# Rajasthan Small Industries Corportion ... vs M/S Ganesh Containers Movers Syndicate on 23 January, 2019

## Equivalent citations: AIRONLINE 2019 SC 615

## Author: R. Banumathi

## Bench: Indira Banerjee, R. Banumathi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1039 OF 2019
(Arising out of SLP(C)No.22809 of 2016)

RAJASTHAN SMALL INDUSTRIES
CORPORATION LIMITED …App

VERSUS

M/S GANESH CONTAINERS MOVERS
SYNDICATE …Respon

JUDGMENT

R. BANUMATHI, J.

Leave granted.

2. This appeal arises out of the judgment dated 22.04.2016 passed by the High Court of Rajasthan at Jaipur Bench in and by which the High Court has allowed the application filed by the respondent under Section 11 and Section 15 of the Arbitration and Conciliation Act, 1996 thereby appointing Mr. J. P. Bansal, retired District Judge as the sole arbitrator to resolve the dispute between the parties.

3. Brief facts which led to filing of this appeal are as under:-

> The appellant-Rajasthan Small Industries Corporation Limited invited tender for "Handling and Road transportation of ISO containers and Cargo between Inland container Depots at Jaipur, Jodhpur and Ports." Respondent-Contractor participated in the said tender and Letter of Intent was issued in favour of the respondent-Contractor on 21.01.2000. The agreement was executed on 28.01.2000 between the parties. Initially, the contract period was of three years; but it was extended for another two years from 31.01.2003 by consent of both the parties.

Dispute arose between the parties regarding imposition of transit penalty by the appellant upon the respondent for delay in transportation of containers, non-payment of handling charges of containers for various period of time and several other disputes. The terms of the contract Clause 4.20.1 of Schedule-4 (General Conditions) provided for arbitration by the Managing Director himself or his or her nominee for the sole arbitration. The respondent-Contractor requested for appointment of the arbitrator in terms of Clause 4.20.1 of Schedule-4 (General Conditions). One I.C. Shrivastava, IAS (Retd.) was appointed as the sole arbitrator on 21.02.2005. Since the progress of the sole arbitrator was not satisfactory in disposing the matter, the said sole arbitrator was removed on 26.03.2009 and in his place, Chairman-cum-Managing Director of the appellant-

Corporation was appointed to act as the sole arbitrator by the consent of both the parties.

4. For one reason or other, the arbitration proceedings could not be concluded. According to the appellant, the matter was adjourned repeatedly vide orders of the Arbitral Tribunal dated 10.02.2010, 11.02.2010, 15.02.2010, 18.02.2010 and 10.03.2010 as no one appeared on behalf of the respondent-Contractor. On 16.03.2010, the respondent raised its doubts regarding impartiality of the newly appointed sole arbitrator. The sole arbitrator passed the order dated 06.04.2010 stating that the agreement Clause 4.20.1 of Schedule-4 (General Conditions) provides for arbitration by the Chairman-cum- Managing Director of the Corporation or his nominee and that only at the joint request of both the parties, the Chairman-cum-Managing Director has taken up the arbitration to resolve the dispute between the parties. The proceedings further continued fixing date of hearing on various dates till 17.08.2011.

5. On 07.02.2013, the respondent-Contractor sent a legal notice to the appellant stating that even after so many requests, the sole arbitrator has not passed the award and called upon the appellant to pay the amount of Rs.3,90,81,602/- said to have been settled, along with the statutory interest within one month. The appellant sent a reply dated 19.03.2013 stating that since the Chairman-cum- Managing Director has been transferred, award could not be passed and there is no question of payment to the respondent-Contractor.

6. On 13.05.2015, the respondent-Contractor filed an application under Section 11(6) and Section 15 of the Arbitration and Conciliation Act, 1996 before the High Court seeking for appointment of an independent arbitrator for adjudication of dispute between the appellant and the respondent in respect of agreement dated 28.01.2000. On 18.12.2015, it was brought to the notice of the arbitrator that an arbitration application has been filed before the High Court. On 05.01.2016, the Arbitral Tribunal adjourned the matter to 13.01.2016 as a last opportunity of hearing to the parties. On 13.01.2016, the arbitrator rejected the application of the respondent-Contractor and his request to adjourn the matter till hearing and final disposal of the arbitration application pending before the High Court and held that the arbitration proceedings would be finalized on the basis of available facts and therefore, adjourned the matter to 21.01.2016. The sole arbitrator passed an ex-parte award on 21.01.2016.

7. The High Court vide impugned order allowed the arbitration application thereby appointing Mr. J.P. Bansal (Retd.), District Judge as the sole arbitrator. The High Court held that the respondent-Contractor had to approach the High Court due to prolongation of the matter before the sole arbitrator who kept on changing one after another and only after the notice of the arbitration petition was served upon the appellant-Corporation, the arbitrator speeded up the proceedings and the ex-parte award was passed on 21.01.2016 without hearing the respondent-Contractor. The High Court was of the view that the arbitrator hurried up to conclude the proceedings with a view to frustrate the arbitration application.

8. Mr. A.D.N. Rao, learned counsel for the appellant-Corporation submitted that the High Court erred in not keeping in view of Clause 4.20.1 of Schedule-4 (General Conditions) that the respondent could not have moved the application under Section 11 and Section 15 of the Arbitration and Conciliation Act, 1996 in the light of the agreement between the parties and the competence of the arbitral tribunal to adjudicate the dispute between the parties. It was further submitted that though the arbitrator was ready to proceed with the matter, the arbitrator could not make progress since the respondent was either not present or continually taking adjournments and when the arbitrator was proceeding with the matter in right earnest, the respondent could not have approached the High Court seeking appointment of an arbitrator. It was urged that in the light of the fact that a final arbitral award has been passed by the arbitral tribunal, the respondent could only challenge the same by way of an appeal under Section 34 of the Arbitration and Conciliation Act, 1996 and the impugned order of the High Court is liable to be set aside.

9. Ms. Mishra, learned counsel for the respondent-Contractor submitted that in view of Section 12 of the Arbitration and Conciliation (Amendment) Act, 2015, if the arbitrator is an employee/advisor or has any past or present business relation or being the Manager/Director then he cannot be appointed as an arbitrator and not qualified to decide the dispute and therefore, the High Court has rightly appointed the fresh independent arbitrator. It was submitted that the disqualification of the person to hold the post of an arbitrator as enumerated in Seventh Schedule of Arbitration and Conciliation (Amendment) Act, 2015 is a legal right conferred upon the respondent-Contractor and there cannot be any promissory estoppel against the statute by alleging that in the agreement dated 28.01.2000, the respondent agreed that the dispute and differences shall be referred to the Managing Director himself or his nominee for the sole arbitration. Placing reliance upon Union of India and Others v. Uttar Pradesh State Bridge Corporation Limited (2015) 2 SCC 52, it was contended that when there is failure on the part of the arbitral tribunal to act and unable to perform its functions, it is open to a party to the arbitration proceedings to approach the court for termination of the mandate of the arbitrator and seek appointment of the substitute arbitrator. The learned counsel for the respondent further submitted that in the present case, since for a long period of about ten years, no award has been passed and that the arbitrators were kept on changing for one reason or other, the respondent was justified in approaching the High Court for substitution or appointment of fresh arbitrator. It was submitted that only after the respondent approached the High Court, the proceedings were accelerated and award came to be passed.

10. We have carefully considered the contentions of both the parties and perused the impugned judgment and materials on record. The following points arise for consideration:-

In the light of the proceedings before the sole arbitrator on various dates and when the proceedings before the arbitrator was pending, whether the respondent was right in filing arbitration petition approaching the High Court under Section 11 and Section 15 of the Arbitration Act, 1996 for appointment of a substitute arbitrator?

When by virtue of arbitration agreement Clause 4.20.1 of Schedule-4 (General Conditions), parties have agreed that the dispute, differences between the parties to be resolved by the Managing Director or his nominee, whether the High Court was right in deviating from the terms of the agreement between the parties and appointing an independent Arbitrator?

Whether by virtue of Section 12 of the Arbitration and Conciliation (Amendment) Act, 2015, the Chairman- cum-Managing Director has become ineligible to act as the arbitrator?

Whether the High Court was right in terminating the mandate of the arbitrator whom the parties have agreed and appointing substitute arbitrator on the ground that there was delay in passing the award?

11. In deviation from the terms of the agreement, whether the respondent was right in filing arbitration petition under Section 11 of the Arbitration Act:- Admittedly, the parties entered into an agreement dated 28.01.2000 for handling on road transportation of ISO containers and cargo between the Inland Container Depot at Jaipur, Jodhpur and Ports. The agreement was to remain in force for a period of three years starting from 10.04.2000. The abovementioned agreement was extended for another period of two years starting from 31.01.2003. Clause 4.20.1 of Schedule-4 (General Conditions) provided for arbitration which reads as follows:-

> "4.20.1 All disputes and difference arising out of or in any way concerning this Contract, shall be referred to the Managing Director himself, herself or his or her nominees for the sole arbitration. There will be no objection to any such appointment on the ground that the person so appointed is an employee of the Corporation, that he has dealt with the matters to which the contract relates and that in the course of his duties. As such arbitration shall be final and binding on the parties to the contract. If the person to whom the matter was originally referred to for arbitration becomes unable to function on account of vacation of office, transfer, resignation, retirement from services, suspension or for any other reason, whatsoever, the Managing Director shall nominate another person to take over his function as soon as possible. Such person shall proceed further from the stage where the matter was left by his predecessor. The arbitrator shall give reasons for the award."

12. In order to appreciate the points, it is necessary to refer to the details of various proceedings before the arbitrator, before the respondent-Contractor approached the High Court. In terms of Clause 4.20.1, I.C. Shrivastava, IAS (Retd.) was appointed as sole arbitrator by order dated 21.02.2005. Since the progress of the arbitration proceedings before the said arbitrator was not

satisfactory, vide order No.RSIC/Legal/08-09/23999-24001 dated 26.03.2009, appointment of I.C. Shrivastava, IAS (Retd.) as arbitrator was withdrawn. Since records were not received from the said arbitrator, an order was passed on 13.08.2009 in the presence of both the parties, wherein it was agreed that the records of the case are to be reconstructed and by the same order, it was decided to request Additional Chief Secretary (SSI), Rukmani Haldea, IAS to be the sole arbitrator. However, subsequently by the consent of both the parties Chairman-cum-MD of the appellant-Corporation was appointed as the sole arbitrator.

13. The matter was adjourned before the arbitral tribunal on 24.11.2009 and 30.11.2009 and other dates. It is seen from the order of the arbitral tribunal dated 08.01.2010, the earlier arbitrator was requested number of times to handover the records connected with the case; but he had not handed over the records and therefore, parties were advised to exchange records so that the proceedings could begin and the matter was adjourned. In the subsequent hearing on 25.01.2010, both the parties were represented by their counsel and therefore, the matter was adjourned to 08.02.2010 for final arguments. On 08.02.2010, arguments of the respondent-claimant was heard in part and the case was adjourned to 10.02.2010 on account of paucity of time. On the subsequent hearing dates viz. 10.02.2010, 11.02.2010, 15.02.2010, 18.02.2010 and 10.03.2010, there was no representation for the respondent-claimant and the matter was adjourned to 17.03.2010. Respondent-Contractor vide its letter dated 16.03.2010 addressed to the Chairman and Managing Director of the appellant-Corporation raised doubts on impartiality of the arbitrator expressing his desire to withdraw the arbitration from the present sole arbitrator and was willing to get the matter adjudicated by the pervious arbitrator, I.C. Shrivastava who was already removed at the joint request of the parties. By letter dated 18.03.2010, respondent requested for adjournment of the matter. On the next date of hearing i.e. on 19.03.2010, the respondent- Contractor has not entered appearance and the matter was adjourned to 06.04.2010. On 06.04.2010, the respondent-Contractor was appeared through its representative F.K. Sherwani. As seen from the proceeding of arbitrator dated 06.04.2010, though initially pressed for arbitrator outside appellant-RSIC, finally gave his consent that Chairman-cum-Managing Director may arbitrate.

14. On 29.04.2010, the matter could not be taken up as on 28.04.2010, the arbitral tribunal passed the order stating that the sole arbitrator-CMD has to go to Mumbai for attending a very important official work and the matter was adjourned to 19.05.2010. The matter was then adjourned to 20.05.2010, 16.06.2010, 25.08.2010 and 21.10.2010. It is seen that the respondent-claimant (vide letter dated 21.10.2010) stated that they have full faith in the present sole arbitrator and that the matter has to be decided at an early date on the basis of material available on record at the earliest.

15. For want of reconciliation of records of the parties and certain clarifications, by order dated 24.03.2011, the arbitrator directed both the parties to appear before him on 18.04.2011 along with complete records relating to the claim and counter claim. On the next hearing dates i.e. 20.04.2011 and 21.04.2011, there were detailed discussions between the parties and the sole arbitrator and accordingly, the respondent-Contractor agreed to withdraw certain claims. By various correspondence dated 21.04.2011, 18.05.2011, 20.05.2011 and 24.05.2011, the arbitrator required certain clarifications from both the parties to finalise the award and replies were also received. On 17.08.2011, in the presence of both the parties, the arbitral tribunal passed the following order:-

> "The "file regarding this arbitration" appears tempered/missing paper or incomplete. Therefore, the chronological events need to be ascertained and reconstruction will be required. The detailed order will be passed informing both the parties in this respect. They must wait till further order in this content."
>
> 16. It was in the above background, the respondent-Contractor sent a legal notice dated 07.02.2013 stating that both the parties have submitted their relevant claims before the sole arbitrator on 18.04.2011 and that it was mutually agreed to settle the claim after deduction of some amount and that the amount was finalised and settled for Rs.3,90,81,602/- and in spite of the fact that settled amount was agreed between the parties, no award was passed by the arbitrator. The respondent sent another legal notice dated 07.03.2013 reiterating the claim for Rs. 3,90,81,602/- along with statutory interest. The appellant-Corporation has sent a detailed reply dated 19.03.2013 denying any settlement and also denying that the amount was finalised for a sum of Rs.3,90,81,602/-.
>
> 17. It was in the above backdrop, on 13.05.2015, the respondent-

Contractor filed an application under Section 11 and Section 15 of the Arbitration and Conciliation Act, 1996 before the High Court for appointment of an independent arbitrator for adjudication of disputes and differences between the appellant-Corporation and the respondent-contractor in respect of agreement dated 28.01.2000. When the said petition was pending before the High Court, the arbitrator vide order dated 18.12.2015 fixed the next date of hearing for 05.01.2016. The respondent-Contractor sent a letter requesting to keep the arbitration proceedings in abeyance. However, the Arbitral Tribunal adjourned the matter to 13.01.2016 and then to 21.01.2016, on which date the final award came to be passed by the Arbitral Tribunal. It was thereafter, by the impugned order dated 22.04.2016 passed by the High Court retired District Judge, Mr. J.P. Bansal was appointed as the sole arbitrator to resolve the dispute between both the parties.

18. As pointed out earlier, on 06.04.2010, though the respondent initially pressed for arbitrator outside RSIC, then finally gave its consent for Managing Director to arbitrate. The said proceeding dated 06.04.2010 reads as under:-

> "Shri F.K. Sherwani appeared on behalf of the Claimant and Shri G.C. Garg and Shri R.K. Agarwal, Advocates appeared on behalf of the Corporation. Shri F.K. Sherwani initially pressed for appointing an Arbitrator from outside RSIC. His apprehension was that the CMD will not be an independent Arbitrator since he is likely to take interest of the RSIC into consideration. This would be more so due to the financial difficulties being faced by the Corporation.
>
> It was explained to Shri Sherwani that the agreement signed in principle provides for arbitration by the Chairman or MD of the Corporation or his nominee and also it was at the joint request of both the parties that the arbitration was taken away from the earlier Arbitrator. After discussions it was decided that the CMD may arbitrate the

dispute. Shri Sherwani also has given his consent that CMD may arbitrate.

The next date of hearing is fixed for 29.04.2010 at 3.00 PM."

19. As seen from the order dated 21.10.2010, the respondent submitted that "they do not want to prolong the matter further and they have full faith in the present sole arbitrator and that they would like the sole arbitrator to decide the case and pass an award on the basis of material available on record at the earliest." As stated earlier, to that effect, Shri Ram B. Salve, sole proprietor of the respondent had also given a letter dated 21.10.2010. Since the papers were missing or incomplete, in the presence of both the parties, the arbitral tribunal vide its order dated 17.08.2011 has decided that the chronological events need to be ascertained and reconstruction will be required and a detailed order will be passed informing both the parties in this regard. As seen from the proceedings of the arbitral tribunal till that time, the respondent voluntarily participated and acquiesced in the proceedings before the arbitral tribunal and also expressed faith in the sole arbitrator. Having thus voluntarily participated in the arbitral proceedings, the respondent has sent a legal notice dated 07.02.2013 to the appellant-Corporation stating that in the arbitral proceedings, the respondent mutually agreed to the claim and the matter was settled for a sum of Rs.3,90,81,602/- and that in spite of repeated requests, the amount was not paid to the respondent. The respondent also sent another legal notice dated 07.03.2013 reiterating its demand for payment of Rs.3,90,81,602/-. To that effect, the appellant- Corporation has sent a detailed reply dated 19.03.2013.

20. It is in this backdrop, the respondent has filed the arbitration petition before the High Court under Section 11 and Section 15 of the Arbitration and Conciliation Act, 1996 on 13.05.2015 seeking appointment of an independent arbitrator. As noted earlier, as per Clause 4.20.1 of Schedule-4 (General Conditions), the parties have agreed that all disputes and differences arising out of or in any way concerning the contract, shall be referred to the Managing Director himself or his nominees for the sole arbitration and that there will be no objection to any such appointment on the ground that the person so appointed is an employee of the Corporation and that he has dealt with the matter to which the contract relates. When the parties have consciously agreed that the disputes or differences shall be referred to the Managing Director himself or his nominee for sole arbitration and having participated in the arbitral proceedings before arbitrator for quite some time, the respondent cannot turn round and seek for appointment of an independent arbitrator.

21. The respondent having participated in the proceedings before the arbitral tribunal for quite some time and also having expressed faith in the sole arbitrator, is not justified in challenging the appointment of the Managing Director of the appellant-Corporation as the sole arbitrator. In Indian Oil Corporation Limited and Others v. Raja Transport Private Limited (2009) 8 SCC 520, this Court held as under:-

> "34. 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 (as

> contrasted from an officer of an inferior rank in some other Department) to the officer whose decision is the subject-matter of the dispute.
>
> 44. While considering the question whether the arbitral procedure prescribed in the agreement for reference to a named arbitrator, can be ignored, it is also necessary to keep in view clause (v) of sub-section (2) of Section 34 of the Act which provides that an arbitral award may be set aside by the court if the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties (unless such agreement was in conflict with any provision of Part I of the Act from which parties cannot derogate, or, failing such agreement, was not in accordance with the provisions of Part I of the Act). The legislative intent is that the parties should abide by the terms of the arbitration agreement." [underlining added]

22. The respondent has not placed any material to show that it has reason to believe that the arbitrator had not acted independently or impartially. The respondent has not brought on record any material to entertain an apprehension that the Managing Director of the appellant-Corporation is not likely to act independently or impartially. On the other hand, as noted earlier, as per the proceeding of the arbitral tribunal dated 21.10.2010, the respondent had expressed its full faith in the sole arbitrator and had also given a letter dated 21.10.2010 to that effect. The fact that the sole arbitrator is the Managing Director of the appellant-Corporation is not a ground to raise a presumption of bias or lack of independence on his part. The arbitration Clause 4.20.1 of Schedule-4 (General Conditions) stipulates a high official i.e. - Managing Director of the Corporation not connected with the contract or the work executed by the respondent. Having participated in the entire arbitration proceedings and acquiesced in the proceedings, the respondent is estopped from challenging the competence of the arbitrator. The respondent was not justified in filing the arbitration petition seeking appointment of an independent arbitrator.

Whether by virtue of Section 12 of the Amendment Act, the Managing Director has become ineligible to act:-

23. After the amendment to the Arbitration and Conciliation Act, 2015, Section 12(5) prohibits the employee of one of the parties from being an arbitrator. In the present case, the agreement between the parties was entered into on 28.01.2000 and the arbitration proceedings commenced way back in 2009 and thus, the respondent cannot invoke Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015. As per Section 26 of the Act, 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 this Act unless the parties otherwise agree.

24. In Board of Control for Cricket in India v. Kochi Cricket Private Limited and others, (2018) 6 SCC 287, this Court held that the provisions of Amendment Act, 2015 (with effect from 23.10.2015) cannot have retrospective operation in the arbitral proceedings already commenced unless the parties otherwise agree. In the present case, there is nothing to suggest that the parties have agreed that the provisions of the new Act shall apply in relation to the arbitral proceedings.

25. Contending that the sole arbitrator/Chairman-cum-Managing Director, by virtue of 2015 amendment, has become ineligible to act as the arbitrator, the learned counsel for the respondent placed reliance upon TRF Limited v. Energo Engineering Projects Limited (2017) 8 SCC 377. In the said case, though the agreement/purchase order was dated 10.05.2014 (prior to the amendment), notice invoking arbitration was issued on 28.12.2015 (after the Amendment Act 2015) and the letter of the Managing Director nominating the arbitrator is dated 27.01.2016. In such factual matrix of the case, this Court has held that the named arbitrator-Managing Director of the respondent therein had become ineligible by operation of law and therefore, he cannot nominate another person as an arbitrator. In para (54), it was held as under:-

> "54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so." [underlining added]

26. The facts of the said case are entirely different from the case in hand. In the said case, when notice invoking arbitration was issued on 28.12.2015, after the Amendment Act, 2015 came into force with effect from 23.10.2015, by virtue of which the person named in the agreement became ineligible to act as the arbitrator. In the case in hand, the arbitration proceedings started way back in 2009 long before 2015 Amendment Act came into force and therefore, 2015 Amendment Act is not applicable to the case in hand. The statutory provisions that would govern the matter are those which were then in force before the Amendment Act.

27. To fortify our view, we can usefully refer to the decision of this Court in Aravali Power Company Private Limited v. Era Infra Engineering Limited (2017) 15 SCC 32. In this case, the invocation of arbitration was on 29.07.2015 and the arbitrator was appointed on 19.08.2015 and the parties appeared before the arbitrator on 07.10.2015 well before 23.10.2015 i.e. date on which the Amendment Act was deemed to have come into force. It was held that the statutory provisions that would therefore govern the controversy are those that were in force before the Amendment Act came into effect. This Court has therefore directed that the arbitration, in pursuance of the appointment of the arbitrator on 19.08.2015, shall proceed in accordance with law. Whether the High Court was right in terminating the mandate of the arbitrator appointed as per the agreement:-

> 28. The main question falling for consideration is whether the High Court was right in terminating the mandate of the arbitrator appointed as per the agreement and appointing a substitute arbitrator in the application filed under Section 11(6) and Section 15 of the Arbitration Act. As pointed out earlier, the proceedings before the Arbitral Tribunal proceeded till 17.08.2011 and thereafter, no progress was made. The respondent issued legal notice on 07.02.2013 calling upon the appellant to pay Rs.3.90,81,602/-

alleging that the said amount was settled during the course of proceedings before the Arbitral Tribunal. Reiterating the demand, the respondent has again sent the legal notice on 07.03.2013. However, no award came to be passed. The respondent filed application under Sections 11 and 15 of the Act of 1996 on 13.05.2015 seeking appointment of an independent arbitrator for adjudication of the disputes and differences between the appellant and the respondent.

29. In support of his contention, the learned counsel for the respondent relied upon the decision in Union of India and others v. Uttar Pradesh State Bridge Corporation Limited (2015) 2 SCC

52. Learned counsel for the respondent contended that the arbitrator failed to conclude the proceedings even after four years and the High Court rightly appointed the substitute arbitrator departing from the arbitration clause in the agreement between the parties. In the said case, since the Arbitral Tribunal did not pass award in spite of expiry of four years, the respondent thereon filed Request Case No.10/2010 and the High Court passed order dated 09.03.2011 giving the last chance to the Arbitral Tribunal to complete the arbitral proceedings within a period of three months. In para (6) of the judgment, this Court pointed out that the High Court took note of the various dates and hearings that are fixed by the Tribunal between 25.03.2011 and 25.06.2011 and came to the conclusion that the delay caused in the arbitral proceedings was intentional. After referring to Union of India v. Singh Builders Syndicate (2009) 4 SCC 523 and other judgments, this Court observed that the delays and frequent changes in the Arbitral Tribunal defeat the process of arbitration and therefore, the appointment of the arbitrator by the court of its own choice departing from the arbitration clause has become an acceptable proposition of law which can be termed as a legal principle which has come to be established by a series of judgments of this Court. Having regard to the facts of the said case, observing that the delay in arbitral proceedings was intentional, in para (6) of Uttar Pradesh State Bridge Corporation Limited, it was held as under:-

> “6. The High Court took note of the various dates of hearings that are fixed by the Tribunal between 25-3-2011 and 25-6-2011 and came to the conclusion that delay caused in the arbitral proceedings was intentional. So much so, the members of the Arbitral Tribunal were continuing their dilatory tactics in deciding the matter before it since 2007 and four years had passed in the process. The Tribunal had faltered even after giving specific directions to conclude the matter within three months and long adjournments were granted thereby violating the specific directions of the High Court. Terming this attitude of the members of the Tribunal as negligent on their part towards their duties with no sanctity for any law or for the orders of the High Court, the High Court allowed the petition of the respondent herein and set aside the

mandate of the Tribunal with the appointment of sole arbitrator by the Court itself."

> 30. Having regard to the factual matrix of the present case, in our considered view, the ratio of the said decision cannot be applied to the case in hand. Per contra, in the present case, the proceedings of the arbitral tribunal continued till 17.08.2011. From the proceeding of the arbitral tribunal dated 17.08.2011, it is seen that the "arbitrator observed that the file regarding arbitration appears tampered/missing papers are incomplete and therefore, the chronological events need to be ascertained and reconstitution will be required." It is in this background, the award was not passed till 2013. It is true that there was some delay in passing the award.

However, between 2011 and 2013, the respondent has not filed any application to expedite the proceedings and for passing of the award. The respondent has neither filed the Request Case for passing of the award at an early date nor filed the petition under Section 14 of the Act for termination of the mandate of the arbitrator that the arbitrator has 'failed to act without undue delay'.

31. Mere neglect of an arbitrator to act or delay in passing the award by itself cannot be the ground to appoint another arbitrator in deviation from the terms agreed to by the parties. We may usefully refer to RUSSELL ON ARBITRATION, 20th Edition which reads as under:-

> "Mere neglect of an arbitrator to act, as distinct from refusal or incapacity, does not of itself give the court power to appoint another arbitrator in his place. It does, however, give the court power to remove him, whereupon there is a power to replace him."* *[RUSSELL ON ARBITRATION, 20th Edition, Pg. 136 quoted in Law relating to Arbitration and Conciliation, 9th Edition, by Dr. P.C. Markanda at Pg. 620]

32. Section 15 deals with termination of the mandate and substitution of an arbitrator. Sub-section (1) of Section 15 states that in addition to the circumstances referred to in Sections 13 and 14 of the Act, the mandate of an arbitrator shall terminate where he withdraws from office for any reason or by pursuant to the agreement of the parties. In terms of sub-section (2), after termination of arbitrator's mandate, the appointment of the substitute arbitrator shall be in accordance with the rules applicable to the appointment of an arbitrator who is being replaced.

33. After analysis of the scheme of Sections 11, 14 and 15, in S.B.P. and Company v. Patel Engineering Limited and Another (2009) 10 SCC 293, this Court held that the legislature has repeatedly laid emphasis on the necessity of adherence to the terms of agreement between the parties in the matter of appointment of arbitrators and procedure to be followed for such appointment. In para (31), it was held as under:-

> "31. ……Even Section 15(2), which regulates appointment of a substitute arbitrator, requires that such an appointment shall be made according to the rules which were applicable to the appointment of an original arbitrator. The term "rules" used in this sub-section is not confined to statutory rules or the rules framed by the

competent authority in exercise of the power of delegated legislation but also includes the terms of agreement entered into between the parties."

34. In Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd. and Another (2006) 6 SCC 204, the Supreme Court was called upon to examine the scope of Section 15 of the Act in the backdrop of the fact that after resignation of the arbitrator appointed by the Managing Director of the respondent company, another arbitrator was appointed by him in accordance with the arbitration agreement. At that stage, the petitioner thereon filed an application under Section 11(5) read with Section 15(2) of the Act praying for appointment of a substitute arbitrator to resolve the disputes between the parties. The said application was dismissed by the Chief Justice holding that Section 15(2) refers not only to the statutory rules framed for regulating the appointment of arbitrators but also to contractual provisions for such appointment upholding the view taken by the Chief Justice. In para (4), it was held as under:-

"4. .....The withdrawal of an arbitrator from the office for any reason is within the purview of Section 15(1)(a) of the Act. Obviously, therefore, Section 15(2) would be attracted and a substitute arbitrator has to be appointed according to the rules that are applicable for the appointment of the arbitrator to be replaced. Therefore, what Section 15(2) contemplates is an appointment of the substituted arbitrator or the replacing of the arbitrator by another according to the rules that were applicable to the appointment of the original arbitrator who was being replaced. The term "rules" in Section 15(2) obviously referred to the provision for appointment contained in the arbitration agreement or any rules of any institution under which the disputes were referred to arbitration. There was no failure on the part of the party concerned as per the arbitration agreement, to fulfil his obligation in terms of Section 11 of the Act so as to attract the jurisdiction of the Chief Justice under Section 11(6) of the Act for appointing a substitute arbitrator. Obviously, Section 11(6) of the Act has application only when a party or the person concerned had failed to act in terms of the arbitration agreement. When Section 15(2) says that a substitute arbitrator can be appointed according to the rules that were applicable for the appointment of the arbitrator originally, it is not confined to an appointment under any statutory rule or rule framed under the Act or under the scheme. It only means that the appointment of the substitute arbitrator must be done according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage....." [underlining added] As held in Yashwith Constructions, Section 11(6) of the Act would come into play only when there was failure on the part of the party concerned to appoint an arbitrator in terms of the arbitration agreement. In the case in hand, the High Court, in our view, was not right in appointing an independent arbitrator without keeping in view the terms of the agreement between the parties and therefore, the impugned order appointing an independent arbitrator/retired District Judge is not sustainable.

35. Remedy to the Respondent-Contractor:- The award passed by the arbitrator dated 21.01.2016, whether sustainable, is the next question falling for consideration. As discussed earlier, after

17.08.2011 the Arbitral Tribunal could not make progress and as per the proceeding of the Arbitral Tribunal dated 17.08.2011, the arbitrator observed that the ".....missing papers are incomplete.....the chronological events need to be ascertained and reconstitution will be required....". As pointed out earlier, the respondent filed application under Sections 11 and 15 of the Act of 1996 before the High Court on 13.05.2015. As per the proceedings of the Arbitral Tribunal dated 18.12.2015, the arbitration application before the High Court was brought to the notice of the tribunal and the same was recorded. On 05.01.2016, the respondent prayed for keeping the arbitration proceedings in abeyance and the matter was adjourned for 13.01.2016. The Arbitral Tribunal passed a detailed order on 13.01.2016 stating that the matter is pending for quite some time and on the basis of the available facts and materials, the matter will be finalized and adjourned the matter for 21.01.2016. On the basis of available materials, the Arbitral Tribunal passed the final award on 21.01.2016 awarding a sum of Rs.1,38,000/-, Rs.83,000/- and Rs.1,97,110/- in respect of claims at Serial Nos.3, 4 and 9 respectively to the claimant and the respondent's claim in respect of other claims was rejected. So far as the counter claim of the appellant-Corporation in respect of Serial No.17, the arbitrator awarded a sum of Rs.58,39,018/-.

36. Since the High Court was in seisin of the matter, the Arbitral Tribunal could have given further opportunity to the respondent to put forth his case. The proceedings of the Arbitral Tribunal was pending for quite some time from 2009 till 2015 and after the respondent approached the High Court in May, 2015, the arbitrator appears to have hurriedly passed the award. It is pertinent to note that the respondent was repeatedly praying for adjournment on 05.01.2016, 13.01.2016 and was not present on the date of passing of the final award dated 21.01.2016. As pointed out earlier, it was noted in the proceedings dated 17.08.2011 that the chronological events need to be ascertained and reconstruction will be required. It is not known whether the same was ascertained or not and whether reconstruction was done before passing the final award on 21.01.2016. The respondent has made number of claims under various heads. The respondent has to be given an opportunity to substantiate its claim under various heads. In order to do complete justice between the parties and in exercise of power under Article 142 of the Constitution of India, the award dated 21.01.2016 is to be set aside.

37. In exercise of power under Article 142 of the Constitution of India, it is open to the court to mould the relief by safeguarding the interest of parties. The paramount consideration in such cases should be to ensure that there is no injustice caused. In Raj Kumar and others v. Union of India and another (2006) 1 SCC 737, this Court held as under:-

> "19. .....in exercise of our powers under Article 142 of the Constitution in order to do complete justice to a section of the personnel who would otherwise be placed in an inequitable situation for which the authorities are also partly to blame. It is open to this Court to mould the relief by safeguarding the interest of the parties even while declaring the law. The paramount consideration in such cases should be to ensure that there is no injustice caused....."

38. The phrase "complete justice" engrafted in Article 142(1) is the word of width couched with elasticity to meet myriad situations created by human ingenuity or cause or result of operation of

Statute law or law declared under Articles 32, 136 and 141 of the Constitution. (Vide Ashok Kumar Gupta and another v. State of U.P. and others (1997) 5 SCC 201) In the case in hand, to relegate the respondent to challenge the award under Section 34 of the Act, it would further prolong the litigation between the parties. Considering the facts of the case and in order to do complete justice between the parties, in exercise of power under Article 142 of the Constitution, the award dated 21.01.2016 is set aside.

39. In the result, the impugned order of the High Court dated 22.04.2016 is set aside and this appeal is allowed. The present Managing Director of the appellant-Rajasthan Small Industries Corporation Limited shall be the sole arbitrator and the Managing Director is directed to take up the matter and continue the proceedings and afford sufficient opportunity to both the parties to adduce further evidence and to make oral submissions and pass the final award within a period of four months. It is made clear that the arbitrator may not be influenced by any of the views expressed by the High Court.

.....J. [R. BANUMATHI] .....J. [INDIRA BANERJEE] New Delhi;

January 23, 2019