the petitioner in the instant Arbitration petition has prayed for two-fold prayers; firstly for quashing and setting aside the appointment of the respondent No.2 as the Sole Arbitrator, under Section 14 of the said Act and secondly, for appointment of Sole Arbitrator to constitute the Arbitral Tribunal to adjudicate the disputes between the parties, under Section 11(6) of the said Act. Mr. Bhatia placing heavy reliance on the various authorities of the Supreme Court has sought to submit that when the appointment of the sole arbitrator is *ex facie* non est in law, such appointment will not inhibit the exercise of jurisdiction of this Court under Section 11(6) of the said Act.

13. In case of Perking Eastman Architects DPC (supra), the two

Judge Bench of Supreme Court exercised their powers under Section 11(6) of the Act, following the earlier judgments where the appointment of the Arbitrator was found to be non-est in law. It was observed therein as under:

> "26. The further question that arises is whether the power can be exercised by this Court under Section 11 of the Act when the appointment of an arbitrator has already been made by the respondent and whether the appellant should be left to raise challenge at an appropriate stage in terms of remedies available in law. Similar controversy was gone into by a Designated Judge of this Court in Walter Bau AG3 and the discussion on the point was as under:-
>
> > "9. While it is correct that in Antrix and Pricol Ltd., it was opined by this Court that after appointment of an arbitrator is made, the remedy of the aggrieved party is not under Section 11(6) but such remedy lies elsewhere and under different provisions of the Arbitration Act (Sections 12 and 13), the context in which the aforesaid view was expressed cannot be lost sight of. In Antrix, appointment of the arbitrator, as per the ICC Rules, was as per the alternative procedure agreed upon, whereas in Pricol Ltd., the party which had filed the application under Section 11(6) of the Arbitration Act had already submitted to the jurisdiction of the arbitrator. In the present case, the situation is otherwise.
> >
> > 10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law. In the present case, the agreed upon procedure between the parties contemplated the appointment of the arbitrator by the second party within 30 days of receipt of a notice from the first party. While the decision in Datar Switchgears Ltd. may have introduced some flexibility in the time frame agreed upon by the parties by extending it till a point of time anterior to the filing of the application under Section 11(6) of the Arbitration Act, it cannot be lost sight of that in the present case the appointment of Shri Justice A.D. Mane is

clearly contrary to the provisions of the Rules governing the appointment of arbitrators by ICADR, which the parties had agreed to abide by in the matter of such appointment. The option given to the respondent Corporation to go beyond the panel submitted by ICADR and to appoint any person of its choice was clearly not in the contemplation of the parties. If that be so, obviously, the appointment of Shri Justice A.D. Mane is non est in law. Such an appointment, therefore, will not inhibit the exercise of jurisdiction by this Court under Section 11(6) of the Arbitration Act. It cannot, therefore, be held that the present proceeding is not maintainable in law. The appointment of Shri Justice A.D. Mane made beyond 30 days of the receipt of notice by the petitioner, though may appear to be in conformity with the law laid down in Datar Switchgears Ltd18., is clearly contrary to the agreed procedure which required the appointment made by the respondent Corporation to be from the panel submitted by ICADR. The said appointment, therefore, is clearly invalid in law."

27. It may be noted here that the aforesaid view of the Designated Judge in Walter Bau AG3 was pressed into service on behalf of the appellant in TRF Limited4 and the opinion expressed by the Designated Judge was found to be in consonance with the binding authorities of this Court. It was observed:-

"32. Mr Sundaram, learned Senior Counsel for the appellant has also drawn inspiration from the judgment passed by the Designated Judge of this Court in Walter Bau AG3, where the learned Judge, after referring to Antrix Corpn. Ltd., distinguished the same and also distinguished the authority in Pricol Ltd. v. Johnson Controls Enterprise Ltd. and came to hold that: (Walter Bau AG case3, SCC p. 806, para 10)

"10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law. …"

33. We may immediately state that the opinion expressed in the aforesaid case is in consonance with the binding authorities we have referred to hereinbefore."

> 23. In TRF Limited, the Managing Director of the respondent had nominated a former Judge of this Court as sole arbitrator in terms of aforesaid Clause 33(d), after which the appellant had preferred an application under Section 11(5) read with Section 11(6) of the Act. The plea was rejected by the High Court and the appeal therefrom on the issue whether the Managing Director could nominate an arbitrator was decided in favour of the appellant as stated hereinabove. As regards the issue about fresh appointment, this Court remanded the matter to the High Court for fresh consideration as is discernible from para 55 of the Judgment. In the light of these authorities there is no hindrance in entertaining the instant application preferred by the Applicants."

14. It may be noted that a three Judge Bench of Supreme Court in case of **Central Organisation for Railway Electrification (supra),** distinguishing the decisions in **TRF Limited (supra)** and in **Perkins Eastman architects DPC & Anr. (supra)** while dealing with the issue as to whether the General Manager himself on becoming ineligible by operation of law to be appointed as Arbitrator, would be eligible to nominate the Arbitrator, negatived the contention that the General Manager had become ineligible to nominate an Arbitrator. It has been held in Para. Nos. 37 and 38 thereof as under:

> "37. In the present matter, after the respondent had sent the letter dated 27.07.2018 calling upon the appellant to constitute Arbitral Tribunal, the appellant sent the communication dated 24.09.2018 nominating the panel of serving officers of Junior Administrative Grade to act as arbitrators and asked the respondent to select any two from the list and communicate to the office of the General Manager. By the letter dated 26.09.2018, the respondent conveyed their disagreement in waiving the applicability of Section 12(5) of the Amendment Act, 2015. In response to the respondent's letter dated 26.09.2018, the appellant has sent a panel of four retired Railway Officers to act as arbitrators giving the details of those retired officers and requesting the respondent to select any two from the list and

communicate to the office of the General Manager. Since the respondent has been given the power to select two names from out of the four names of the panel, the power of the appellant nominating its arbitrator gets counter-balanced by the power of choice given to the respondent. Thus, the power of the General Manager to nominate the arbitrator is counter-balanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers. In view of the modified Clauses 64(3)(a)(ii) and 64(3)(b) of GCC, it cannot therefore be said that the General Manager has become ineligible to act as the arbitrator. We do not find any merit in the contrary contention of the respondent. The decision in TRF Limited is not applicable to the present case.

38. There is an express provision in the modified clauses of General Conditions of Contract, as per Clauses 64(3)(a)(ii) and 64(3)(b), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers [Clause 64(3)(a)(ii)] and three retired Railway Officers retired not below the rank of Senior Administrative Grade Officers [Clause 64(3)(b)]. When the agreement specifically provides for appointment of Arbitral Tribunal consisting of three arbitrators from out of the panel serving or retired Railway Officers, the appointment of the arbitrators should be in terms of the agreement as agreed by the parties. That being the conditions in the agreement between the parties and the General Conditions of the Contract, the High Court was not justified in appointing an independent sole arbitrator ignoring Clauses 64(3)(a)(ii) and 64(3)(b) of the General Conditions of Contract and the impugned orders cannot be sustained."

15. Now, recently another three Judge Bench in case of **Union Of India vs M/S Tantia Constructions Limited in SLP (C) No. 12670/2020 (supra),** while disagreeing with the view taken by three Judge Bench in **Central Organisation for Railway Electrification (supra)**, on the issue that once the appointing authority itself is incapacitated from referring the matter to arbitration, the appointment made by it would still be valid, has requested to refer the matter to the larger Bench.

16. At this juncture, it may be noted that in none of the above referred judgments, the Supreme Court had an occasion to deal with the proviso to Section 12(5) of the Act, which states that the parties may subsequent to the disputes having arisen between them, waive the applicability of the said sub-section (5) by an express agreement in writing.

17. The bone of contention raised by the learned Advocate Mr.Bhatia for the petitioner is that the respondent No.1 could not have made unilateral appointment of the respondent No.2 in view of the 7th Schedule of the Act, which makes the person ineligible to be appointed as an Arbitrator, if he falls in any of the categories specified in the 7th Schedule. According to Mr.Bhatia as per Clause 64 of the contract agreement the disputes relating to the contract had to be referred to the Chairman for sole arbitration by himself or by any officer appointed by him, however, the Chairman of the respondent No.1 would fall under Sr.1 of the categories mentioned in the 7th Schedule, and therefore, neither he himself could have been the Arbitrator, nor could he have appointed the respondent No.2 as an Arbitrator. Thus, according to Mr.Bhatia the Arbitrator having become *de jure* unable to perform the functions, the mandate of the respondent No.2 as an Arbitrator had stood terminated under Section 14(1) of the said Act. The Court does not find any substance in any of the submissions made by the learned Advocate Mr.Bhatia. It seems that Mr.Bhatia while making such submissions was completely oblivion to the proviso to sub-section (5) of Section 12 of the said Act.

It may be noted that the said sub-section (5) of Section 12 was inserted by the Act of 3 of 2016, which came into effect from 23rd October, 2015, and admittedly the contract agreement was awarded by the respondent no.1 to the petitioner by way of letter of award dated 21.6.2016. Meaning thereby the terms and conditions including the Clause 64 pertaining to Arbitration, of the contract entered into between the parties were agreed upon after the said Amendment of 2015. Further, the petitioner itself on the disputes having arisen had called upon the respondent No.1 to appoint an Arbitrator in terms of Clause 64 of the Contract. The respondent No.1 having acceded to the said request and having appointed the respondent No.2 as the sole Arbitrator to adjudicate the disputes between the parties, had communicated the same to the petitioner vide letter dated 22.12.2017. Admittedly, thereafter the respondent No.1 had addressed another communication on 1.6.2018 to the petitioner requesting to grant consent to pay 50% of the arbitration fees of the said Arbitrator, to which the petitioner specifically agreed vide the letter dated 7.6.2017 and requested the respondent No.1 to do the needful. From the said correspondence, there remains no shadow of doubt that subsequent to the disputes having arisen between the parties, the petitioner had expressely consented for the appointment of the respondent No.2 as the Sole Arbitrator and had also expressely consented for making payment of 50% of the fees of the said Arbitrator. Such consent on the part of the petitioner was nothing but the consent to waive applicability of sub-section (5) of Section 12 as contemplated in the proviso therof. Under the circumstances, it does not lie in the mouth of the petitioner to say that the appointment of the respondent No. 2 as an Arbitrator is invalid or non-est in the eye of law.

18. The petitioner even otherwise, if it had any objection, had to challenge the Arbitrator within 15 days after it became aware of the constitution of the Arbitral Tribunal as required under Section 13(2) of the said Act. The same having not been challenged within the prescribed time limit and as per the procedure laid down in Section 13, and having challenged it for the first time before this Court by way of the present petition, such challenge could not be said to be tenable in the eye of law.

19. Further, from the bare reading, it appears that sub-section (6) of Section 11 for the appointment of an arbitrator could be invoked, only when any of the three contigencies mentioned therein existed. As held by the Supreme Court in case of **Indian Oil Corporation Limited Vs. Raja Transport (P) Limited**, reported in **(2009) 8 SCC 520**, where the appointment procedure has been agreed between the parties, but if the cause of action for invoking the jurisdiction of the Chief Justice or his designate under Clauses (a), (b) or (c) of Sub-section (6) of Section 11 has not arisen, then the question of the Chief Justice or his designate exercising power under Sub-section (6) does not arise. In the instant case, the appointment procedure was agreed between the petitioner and the respondent No.1, and the respondent No.1 has not only followed the procedure as agreed, but has followed the same as requested by the petitioner. Mr. Bhatia has failed to point out as to how the case of the petitioner would fall under Clause (a),(b) or (c) of sub-section (6) of Section 11, so as to invoke the jurisdiction of this Court to appoint an Arbitrator under Section 11(6) of the Act.

20. In that view of the matter, the petition deserves to be dismissed without any further discussion, however, since Mr. Bhatia has also argued on the prayer for quashing and setting aside the appointment in view of Section 14 of the Act, the Court deems it proper to deal with the said issue also. From the bare reading of the said Section 14, it transpires that the mandate of Arbitrator would terminate and he would be substituted by another Arbitrator, if two conditions as stated therein are fulfilled namely; (I) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons, fails to act without undue delay and (ii) he withdraws from his office or the parties agree to the termination of his mandate. If both these conditions are satisfied then only the mandate of the Arbitrator would stand terminated and he would be substituted by another Arbitrator. Sub-section (2) of Section 14 states that if the controversy remains concerning any of the grounds referred to in clause (a) of sub-Section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate. In the instant case, the contention raised by the petitioner that the respondent No.2, the Sole Arbitrator appointed for resolving the disputes between the parties has become *de jure* unable to perform his functions, has been seriously disputed by the respondent No.1, and therefore, a controversy has arisen concerning as to whether the respondent No.2 has become *de jure* unable to perform his functions as contemplated in Clause (a) of Sub-section (1) of Section 14. Since the parties have not otherwise agreed, the party asserting the termination of the mandate of the Arbitrator, i.e. the petitioner has to apply to the "Court" to decide on the termination of the mandate. It is further

pertinent to note that the "Court" mentioned in the said provision would be the "Court" as defined in Clause (e) of Section 2(1) of the said Act. This Court being not the "Court" as falling within the meaning of Clause (e) of Section 2(1) of the said Act, the prayer sought for quashing and setting aside the appointment of respondent No.2 as the Arbitrator under Section 14 of the said Act, on the ground that the mandate of the Arbitrator has stood terminated, also cannot be granted.

21. In the aforesaid premises, the petition being devoid of merits is dismissed.

(BELA M. TRIVEDI, J)

V.V.P.PODUVAL/SINDHU NAIR