IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

Present:

The Hon'ble Justice Shekhar B. Saraf

AP 189 of 2019

WEST BENGAL HOUSING BOARD

VERSUS

M/s. ABHISEK CONSTRUCTION

For the Petitioner: Mr. Rohit Banerjee, Adv.
Ms. Shreyanshee Das, Adv.

For the Respondent: Mr. Aniruddh Mitra, Adv.

Last Heard On: March 17, 2023

Judgement On: April 11, 2023

Shekhar B. Saraf, J.:

1. The instant application has been filed by the petitioner, West Bengal Housing Board ('award debtor'), under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act' and/or the 'the principal Act') seeking to set aside an arbitral

award dated December 21, 2018 passed by the sole arbitrator Mr. Santanu Basu Rai Chaudhuri.

2. The respondent in the instant application is M/s. Abhisek Construction ('award holder').

3. At the very outset, it would be prudent on my part to mention that the instant application has been argued on inherent jurisdictional issues pertaining to the eligibility of the arbitrator to enter reference in the first place. The petitioner / award debtor has prayed for setting of the arbitral award on the ground that the award was passed by a unilaterally appointed arbitrator. It is to be noted that the challenge under the aforesaid ground was not present when the instant application was originally filed on March 15, 2019 and becomes available subsequently due to judicial interpretations on the position of law. The said challenge was vehemently opposed by the respondent, and hence, in this judgment, I have only dealt with the point of maintainability of this Section 34 application.

Facts

4. I have mapped the factual matrix of the present *lis* below :-

a. A notice inviting tender was issued by the respondent/award debtor for "Construction of roads with pavered blocks, driveways, pathways & open garages of M.I.G. and L.I.G. clusters of chequered tiles at Eastern High/Grove/Nook Housing Project of West Bengal Housing Board at New Town, Kolkata". The bid of the respondent/award holder, in this regard, was accepted by the petitioner/ award debtor vide its letter dated April 30, 2010. A formal agreement in this regard was executed between the parties on May 19, 2010 and the work order was issued by the Joint Director (EW-1) of the award debtor on the same day.

b. Subsequently, on account of disputes having arisen between parties, the respondent vide letter dated March 12, 2012 addressed to the Deputy Director (EW), Eastern Housing Project, West Bengal Housing Board, Rajarhat, Kolkata raised several claims and requested the petitioner to make payment of the said claims within 15 days. On March 16, 2012, the petitioner rejected the claims raised by the respondent in the aforesaid letter.

c. By another letter dated March 28, 2012, the respondent requested the petitioner's Director (Engineer) for appointment of an arbitrator in terms of clause 25 of the contract between the parties. The petitioner vide its letter dated April 20, 2012

nominated Shri Santanu Basu Rai Chaudhuri, retired Engineer-in-Charge, PWD and *ex officio* Secretary as the sole arbitrator.

d. The sole arbitrator concluded the arbitral proceedings on November 23, 2018 and published the award on December 21, 2018. The arbitrator awarded the respondent a sum of INR 41,82,385/- (Indian Rupees Forty One Lakhs Eighty Two Thousand Three Hundred Eighty Five only) along with simple interest at the rate of 10% per annum from the date of award till the date of payment.

e. On March 15, 2019, the award debtor filed the instant application challenging the aforesaid award under Section 34 of the Act.

Submissions

5. Mr. Rohit Banerjee, counsel for the petitioner/ award debtor made oral submissions and challenged the said arbitral award on the ground that unilateral appointment of the sole arbitrator is impermissible under Section 12(5) read with Schedule VII of the Act. I have reproduced his submissions below :-

a. The counsel submitted that the sole arbitrator was appointed unilaterally by the award debtor at the request of the award holder. The counsel further submitted that the arbitrator lacked the inherent jurisdiction to pass the said award as he was appointed by an interested party. In light of the same, the counsel argued that the award passed is *non-est* in law and is liable to be set aside.

b. The counsel further, while drawing the attention of this Court to Section 12(1) of the Act, submitted that the Arbitrator did not disclose in writing any circumstances which would give rise to justifiable doubts regarding his independence or impartiality. In absence of such a disclosure, the counsel argued, the award is liable to be set aside. The counsel submitted the judgment of ***Satyendra Kumar -v- Hind Construction*** reported in ***1951 SCC OnLine Bom 89***, in support of his contentions.

c. The counsel submitted that disclosure in writing as mandated by Section 12(1) of the Act is *sine qua non*. The counsel further argued that Section 12(4) of the Act confers a right upon a party who had participated in the arbitral proceedings to challenge appointment *"...only for reasons of which he becomes aware after the appointment has been made.....*". In the instant case, the counsel submits that there was no

disclosure made by the Arbitrator and on this ground itself, he submits, the award should be set aside.

d. The counsel, in support of his contentions, relied upon the judgments of the Apex Court in ***Perkins Eastman Architects DPC and Ors. -v- HSCC (India) Ltd.*** reported in (***2020) 20 SCC 760,*** and ***TRF Ltd. -v- Energo Enginereing Projects Ltd.*** reported in ***(2017) 8 SCC 377***.

6. Mr. Aniruddha Mitra, counsel for the respondent/ award holder propounded the following submissions with regards to unilateral appointment of the arbitrator made by the award debtor:

a. The counsel submitted that as on the date of invocation of arbitration and subsequent appointment of the arbitrator, the appointing authority, that is, the Director of West Bengal Housing Board was not disqualified to appoint an arbitrator. The counsel further submitted that the Arbitration and Conciliation (Amendment) Act, 2015 ('2015 Amendment Act') came into force with effect from October 23, 2015. He argued that the un-amended Act was in force at that point of time wherein the parties were free to agree on a procedure for appointing an arbitrator(s). Therefore, in light of the appointment made as per the arbitration clause, an

application under Section 11(6) of the Act (in the pre-amended era) would not have been maintainable.

b. The counsel submitted that it was always open for the petitioner to challenge the independence or impartiality of the arbitrator under Sections 12, 13 and 14 of the Act as it stood prior to the 2015 amendment subject to restriction as provided in Section 16(2). He submitted that in the instant case, at no point of time during the arbitral proceedings any such application was filed by the petitioner/ award debtor. In view of the same, he argued, that the award debtor is precluded from saying that the arbitrator did not have jurisdiction to proceed with the reference or that the arbitrator did not make disclosures under Section 12.

c. The counsel then drew the attention of this Court towards Section 26 of the 2015 Amendment Act which reads as follows:

> "*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.*"

He submitted that the Supreme Court had interpreted the aforesaid section in ***Board of Control for Cricket in India -v- Kochi Cricket Pvt. Ltd.*** reported in ***(2018) 6 SCC 287*** wherein it was held that none of the provisions of the 2015 Amendment Act shall apply to arbitral proceedings commenced before the commencement of the 2015 Amendment Act unless the parties otherwise agree. He further submitted that 2015 Amendment Act will apply to court proceedings which are *"in relation to arbitral proceedings"*.

d. The counsel submitted that subsequent to 2015 Amendment Act, the principal Act was further amended in the year 2019 vide the Arbitration & Conciliation (Amendment) Act, 2019 ('the 2019 Amendment Act') which came into effect from August 30, 2019. By virtue of the 2019 Amendment Act, he submitted that :-

i) a new Section 87 was introduced in the principal Act; and

ii) Section 26 of the Arbitration & Conciliation (Amendment) Act 2015 was omitted with effect from October 23, 2015.

He argued that by introduction of Section 87 in the principal Act, the legislature attempted to regulate the applicability of the 2015 Amendment Act, and in essence overturned the judicial interpretation of ***BCCI –v- Kochi (supra)***.

e. The counsel submitted that the constitutional validity of Section 87 of the principal Act and the omission of Section 26 of the 2015 Amendment Act was challenged before the apex court in ***Hindustan Construction Company -v- Union of India*** reported in ***(2020) 17 SCC 324***, wherein it court held :–

> *"For all these reasons, the deletion of Section 26 of the 2015 Amendment Act, together with the insertion of Section 87 into the Arbitration Act, 1996 by the 2019 Amendment Act, is struck down as being manifestly arbitrary under Article 14 of the Constitution of India."*

As a result whereof, the counsel added, Section 26 of the 2015 Amendment Act as interpreted by the Apex Court in ***BCCI -v- Kochi (supra)*** stands restored.

f. The counsel submitted that the 2015 Amendment Act came into force during the pendency of the instant arbitration which concluded upon passing of the arbitral award dated December 21, 2018. He submitted that in view of the law laid down in ***BCCI -v- Kochi (supra)***, none of the provisions of the 2015 Amendment Act is applicable to pending arbitrations

but is applicable to court proceedings which is in relation to the arbitral proceeding.

g. The counsel submitted that the 2015 Amendment Act came into force during the pendency of the arbitration proceedings herein which concluded upon passing of the Award dated December 21, 2018. He submitted that in view of the law laid down by the apex court in ***BCCI -v- Kochi (supra)***, none of the provisions of the 2015 Amendment Act is applicable to the pending arbitration but is applicable to those court proceedings which are in relation to the arbitral proceeding.

h. The counsel submitted that the applicability of the 2015 Amendment Act was decided by the Supreme Court conclusively in ***BCCI -v- Kochi (supra)***. He argued that as such, the most important fact with regard to the applicability of the 2015 Amendment Act is the date of invocation of arbitration by way of Section 21 notice.

And, the counsel added, to decide upon the applicability of judgments of Supreme Court in ***Voestalpine Schienen GmbH -v- Delhi Metro Rail Corpoation Ltd.*** reported in ***(2017) 4 SCC 665, TRF (supra), Perkins (supra), and Bharat Broadband Network Limited -v- United Telecom Limited*** reported in ***(2019) 5 SCC 755*** in the instant case, it is crucial to note the date of invocation of the arbitration.

<u>Date of Section 21 Notice</u>	
Voestalpine Schienen GmbH (supra)	*June 14, 2016*
TRF Limited (supra)	*December 28, 2015*
Bharat Broadband (supra)	*January 3, 2017*
Perkins Eastman (supra)	*April 11, 2019*

The counsel argued that from the above dates it is manifestly clear that in all the aforesaid matters before the apex court, the date of issuance of Section 21 notice which is reckoned as the date of commencement of arbitral proceeding is after coming into force the 2015 Amendment Act. As such, he added, all the clutches of the 2015 Amendment Act regarding appointment of an arbitrator were applicable to those cases.

i. Lastly, he submitted that the contention of the petitioner/ award debtor that the unilateral appointment of the arbitrator was bad which can be challenged at the Section 34 stage or that the arbitrator did not have the jurisdiction to proceed with reference, cannot be raised and/or agitated in the facts of the instant case. The counsel added that it is too late in the day for

the petitioner to question the independence or impartiality of the concerned arbitrator or about his non-compliance with disclosure requirements.

Observations & Analysis

7. I have heard the learned counsel appearing on behalf of the respective parties and have perused the materials on record.

8. For the sake of clarity in the judgment, I have formulated the contentions of the parties into two issues :–

1. **Whether non-disclosure by the arbitrator as mandated under Section 12(1) of the Act can be a ground for setting aside an arbitral award?**

2. **Whether the provisions of 2015 Amendment Act in relation to unilateral appointment would apply to arbitral proceedings initiated before October 23, 2015?**

Issue 1

9. It has been contended by the counsel for petitioner/ award debtor that there was no disclosure made in writing by the arbitrator which is contrary to the mandate under Section 12(1) of the Act.

Therefore, the arbitral award must be set aside under Section 34 on this ground.

10. In the case of ***Manish Anand -vs- Fiitjee Ltd.*** reported *in* ***2018 SCC OnLine Del 7587***, the Delhi High Court propounded that mere non-disclosure under Section 12(1) would not render the arbitrator ineligible. Relevant portions have been extracted below -

> *"10. Reading of Section 12(1) of the Act with the Sixth Schedule would clearly demonstrate the importance of the disclosure to be made by the proposed Arbitrator who is approached by the parties with his possible appointment as an Arbitrator. The disclosure is relevant and necessary as independence and impartiality of the Arbitrator are the hallmark of any arbitration proceedings. The amended provision is enacted to identify 'circumstances' which give rise to 'justifiable doubt' about the independence and impartiality of the Arbitrator.*
>
> *11. Having appreciated and re-emphasized the importance of the disclosure under Section 12(1) of the Act, the question is whether an improper disclosure, as in the present case would render the Arbitrator so appointed ineligible or de jure incapable of proceeding with the arbitration proceedings. The answer to this, in my opinion, has to be in the negative. The legislature, while emphasizing on the disclosure under Section 12(1) of the Act, has not further stated that the consequence of such non-disclosure would be automatic termination of the mandate of the Arbitrator so appointed. In absence of such a legislative consequences, in my opinion, it would depend on the facts of the given case whether the mandate of the Arbitrator would stand terminated upon non-disclosure or giving a false disclosure under Section 12(1) of the Act."*

Emphasis Added

11. Moreover, in the unamended Section 12(1) of the Act, the challenge on ground of the arbitrator's non-disclosure under the said section was provided for in Sections 12, 13 and 14 of the Act subject to restriction in Section 16(2) of the Act. This is because the arbitral tribunal is competent to rule on aspects of its competence and jurisdiction. The Act, being a complete code in itself, in certain cases provides a procedure for challenge in case of derogation from its provisions. In case of failure to challenge under Section 13, this Court is of the view that deemed waiver under Section 4 will apply. The relevant section is delineated below:-

> *"4 Waiver of right to object. —A party who knows that—*
> *(a) any provision of this Part from which the parties may derogate, or*
>
> *(b) any requirement under the arbitration agreement,*
>
> *has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."*

12. As a result of the aforementioned provision, without challenging the non-disclosure requirement before the arbitral tribunal first, the petitioner cannot be allowed to take it up for the first time under Section 34. While the fact that the arbitrator did not make a disclosure under Section 12(1) as mandated by the Act does hold significance, it cannot be the sole ground of setting aside the instant arbitral award. Merely because the petitioner/ award

debtor decided to wake up from its deep slumber, and raise this ground for the very first time in the Section 34 application, without having taken any recourse to other remedies available in the Act, it will in no manner render the arbitral award void and invalid. As law serves those who stand vigilant and at the same time it cannot serve as a tool for a party to have a second pick at the cherry.

Hence, issue no. 1 is answered in the negative.

Issue 2

13. The practice of unilateral appointments hits the crux of the arbitration process which is that of independence and impartiality in decision making. In ***TRF Limited (supra)*** and ***Perkins Eastman (supra)***, the apex court held that the Courts have a duty to uphold and safeguard the sanctity of arbitral process at every step in the entire arbitration process. By virtue of the aforesaid decisions, the apex court judicially expanded Schedule VII of the Act to include persons unilaterally appointed by one of the parties. It has now become a settled principle of law that compliance with Section 12(5) r/w Schedule VII of the Act is *sine qua non* for any arbitral reference to gain recognition and validity before the Courts. An arbitral reference which begins with an illegal act vitiates the entire arbitral proceedings including the award itself, and the same cannot be validated by the Courts at any later stage.

Thus, it would be a logical inference to consider such arbitral proceedings and the consequent arbitral award as *void ab initio.*

14. However, it is to be kept in mind that ineligibility which plagues such arbitral appointments operates as a result of Section 12(5) r/w Schedule VII of the Act which in turn emerges from the 2015 Amendment Act. Ergo, it would be appropriate on my part to adjudicate upon the applicability of the said amendment in the present facts in hand.

15. As mentioned above, the issue before me is to determine whether the provisions of the 2015 Amendment Act, in relation to unilateral appointment of arbitrators, apply retrospectively to arbitral proceedings which were initiated before October 23, 2015, ('effective date') that is, before the 2015 Amendment Act came into force but where the award was passed on or after the effective date that is after the 2015 Amendment Act came into force. Therefore, to begin, it would be apt for me to reproduce the relevant provision of the 2015 Amendment Act :-

> "*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.*"

16. From the bare reading of Section 26 of the 2015 Amendment Act, it can be deduced that the said amendment will not apply to those

arbitral proceedings which have commenced, in accordance with Section 21 of the Act, before the effective date. However, the provision permits the parties to agree on the applicability of the said amendment on pending arbitral proceedings. In the present case, the arbitral proceedings commenced way back in 2012, much prior to coming into force of the 2015 Amendment Act.

17. At this juncture, it would be prudent on my part to refer to the judicial pronouncements on the interpretation of Section 26 of the 2015 Amendment Act. While dealing with a similar situation in the case of ***Union of India -v- Parmar Construction*** reported in ***(2019) 15 SCC 682***, the apex court outlined that by virtue of Section 26 of the 2015 Amendment Act, the 2015 Amendment Act will only apply to those arbitral proceedings which had commenced in accordance with Section 21 of the Act on or after the effective date, provided that the parties have not agreed otherwise. I have extracted the relevant paragraphs below -

"26. The conjoint reading of Section 21 read with Section 26 leaves no manner of doubt that the provisions of the 2015 Amendment Act shall not apply to such of the arbitral proceedings which have 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 the 2015 Amendment Act has been examined by this Court in Aravali Power Co. (P) Ltd. v. Era Infra Engg. Ltd. and taking note of Section 26 of the 2015 Amendment Act laid down the broad principles as under :

*

27. We are also of the view that the 2015 Amendment Act which came into force i.e. on 23-10-2015, shall not apply to the arbitral proceedings which have commenced in accordance with the provisions of Section 21 of the principal Act, 1996 before the coming into force of the 2015 Amendment Act, unless the parties otherwise agree."

Emphasis Added

18. In another such instance in the case of ***Union of India -v- Pradeep Vinod Construction Co.*** reported in ***(2020) 2 SCC 464***, the apex court held that for arbitral proceedings commenced before the effective date, the provisions of the 2015 Amendment Act will not apply. I have delineated the relevant paragraphs below:-

"11. The respondent(s) are registered contractors with the Railways and they are claiming certain payments on account of the work entrusted to them. The request of the respondent(s) for appointment of arbitrator invoking Clause 64 of the contract was declined by the Railways stating that their claims have been settled and the respondent(s) have issued "no claim" certificate and executed supplementary agreement recording "accord and satisfaction" and hence, the matter is not referable to arbitration. Admittedly, the request for referring the dispute was made much prior to the Amendment Act, 2015 which came into force w.e.f. 23-10-2015. Since the request for appointment of arbitrator was made much prior to the Amendment Act, 2015 (w.e.f. 23-10-2015), the provision of the Amendment Act, 2015 shall not apply to the arbitral proceedings in terms of Section 21 of the Act unless the parties otherwise agree. As rightly pointed out by the learned counsel for the appellant, the request by the respondent(s) contractors is to be examined in

accordance with the principal Act, 1996 without taking resort to the Amendment Act, 2015."

Emphasis Added

19. Expanding the view taken earlier, the Supreme Court in the case of ***BCCI -v- Kochi (supra)*** held that while the 2015 Amendment Act will not apply to arbitral proceedings initiated, in accordance with Section 21 of the Act, before the effective date, it will apply to court proceedings, which are in relation to arbitral proceedings, initiated after the effective date irrespective of when the arbitral proceedings were initiated. I have reproduced the relevant portions of the judgment below for ease of reference -

"36. All the learned counsel have agreed, and this Court has found, on a reading of Section 26, that the provision is indeed in two parts. The first part refers to the Amendment Act not applying to certain proceedings, whereas the second part affirmatively applies the Amendment Act to certain proceedings. The question is what exactly is contained in both parts. The two parts are separated by the word "but", which also shows that the two parts are separate and distinct. However, Shri Viswanathan has argued that the expression "but" means only that there is an emphatic repetition of the first part of Section 26 in the second part of the said section. For this, he relied upon Concise Oxford Dictionary on Current English, which states: "introducing emphatic repetition; definitely (wanted to see nobody, but nobody)."

Quite obviously, the context of the word "but" in Section 26 cannot bear the aforesaid meaning, but serves only to separate the two distinct parts of Section 26.

37. What will be noticed, so far as the first part is concerned, which states—

> *"26. Act not to apply to pending arbitral proceedings.—Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree.…"*

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

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

"Conduct of arbitral proceedings"

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

Amendment Act came into force. In stark contrast to the first part of Section 26 is the second part, where the Amendment Act is made applicable "in relation to" arbitral proceedings which commenced on or after the date of commencement of the Amendment Act. What is conspicuous by its absence in the second part is any reference to Section 21 of the 1996 Act. Whereas the first part refers only to arbitral proceedings before an Arbitral Tribunal, the second part refers to court proceedings "in relation to" arbitral proceedings, and it is the commencement of these court proceedings that is referred to in the second part of Section 26, as the words "in relation to the arbitral proceedings" in the second part are not controlled by the application of Section 21 of the 1996 Act.

39. Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings — arbitral proceedings themselves, and court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, "arbitral proceedings" having been subsumed in the first part cannot re-appear in the second part, and the expression "in relation to arbitral proceedings" would, therefore, apply only to court proceedings which relate to the arbitral proceedings. <u>The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to court proceedings which have commenced on or after the Amendment Act came into force</u>."

<u>*Emphasis Added*</u>

20. Whilst all the aforesaid decisions were delivered by the apex court considering the existence of Section 26 of the 2015 Amendment Act, there was a legislative change in circumstances when the Parliament enacted the 2019 Amendment Act wherein Section 26 of the 2015 Amendment Act was deleted and deemed to have been omitted with effect from October 23, 2015[1] and Section 87 was introduced and deemed to have been inserted in the Act with effect from October 23, 2015. Section 87 of the Act reads as follows -

> "*87. Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act, 2015 shall—*
>
> *(a) not apply to—*
>
> *(i) arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (23rd October, 2015);*
>
> *(ii) court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;*
>
> *(b) apply only to arbitral proceedings commenced on or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and to court proceedings arising out of or in relation to such arbitral proceedings.*"

[1] This was done by way of adding Section 15 in the 2019 Amendment Act.

21. Considering it against the very essence of the ratio laid down by the apex court in ***BCCI -v- Kochi (supra)***, the constitutional gavel in the case of ***Hindustan Construction (supra)*** struck down deletion of Section 26 of the 2015 Amendment Act together with the insertion of Section 87 into the Act by the 2019 Amendment Act. In plain words, Section 26 of the 2015 Amendment Act and the judicial interpretation thereto stood restored. The relevant paragraphs have been extracted below:-

"59.This now sets the stage for the examination of the constitutional validity of the introduction of Section 87 into the Arbitration Act, 1996, and deletion of Section 26 of the 2015 Amendment Act by the 2019 Amendment Act against Articles 14, 19(1)(g), 21 and Article 300-A of the Constitution of India. The Srikrishna Committee Report recommended the introduction of Section 87 owing to the fact that there were conflicting High Court judgments on the reach of the 2015 Amendment Act at the time when the Committee deliberated on this subject. This was stated as follows in the Srikrishna Committee Report:

> *"However, Section 26 has remained silent on the applicability of the 2015 Amendment Act to court proceedings, both pending and newly initiated in case of arbitrations commenced prior to 23-10-2015. Different High Courts in India have taken divergent views on the applicability of the 2015 Amendment Act to such court proceedings. Broadly, there are three sets of views as summarised below:*
>
> *(a) The 2015 Amendment Act is not applicable to court proceedings (fresh and pending) where the arbitral proceedings to which they relate commenced before 23-10-2015.*

(b) The first part of Section 26 is narrower than the second and only excludes arbitral proceedings commenced prior to 23-10-2015 from the application of the 2015 Amendment Act. The 2015 Amendment Act would, however, apply to fresh or pending court proceedings in relation to arbitral proceedings commenced prior to 23-10-2015.

(c) The wording "arbitral proceedings" in Section 26 cannot be construed to include related court proceedings. Accordingly, the 2015 Amendment Act applied to all arbitrations commenced on or after 23-10-2015. As far as court proceedings are concerned, the 2015 Amendment Act would apply to all court proceedings from 23-10-2015, including fresh or pending court proceedings in relation to arbitration commenced before, on or after 23-10-2015.

Thus, it is evident that there is considerable confusion regarding the applicability of the 2015 Amendment Act to related court proceedings in arbitration commenced before 23-10-2015. The Committee is of the view that a suitable legislative amendment is required to address this issue.

The committee feels that permitting the 2015 Amendment Act to apply to pending court proceedings related to arbitrations commenced prior to 23-10-2015 would result in uncertainty and prejudice to parties, as they may have to be heard again. It may also not be advisable to make the 2015 Amendment Act applicable to fresh court proceedings in relation to such arbitrations, as it may result in an inconsistent position. Therefore, it is felt that it may be desirable to limit the applicability of the 2015 Amendment Act to arbitrations commenced on or after 23-10-2015 and related court proceedings."

(emphasis supplied)

60. *The Srikrishna Committee Report is dated 30-7-2017, which is long before this Court's judgment in Kochi Cricket case [BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287 : (2018) 3 SCC (Civ) 534] . Whatever uncertainty there may have been because of the interpretation by different High Courts has disappeared as*

a result of Kochi Cricket [BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287 : (2018) 3 SCC (Civ) 534] judgment, the law on Section 26 of the 2015 Amendment Act being laid down with great clarity. To thereafter delete this salutary provision and introduce Section 87 in its place, would be wholly without justification and contrary to the object sought to be achieved by the 2015 Amendment Act, which was enacted pursuant to a detailed Law Commission Report which found various infirmities in the working of the original 1996 statute. Also, it is not understood as to how "uncertainty and prejudice would be caused, as they may have to be heard again", resulting in an "inconsistent position". The amended law would be applied to pending court proceedings, which would then have to be disposed of in accordance therewith, resulting in the benefits of the 2015 Amendment Act now being applied. To refer to the Srikrishna Committee Report (without at all referring to this Court's judgment) even after the judgment has pointed out the pitfalls of following such provision, would render Section 87 and the deletion of Section 26 of the 2015 Amendment Act manifestly arbitrary, having been enacted unreasonably, without adequate determining principle, and contrary to the public interest sought to be subserved by the Arbitration Act, 1996 and the 2015 Amendment Act. This is for the reason that a key finding of Kochi Cricket [BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287 : (2018) 3 SCC (Civ) 534] judgment is that the introduction of Section 87 would result in a delay of disposal of arbitration proceedings, and an increase in the interference of courts in arbitration matters, which defeats the very object of the Arbitration Act, 1996, which was strengthened by the 2015 Amendment Act.

61. Further, this Court has repeatedly held that an application under Section 34 of the Arbitration Act, 1996 is a summary proceeding not in the nature of a regular suit—see Canara Nidhi Ltd. v. M. Shashikala [Canara Nidhi Ltd. v. M. Shashikala, (2019) 9 SCC 462 : (2019) 4 SCC (Civ) 545] , SCC para 20. As a result, a court reviewing an arbitral award under Section 34 does not sit in appeal over the award, and if the view taken by the arbitrator is possible, no interference is called for—see Associated Construction v. Pawanhans Helicopters Ltd. [Associated Construction v. Pawanhans Helicopters Ltd., (2008) 16 SCC 128] , SCC para 17.

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63. Also, it is important to notice that the Srikrishna Committee Report did not refer to the provisions of the Insolvency Code. After the advent of the Insolvency Code on 1-12-2016, the consequence of applying Section 87 is that due to the automatic stay doctrine laid down by judgments of this Court—which have only been reversed today by the present judgment—the award-holder may become insolvent by defaulting on its payment to its suppliers, when such payments would be forthcoming from arbitral awards in cases where there is no stay, or even in cases where conditional stays are granted. Also, an arbitral award-holder is deprived of the fruits of its award—which is usually obtained after several years of litigating—as a result of the automatic stay, whereas it would be faced with immediate payment to its operational creditors, which payments may not be forthcoming due to monies not being released on account of automatic stays of arbitral awards, exposing such award-holders to the rigors of the Insolvency Code. <u>For all these reasons, the deletion of Section 26 of the 2015 Amendment Act, together with the insertion of Section 87 into the Arbitration Act, 1996 by the 2019 Amendment Act, is struck down as being manifestly arbitrary under Article 14 of the Constitution of India.</u>

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66. <u>The result is that Kochi Cricket judgment will therefore continue to apply so as to make applicable the salutary amendments made by the 2015 Amendment Act to all court proceedings initiated after 23-10-2015</u>"

<u>Emphasis Added</u>

22. Therefore, it becomes manifestly clear that Section 26 of the 2015 Amendment Act is the position of law on this subject whereas Section 87 in the principal Act is no longer in existence. While interpreting a particular statutory provision, the Court has to accord significance to every word, space, and character in that

provision. Post ***BCCI –v- Kochi (supra)*** interpretation of Section 26 of the 2015 Amendment Act, it is crystal clear that the applicability of 2015 Amendment Act is prospective in nature, and will apply to those arbitral proceedings that have commenced, in accordance with Section 21 of the Act, on or after the effective date, and also to court proceedings which have commenced on or after the effective date.

23. Reliance can also be placed upon the decision in ***Ratnam Sudesh Iyer -v- Jackie Kakubhai Shroff*** reported in ***[2021] 11 S.C.R. 97*** wherein after analyzing the earlier pronouncements in ***BCCI -v- Kochi (supra)*** and ***Hindustan Construction (supra)***, the apex court concluded that on a conjoint reading of Section 21 of the principal Act and Section 26 of the 2015 Amendment Act makes it apparent that unless the parties otherwise agree, provisions of 2015 Amendment Act will not apply to arbitral proceedings which had commenced in accordance with Section 21 of the Act before the effective date. The relevant portions from the aforesaid said judgment have been extracted below –

"21. In BCCI v. Kochi Cricket (P) Ltd. [(2018) 6 SCC 287] a reference was made to Section 26 of the 2015 Amendment Act which had bifurcated proceedings into arbitral proceedings and court proceedings. The said provision reads as under:

"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."

22. *It was clearly elucidated in para 39 of the judgment that the reason behind the first part of Section 26 of the 2015 Amendment Act being couched in the negative was only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if the parties otherwise agree. This is not so in the second part. The judgment derived that the intention of the legislature was to mean that the 2015 Amendment Act is prospective in nature and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the said Act, on or after the 2015 Amendment Act, and to court proceedings which had commenced on or after the 2015 Amendment Act came into force.*

23. *The applicability of Section 34(2-A) was further elucidated in Ssangyong Engg. & Construction Co. Ltd. v. NHAI [(2019) 15 SCC 131], where the SC categorically opined that Section 34 as amended will apply only to Section 34 applications that have been made to the Court on or after 23-10-2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date.*

24. *In the subsequent judgment of Hindustan Construction Co. Ltd. v. Union of [(2020) 17 SCC 324] , it was observed in para 60 that the result of the BCCI judgment was that salutary amendments made by the 2015 Amendment Act would apply to all court proceedings initiated after 23-10-2015."*

Emphasis Added

24. In the instant case, the petitioner/ award debtor has presented the arbitral award before this Court to be sacrificed at the altar of unilateral appointments. The judicial expansion of Section 12(5)

r/w Schedule VII of the Act to make the arbitrator *de jure* ineligible creates a substantive right on the parties which had not existed when the arbitrator in the instant case was appointed by the parties and therefore the arbitral proceedings had begun under the unamended Act. It is a settled principle of law that a statute which creates substantive rights and liabilities on the parties shall be construed to be prospective in operation. Hence, on one hand, due regard has to be accorded to the principles of impartiality and un-biasedness which are safeguarded by insertion of Section 12(5) r/w Schedule VII of the Act, whilst on the other hand, the Court must ensure that substantive rights and liabilities should not be imposed on a particular party retrospectively. Therefore, even though 2015 Amendment Act is applicable on court proceedings in relation to arbitral proceedings which had commenced before the effective date, the applicability cannot be said to include the substantive rights and liabilities emerging out of the 2015 Amendment Act. While I have no doubts in holding that the act of unilateral appointment is outlawed as of today and cannot be sustained at any stage whatsoever, it was not so when the unilateral appointment was made in the instant case. This Court finds itself in consonance with the arguments put forth by the counsel for the award holder that there was no bar placed on unilateral appointment of an arbitrator at the time when the appointment was made in the instant case.

25. Moving on, the perplexity which presented itself before me during pleadings was the case of ***Ellora Paper Mills Ltd. -v- State of MP*** reported in ***(2022) 3 SCC 1***, which is the only such reported instance where the Supreme Court applied principles of Section 12(5) r/w Schedule VII of the Act to a situation where Section 21 notice was issued prior to the effective date, and the arbitral tribunal was constituted way back in the year 2001. However, before jumping the gun and making the principle of retrospective applicability universal, it needs to be kept in mind that the facts therein were peculiar and an exception. The proceedings, in that case, had not *technically commenced* prior to the effective date. And therefore, to my understanding, the case of ***Ellora Paper Mills (supra)*** is an extraordinary one and cannot be construed as a part of the prevailing jurisprudence on the subject.

Hence, issue no. 2 is also answered in the negative.

26. In light of the aforesaid discussions, I am inclined to conclude that the 2015 Amendment Act would not apply to the instant case wherein not only arbitral proceedings were initiated before the effective date in accordance with Section 21 of the Act, but the petitioner also received the said Section 21 notice before the effective date. Hence, the present award cannot be rendered as invalid on the ground of unilateral appointment of the arbitrator. Further, by way of participation in the arbitral proceedings, the

petitioner waived its right to challenge the non-compliance of the disclosure requirements by the arbitrator.

27. In view of the aforesaid findings, the present petition survives the challenge made on grounds of unilateral appointment of the arbitrator. The application shall be adjudicated on merits in accordance with the law.

28. There shall be no order as to the costs.

29. The respondent is directed to file their affidavit-in-opposition within five weeks from the date of this judgment. Reply, if any, to be filed within three weeks thereafter. The parties are at liberty to mention this matter in the month of June 2023 for inclusion in the list.

30. Urgent photostat-certified copy of this order, if applied for, should be readily made available to the parties upon compliance with the requisite formalities.

(Shekhar B. Saraf, J.)