IN THE JUDICATURE OF HIGH COURT AT BOMBAY
BENCH AT AURANGABAD

COMMERCIAL ARBITRATION APPEAL NO. 01 OF 2023

State of Maharashtra,
Through Public Works Department,
Through its Executive Engineer,
Public Division, Beed, Tq. and Dist. Beed. **...Appellant**

VERSUS

Morya Infrastructure Pvt.Ltd Beed
Through Its Director,
Bhaskar Tukaram Waghmare,
R/o Head Office At Shahunagar, Beed,
Tq. and Dist. Beed. **...Respondent**

...
AGP Appellant : Mr. M. K. Goyanka and Mr. P. K. Lakhotiya
Advocate for Respondent : Mr. J. N. Singh a/w/ Mr. Sunil L. Sange
...

WITH CIVIL APPLICATION NO. 9207 OF 2023
IN CARBA/1/2023

WITH CIVIL APPLICATION NO. 12453 OF 2023
IN CARBA/1/2023

...

CORAM : ARUN R. PEDNEKER AND
VAISHALI PATIL-JADHAV, JJ.

Date of Reserving the Judgment : 11/02/2026

Date of Pronouncing the Judgment : 16/02/2026

JUDGMENT : (Per ARUN R. PEDNEKER, J.)

1. By the present Commercial Arbitration Appeal filed under Section 13 of the Commercial Courts Act, read with Section 37 of the Arbitration and Conciliation Act, 1996, the appellant has challenged the order dated 06/05/2022 passed by the Commercial Court, District Beed, in Civil M.A. (Arbitration) No. 87 of 2018, whereby the Commercial Court was pleased to

dismiss the application filed by the Appellant under Section 34 of the Arbitration and Conciliation Act, 1996, and maintained the arbitral award dated 11/02/2018 passed by the Sole Arbitrator.

2. The facts of the appeal, in brief, are as follows :

Pursuant to a tender notice dated 31/05/2002, tenders were invited by the Appellant for the work of improvement and development of the road Chumbli Phata–Patoda–Manjarsumba, i.e. SH/155 and SH/156, from Km. 80/00 to 84/500 and Km. 18/60 to 46/300 in District Beed (Maharashtra) under the B.O.T. scheme. The concession period was 13 years and 6 months. The respondent was found to be the lowest bidder, and the work was accordingly allotted to him. An agreement was executed between the parties.

3. The work was completed on 24/05/2004, and the respondent was permitted to collect toll from 01/07/2004 to 30/06/2016, with the obligation to maintain the road during the said period. It is the case of the Appellant that the condition of the road deteriorated and that the respondent failed to carry out necessary repairs despite repeated complaints received by the Appellant. The respondent was informed accordingly but failed to take corrective measures. Consequently, the Appellant was constrained to stop toll collection and passed an order to that effect.

4. A notice to stop toll collection was issued on 30/06/2014, and toll collection was stopped on 17/07/2014. On 26/06/2014, the claim was settled by the Appellant for an amount of Rs. 67.79 lakhs, and on 27/06/2014, the said amount was paid to the respondent by way of buy-back price.

5. Being dissatisfied with the buy-back price, the respondent issued a notice for settlement of disputes on 30/06/2014 and thereafter sent a reminder on 19/08/2014 to the Chief Engineer. As the dues were not settled, the respondent issued a notice dated 25/09/2014 under Clause 3.4.17 of the tender agreement, requesting the Chief Engineer to refer the disputes to arbitration. Upon failure to do so, the respondent issued another notice dated 28/10/2014 to the Secretary, P.W.D., Government of Maharashtra, seeking reference of disputes to arbitration.

6. Since the disputes were not referred to Arbitration, the respondent approached this Court by filing Arbitration Application No. 2 of 2015 under Section 11 of the Arbitration and Conciliation Act, 1996, seeking appointment of an Arbitrator. It is the case of the respondent that with the consent of both parties, a sole Arbitrator was appointed, and by order dated 02/03/2015, the said Arbitration Application was disposed of. As the fact of appointment of the Sole Arbitrator by the High Court is disputed, we will deal with this aspect little later in the Judgment.

7. Thereafter, a preliminary meeting was held by the Arbitrator on 19/02/2017, which was attended by both parties. No objections were raised either under Section 12, Section 13, or Section 16 of the Arbitration and Conciliation Act, 1996.

8. On 06/04/2017, the respondent raised the following claims :

Claim No.1 : Compensation on account of illegal termination of contract and unilateral closer of the Toll Collection an amount of Rs.558.78 Lacs.

Claim No.2 : Compensation due to idleness of toll staff and maintenance labourers an amount of Rs.46.84 Lacs.

Claim No.3 : Loss of Business Profit @ 15% at Rs.86.88 Lacs.

Claim No.4 : Non-payment of price escalation as per agreement an amount of Rs.187.42 Lacs.

Claim No.5 : Non-payment of bill in respect of special repairs done an amount of Rs.52.60 Lacs.

Claim No.6 : Interest @ 14.50 % on all amount due and payable.

Claim No.7 : Cost towards Arbitration at Rs.15 Lacs.

9. On 18/05/2017, the claimant led evidence by way of affidavit. In July 2017, the Appellant appeared and filed its written statement of defence. The appellant filed its counter-claim on 14/07/2017. Statements of admission and denial were submitted on 20/07/2017, and the respondent

filed closing pursis on 28/10/2017.

10. Applications seeking adjournments were filed by the appellant on 07/06/2017 and 11/06/2017. Various internal communications were exchanged between the Executive Engineer, Superintendent Engineer, Chief Engineer, and Secretary (Desk–9), P.W.D., Mantralaya, Mumbai, between July and October 2017, including a request to file a review petition before the High Court.

11. In the 5th meeting held of the Arbitral proceedings on 22/07/2017, the Executive Engineer submitted an application objecting to the continuation of arbitral proceedings on the ground that the Tribunal was constituted contrary to Clause 3.4.17(iii) of the contract. The said objection was rejected by the Tribunal. Similar objections were again raised during the 7th meeting held on 10/09/2017 and were overruled.

12. On 10/12/2017, the learned counsel for the Appellant filed a pursis before the Arbitrator stating that the respondent had filed a review petition seeking review of the order dated 02/03/2015 of the High Court in Arbitration Application No.02 of 2015, and requested that the arbitration proceedings be stayed. However, the Arbitrator proceeded with the matter

and passed an award directing the Appellant to pay an amount of Rs. 596.60 lakhs along with interest @ 12.10% per annum from the date of award till realization.

13. The Appellant challenged the said award by filing an application under Section 34 of the Arbitration and Conciliation Act, 1996. The Commercial Court dismissed the application, and hence, the present appeal has been filed under Section 13 of the Commercial Courts Act read with Section 37 of the Arbitration and Conciliation Act, 1996.

14. The learned counsel for the appellant contended that as per Clause 3.4.17 (iii) of the agreement, disputes were required to be resolved by a panel of three Arbitrators. It is submitted that the communication sent by the Executive Engineer to learned APP was misinterpreted and that the Arbitrator was not appointed by the High Court under Section 11(6) of the Act. According to the appellant, the right to appoint one Arbitrator from the side of appellant vested only with the Secretary under the terms of the agreement.

15. It is further submitted that Mr. C. D. Fakir, the sole Arbitrator, was appointed by the respondent from the respondent’s side and had earlier

been associated with the project, thereby attracting disqualification under Schedule V read with Section 12 (2) of the Arbitration Act and also Schedule VII read with Section 12 (5) of the Arbitration Act. In the absence of a written agreement post-dispute, the Arbitrator's continuance of the proceedings were without jurisdiction.

16. Per contra, the learned counsel for the respondent submitted that no objections were raised at the earliest stage under Sections 12, 13, or 16 of the Act and, therefore, the appellant is deemed to have waived its right to challenge the constitution of arbitral tribunal and the disqualification of the sole arbitrator under Section 4 of the Arbitration Act. It is contended that the appellant had consented to the appointment of the Arbitrator before the High Court and actively participated in the proceedings by filing written statements and counter-claims. Hence, it is not open to the appellant to challenge the constitution of the Tribunal at the belated stage. It is submitted that Section 16 (5) read with Schedule VII would not apply to the instant case as the arbitration was invoked much prior to the amended Act of 2015 being enacted.

17. Having considered the rival submissions, the following issues arise for consideration in the present appeal :

(a) Whether the Arbitrator, Mr. C. D. Fakir, was appointed by the High Court in exercise of powers under Section 11(6) of the

Arbitration and Conciliation Act, 1996 ?

(b) Whether there is a deemed waiver of objection to the constitution of the Arbitral Tribunal under Section 4 of the Arbitration and Conciliation Act, 1996, and alternatively, whether Section 10 is a non-derogable provision such that there can be no waiver regarding the constitution of the Arbitral Tribunal ?

(c) Whether the Arbitrator is disqualified to act in view of disqualification under Section 12 (1) read with Schedule V of the Arbitration Act ?

(d) Whether the Sole Arbitrator lacked jurisdiction in the absence of a written consent, post-dispute, under Section 12(5) read with the Seventh Schedule to the Arbitration and Conciliation Act, 1996 ?

(e) Whether the amended provision of Section 12 (1) and Section 12 (5) read with Schedule V and Schedule VII would apply to the instant case ?

18. The first issue that arises for consideration is whether the High Court appointed the Arbitrator in terms of its order dated 02/03/2015 passed in the proceedings under Section 11(6) of the Arbitration and Conciliation Act, 1996.

19. Before deciding the above issue, it is necessary to first note certain undisputed facts. It is an admitted position that a notice dated 30/06/2014 was issued directing stoppage of toll collection, and the toll collection was actually stopped on 17/07/2014. The agreement between the parties for

toll collection and maintenance of road was for a period of 13 years and 6 months, i.e., from 15/12/2004 to 05/06/2017. On 26/06/2014, the claim was settled by the appellant for an amount of Rs. 67.79 lakhs as buy back price, and on 27/06/2014, the said amount was paid to the respondent. Thereafter, a notice invoking arbitration was issued on 30/06/2014. An application under Section 11(6) of the Arbitration and Conciliation Act, 1996 was subsequently filed before this Court which was disposed on 02/03/2015.

20. The relevant Clause 3.4.17 of the agreement, governs the arbitration mechanism between the parties and reads as under:

> "3.4.17 SETTLEMENT OF DISPUTES :
> Under no circumstances whatever shall be Entrepreneur be entitled to submit any claim for consideration of the Government on any account unless the Entrepreneur shall have given sufficient prior intimation and shall have submitted the details in writing to the Engineer within one month of the cause of such claim.
>
> (i) Except where otherwise specified in the contract documents and subject to the powers delegated to him by the Government under the codes / rules then in force, the decision of the Superintending Engineer of the Circle for the time being shall be final, conclusive and binding on all parties to the contract, upon all questions, relating to meaning of the Specifications, designs, drawings, and instructions herein before mentioned and as to quality or workmanship or materials used on the work or as to any other question, claim, right matter or thing whatsoever if in any way arising out of or relating to the contract, designs, drawings,

specifications, estimates, instructions, order 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 completion or abandonment there of or during operation or maintenance. The Superintending Engineer, shall give his orders on the claim within 45 days of receipt of claim by the Engineer, failing which the Entrepreneur may submit the claim directly to Chief Engineer irrespective of the amount of claim.

(ii) The Entrepreneur may within thirty days of receipt by any order by the Superintending Engineer of the Circle as aforesaid, appeal against it to the Chief Engineer concerned with the work/ project. The Chief Engineer shall give his orders on all claims referred to him within 30 days of receipt of claims. Where any dispute is not resolved as above or the Entrepreneur is not satisfied with the decision of Chief Engineer, the following provisions shall apply.

(iii) Arbitration : Where any dispute is not resolved as above, the following provisions shall apply.

a) At the request of either party by a written notice to that effect to the other party (a notice of Reference) the dispute shall be submitted to arbitration in accordance with provisions of the Arbitration and Conciliation Act, 1996 (No. 26 of 1996).

b) the place of Arbitration shall be the city of head quarter of the Chief Engineer.

c) The arbitration shall take place before a panel of three arbitrator.

d) The parties shall agree upon the identity of the Arbitrator (s) within thirty days of the receipt of the Notice of Reference by the relevant party. If the parties are unable to so agree upon the identity of the Arbitrator (s) then :

(i) The parties shall use their best endeavor to agree on to an

> appointing authority within thirty days of the receipt of the Notice of Reference by the relevant party, and
>
> (ii) In the event that the parties are unable to agree as aforesaid upon an appointing, authority, the Arbitrator (s) shall be appointed on the application of either party by the Secretary, Public Works Department, Government of Maharashtra whose decision as to the identity of the Arbitrator (s) shall be final."

21. In the present case, it is evident that a notice under Clause 3.4.17 of the agreement was issued on 30/06/2014 invoking the arbitration clause. However, there was no response from the appellant. Consequently, the respondent was constrained to file an application No.02/2015 before the High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator.. The High Court thereafter passed the following order in the said application :

> "1].....
>
> 2] Learned A.G.P. files on record the communication received by him from the respondents dated 18th February 2015. The same is accepted on record and marked as "X" for the purpose of identification.
>
> 3] The communication would show that now, the respondents have appointed an Arbitrator. Though it was desirable that the respondents should have appointed an Arbitrator in view of the agreement, it is only after filing of the present application, the Arbitrator is appointed.
>
> 4] In the circumstances, by recording displeasure of this Court, present application is disposed, as the Arbitrator is appointed...."

22. For ready reference, the communication/ instructions issued by the

Executive Engineer to the learned A.G.P., which was produced and taken on record by the High Court, is reproduced hereinbelow :

> “उपरोक्त विषयी आपणास सादर करण्यात येते की, संदर्भीय पत्राच्या अनुषंगाने खाजगीकरणांतर्गत बांधा, वापरा व हस्तांतरीत करा या तत्त्वावर, चुंबळी फाटा पाटोदा मांजरसुंबा रस्ता राज्य मार्ग क्र.१५५ व १५६ कि.मी. ८४/०० ते ८४/५०० व १८/६०० ते ४६/३०० ता. पाटोदा जि. बीड अंतर्गत उद्योजक मोरया इन्फ्रास्ट्रक्चर प्रा. लि. बीड यांना अधिसुचना सार्वजनिक बांधकाम विभाग, मंत्रालय मुंबई खाक्षस — २००४/प्र.क्र.५८/ रस्ते—९ दि. २९/०७/२००४ नुसार यांना दिलेले होते.
>
> परंतु संबंधीत उद्योजकांने निविदेतील शर्ती व अटीनुसार रस्त्याची देखभाल व दुरुस्ती करण्यात कसूर केल्याबद्दल वारंवार सुचना / लेखी कळवून सुध्दा रस्त्याची देखभाल दुरुस्ती न केल्यामुळे कार्यकारी अभियंता, सा. बां. विभाग, बीड यांनी उद्योजकासमवेत बैठक घेवून दि. ११/०९/२०११ रोजी सकाळी ८.०० वा. पासून पथकर वसुली तात्पुरत्या स्वरुपात बंद करुन जोपर्यंत रस्ता निविदेतील शर्ती व अटीनुसार समाधानकारक दुरुस्त करुन देईपर्यंत तात्पुरत्या स्वरुपात बंद करण्यात आले.
>
> परंतू संबंधीत उद्योजकाने समाधानकारक दुरुस्ती करुन सुधारणा न केल्याने व शासन आदेशानुसार दि. १/०७/२०१४ पासुन वसुली नाका कायमस्वरुपी बंद करण्यात आलेला आहे.
>
> शासन आदेशानुसार टोलनाका (Take Over) करुन त्याची नुकसान भरपाई म्हणून रु.६७.७८ लक्ष उद्योजकास प्रदान केलेले आहे व उद्योजकाने ते स्विकारलेले आहे. परंतु उद्योजकाने सदर रक्कम अमान्य असल्याने न्यायालयात आव्हान दिलेले आहे. तरी यावर निविदेतील शर्ती व अटी सबखंड (iii)(अ) व खंड ३.४.१७ अन्वये द्विपक्षाच्या समंतीने आर्बीट्रेटर नेमण्याची तरतूद आहे. **त्यानुसार उद्योजक व शासन दोघांच्या संमतीने आर्बीट्रेटर म्हणून श्री. सि. डी. फकीर, सेवानिवृत्त मुख्य अभियंता यांची**

नियुक्ती करण्याचे ठरले आहे……”

23. It is evident from the record that an application under Section 11(6) of the Act was filed before the High Court seeking appointment of an Arbitrator. During the hearing of the said application, the learned A.G.P. placed on record the instructions received from the Executive Engineer indicating that decision is taken to jointly accept Mr. C. D. Fakir as an Arbitrator. Taking note of the said communication, the High Court disposed of the application. However, a careful reading of the order makes it clear that the High Court, in exercise of its powers under Section 11(6) of the Act, did not itself appoint the Arbitrator. The Court merely recorded that the respondents has decided to jointly appoint Mr. C. D. Fakir as an Arbitrator and, in view of the same, disposed of the application. Thus, it cannot be said that the Arbitrator was appointed by the High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996.

24. The next issue that arises for consideration is whether Mr. C. D. Fakir could have proceeded with the arbitration and whether the constitution of the Arbitral Tribunal was contrary to Clause 3.4.17 of the agreement. In other words, whether the appointment of a sole Arbitrator was in deviation of the agreed procedure and whether, in such circumstances, Mr. C. D. Fakir could validly continue with the arbitral proceedings. This Court is called upon to determine whether there is a deemed waiver of objection to the

constitution of the Arbitral Tribunal under Section 4 of the Arbitration and Conciliation Act, 1996, and, alternatively, whether Section 10 of the said Act is a non-derogable provision, such that no waiver is permissible with respect to the constitution of the Arbitral Tribunal.

25. As discussed earlier, in the proceedings before the High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996, the learned A.G.P. placed on record the communication received from the Executive Engineer indicating that joint decision is taken to appoint Mr. C. D. Fakir as Arbitrator. The High Court disposed of the application on that basis. Though the High Court did not itself appoint the Arbitrator, the order recorded that it has been jointly decided to appoint Mr. C. D. Fakir as the Arbitrator.

26. It appears that Mr. C. D. Fakir proceeded on the understanding that, in view of the communication placed before the High Court and the disposal of the Section 11 application, he was duly appointed and had the authority to conduct the arbitral proceedings. There is also a prior communication dated 25/04/2015 whereby Mr. C. D. Fakir had asked the Appellant to appoint its arbitrator. However, subsequently he has proceeded on the basis of High Court's observations i.e. consent to appoint him as an arbitrator. It is the contention of the appellant that, in terms of Clause 3.4.17 of the agreement, a panel of three Arbitrators was contemplated and that, therefore, the learned sole Arbitrator ought not to

have proceeded without calling upon the respondent to appoint its nominee Arbitrator.

27. However, it is significant to note that the appellant initially before the High Court had expressed joint consent to appoint Mr. C.D. Fakir as Arbitrator and also at the stage of commencement of Arbitral proceeding did not raise any objection to the constitution of the Tribunal. The appellant appeared before the learned Arbitrator, filed its written statement of defence, raised a counter-claim, and participated in the proceedings. The respondent also led evidence by affidavit, and written submissions were filed.

28. It was only at the 5th meeting of the Arbitral Tribunal on 22/07/2017 that an objection was raised regarding the constitution of the Arbitral Tribunal and the continuation of proceedings. The question, therefore, is whether such an objection, raised at that stage, can be said to be in accordance with the statutory requirements.

29. The Hon'ble Supreme Court in ***Quippo Construction Equipment Limited v. Janardan Nirman Private Limited*, (2020) 18 SCC 277**, while affirming the legal position in ***Narayan Prasad Lohia v. Nikunj Kumar Lohia*, (2002) 3 SCC 572**, has held that Sections 10 and 16 of the Arbitration and Conciliation Act, 1996 are required to be read conjointly. It

has been held that if a party does not raise an objection under Section 16 with regard to the constitution of the arbitral tribunal, such party shall be deemed to have waived its right to object under Section 4 of the Act.

30. The Supreme Court observed that though Section 10 provides that the arbitral tribunal shall not consist of an even number of arbitrators, the provision is derogable in nature. The Court further considered the question whether non-compliance with Section 10 would render the constitution of the tribunal void. Answering the said question, it was held that the real issue is whether the party has exercised its right to object to the composition of the arbitral tribunal in accordance with Section 16. If such objection is not raised within the time prescribed, the right stands waived.

31. It has been observed that arbitration is a creature of agreement and there can be no arbitration in the absence of an agreement between the parties. However, once parties have agreed to arbitrate and have participated in the proceedings without objection, they cannot subsequently challenge the composition of the tribunal at a later stage.

32. The Supreme Court also relied upon the judgment in ***Konkan Railway Corporation Ltd. v. Rani Construction (P) Ltd., (2002) 2 SCC 388***, and observed that Section 16 embodies the principle that the arbitral tribunal is competent to rule on its own jurisdiction, including

objections with respect to the existence or validity of the arbitration agreement and the constitution of the tribunal. The arbitral tribunal is empowered not only to decide jurisdictional issues but also to examine issues which go to the root of its authority.

33. It has thus been clarified that a challenge to the composition of the arbitral tribunal must be raised before the tribunal itself under Section 16(2), not later than the submission of the statement of defence. Section 16 further makes it clear that such a plea can be raised even by a party who has appointed or participated in the appointment of an arbitrator. However, if no objection is raised within the prescribed time, Section 4 operates as a deemed waiver of the right to object.

34. Thus, from conjoint reading of Sections 10, 16 and 4, it is evident that an objection to the composition of the arbitral tribunal is a matter which is derogable and must be raised in the manner and within the time prescribed under Section 16(2), failing which the party is precluded from raising such objection at a subsequent stage.

35. In the instant case, we find that the appellant had made a statement before this Court that it would jointly consider to the appointment of Mr. C. D. Fakir as the Arbitrator on 18/02/2015. Pursuant thereto, after some initial hesitation as seen from above noted letter dated 25/04/2015, the

arbitral proceedings commenced and were conducted from time to time.

36. It is further evident that even up to the fourth meeting dated 08/07/2017 of the arbitral tribunal, no objection whatsoever was raised by the appellant with regard to the constitution of the arbitral tribunal. On the contrary, the appellant participated in the proceedings, filed its written statement as well as counter-claim, and the claimant also filed its affidavit of evidence. The matter thereafter proceeded substantially.

37. It is significant to note that for a period of nearly two years, the appellant did not take any steps either to seek recall of the order passed by the High Court or to raise any objection to the constitution of the tribunal in accordance with law.

38. In such circumstances, the objection raised at a belated stage, after filing of the written statement, counter-claim and after commencement of evidence, is clearly not in consonance with Section 16(2) of the Arbitration and Conciliation Act, 1996, which mandates that a plea as to the lack of jurisdiction or improper constitution of the arbitral tribunal shall be raised not later than the submission of the statement of defence.

39. Accordingly, the appellant, having failed to raise a timely objection and having participated in the proceedings without protest, is deemed to

have waived its right under Section 4 of the Act and is therefore precluded from challenging the constitution of the arbitral tribunal at a belated stage.

40. The objection raised by the appellant that the consent was not taken from the Secretary, who alone was entitled to appoint the Arbitrator on behalf of the appellant, and that the consent was given by the Executive Engineer, and therefore there was no valid consent for the appointment of the Sole Arbitrator, cannot be accepted. The appellant was represented before the High Court through the learned A.G.P., and it was not for the claimant to verify the validity of such consent.

41. We may also refer to the judgment of the Hon'ble Supreme Court in ***M.K. Shah Engineers & Contractors v. State of M.P.*, (1999) 2 SCC 594**, wherein the Supreme Court considered a similar objection regarding non-compliance with a contractual pre-condition requiring a decision of the Superintending Engineer prior to invocation of arbitration.

42. In the said case, the communication rejecting the claim of the contractor was issued by the Executive Engineer. The Superintending Engineer never expressly stated that the rejection was not his decision. The Supreme Court held that, in such circumstances, the contractor was justified in treating the communication as a decision and in invoking arbitration. The Court further observed that if the Appellant had, through

its own officers, created ambiguity or failed to act in accordance with the contractual mechanism, it could not take advantage of its own wrong to defeat the claim of the contractor.

43. The Hon’ble Supreme Court categorically held that no party can be permitted to take advantage of its own wrong, and that where the procedural pre-requisite is frustrated by the conduct of the respondent itself, such party cannot subsequently rely upon that very non-compliance to invalidate the arbitration.

44. Similarly, in the present case, the Executive Engineer, who executed the contract on behalf of the Appellant and defended the proceedings before the Tribunal, acted as an authorized representative of the appellant. Any internal miscommunication, procedural lapse, or failure of coordination between the Executive Engineer, the Superintending Engineer, or the concerned Departmental authorities is a matter internal to the appellant. The claimant cannot be made to suffer on account of such internal administrative lapses.

45. Therefore, the appellant cannot now contend that any alleged defect in the pre-arbitral procedure, arising from its own internal functioning, would render the arbitral proceedings invalid. The claimant cannot be made the victim of the appellant’s own procedural lapses.

46. The Hon’ble Supreme Court has consistently held that an objection to the constitution of the Arbitral Tribunal must be raised at the earliest opportunity, as contemplated under Section 16(2) of the Arbitration and Conciliation Act, 1996. Such objection is required to be made within the prescribed time, ordinarily before or along with the filing of the first statement of defence. If a party proceeds with the arbitration without raising a timely objection, the consequence under Section 4 of the Act follows, namely, deemed waiver.

47. The next issue that arises for consideration is whether the mandate of the arbitral tribunal stands vitiated in view of the alleged disqualification under Schedule V read with Section 12(1) of the Arbitration and Conciliation Act, 1996, and whether the arbitrator has become ineligible to act as an arbitrator unless there is express written consent after the dispute has arisen in view of the statutory bar contained in Schedule VII read with Section 12 (5) of the Act.

48. The learned Counsel appearing for the appellant submits that the learned Arbitrator appointed in the present matter is a former employee of the appellant and was allegedly responsible for sanctioning the project which was subsequently tendered to the sister concern of the respondent. It is contended that the Chief Engineer who had dealt with the sanctioning

of the project was nominated as Arbitrator of the respondent / contractor under Clause 3.4.17 of the agreement, and thus the Arbitrator had live nexus with the respondent. According to the appellant, such relationship gives rise to justifiable doubts as to independence and impartiality, thereby attracting disqualification under the Fifth Schedule read with Section 12(1) of the Arbitration and Conciliation Act, 1996.

49. The learned Counsel submits that though the objection was raised in the fifth meeting of the arbitral tribunal, it was raised immediately upon the appellant becoming aware of the circumstances giving rise to such ineligibility. According to him, such an objection can be raised even after filing of the statement of claim or defence, particularly when the ground pertains to statutory ineligibility.

50. The learned Counsel further contends that by virtue of the Arbitrator being a nominee of the respondent, he suffered disqualification under the Seventh Schedule read with Section 12(5). It is urged that Section 12(5) is a substantive provision which relates to the *de jure* inability of an arbitrator to act. By virtue of the non obstante clause contained therein, any prior agreement between the parties stands overridden the moment it is found that the relationship of the arbitrator with the parties or the subject matter of the dispute falls within any of the categories specified in the Seventh Schedule. In such circumstances, the person becomes ineligible, as a

matter of law, to be appointed as an arbitrator.

51. It is further submitted that such ineligibility can be cured only by an express agreement in writing entered into between the parties after the disputes have arisen, whereby they waive the applicability of Section 12(5). In the absence of such an express written waiver, the ineligibility operates automatically. In support of these submissions, reliance is placed upon the judgment of the Hon'ble Supreme Court in ***Bharat Broadband Network Limited v. United Telecoms Limited, AIR 2019 SC 2434***.

52. The learned Counsel for the appellant submits that the aforesaid objections raise serious and substantial issues concerning the impartiality and independence of the Arbitrator, and therefore prays that the arbitral award be set aside. The issues raised herein are *prima facie* serious and may require examination by this Court. However, before examining the question of disqualification of the Arbitrator under Schedule V read with Section 12(1) of the Arbitration and Conciliation Act, 1996, and the Seventh Schedule read with Section 12(5) of the Act, it becomes necessary to determine whether the said provisions are applicable to the arbitral proceedings in question, having regard to the date of commencement of the arbitration proceedings.

53. The Hon'ble Supreme Court in **Bhadra International (India) Pvt.**

Ltd. and Ors. v. Airports Authority of India, 2026 INSC 6, while considering the applicability of the Arbitration and Conciliation (Amendment) Act, 2015, has held that Section 26 of the Amendment Act, 2015 makes it clear that the amended provisions shall apply only to arbitral proceedings commenced on or after 23/10/2015, unless the parties otherwise agree. Section 26 of the Amendment Act 2015 reads as under :

> "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."

54. The Supreme Court reiterated that, in view of Section 21 of the Arbitration and Conciliation Act, 1996, arbitral proceedings commence on the date on which a notice invoking arbitration is received by the respondent, unless there is a contrary agreement between the parties.

55. Reliance was placed upon the judgment in ***Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. and Ors., (2018) 6 SCC 287***, wherein the Supreme Court has observed as under :

> "37. What will be noticed, so far as the first part is concerned, which states, -
>
> > "26. Act not to apply to pending arbitral proceedings . - 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…"

is that: (1) "the arbitral proceedings" and their commencement is mentioned in the context of Section 21 of the principal Act ; (2) the expression used is "to" and not "in relation to"; and (3) parties may otherwise agree. So far as the second part of Section 26 is concerned, namely, the part which reads, "…but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act" makes it clear that the expression "in relation to" is used; and the expression "the" arbitral proceedings and "in accordance with the provisions of Section 21 of the principal Act" is conspicuous by its absence."

"38. That the expression "the arbitral proceedings" refers to proceedings before an arbitral tribunal is clear from the heading of Chapter V of the 1996 Act, which reads as follows:

"Conduct of Arbitral Proceedings"

The entire chapter consists of Sections 18 to 27 dealing with the conduct of arbitral proceedings before an arbitral tribunal. What is also important to notice is that these proceedings alone are referred to, the expression "to" as contrasted with the expression "in relation to" making this clear. Also, the reference to Section 21 of the 1996 Act, which appears in Chapter V, and which speaks of the arbitral proceedings commencing on the date on which a request for a dispute to be referred to arbitration is received by the respondent, would also make it clear that it is these proceedings, and no others, that form the subject-matter of the first part of Section 26. Also, since the conduct of arbitral proceedings is largely

procedural in nature, parties may “otherwise agree” and apply the Amendment Act to arbitral proceedings that have commenced before the Amendment Act came into force In stark contrast to the first part of Section 26 is the second part, where the Amendment Act is made applicable “in relation to” arbitral proceedings which commenced on or after the date of commencement of the Amendment Act. What is conspicuous by its absence in the second part is any reference to Section 21 of the 1996 Act. Whereas the first part refers only to arbitral proceedings before an arbitral tribunal, the second part refers to Court proceedings “in relation to” arbitral proceedings, and it is the commencement of these Court proceedings that is referred to in the second part of Section 26, as the words “in relation to the arbitral proceedings” in the second part are not controlled by the application of Section 21 of the 1996 Act.”

39. Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings – arbitral proceedings themselves, and Court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, “arbitral proceedings” having been subsumed in the first part cannot re-appear in the second part, and the expression “in relation to arbitral proceedings” would,

> therefore, apply only to Court proceedings which relate to the arbitral proceedings. The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to Court proceedings which have commenced on or after the Amendment Act came into force."

56. The Supreme Court in ***BCCI*** (Supra) clarified that the first part of Section 26 makes it explicit that the Amendment Act, 2015 is prospective in nature and would not apply to arbitral proceedings which commenced prior to 23/10/2015, unless the parties otherwise agree. The commencement of proceedings must be understood in the manner contemplated under Section 21 of the principal Act. Section 21 of the Arbitration Act provides :

> "Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

57. Thus, the determining factor for applicability of the Amendment Act, 2015 is the date on which the notice invoking arbitration was received by the respondent. In the present case, it is found that the first notice invoking arbitration was issued in March 2014 and was received by the respondent. Thus the notice of arbitration was prior to the commencement of the Amendment Act, 2015. The respondent thereafter approached the High Court under Section 11(6) and the High Court disposed of the

application by an order on 02/03/2015. Thus commencement of arbitral proceedings, in terms of Section 21, had already taken place upon receipt of the notice invoking arbitration, much prior to the commencement of the Amendment Act in 2015.

58. Since the arbitral proceedings in the present case commenced prior to 23/10/2015, and there is no material to show that the parties agreed to the applicability of the amended provisions, the Arbitration and Conciliation (Amendment) Act, 2015 would not apply to the present proceedings. Consequently, Section 12(1), and the Fifth Schedule of the Act and Section 12 (5) and the Seventh Schedule of the Act , which were introduced by the 2015 Amendment, are not applicable to the present arbitration proceedings. Thus the disqualification of Sole Arbitrator as provided in the above provisions [i.e. Schedule V read with Section 12 (1) and Schedule VII read with Section 12 (5)] cannot be invoked qua the present proceedings.

59. In view of he above discussion, no case is made out to set aside the arbitral award. The Commercial Arbitration Appeal is thus dismissed with costs. Pending civil applications stand disposed of.

(VAISHALI PATIL-JADHAV, J.) **(ARUN R. PEDNEKER, J.)**

AFTER PRONOUNCEENT OF JUDGMENT :

60. The learned A.G.P., after pronouncement of the Judgment, seeks stay of the Judgment passed today. The Arbitral Award is against the Appellant, and the application under Section 34 of the Arbitration and Conciliation Act, 1996 has been dismissed by this order. We have also dismissed the Commercial Appeal under Section 13 of the Commercial Courts Act read with Section 37 of the Arbitration and Conciliation Act, 1996.

61. Considering the same, no case is made out to stay the Judgment passed today.

(VAISHALI PATIL-JADHAV, J.) **(ARUN R. PEDNEKER, J.)**

vj gawade/-.