Sp Singla Constructions Pvt. Ltd. vs State Of Himachal Pradesh on 4 December, 2018

Equivalent citations: AIRONLINE 2018 SC 1025, 2019 (2) SCC 488, (2018) 15 SCALE 421, (2018) 4 CURCC 579, (2018) 6 ARBILR 355, (2019) 1 JLJR 199, (2019) 1 PAT LJR 276, (2019) 1 RECCIVR 224, (2019) 2 CAL HN 30, (2019) 2 MAD LW 775, (2019) 3 CIVLJ 864, (2019) 3 GUJ LR 1725

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Bench: Indira Banerjee, R. Banumathi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 11824-11825 OF 2018
(Arising out of SLP(C) Nos.1274-75 of 2015)

SP SINGLA CONSTRUCTIONS PVT. LTD. …Appellant

VERSUS

STATE OF HIMACHAL PRADESH AND
ANOTHER …Respondent

JUDGMENT

R. BANUMATHI, J.

Leave granted.

2. These appeals arise out of the judgments dated 10.03.2014 in Arbitration Case No.4049 of 2013 and dated 01.09.2014 in Review Petition No. RPST/20087/2014 passed by the High Court of Himachal Pradesh in and by which the High Court dismissed the Arbitration Petition and Review Petition filed by the appellant declining to appoint arbitrator holding that as per the terms of the agreement, arbitrator had already been appointed.

3. Brief facts which led to the filing of these appeals are as follows:-

> The appellant was awarded construction work contract on 19.12.2006 relating to balance work of 214.00 mtrs. span C/C bearings on abutment bridge over river Beas at Harsipattan on Mandi Rewalsar Chandesh-Rakhota Maserah Sarkaghat Tihra

Sandhole Alampur Jawalamukhi road for a sum of Rs.14,29,81,500/-. An agreement was also entered into between the parties and clause (65) of the General Conditions of Contract contains arbitration clause. The period allowed for completion of work was on or before 04.01.2009. However, extension was granted to the appellant up to 30.06.2010. The work was completed by the appellant on 04.06.2011 and payment for the execution of work was made. The appellant raised a dispute and requested for the appointment of arbitrator vide its letter dated 18.10.2013. Pursuant to the request of the appellant, the Chief Engineer, HPPWD appointed the "Superintendent Engineer, Arbitration Circle, HPPWD, Solan" as the arbitrator on 30.10.2013 and the said appointment had been made in terms of clause (65) of the agreement. The arbitrator entered upon reference on 11.11.2013. The appellant after requesting for the appointment of arbitrator either remained absent from the proceedings or sought adjournments stating that he intends to challenge the appointment of arbitrator before the Chief Justice as per the provisions of Arbitration and Conciliation Act, 1996. Even after hearing, no statement of claim was filed by the appellant. On 06.08.2014, arbitration proceedings were terminated under Section 25(a) of the Arbitration and Conciliation Act, 1996.

4. Being aggrieved by the appointment of "Superintendent Engineer, Arbitration Circle, Solan, HPPWD" as the arbitrator, the appellant filed petition before the High Court under Section 11(6) of the 1996 Act praying for appointment of independent arbitrator. The High Court placed reliance upon the judgment of this Court in Antrix Corporation Limited v. Devas Multimedia Private Limited (2014) 11 SCC 560 wherein it was held that in case, if any party is dissatisfied or aggrieved by the appointment of arbitrator in terms of the agreement by other party/parties, his remedy would be by way of petition under Section 13 of the 1996 Act, and, thereafter while challenging the award under Section 34 of the 1996 Act. The High Court held that the appointment of "Superintendent Engineer" as arbitrator being in terms of clause (65) of the agreement, Section 11(6) of the Act cannot be invoked. The appointment of arbitrator could not be challenged by way of an application under Section 11(6) of the 1996 Act. Being aggrieved by the dismissal of the arbitration petition, the appellant is before us.

5. On behalf of the appellant, learned senior counsel Mr. Maninder Singh submitted that the appointment by office after coming into operation of the 1996 Act, was no more permissible and any appointment could only be made in terms of Section 11 of 1996 Act. It was further submitted that since the arbitrator appointed by office had entered upon the reference, the appellant was compelled to file Arbitration Petition No.4049 of 2013 and the High Court erroneously rejected the prayer made on behalf of the appellant for appointment of an independent arbitrator by name. The learned senior counsel further submitted that the arbitrator appointed by office, is an employee in service of the HPPWD which the provision of Section 12(5) bars at the threshold. Learned senior counsel placed reliance upon Ratna Infrastructure Projects Pvt. Ltd. v. Meja Urja Nigam Private Limited (2017) SCC Online Del 7808.

6. Refuting the above contention, on behalf of the respondent- State, learned counsel submitted that the appointment of Superintendent Engineer, Arbitration Circle is as per clause (65) of the

agreement and as per the provisions of law. In response to the contention that Section 12(5) of the Amendment Act, 2015 bars appointment of arbitrator by post, the learned counsel for the State placed reliance upon Board of Control for Cricket in India v. Kochi Cricket Private Limited and others (2018) 6 SCC 287 and submitted that 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 and shall not apply to the arbitral proceedings commenced prior to the Amendment Act, 2015 unless the parties otherwise agree. The learned counsel submitted that the provision contained in clause (65) of the general conditions of the Contract would not amount to agreement of the parties so as to imply application of the provisions of the Amendment Act, 2015.

7. We have carefully considered the contentions of the parties and perused the impugned judgment and materials on record. The point falling for consideration in this appeal is that in the light of the agreement between the parties in clause (65) of the general conditions of contract whether the appellant/contractor can challenge the appointment of the Superintendent Engineer, Arbitration Circle as Arbitrator to resolve the dispute between the parties.

8. By the order of HPPWD dated 30.10.2013, the Superintendent Engineer, Arbitration Circle, HPPWD, Solan was appointed as the sole Arbitrator to decide and make its award regarding claim/dispute given by the appellant/contractor. The main thrust of challenge for appointment of sole arbitrator was on the ground that the arbitrator had not been appointed by name but, had been appointed by designation. It was submitted that appointment of arbitrator by office is not permissible and appointment ought to have been made by name and the same is evident from bare perusal of clause (65) of the contract. It was submitted that as per Section 11(1) of the 1996 Act "a person of any nationality may be an arbitrator, unless otherwise agreed by the parties.....". It was submitted that the Arbitrator appointed by the office is not an appointment in terms of clause (65) of the contract and this aspect has not been properly considered by the High Court.

9. For proper appreciation of the contentions, we may usually refer to Clause (65) of the general conditions of contract which reads as under:-

> "Clause 65 of the General Conditions of Contract-.....Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs drawings and instructions therein before mentioned and as to the quality of workmanship of materials used on the work or as to any other question, claim, right matter or thing whatsoever in any way arising out of or relating to the contractor designs drawings, specification and estimates, instructions orders or these conditions otherwise concerning the works of the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Engineer-in-Chief/Chief Engineer, Himachal Pradesh Public Works Department. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant that he had to deal with the matters to which the contract relates, and that in the course of his duties as Government servant he had expressed views on all or any of the matters in dispute or different. The arbitrator to

> whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason that (sic) the Chief Engineer, HPPWD at the time of such transfer vacation of office or inability to act shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor, it is also a terms of this contract that no person other than a person appointed by the Chief Engineer, HPPWD, should act as arbitrator and if for any reason that is not possible the matter is not be claim in dispute is Rs.50,000/- (Rupees Fifty Thousand) and above, the arbitrator shall give reasons for the award.
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> Subject as aforesaid the provision of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being shall apply to the arbitration proceeding under this clause." [Underlining added]

10. A perusal of clause (65) makes it apparently clear that it was permissible to appoint a person by designation and this will be evident from clause (65), in particular the sentence "the arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason the Chief Engineer is to appoint another person....". If appointments were only to be made by name and not by designation there could be no question of further appointment on the Arbitrator vacating his office. It is only when an Arbitrator is appointed by designation that the question of a vacancy upon the incumbent vacating office could arise thereby enabling the Chief Engineer to appoint another person to act as arbitrator. The Superintendent Engineer, Arbitration Circle appointed as the Arbitrator is from the very arbitration circle, HPPWD and such appointment is only as per clause (65) of the contract and we find no merit in the objection raised by the appellant.

11. Likewise, there is no merit in the contention of the appellant- contractor that the appointed arbitrator is an employee in service of the HPPWD which the provision of Section 12(5) of the 1996 Act (as amended w.e.f. 23.10.2015) bars at the threshold itself. In a catena of judgments, the Supreme Court held that arbitration clauses in government contracts providing that an employee of the department will be the sole arbitrator are neither void nor unenforceable. [Indian Oil Corporation Limited and others v. Raja Transport Private Limited (2009) 8 SCC 520, Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corporation Limited (2007) 5 SCC 304, Union of India and another v. M.P. Gupta (2004) 10 SCC 504] The fact that a named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or lack of independence on his part. The arbitration agreements in government contracts providing that an employee of the department or a higher official unconnected with the work or the contract will be the arbitrator are neither void nor unenforceable.

12. Observing that, in government contracts before appointing arbitrators, the appointing authority should be more vigilant and more responsible in choosing arbitrators who are in a position to conduct arbitral proceedings in an efficient manner without comprising with the other duties, in Union of India v. Uttar Pradesh State Bridge Corporation Limited (2015) 2 SCC 52, it was held as

under:-

> "17. In the case of contracts between government corporations/State-owned companies with private parties/contractors, the terms of the agreement are usually drawn by the government company or public sector undertakings. Government contracts have broadly two kinds of arbitration clauses, first where a named officer is to act as sole arbitrator; and second, where a senior officer like a Managing Director, nominates a designated officer to act as the sole arbitrator. No doubt, such clauses which give the Government a dominant position to constitute the Arbitral Tribunal are held to be valid. At the same time, it also casts an onerous and responsible duty upon the persona designata to appoint such persons/officers as the arbitrators who are not only able to function independently and impartially, but are in a position to devote adequate time in conducting the arbitration. If the Government has nominated those officers as arbitrators who are not able to devote time to the arbitration proceedings or become incapable of acting as arbitrators because of frequent transfers, etc., then the principle of "default procedure" at least in the cases where Government has assumed the role of appointment of arbitrators to itself, has to be applied in the case of substitute arbitrators as well and the Court will step in to appoint the arbitrator by keeping aside the procedure which is agreed to between the parties. However, it will depend upon the facts of a particular case as to whether such a course of action should be taken or not. What we emphasise is that Court is not powerless in this regard." As pointed out earlier, in the case at hand, the Superintendent Engineer, Arbitration Circle, HPPWD was appointed as the sole Arbitrator who, by virtue of his designation, regularly does the arbitration devoting time to the arbitration proceedings and such appointment of Superintendent Engineer cannot be said to be a deviation from clause (65) of the agreement.

13. Any challenge regarding the appointment of an arbitrator as per the terms of the agreement between the parties must be viewed in the context of the agreement between the parties. As pointed out earlier, the parties have mutually agreed that there will be sole Arbitration by the person appointed by the Engineer-in-Chief and that the appellant shall have no objection to any such appointment that the Arbitrator so appointed is a Government Servant. If the appellant has any grievance that the appointment of the arbitrator is by 'post' and not by 'person', the appellant ought to have raised the challenge before the arbitrator in the first instance. Be it noted, in the petition filed before the High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 on 28.12.2013, the appellant has only prayed for quashing the appointment of the Superintendent Engineer, Arbitration Circle, HPPWD, Solan as the sole arbitrator as unconstitutional and sought for appointment of an independent and impartial sole arbitrator to adjudicate the dispute between the parties. It is fairly well settled that any challenge to the arbitrator appointed ought to have been raised before the arbitrator himself in the first instance.

14. Drawing our attention to the wordings in Clause (65) "that the agreement is subject to any statutory modification or re-enactment thereof and the rules made thereunder and for the time being shall apply to the arbitration proceeding under this clause" the learned senior counsel

contended that these words would certainly attract Section 12(5) of the Act as amended with effect from 23.10.2015. In this regard, the learned senior counsel placed reliance upon Delhi High Court judgment in Ratna Infrastructure Projects Pvt. Ltd. v. Meja Urja Nigam Private Limited (2017) SCC Online Del 7808 wherein interpreting the similar words in a contract, Delhi High Court held that those words satisfy the requirement of Section 26 (amended Act of 2015) of there being an agreement between the parties that the Act as amended with effect from 23.10.2015 will apply and held as under:-

> "22. ..... The words "any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration..." satisfies the requirement of Section 26 of there being an agreement between the parties that the Act as amended with effect from 23 rd October 2015 will apply. The Court is not prepared to draw the fine distinction between 'agree' and 'agreed'. Once the amendment to the clause clearly stated that all statutory modidications and re-enactments would apply, then there is no need for further agreement in that respect after 23rd October, 2015. The plea of the Respondent in this regard is rejected.
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> 23. The net result is that Section 12(5) as amended with effect from 23rd October 2015 would apply. Section 12(5) clearly prohibits the employee of one of the parties from being an Arbitrator. This would straightway disqualify Mr. Kher who happens to be a serving GM of the Respondent. Therefore it is to no avail that the Respondent has by its letter dated 21st August 2016 appointed Mr. Kher as an Arbitrator to adjudicate the Arbitration Case Nos. 1 of 2013 and 1 of 2014. His mandate stands terminated."

15. 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.

16. In Board of Control for Cricket in India v. Kochi Cricket Private Limited and others, (2018) 6 SCC 287, this Court has 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 and held as under:-

"37. What will be noticed, so far as the first part is concerned, which states— "26. Act not to apply to pending arbitral proceedings.—Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree...." is that: (1) "the arbitral proceedings" and their commencement is mentioned in the context of Section 21 of the principal Act; (2) the expression used is "to" and not "in relation to"; and (3) parties may otherwise agree. So far as the second part of Section 26 is concerned, namely, the part which reads, "... but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act" makes it clear that the expression "in relation to" is used; and the expression "the" arbitral proceedings and "in accordance with the provisions of Section 21 of the principal Act" is conspicuous by its absence."

17. Immediately after the appointment of the Superintendent Engineer, Arbitration Circle as the sole Arbitrator (30.10.2013), the appellant preferred Arbitration Petition No.4049/2013 (28.12.2013) before the High Court under Section 11(6), 14 and 15 of the Arbitration and Conciliation Act, 1996 for appointment of an independent sole Arbitrator.

18. The High Court placed reliance upon the judgment in Antrix Corporation Limited v. Devas Multimedia Private Limited (2014) 11 SCC 560 and held that when the Superintendent Engineer, Arbitration Circle was appointed as the Arbitrator in terms of the agreement (or arbitration clause), the provisions of sub-section (6) of Section 11 cannot be invoked again. The High Court further observed that in case, the other party is dissatisfied or aggrieved by the appointment of an arbitrator in terms of the agreement, his remedy would be by way of petition under Section 13 and thereafter while challenging the award under Section 34 of the 1996 Act.

19. The High Court in the impugned judgment placed reliance upon the judgment in Antrix Corporation Limited v. Devas Multimedia Private Limited (2014) 11 SCC 560 wherein the Supreme Court held as under:-

"31. The matter is not as complex as it seems and in our view, once the arbitration agreement had been invoked by Devas and a nominee arbitrator had also been appointed by it, the arbitration agreement could not have been invoked for a second time by the petitioner, which was fully aware of the appointment made by the respondent. It would lead to an anomalous state of affairs if the appointment of an arbitrator once made, could be questioned in a subsequent proceeding initiated by the other party also for the appointment of an arbitrator. In our view, while the petitioner was certainly entitled to challenge the appointment of the arbitrator at the instance of Devas, it could not do so by way of an independent proceeding under Section 11(6) of the 1996 Act. While power has been vested in the Chief Justice to appoint an arbitrator under Section 11(6) of the 1996 Act, such appointment can be questioned under Section 13 thereof. In a proceeding under Section 11 of the 1996

> Act, the Chief Justice cannot replace one arbitrator already appointed in exercise of the arbitration agreement." .....
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> 33. Sub-section (6) of Section 11 of the 1996 Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of sub-section (6) may be invoked by any of the parties. Where in terms of the agreement, the arbitration clause has already been invoked by one of the parties thereto under the ICC Rules, the provisions of sub-

section (6) cannot be invoked again, and, in case the other party is dissatisfied or aggrieved by the appointment of an arbitrator in terms of the agreement, his/its remedy would be by way of a petition under Section 13, and, thereafter, under Section 34 of the 1996 Act." In the present case, the Arbitrator has been appointed as per clause (65) of the agreement and as per the provisions of law. Once, the appointment of an arbitrator is made at the instance of the government, the arbitration agreement could not have been invoked for the second time.

20. As pointed out earlier the Arbitrator has already entered upon reference on 11.11.2013. The Arbitrator had first hearing on 07.12.2013; on which date appellant-contractor was absent. For the next date of hearing on 13.03.2014 the Arbitrator has recorded the finding that the appellant-claimant-contractor was absent without any intimation to the Tribunal. In this regard, Mr. Maninder Singh, the learned Senior Council for the appellant has drawn our attention to the letter dated 12.03.2014 sent by the appellant requesting for adjournment. Similarly, in the next date of hearings before the arbitrator namely, 03.04.2014, 25.04.2014 and 06.08.2014 the appellant-contractor did not appear; but only sent the letters requesting for adjournment. On 03.04.2014, the matter was adjourned to 25.04.2014 directing that both parties to come prepared for the next date of hearing on 25.04.2014. Similar was the order passed on 25.04.2014 that both parties have to come prepared for the next date of hearing on 06.08.2014. Since the appellant-claimant did not appear before the Arbitrator, the Arbitrator terminated the proceedings on 06.08.2014 under Section 25(a) of the 1996 Act.

21. Section 25 of the Arbitration Act, 1996 deals with the situation where the parties commit default without showing sufficient cause and consequent termination of the proceedings. Section 25 provides three situations where on account of the default of a party, the arbitral tribunal shall terminate the proceedings which are as under:-

> (i) Under Section 25(a) where the claimant fails to communicate his statement of claim in accordance with sub-section (1) of Section 23;
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> (ii) Under Section 25(b) continue the proceedings on the failure of the respondent to communicate his claim of defence in accordance with sub-section (1) of Section 23;
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> (iii) Under Section 25(c) continue the proceedings, and make the arbitral award on the evidence before it, in the event of a party failing to appear at an oral hearing or produce documentary evidence.

Section 25(a) provides that the Arbitral Tribunal shall terminate the proceedings where the claimants failed to communicate his claim in accordance with sub-section (1) of Section 23 of the Act. In the present case, the appellant has failed to file his statement of claim; and only sent the communication to the arbitrator seeking adjournment on the ground that the appellant has approached the High Court by filing petition under Section 11(6) of the Act. When the parties have specifically agreed for appointment of sole Arbitrator of the person appointed by the Engineer-in-Chief/Chief Engineer, HPPWD, the appellant was not right in approaching the High Court seeking appointment of an independent Arbitrator.

22. Inspite of extension of time, since the appellant-contractor had not filed statement of claim, the arbitrator terminated the proceedings under Section 25(a) of the 1996 Act by proceedings dated 06.08.2014. The appellant-contractor did not file his statement of claim before the arbitrator since the appellant had approached the High Court by filing petition under Section 11(6) of the 1996 Act, probably under the advice that the appellant can get an independent arbitrator appointed. The appellant had been writing letters to the arbitrator before the hearing seeking adjournment. However, on the fourth occasion, proceedings were simply terminated since no hearings were held on earlier occasions, he expected that his request might be accepted. The arbitrator could have issued a notice warning the appellant that no adjournment would be granted under any circumstances. Since, no such warning was given, we deem it appropriate to set aside the order of termination. Appellant had made a claim on account of delay as indicated in his letter dated 18.10.2013 under various heads. In the interest of justice, in our considered view, an opportunity is to be afforded to the appellant to go before the departmental arbitrator (as agreed by the parties in clause (65) of the general conditions of contract) and the proceedings of the arbitrator dated 06.08.2014 terminating the proceedings is to be set aside. We are conscious that after the Amendment Act, 2015, there cannot be a departmental arbitrator. As discussed earlier, in this case, the agreement between the parties is dated 19.12.2006 and the relationship between the parties are governed by the general conditions of the contract dated 19.12.2006, the provisions of the Amendment Act, 2015 cannot be invoked.

23. In the result, the appeals are disposed of with the following directions:-

> (i) the proceedings of the arbitrator dated 06.08.2014 terminating the arbitral proceedings is set aside. In terms of clause (65) of the general conditions of contract, the Chief Engineer, Himachal Pradesh Public Works Department is directed to appoint an arbitrator in terms of clause (65) of the agreement.
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> (ii) the appellant shall file his claim before the arbitrator so nominated and the arbitrator shall afford sufficient opportunities to both the parties and proceed with the matter in accordance with law.

We make it clear that we have not expressed any opinion on the merits of the claim of the appellant.

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

December 04, 2018