

Union Of India vs Parmar Construction Company on 29 March, 2019

Equivalent citations: AIR 2019 SUPREME COURT 5522, AIRONLINE 2019 SC 188, (2019) 2 ARBILR 328, (2019) 2 WLC(SC)CVL 106, (2019) 3 ALL WC 2272, (2019) 3 CAL HN 343, (2019) 3 MAD LJ 691, (2019) 5 SCALE 453

Author: Ajay Rastogi

Bench: Ajay Rastogi, A.M. Khanwilkar

REPORTABLE
IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(s). 3303 OF 2019
(Arising out of SLP(C) No(s). 6312 of 2018)

UNION OF INDIA

.....Appellants(s)

VERSUS

PARMAR CONSTRUCTION COMPANY

.....Respondent(s)

WITH

CIVIL APPEAL NO(s).3306 OF 2019
(Arising out of SLP(C) No(s). 6034 of 2018)

CIVIL APPEAL NO(s). 3304 OF 2019
(Arising out of SLP(C) No(s). 2166 of 2018)

CIVIL APPEAL NO(s). 3307 OF 2019
(Arising out of SLP(C) No(s). 6316 of 2018)

CIVIL APPEAL NO(s). 3312 OF 2019
(Arising out of SLP(C) No(s). 7720 of 2018)

CIVIL APPEAL NO(s). 3310 OF 2019
(Arising out of SLP(C) No(s). 8019 of 2018)

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CIVIL APPEAL NO(s). 3311 OF 2019

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(Arising out of SLP(C) No(s). 8021 of 2018)

Reason:

1

CIVIL APPEAL NO(s). 3305 OF 2019
(Arising out of SLP(C) No(s). 7937 of 2018)

CIVIL APPEAL NO(s). 3308 OF 2019
(Arising out of SLP(C) No(s). 8597 of 2018)

CIVIL APPEAL NO(s). 3319 OF 2019
(Arising out of SLP(C) No(s).8256 OF 2019)
(Arising out of Diary No.8885/2018)

CIVIL APPEAL NO(s). 3309 OF 2019
(Arising out of SLP(C) No(s). 8596 of 2018)

CIVIL APPEAL NO(s). 3314 OF 2019
(Arising out of SLP(C) No(s). 9514 of 2018)

CIVIL APPEAL NO(s). 3313 OF 2019
(Arising out of SLP(C) No(s). 8598 of 2018)

CIVIL APPEAL NO(s). 3315 OF 2019
(Arising out of SLP(C) No(s). 9559 of 2018)

CIVIL APPEAL NO(s). 3317 OF 2019
(Arising out of SLP(C) No(s). 11417 of 2018)

CIVIL APPEAL NO(s). 3318 OF 2019
(Arising out of SLP(C) No(s). 11862 of 2018)

CIVIL APPEAL NO(s). 3316 OF 2019
(Arising out of SLP(C) No(s). 22263 of 2018)

JUDGMENT

Rastogi, J.

Leave granted.

2. The question that arises for consideration in the batch of appeals by special leave is as to whether (1) the High Court was justified in invoking amended provision which has been introduced by Arbitration and Conciliation (Amendment Act), 2015 with effect from 23rd October, 2015 (hereinafter being referred to as “Amendment Act, 2015”); (2) whether the arbitration agreement stands discharged on acceptance of the amount and signing no claim/discharge certificate and (3) whether it was permissible for the High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 (prior to the Amendment Act, 2015) to appoint third party or an independent Arbitrator when the parties have mutually agreed for the procedure vis-à-vis the authority to appoint the designated arbitrator. The High Court has passed separate orders in exercise of its powers under Section 11(6) of the Act, 1996 in appointing an independent arbitrator without adhering to the mutually agreed procedure under the agreement executed between the parties. Since the batch of appeals involve common questions of law and facts with the consent of parties, are disposed off by the present judgment.

3. The facts have been noticed from civil appeal arising out of SLP (Civil) no. 2166 of 2018.

4. The work for construction of office accommodation for officer and rest house was allotted to the respondent contractor, at Dungarpur in the State of Rajasthan on 21st December, 2011. As alleged, the extension was granted by the appellants to complete the work by 31st March, 2013. The measurement was accepted by the respondent under protest and when appellants officials failed to clear 7th final bill until the respondent put a line over “under protest” and signed no claim certificate. The total value of the work executed was of Rs. 58.60 lakhs against which Rs. 55.54 lakhs was paid and escalation cost was not added with interest @ 18% over delay payment. Demand notice was sent to the appellants to appoint an arbitrator invoking Clause 64(3) of the GCC to resolve the disputes/differences on 23rd December, 2013. When the appellants failed to appoint the arbitrator in terms of Clause 64(3), application came to be filed under Section 11(6) of the Act, 1996 before the Chief Justice/his Designate for appointment of an independent arbitrator who after hearing the parties under the impugned judgment allowed the application of the respondent and appointed a retired judge of the High Court as an independent arbitrator to arbitrate the proceedings.

5. In the instant batch of appeals, one fact is common that the orders were placed for various nature of construction works for its execution and the agreement executed between the parties includes a separate chapter for settlement of disputes leaving any dispute or difference between the parties to be resolved through the process of arbitration by appointing an arbitrator invoking clause 64(3) of the contract. As per terms of the agreement, date of completion of the project was delayed as alleged due to breach of obligations by the appellants and the scheduled date of completion had to be extended. Meanwhile, due to rise in the prices of raw material, the project was impossible to be completed by the respondent contractors and hence correspondence was made to either pay the escalated price or in the absence, the respondents would not be in a position to conclude the contract. It was alleged that the appellants accepted the terms and conditions for escalated prices and asked the respondents to complete the work and handover the project.

6. But when the respondents raised the final bills in the pre-determined format (which also included the no dues certificate) on the newly agreed prices, dispute has arisen in context of

payment of escalated prices or withholding of security deposits, taking note of the existence of arbitration clause in the agreement the respondents sent a notice to appoint an arbitrator as per clause 64(3) of GCC to resolve the dispute of payment of outstanding dues which was declined by the appellants by sending the reply that “No Due Certificate” was signed and that entails no dispute to be sent to arbitration. Since the appellants failed to appoint the arbitrator in accordance with the arbitration clause in the agreement, each of the respondent filed application under Section 11(6) of the Act before the High Court for appointment of an independent arbitrator and the primary objection of the appellants before the High Court was that on furnishing the no claim certificate by the contractor, no dispute subsists which is to be sent to the arbitrator and further the claims which has been submitted were beyond time as prescribed in the agreement and thus falls under the ‘excepted matter’ in the agreement.

7. After the matter being heard, the application for appointment of arbitrator under Section 11(6) of the Act, 1996 came to be decided by the High Court of Rajasthan by separate order(s) keeping in view the independence and neutrality of arbitrator as envisaged under Section 12(5) of the Amendment Act, 2015. The High Court further observed that the amended provisions of Act, 2015 shall apply to the pending proceedings and mere furnishing of no claim certificate would not take away the right of the parties and it is open for adjudication before the arbitrator and appointed a retired Judge of the High Court as an independent sole arbitrator under the impugned judgment in exercise of power under Section 11(6) of the Act, 1996. Indisputedly, the request for the dispute to be referred to arbitration in the instant batch of appeals was received by the appellants much before the Amendment Act, 2015 came into force (i.e. 23rd October, 2015).

8. Mr. K.M. Natarajan, learned Additional Solicitor General appearing for the appellants submits that Section 12 including sub-sections (1) and (5) as also Fifth and Seventh Schedule, has come into force by the Amendment Act, 2015 w.e.f. 23 rd October, 2015 and indisputedly, in the instant batch of appeals, request to refer to the arbitration was received by the appellants much prior to the Amendment Act, 2015. In view of Section 21 read with Section 26 of the Amendment Act, 2015 where the request has been sent to refer the dispute to arbitration and received by the other side before the amendment Act, 2015 has come into force, the proceedings will commence in accordance with the pre-amended provisions of the Act, 1996 and in the given circumstances, apparent error has been committed by invoking Section 12(5) of the Amendment Act, 2015 for appointment of an independent arbitrator without resorting to the clause 64(3) of GCC as agreed by the parties and in support of submission, learned counsel has placed reliance on the decision of this Court in the case of M/s. Aravali Power Company Private Limited Vs. Era Infrastructure Engineering Limited 2017(15) SCC 32 and S.P. Singla Constructions Pvt. Ltd. Vs. State of Himachal Pradesh and Others 2018(15) Scale 421.

9. Learned counsel further submits that once the no claim certificate has been signed by each of the respondent and after settlement of the final bills, no arbitral dispute subsists and the contract stands discharged and they cannot be permitted to urge that they gave the no claim certificate under any kind of financial duress/undue influence and even in support thereof, no prima facie evidence has been placed on record. In the given circumstances, the appointment of an independent arbitrator by the High Court under Section 11(6) of the Act, 1996 is not sustainable and in support of submission,

learned counsel has placed reliance on the decisions of this Court in Union of India and Others Vs. Master Construction Company 2011(12) SCC 349; New India Assurance Company Limited Vs. Genus Power Infrastructure Ltd. 2015(2) SCC 424; ONGC Mangalore Petrochemicals Limited Vs. ANS Constructions Limited and Anr. 2018(3) SCC 373.

10. Learned counsel further submits that none of the respondents had made any allegation of bias to the arbitrator who was likely to be appointed by the railways in terms of the agreement. The said issue would have cropped up only when the appointment of arbitrator was made by the railways. It was required in the first instance to make every possible attempt to respect the agreement agreed upon by the parties in appointing an arbitrator to settle the disputes/differences and only when there are allegations of bias or malafide, or the appointed arbitrator has miserably failed to discharge its obligation in submitting the award, the Court is required to examine those aspects and to record a finding as to whether there is any requirement in default to appoint an independent arbitrator invoking Section 11(6) of the Act, 1996 and in support of submission, learned counsel has placed reliance on the decision of this Court in Union of India & Another Vs. M.P. Gupta 2004(10) SCC 504, Union of India & Another Vs. V.S. Engineering(P) Ltd. 2006(13) SCC 240, Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Co. Limited 2008(10) SCC 240, Union of India Vs. Singh Builders Syndicate 2009(4) SCC 523.

11. Learned counsel further submits that as indicated in clause 64(7) of the GCC, all statutory modifications thereof will be binding to the arbitration proceedings and after promulgation of the Arbitration and Conciliation (Amendment) Act, 2015, clause 64(7) stood amended to fulfil the mandate of Amendment Act, 2015 and it was clarified that all statutory modifications thereof shall apply to the appointment of arbitrator and arbitration proceedings and the respondents being signatory to the agreement have accepted the enforceability of aforesaid clause 64(7) and, therefore, are bound by any modification made in GCC even subsequently and placed reliance on the judgment of this Court in S.P. Singla Constructions Pvt. Ltd's case(supra).

12. Per contra, Mr. Sameer Jain, learned counsel for the respondents submits that respondents are the registered contractors undertaking various nature of works contracts with the railway establishment and are not in a bargaining position and it is a ground reality that final bills are not being released without a no claim certificate being furnished in advance by them. In all the cases, unilateral deductions have been made from the final bills furnished by each of the respondent and they are very small and petty contractors and the payments are not released unless the no claim certificate is being furnished, it is nothing more than a financial duress and undue influence by the authorities and is open for the arbitrator to adjudicate by examining the bills which was furnished for payment.

13. Learned counsel further submits that the effect of no claim certificate has been examined by this Court in National Insurance Company Limited Vs. Boghara Polyfab Private Limited 2009(1) SCC 267 and there are series of decisions of this Court where no claim certificate in itself has never been considered to be the basis to non-suit the request made in appointing an arbitrator to independently examine the dispute arising under the terms of the agreement.

14. Learned counsel further submits that once the appellants have failed to appoint an arbitrator under the terms of agreement before the application under Section 11(6) being filed before the Court, the authority forfeits its right of appointing an arbitrator and it is for the Chief Justice/his designate to appoint an independent arbitrator under Section 11(6) of the Act, 1996 as held by this Court in *Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another* 2000(8) SCC 151 followed in *Punj Lloyd Ltd. Vs. Petronet MHB Ltd.* 2006(2) SCC 638 and later in *Union of India Vs. Bharat Battery Manufacturing Co. (P) Ltd.* 2007(7) SCC 684 that once the party fails to appoint an arbitrator until filing of an application under Section 11(6) of the Act, the opposite party would lose its right of appointment of arbitrator(s) as per the terms of the contract.

15. Learned counsel further submits that while dealing with Section 11(6), the Chief Justice/his designate can even overlook the qualification of the arbitrator under the agreement but arbitration agreement in the instant case does not contain any specific qualification of the arbitrator under Clause 64(3) of the GCC and since the appellants failed to appoint an arbitrator until the application was filed, Section 11(6) empowers the Court to deviate from the agreed terms if required by appointing an independent arbitrator and by virtue of operation of Section 12(5) of the Amendment Act, 2015, the employee of the railway establishment became ineligible to be appointed as arbitrator. In the given circumstances, the authority is vested with the Chief Justice or his designate to appoint an independent arbitrator under Section 11(6) of the Act and the same has been held by this Court in *North Eastern Railway and Others Vs. Tripple Engineering Works* 2014(9) SCC 288 and *Union of India and Others Vs. Uttar Pradesh State Bridge Corporation Limited* 2015(2) SCC 52.

16. Learned counsel further submits that the primary object by introducing the remedy to measure arbitration is to have a fair, speedy and inexpensive trial by the Arbitral Tribunal. Unnecessary delay or expense would frustrate the very purpose of arbitration and it holds out that arbitrator should always be impartial and neutrality of the arbitrator is of utmost importance and that has been noticed by the Parliament in amending Section 12(5) of the Act, 1996 which came into force on 23 rd October, 2015 and when the matters have been taken up for hearing by the High Court after the amendment has come into force, the effect of the amended provisions would certainly be taken note of and in the given circumstances, if an independent arbitrator has been appointed which is indisputedly an impartial and neutral person fulfilling the mandate of the object of the proceedings of arbitration, the amended provision has been rightly invoked by the High Court in the appointment of an independent arbitrator invoking Section 11(6) of the Act, 1996.

17. We have heard learned counsel for the parties and with their assistance perused the material on record.

18. The facts which manifest from the batch of appeals are that the respondents are the registered contractors with the railway establishment and undertaking work contracts (construction) of various kinds. They raised a demand for escalation cost and the interest accrued thereon because the date of the completion of the project was delayed as alleged due to breach of obligations by the appellants and the scheduled date of completion had to be extended. In the interregnum period, there was a rise in the prices of the raw material and the project became impossible to be completed by the respondent contractors. Hence, a request was made to the appellants to either pay the

enhanced escalation price otherwise the respondent contractors would not be in a position to conclude the contract and on the acceptance for payment of the escalation costs, respondent contractor completed the work and delivered the project and raised final bills in the prescribed pre-determined format (which also included no dues certificate). Since the dispute has arisen in the context of the payment of the escalated cost, as demanded by respondent contractors, and their being a clause of arbitration in the agreement, each of the respondent contractors sent a notice for arbitration invoking clause 64(3) of GCC, which in majority of the cases declined by the appellants stating that no dues certificate has been furnished and that entailed no subsisting dispute and that was the reason due to which each of the respondent contractor had approached the High Court by filing an application under Section 11(6) of the Act, 1996. It is also not in dispute that the request for referring the dispute to arbitration was received by the appellants much prior to the enforcement of the Amendment Act, 2015 which came into force, w.e.f. 23 rd October, 2015.

19. To proceed with the matter further, it will be apposite to take note of the relevant clauses of the agreement with which we are presently concerned: □“CLAIMS 43.(1) Monthly Statement Of Claims : The Contractor shall prepare and furnish to the Engineer once in every month an account giving full and detailed particulars of all claims for any additional expenses to which the Contractor may consider himself entitled to and of all extra or additional works ordered by the Engineer which he has executed during the preceding month and no claim for payment for and such work will be considered which has not been included in such particulars.

43.(2) Signing Of "No Claim" Certificate : The Contractor shall not be entitled to make any claim whatsoever against the Railway under or by virtue of or arising out of this contract, nor shall the Railway entertain or consider any such claim, if made by the Contractor, after he shall have signed a "No Claim"

Certificate in favour of the Railway in such form as shall be required by the Railway after the works are finally measured up. The Contractor shall be debarred from disputing the correctness of the items covered by "No Claim" Certificate or demanding a clearance to arbitration in respect thereof.

64.(1) Demand for Arbitration:

64.(1) (i) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the “excepted matters” referred to in Clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

64.(1) (ii) The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item wise. Only such dispute(s) or difference(s) in respect of which the demand has been made, together with counter claims or set off, given by the Railway, shall be referred to arbitration and other matters shall not be included in the reference.

64.(1) (iii) (a) The Arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway. (b) The claimant shall submit his claim stating the facts supporting the claims along with all the relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of appointment of the Arbitral Tribunal.

(c) The Railway shall submit its defence statement and counter claim(s), if any, within a period of 60 days of receipt of copy of claims from Tribunal thereafter, unless otherwise extension has been granted by Tribunal. (d) Place of Arbitration : The place of arbitration would be within the geographical limits of the Division of the Railway where the cause of action arose or the Headquarters of the concerned Railway or any other place with the written consent of both the parties.

64.(1) (iv) No new claim shall be added during proceedings by either party. However, a party may amend or supplement the original claim or defence thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in making it.

64.(1) (v) If the contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Railways that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims.

64.(2) Obligation During Pendency Of Arbitration :

Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Railway shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to consider and decide whether or not such work should continue during arbitration proceedings.

64.(3) Appointment of Arbitrator :

64.(3) (a)(i) In cases where the total value of all claims in question added together does not exceed Rs.

25,00,000 (Rupees twenty five lakh only), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below JA Grade, nominated by the General Manager.

The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM. {Authority : Railway Board's letter no. 2012/CE□I/CT/ARB./24, Dated 22.10./05.11.2013}

64.(3) (a)(ii) In cases not covered by the Clause 64(3)(a)

(i), the Arbitral Tribunal shall consist of a Panel of three Gazetted Railway Officers not below JA Grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM. Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them is from the Accounts Department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA grade of other departments of the Railway for the purpose of appointment of arbitrator.

64.(7) Subject to the provisions of the aforesaid Arbitration and Conciliation Act, 1996 and the rules thereunder and any statutory modifications thereof shall apply to the arbitration proceedings under this Clause.

20. As per clause 43(2), the contractor signs a "No claim" certificate in favour of the railway in the prescribed format after the work is finally measured up and the contractor shall be debarred from disputing the correctness of the items covered under the "No Claim" certificate or demanding a clearance to arbitration in respect thereof. Each of the respondent has to attach no claim certificate with final bills in the prescribed format to be furnished in advance before the final bills are being examined and measured by the railway authorities. Although it has been seriously disputed by the appellants but that is the reason for which even after furnishing no claim certificate with the final bills being raised, it came to be questioned by the respondent(contractor) by filing an application to refer the matter to arbitration invoking clause 64(3) of the conditions of contract as agreed by the parties.

21. Under clause 64(1), if there is any dispute or difference between the parties hitherto as to the construction or operation of the contract, or the respective rights and liabilities of the parties on any matter in question or any other ancillary disputes arising from the terms of the contract or if the railway establishment fails to take a decision within the stipulated period and the dispute could not be amicably settled, such dispute or difference is to be referred to arbitration and who shall arbitrate such disputes/differences between the parties, the General Manager may nominate the officer by

designation as referred to under clause 64(3)(a)(i) and a(ii) respectively with further procedure being prescribed for the sole arbitrator or the Arbitral Tribunal to adjudicate the disputes/differences arising under the terms of contract between the parties.

22. It is also not disputed that when the request of the respondent contractors was rejected by the appellants on the premise of the no claim certificate being furnished, arbitral dispute does not survive which is to be sent to arbitration, each of the respondent contractor approached the High Court by filing an application under Section 11(6) of the Act for appointment of an arbitrator for settling their disputes/differences arising from the terms of contract as agreed between the parties.

23. It is to be noticed that the cost of escalation which was raised by each of the respondent contractor with final bills were appended with the no claim certificate in the prescribed pre-determined format and each of the claim of the respondent contractor for making a reference to the Arbitrator for settling the disputes/differences arising from the terms of the contract, as agreed between the parties was turned down by the appellants because of furnishing no claim certificate.

24. As on 1st January, 2016, the Amendment Act, 2015 was gazetted and according to Section 1(2) of the Amendment Act, 2015, it deemed to have come into force on 23rd October 2015. Section 21 of the Act, 1996 clearly envisage that unless otherwise agreed by the parties, the arbitral proceedings in respect of a dispute shall commence from the date on which a request for that dispute to be referred to arbitration is received by the respondent and the plain reading of Section 26 of Amendment Act, 2015 is self-explanatory, leaves no room for interpretation. Section 21 & 26 of the Act, 1996/Amendment Act, 2015 relevant for the purpose is extracted hereunder: “21. Commencement of arbitral proceedings. — 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.

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 but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.”

25. The conjoint reading of Section 21 read with Section 26 leaves no manner of doubt that the provisions of the Amendment Act, 2015 shall not apply to such of the arbitral proceedings which has commenced in terms of the provisions of Section 21 of the Principal Act unless the parties otherwise agree. The effect of Section 21 read with Section 26 of Amendment Act, 2015 has been examined by this Court in Aravali Power Company Private Limited Vs. Era Infra Engineering Limited (supra) and taking note of Section 26 of the Amendment Act, 2015 laid down the broad principles as under: “22. The principles which emerge from the decisions referred to above are:

22.1. In cases governed by 1996 Act as it stood before the Amendment Act came into force:

22.1.1. The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate to the officer whose decision is the subject-matter of the dispute.

22.1.2. Unless the cause of action for invoking jurisdiction under Clauses (a), (b) or (c) of sub-section (6) of Section 11 of the 1996 Act arises, there is no question of the Chief Justice or his designate exercising power under sub-section (6) of Section 11.

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

22.1.4. While exercising such power under sub-section (6) of Section 11, if circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.

22.2. In cases governed by 1996 Act after the Amendment Act has come into force: If the arbitration clause finds foul with the amended provisions, the appointment of the arbitrator even if apparently in conformity with the arbitration clause in the agreement, would be illegal and thus the court would be within its powers to appoint such arbitrator(s) as may be permissible.” which has been further considered in S.P. Singla Constructions Pvt. Ltd. case(supra).

“16. Considering the facts and circumstances of the present case, we are not inclined to go into the merits of this contention of the appellant nor examine the correctness or otherwise of the above view taken by the Delhi High Court in Ratna Infrastructure Projects case; suffice it to note that as per Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 the provisions of the Amended Act, 2015 shall not apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the Principal Act before the commencement of the Amendment Act unless the parties otherwise agree. In the facts and circumstances of the present case, the proviso in clause (65) of the general conditions of the contract cannot be taken to be the agreement between the parties so as to apply the provisions of the amended Act. As per Section 26 of the Act, the provisions of the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after the date of commencement of the Amendment Act, 2015(w.e.f. 23.10.2015). In the present case, arbitration proceedings commenced way back in 2013, much prior to coming into force of the amended Act and, therefore, provisions of the Amended Act cannot be invoked.”

26. We are also of the view that the Amendment Act, 2015 which came into force, i.e. on 23 rd October, 2015, shall not apply to the arbitral proceedings which has commenced in accordance with the provisions of Section 21 of the Principal Act, 1996 before the coming into force of Amendment Act, 2015, unless the parties otherwise agree.

27. In the instant case, the request was made and received by the appellants in the concerned appeal much before the Amendment Act, 2015 came into force. Whether the application was pending for appointment of an arbitrator or in the case of rejection because of no claim as in the instant case for appointment of an arbitrator including change/substitution of arbitrator, would not be of any legal effect for invoking the provisions of Amendment Act, 2015, in terms of Section 21 of the principal Act, 1996. In our considered view, the applications/requests made by the respondent contractors deserves to be examined in accordance with the principal Act, 1996 without taking resort to the Amendment Act, 2015 which came into force from 23rd October, 2015.

28. The thrust of the learned counsel for the appellants that submission of a no claim certificate furnished by each of the respondent/contractor takes away the right for settlement of dispute/difference arising in terms of the agreement to be examined by the arbitrator invoking Clause 64(3) of the conditions of the contract. The controversy presented before us is that whether after furnishing of no claim certificate and the receipt of payment of final bills as submitted by the contractor, still any arbitral dispute subsists between the parties or the contract stands discharged.

29. Before we take note of the factual aspect of the present matters, it will be appropriate to carefully consider the plenitude of decisions of this Court referred to by learned counsel for the parties and to summarise (first category) Union of India Vs. Kishorilal Gupta & Bros. AIR 1959 SC 1362; P.K. Ramaiah & Co. Vs. Chairman and Managing Director, National Thermal Power Corpn. 1994 Supp(3) SCC 126; State of Maharashtra Vs. Nav Bharat Builders 1994 Supp(3) SCC 83; Nathani Steels Limited Vs. Associated Constructions 1995 Supp(3) SCC 324.....(second category) Damodar Valley Corporation Vs. KK Kar 1974(1) SCC 141; Bharat Heavy Electricals Limited Ranipur Vs. Amarnath Bhan Prakash 1982(1) SCC 625; Union of India and Anr. Vs. L.K. Ahuja and Co. 1988(3) SCC 76; Jayesh Engineering Works Vs. New India Assurance Co. Ltd. 2000(10) SCC 178; Chairman and MD, NTPC Ltd. Vs. Reshmi Constructions Builders & Contractors 2004(2) SCC

663.

30. The aforesaid cases fall under two categories, the one category where the Court after considering the facts found that there was full and final settlement resulting in accord and satisfaction and there was no substance in the allegations of coercion/undue influence. In the second category of cases, the Court found some substance in the contention of the claimants that “no dues/no claims certificate or discharge vouchers” were insisted and taken (either on a printed format or otherwise) as a condition precedent for release of the admitted dues and consequently this Court held that the disputes are arbitrable. It took note of the principles earlier examined and summarised in National Insurance Company Limited Vs. Boghara Polyfab Private Limited case (supra) as under: ¶“44. None of the three cases relied on by the appellant lay down a proposition that mere execution of a full and final settlement receipt or a discharge voucher is a bar to arbitration, even when the validity thereof is challenged by the claimant on the ground of fraud, coercion or undue influence. Nor do they lay down a proposition that even if the discharge of contract is not genuine or legal, the claims cannot be referred to arbitration. In all the three cases, the Court examined the facts and satisfied itself that there was accord and satisfaction or complete discharge of the contract and that there was no evidence to support the allegation of coercion/undue influence.”

31. Further, taking note of the jurisdiction of the Chief Justice/ his Designate in the proceedings under Section 11(6) of Act 1996, this Court culled out the legal proposition in paragraph 51 as follows: □“51. The Chief Justice/his designate exercising jurisdiction under Section 11 of the Act will consider whether there was really accord and satisfaction or discharge of contract by performance. If the answer is in the affirmative, he will refuse to refer the dispute to arbitration. On the other hand, if the Chief Justice/his designate comes to the conclusion that the full and final settlement receipt or discharge voucher was the result of any fraud/coercion/undue influence, he will have to hold that there was no discharge of the contract and consequently, refer the dispute to arbitration. Alternatively, where the Chief Justice/his designate is satisfied prima facie that the discharge voucher was not issued voluntarily and the claimant was under some compulsion or coercion, and that the matter deserved detailed consideration, he may instead of deciding the issue himself, refer the matter to the Arbitral Tribunal with a specific direction that the said question should be decided in the first instance.”

32. It further laid down the illustrations as to when claims are arbitrable and when they are not. This may be illustrative (not exhaustive) but beneficial for the authorities in taking a decision as to whether in a given situation where no claim/discharge voucher has been furnished what will be its legal effect and still there is any arbitral dispute subsists to be examined by the arbitrator in the given facts and circumstances and held in para 52 of National Insurance Company Limited Vs. Boghara Polyfab Private Limited(supra) as follows: □“52. Some illustrations (not exhaustive) as to when claims are arbitrable and when they are not, when discharge of contract by accord and satisfaction are disputed, to round up the discussion on this subject are:

(i) A claim is referred to a conciliation or a pre-litigation Lok Adalat. The parties negotiate and arrive at a settlement. The terms of settlement are drawn up and signed by both the parties and attested by the conciliator or the members of the Lok Adalat. After settlement by way of accord and satisfaction, there can be no reference to arbitration.

(ii) A claimant makes several claims. The admitted or undisputed claims are paid. Thereafter negotiations are held for settlement of the disputed claims resulting in an agreement in writing settling all the pending claims and disputes. On such settlement, the amount agreed is paid and the contractor also issues a discharge voucher/no-claim certificate/full and final receipt.

After the contract is discharged by such accord and satisfaction, neither the contract nor any dispute survives for consideration. There cannot be any reference of any dispute to arbitration thereafter.

(iii) A contractor executes the work and claims payment of say rupees ten lakhs as due in terms of the contract. The employer admits the claim only for rupees six lakhs and informs the contractor either in writing or orally that unless the contractor gives a discharge voucher in the prescribed format acknowledging receipt of rupees six lakhs in full and final satisfaction of the contract, payment of the admitted amount will not be released. The contractor who is hard-pressed for funds and keen to get the admitted amount released, signs on the dotted line either in a printed form or

otherwise, stating that the amount is received in full and final settlement. In such a case, the discharge is under economic duress on account of coercion employed by the employer. Obviously, the discharge voucher cannot be considered to be voluntary or as having resulted in discharge of the contract by accord and satisfaction. It will not be a bar to arbitration.

(iv) An insured makes a claim for loss suffered. The claim is neither admitted nor rejected. But the insured is informed during discussions that unless the claimant gives a full and final voucher for a specified amount (far lesser than the amount claimed by the insured), the entire claim will be rejected. Being in financial difficulties, the claimant agrees to the demand and issues an undated discharge voucher in full and final settlement. Only a few days thereafter, the admitted amount mentioned in the voucher is paid. The accord and satisfaction in such a case is not voluntary but under duress, compulsion and coercion. The coercion is subtle, but very much real. The “accord” is not by free consent. The arbitration agreement can thus be invoked to refer the disputes to arbitration.

(v) A claimant makes a claim for a huge sum, by way of damages. The respondent disputes the claim. The claimant who is keen to have a settlement and avoid litigation, voluntarily reduces the claim and requests for settlement. The respondent agrees and settles the claim and obtains a full and final discharge voucher. Here even if the claimant might have agreed for settlement due to financial compulsions and commercial pressure or economic duress, the decision was his free choice. There was no threat, coercion or compulsion by the respondent. Therefore, the accord and satisfaction is binding and valid and there cannot be any subsequent claim or reference to arbitration.”

33. It is true that there cannot be a rule of absolute kind and each case has to be looked into on its own facts and circumstances. At the same time, we cannot be oblivious of the ground realities that where a petty/small contractor has made investments from his available resources in executing the works contract and bills have been raised for the escalation cost incurred by him and the railway establishments/appellants without any justification reduces the claim unilaterally and take a defence of the no claim certificate being furnished which as alleged by the respondents to be furnished at the time of furnishing the final bills in the prescribed format.

34. The nature of work under contract of the respondent contractors and the claim of the contractors which is the dispute in brief to be adjudicated by the arbitrator is submitted as follows: □
S.N SLP No Name of Nature of Work under Claim of Contractor Contract o Contractor

1. 6312/2018 Parmar Construction, Rs 1,07,98,765/-

Construction Company	Strengthening and rebuilding of major bridges between Nadbhai-Idgah (Agra) Total Cost of Contract Rs 3,30,71,724/-	(Final Bill) + Interest and Arbitration Cost.
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2.	2166/2018 S.K.	Construction of Office	Rs 2.96 Lacs (Deficit
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	Construction	Accommodation for officers and rest house at Dungarpur. Total Cost of Contract Rs 43,76,112/- .	amount) + Rs 2.65 Lacs (Escalation cost) + Rs 2.3 Lacs (Commercial Interest 18% p.a.)
		Total value of Work done was Rs 58.50 Lacs. Rs 55.54 Lacs were paid.	Total Rs 8 Lacs
3.	7937/2018 Anil Trading Company	Augmentation of the capacity of Diesel Shed, Bhagat-ki-kothi, Jodhpur. Contract Price Rs 2,42,85,808.84/-	Rs. 2,15,000/- (Non availability of Drawing) + Rs 1,50,000/- (Non availability of clear site) + Rs 1,14,099 (interest on delay of Final payment) + Rs 12,15,000/- (Bank Guarantee) + Rs 12,14,290/- (Security Deposit with interest) + Rs 1,00,000 (Arbitration Cost) Total Rs 30,08,389/-
4.	6034/201 Rajendra Prasad Bansal 8	Construction addition and alteration and raising of existing platform surfacing RRI Building, S&T Structures and	Rs 1.5 Lacs (deducted along with interest of 18% p.a.) + Rs 7.9 Lacs (expenses incurred on office staff and labour office) + Rs 1.2Lacs (delayed release of security

dismantling of various amount & Final bill) + Rs structures at 2Lacs (Loss of Profit) Bharatpur-Agra Fort Station Yard. Total Rs 12,60,000/-

Total Cost of Contract Rs 87,85,292/-

3 Supplementary contracts of the value of rs 24,62,511.52/-, Rs 3.5 Lacs & Rs 26,12,977,14/-

5. 6316/201 Maya Construction of Rs 38,27,196/- (Final bill Construction Ratangarh Bye Pass. amount) + Rs 17,78,231/- 8 Pvt Ltd Total Cost of Contract (PVC Final bill amount) + Rs 8,29,25,822.68/- Rs 50,63,738/- (Security deposit & EMD) Total Rs 1,06,69,165/-

6. 8597/201 Bharat Spun Construction of Road Rs 1,88,709/- (charged Pipes & Over Bridges across under head Cess) + Rs 8 Construction Railway track in 8,36,386/- (Final PVC Bill) Company Dausa Yard.

Total Cost of Contract Total Rs 10,25,095/- Rs 3,81,90,423.68/-

7. 8596/201 Harsha Construction of new Rs 1,30,960/- (Payment Constructions Major Bridge no 178 withheld for expansion 8 (on Banas River) joints) + Rs 1 Lacs (Refund Total Cost of Contract of penalty from bill no Rs 10,51,42,109/- XXV) + 36 Lacs (refund of cost of PSC box girder) + Rs 3,19,573/- (Loss due to delay in making final payment) + Rs 76,15,206/-

(Increased cost of material) Total Rs 1,17,65,739/-

8. 8019/2018 Bharat Spun Construction of road Rs 6,18,302/- (charged Pipes & over bridges across under head Cess) + Rs Construction railway track 10,30,081/- (Final PVC Bill) Company Total cost of Contract Rs Total Rs 16,48,383/-

6,31,07,472.50/-

9. 8021/2018 SB-SHC-MCDPL Construction of Major Rs 27,93,752/- (amount (JV) Bridges including deducted which was earth work. previously paid on account Total Cost of of overlapping under 10th Contract Rs running bill) + Rs 1,66,785/-

15,92,08,761.97/- (work done outside the scope of work order) + 7,98,214/- (deduction of 1% Cess) + Rs 5,78,144/-

(Interest on delayed payment) + Rs 28,085 (Cost of computer stolen) + Rs 24,87,864/- (Cost of expansion joint) + Rs 1,81,003/- (Price variation) + Rs 60,390/- (Welding and bolting) Total Rs 70,94,237/-

10. 7720/2018 Bharat Spun Construction of road Rs 44,514/- (charged under Pipes & over bridges across head Cess) + Rs 7,80,547 Construction railway track (Final PVC Bill) Company Total cost of Contract Rs Total Rs 8,25,061/-

2,98,59,531/-

11. 8598/2018 Rajendra Construction of misc., Rs 8.8 Lacs (loss of Profit) + Prasad Bansal AEN Office, Rs 5 Lacs (loss due to bad Signalling structure, debts) & some other grounds platform surfacing, like price variation, non temporary site offices, payment of final bill and addition and alteration security deposit for 1.5 yrs of existing structure, & interest on amount of final dismantling and bill rebuilding various structures between Total Rs 13.8 Lacs/-

			Idgah-Agra Fort Station Yard. Total Cost of Contract Rs 1,40,43,594/-	[exact amount not ascertainable from documents on record]
12.	Diary No 8885/2018	Bharat Spun Pipes & Construction Company	Construction of road over bridges across railway track Total cost of Contract Rs	Rs 4,78,780/- (charged under head Cess) + Rs 23,07,563/- (Final PVC Bill along with price variation and interest

5,47,26,451.47/-

Total Rs 27,86,343/-

13.	9514/2018	B.M. Construction Company	Construction of major bridge between Kanauta- Jaipur stations. Total Cost of Contract Rs 8,46,08,660/-	Rs 7,21,733/- (for adding 10% more cement) + Rs 6,23,923/- + Rs 7,55,734/- (Extra work) + Rs 11,07,561/- (Price variation of Steel purchased) + 4Lacs (using pressure rings) + 4,53,304/- (Labour Cess deducted), Rs 1.25Lacs (deduction from bills) + Rs 3,47,880/- (interest on delayed paymet) + Rs 1.28 Lacs (Deducted as penalty) + Rs 19,01,537 (on a/c of PVC) + Rs 60Lacs (20Lacs each for business losses, mental agonies and social humiliation) along with interest Total Rs 1,93,34,667/-
14.	9559/2018	Balaji Builders & Developers	Construction of 72 Units Type-II, 108 Units Type-III, 36 Units Type-IV in multi-storied tower and health units, shopping complex and other ancillary works near Getore Jagatpur Railway Station. Total Cost of Contract Rs 28,28,20,028/-	Rs 1,32,71,424/- (Final PVC Bill) + Rs 50Lacs (Price variation of steel bars) Total Rs 1,82,71,424/-
15.	22263/2018	B.M. Construction Company	Construction of major bridge between Jatwara- Kanauta stations. Total Cost of Contract Rs 10,4484,441/-	Rs 39,05,010/- (for vacant labour charges of 9 months) + Rs 19,46,970/- (delay in providing drawing) + Rs 13,66,488/- (Price variation of Steel purchased) + Rs 3,91,534.88/- (using pressure rings) + 1,32,655/- (Labour Cess deducted), Rs 1,30,771/- (deduction from bills) + Rs 50,000/-

				(Deducted from 21 running bills) + Rs 11,91,127/- (interest on delayed payment) + Rs 56,40,327/- (Security Amount) + Rs 1,38,000/- (deducted as penalty) + Rs 76,39,600/- (PVC Bill)+ Rs 60Lacs (20Lacs each for business losses, mental agonies and social humiliation) along with interest
				Total Rs 2,85,32,482/-
16.	11417/20 18	Kewai Constructions Co (JV)	Construction of Minor Bridge between Dausa – Lalsot Total Cost of Contract Rs 5,98,22,476/-	Rs 16,74,748/- (security Deposit) + Rs 47,66,869/- (Payment of Bill) + Rs 31,33,116/- (Cost of material left at site) + Rs 10Lacs (PSC Slab Advances) + Rs 13.85 Lacs (Idle Labour Charge) + Rs 50,000/- (Cost of Arbitration)
				Total Rs. 1,20,09,733/-
17.	11862/20 18	Harinarayan Khandelwal	Construction of Staircase for fire exit, drilling tube well, underground water tank, and other miscellaneous works Total Cost of Contract Rs 1,56,63,006.87/-	Rs 4,82,283.26/- (Final PVC Bill)

35. The respondents are the contractors and attached with the railway establishment in the instant batch of appeals are claiming either refund of security deposits/bank guarantee, which has been forfeited or the escalation cost has been reduced from final invoices unilaterally without tendering any justification. It is manifest from the pleadings on record that the respondent contractors who entered into contract for construction works with the railway establishment cannot afford to take any displeasure from the employer, the amount under the bills for various reasons which may include discharge of his liability towards the bank, financial institutions and other persons, indeed the railway establishment has a upper hand. A rebuttable presumption could be drawn that when a

no claim has been furnished in the prescribed format at the time of final bills being raised with unilateral deductions made even that acceptable amount will not be released, unless no claim certificate is being attached to the final bills. On the stated facts, para 52(iii) referred to by this Court in National Insurance Company Limited Vs. Boghara Polyfab Private Limited(supra) indeed covers the cases of the present contractors with whom no option has been left and being in financial duress to accept the amount tendered in reference to the final bills furnished and from the discharge voucher which has been taken to be a defence by the appellants prima facie cannot be said to be voluntary and has resulted in the discharge of the contract by accord and satisfaction as claimed by the appellants. In our considered view, the arbitral dispute subsists and the contract has not been discharged as being claimed by the appellants employer(s) and all the contentions in this regard are open to be examined in the arbitral proceedings.

36. Learned counsel for the appellants has referred to the judgments in Union of India and Others Vs. Master Construction Company(supra); New India Assurance Company Limited Vs. Genus Power Infrastructure Limited (supra); ONGC Mangalore Petrochemicals Limited Vs. ANS Constructions Limited and Anr. (supra). In all the cases referred, this Court has taken note of the judgment in National Insurance Company Limited Vs. Boghara Polyfab Private Limited (supra) on which a detailed discussion has been made and taking note of the pleadings of the case on hand, this Court arrived at a conclusion that prima facie there is an evidence on record to justify that no claim certificate or letter of subrogation was voluntary and free from coercion/undue influence and accordingly held that there is no live claim subsists, which is arbitrable after the discharge of the contract by accord and satisfaction.

37. The further submission made by the appellants that the High Court has committed error in appointing an independent arbitrator without resorting to the arbitrator which has been assigned to arbitrate the dispute as referred to under clause 64(3) of the contract. To examine the issue any further, it may be relevant to take note of three clauses in sub-Section 6 of Section 11 of Act, 1996(pre-amended Act, 2015) which is as under:“(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 Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

38. Clause (c) of sub-Section (6) of Section 11 relates to failure to perform any function entrusted to a person including an institution and also failure to act under the procedure agreed upon by the parties. In other words, clause(a) refers to the party failing to act as required under that procedure; clause(b) refers to the agreement where the parties fails to reach to an agreement expected of them

under that procedure and clause (c) relates to a person which may not be a party to the agreement but has given his consent to the agreement and what further transpires is that before any other alternative is resorted to, agreed procedure has to be given its precedence and the terms of the agreement has to be given its due effect as agreed by the parties to the extent possible. The corrective measures have to be taken first and the Court is the last resort. It is also to be noticed that by appointing an arbitrator in terms of sub-section (8) of Section 11 of Act, 1996, due regard has to be given to the qualification required for the arbitrator by the agreement of the parties and also the other considerations such as to secure an independent and impartial arbitrator. To fulfil the object with terms and conditions which are cumulative in nature, it is advisable for the Court to ensure that the remedy provided as agreed between the parties in terms of the contract is first exhausted.

39. It has been considered by a three Judges' Bench of this Court in Union of India & Another Vs. M.P. Gupta(supra). Taking note of clause 64 of the agreement for arbitration, the Court held that in view of express provision contained in terms of the agreement in appointment of two gazetted railway officers, the High Court was not justified in appointment of a retired Judge as the sole arbitrator. It held as under: "3. The relevant part of clause 64 runs as under:

"64. Demand for arbitration.—*** (3)(a)(ii) Two arbitrators who shall be gazetted railway officers of equal status to be appointed in the manner laid in clause 64(3)(b) for all claims of Rs 5,00,000 (Rupees five lakhs) and above, and for all claims irrespective of the amount or value of such claims if the issues involved are of a complicated nature. The General Manager shall be the sole judge to decide whether the issues involved are of a complicated nature or not. In the event of the two arbitrators being undecided in their opinions, the matter under dispute will be referred to an umpire to be appointed in the manner laid down in sub-clause (3)(b) for his decision.

(3)(a)(iii) It is a term of this contract that no person other than a gazetted railway officer should act as an arbitrator/umpire and if for any reason, that is not possible, the matter is not to be referred to arbitration at all."

4. In view of the express provision contained therein that two gazetted railway officers shall be appointed as arbitrators, Justice P.K. Bahri could not be appointed by the High Court as the sole arbitrator. On this short ground alone, the judgment and order under challenge to the extent it appoints Justice P.K. Bahri as sole arbitrator is set aside. Within 30 days from today, the appellants herein shall appoint two gazetted railway officers as arbitrators. The two newly appointed arbitrators shall enter into reference within a period of another one month and thereafter the arbitrators shall make their award within a period of three months."

40. It was further considered by this Court in Union of India and Another Vs. V.S. Engineering(P) Ltd. (supra) as under: "3. The learned Additional Solicitor General appearing for the appellants Union of India has pointed out that as per clauses 63 and 64 of the General Conditions of Contract, this Court in no uncertain terms has held that the Arbitral Tribunal has to be constituted as per the

General Conditions of Contract, the High Court should not interfere under Section 11 of the Act and the High Court should accept the Arbitral Tribunal appointed by the General Manager, Railways. In this connection, the learned ASG invited our attention to a decision of this Court directly bearing on the subject in *Union of India v. M.P. Gupta* [(2004) 10 SCC 504] wherein a similar question with regard to appointment of the Arbitral Tribunal for the Railways with reference to clause 64 of the General Conditions of Contract came up before this Court and this Court held that where two gazetted railway officers are appointed as the Arbitral Tribunal, the High Court should not appoint a retired Judge of the High Court as a sole arbitrator and the appointment of sole arbitrator was set aside. The conditions of clauses 63 and 64 of the General Conditions of Contract are almost analogous to the one we have in our hand. In that case also relying on clause 64 of the contract a three-Judge Bench presided over by the Chief Justice of India observed as follows: (SCC p. 505, para 4) “4. In view of the express provision contained therein that two gazetted railway officers shall be appointed as arbitrators, Justice P.K. Bahri could not be appointed by the High Court as the sole arbitrator. On this short ground alone, the judgment and order under challenge to the extent it appoints Justice P.K. Bahri as sole arbitrator is set aside. Within 30 days from today, the appellants herein shall appoint two gazetted railway officers as arbitrators. The two newly appointed arbitrators shall enter into reference within a period of another one month and thereafter the arbitrators shall make their award within a period of three months.” and further reiterated by this Court in *Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Limited*(supra) as follows: “5. It is pointed out that there are three clauses in sub-section (6) of Section 11. Clause (c) relates to failure to perform function entrusted to a person including an institution and also failure to act under the procedure agreed upon by the parties. In other words, clause (a) refers to parties to the agreement. Clause (c) relates to a person who may not be party to the agreement but has given consent to the agreement. It is also pointed out that there is a statutory mandate to take necessary measures, unless the agreement on the appointment procedure provided other means for securing the appointment. It is, therefore, submitted that before the alternative is resorted to, agreed procedure has to be exhausted. The agreement has to be given effect and the contract has to be adhered to as closely as possible. Corrective measures have to be taken first and the Court is the last resort.

6. It is also pointed out that while appointing an arbitrator in terms of sub-section (8) of Section 11, the Court has to give due regard to any qualification required for the arbitrator by the agreement of the parties and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. It is pointed out that both these conditions are cumulative in nature. Therefore, the Court should not directly make an appointment. It has to ensure first that the provided remedy is exhausted and the Court may ask to do what has not been done.

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

under:“11. The question that arises for consideration in this appeal by special leave is whether the appointment of a retired Judge of the High Court as sole arbitrator should be set aside and an Arbitral Tribunal should again be constituted in the manner provided in terms of Clause 64.

12. Dealing with a matter arising from the old Act (the Arbitration Act, 1940), this Court, in *Union of India v. M.P. Gupta* [(2004) 10 SCC 504] held that appointment of a retired Judge as sole arbitrator contrary to Clause 64 (which requiring serving gazetted railway officers being appointed) was impermissible.

13. The position after the new Act came into force, is different, as explained by this Court in *Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd.*[(2008) 10 SCC 240]. This Court held that the appointment of arbitrator(s) named in the arbitration agreement is not mandatory or a must, but the emphasis should be on the terms of the arbitration agreement being adhered to and/or given effect, as closely as possible.

14. It was further held in *Northern Railway case* [(2008) 10 SCC 240] that the Chief Justice or his designate should first ensure that the remedies provided under the arbitration agreement are exhausted, but at the same time also ensure that the twin requirements of sub-Section (8) of Section 11 of the Act are kept in view. This would mean that invariably the court should first appoint the arbitrators in the manner provided for in the arbitration agreement. But where the independence and impartiality of the arbitrator(s) appointed/nominated in terms of the arbitration agreement is in doubt, or where the Arbitral Tribunal appointed in the manner provided in the arbitration agreement has not functioned and it becomes necessary to make fresh appointment, the Chief Justice or his designate is not powerless to make appropriate alternative arrangements to give effect to the provision for arbitration.”

41. This Court has put emphasis to act on the agreed terms and to first resort to the procedure as prescribed and open for the parties to the agreement to settle differences/disputes arising under the terms of the contract through appointment of a designated arbitrator although the name in the arbitration agreement is not mandatory or must but emphasis should always be on the terms of the arbitration agreement to be adhered to or given effect as closely as possible.

42. The judgments in *Datar Switchgears Ltd. case*(supra); *Punj Lloyd case*(supra) and *Union of India Vs. Bharat Battery Manufacturing Co. (P) Ltd. case*(supra) on which reliance has been placed by the learned counsel for the respondents/contractors may not be of assistance for the reason that the question for consideration before this Court was that if one party demands the opposite party to appoint an arbitrator and the other party fails to appoint an arbitrator within 30 days what will be its legal consequence and it was held in the cases(supra) that if one party demands the opposite party to appoint an arbitrator and if the opposite party has failed to make an appointment within 30 days, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former makes an application under Section 11 seeking appointment of an arbitrator. In the instant cases, the question for consideration is as to whether the Chief Justice or his Designate in exercise of power under Section 11(6) of the Act should directly make an appointment of an independent arbitrator without, in the first instance, resorting to ensure that the

remedies provided under the arbitration agreement are exhausted.

43. In the present batch of appeals, independence and impartiality of the arbitrator has never been doubted but where the impartiality of the arbitrator in terms of the arbitration agreement is in doubt or where the Arbitral Tribunal appointed in terms of the arbitration agreement has not functioned, or has failed to conclude the proceedings or to pass an award without assigning any reason and it became necessary to make a fresh appointment, Chief Justice or his designate in the given circumstances after assigning cogent reasons in appropriate cases may resort to an alternative arrangement to give effect to the appointment of independent arbitrator under Section 11(6) of the Act. In *North Eastern Railway and Others Vs. Tripple Engineering Works* (supra), though the panel of arbitrators as per clause 64(3)(a)(ii) and (iii) of the general conditions of contract under GCC was appointed in the year 1996 but for two decades, the arbitrator failed to pass the award and no explanation came forward. In the given situation, this Court observed that general conditions of the contract do not prescribe any specific qualification of the arbitrators to be appointed under the agreement except that they should be railway officers further held that even if the arbitration agreement was to specifically provide for any particular qualification(s) of an arbitrator the same would not denude the power of the Court acting under Section 11(6) to depart therefrom and accordingly, confirmed the appointment of an independent arbitrator appointed by the High Court in exercise of Section 11(6) of the Act, 1996. Almost the same situation was examined by this Court in *Union of India and Others Vs. Uttar Pradesh State Bridge Corporation Ltd.* (supra) and after placing reliance on *North Eastern Railway and Others Vs. Tripple Engineering works*(supra) held that since Arbitral Tribunal has failed to perform and to conclude the proceedings, appointed an independent arbitrator in exercise of power under Section 11(6) of the Act, 1996. In the given circumstances, it was the duty of the High Court to first resort to the mechanism in appointment of an arbitrator as per the terms of contract as agreed by the parties and the default procedure was opened to be resorted to if the arbitrator appointed in terms of the agreement failed to discharge its obligations or to arbitrate the dispute which was not the case set up by either of the parties.

44. To conclude, in our considered view, the High Court was not justified in appointing an independent arbitrator without resorting to the procedure for appointment of an arbitrator which has been prescribed under clause 64(3) of the contract under the inbuilt mechanism as agreed by the parties.

45. Consequently, the orders passed by the High Court are quashed and set aside. The appellants are directed to appoint the arbitrator in terms of clause 64(3) of the agreement within a period of one month from today under intimation to each of the respondents/contractors and since sufficient time has been consumed, at the first stage itself, in the appointment of an arbitrator and majority of the respondents being the petty contractors, the statement of claim be furnished by each of the respondents within four weeks thereafter and the arbitrator may decide the claim after affording opportunity of hearing to the parties expeditiously without being influenced/inhibited by the observations made independently in accordance with law.

46. The batch of appeals are accordingly disposed of on the terms indicated. No costs.

47. Pending application(s), if any, stand disposed of.

.....J. (A.M. KHANWILKAR)J. (AJAY RASTOGI) NEW DELHI
March 29, 2019