NEUTRAL CITATION NO. 2026:MPHC-JBP:31454

IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE SANJEEV SACHDEVA, CHIEF JUSTICE

&

HON'BLE SHRI JUSTICE VINAY SARAF

ARBITRATION APPEAL No. 14 of 2023

M/S SSANGYONG ENGINEERING AND CONSTRUCTION COMPANY LTD

Versus

M/S S.B. ENGINEERING ASSOCIATES A PARTNERSHIP FIRM

AND

ARBITRATION APPEAL No. 25 of 2023

M/S S.B. ENGINEERING ASSOCIATES A PARTNERSHIP FIRM

Versus

M/S SSANGYONG ENGINEERING AND CONSTRUCTION COMPANY LTD

Appearance:

Shri Ravindra Singh Chhabra - Senior Advocate with Ms. Praneesha Nayyar, Ms. Rashmeet Kaur and Shri Jubin Prasad - Advocates for M/s. SSANGYONG Engineering and Construction Company Limited Appellant in A.A. no. 14 of 2023 & Respondent in A.A. No. 25 of 2023

Shri Om Prakash and Shri Devendra Singh - Advocates for respondent M/s S. B. Engineering Associates and Appellant in A.A. no. 25 of 2023 & Respondent in A.A. No. 14 of 2023

Reserved on – 17.12.2025

Pronounced on – 22.04.2026

ORDER

Per: Justice Sanjeev Sachdeva

1. These Arbitration Appeals filed under section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act") challenge a common order dated 13.12.2022 passed by the Commercial Judge, Jabalpur in MJC (AV)/96/2016 and MJC (AC)/90/2016 on separate applications filed by the respective appellants under section 34 of the Arbitration Act, whereby the learned Commercial Judge has dismissed both the applications and upheld the Arbitration Award dated 31.01.2016 read with Correction Award dated 28.04.2016 passed by the Sole Arbitrator Justice P.C. Naik (Retd.), Jabalpur. Arbitration Appeal No. 14 of 2023 has been filed by Appellant SSANGYONG Engineering and Construction Company Limited (hereinafter referred to as "SSANGYONG") and Arbitration Appeal No. 25 of 2023 has been filed by S.B. Engineering Associates (hereinafter referred to as "SBE").

2. The core issue arising for determination in these appeals is as to validity of the award passed by the Sole Arbitrator appointed by the designate of the Chief Justice of the High Court in an International Commercial Arbitration.

3. On 12.04.2006 the National Highway Authority of India (NHAI for short) awarded a contract for construction of 4 lane highway on Jhansi-Lakhnadon Section between Km 351 to Km 405.7 on NH-26 of package ABD II/C-9 to SSANGYONG being the successful bidder in the tender floated by NHAI. After execution of contract with NHAI, SSANGYONG, on 03.11.2007, entered into a works contract with SBE, a partnership firm, sub-contracting the work of construction of major and minor business, fly-over including construction of RE Wall C-9 package for contract value of Rs. 19,55,46,280/-. Some amendments were incorporated in the works contract on 01.11.2008.

4. Due to certain disputes between the parties, SSANGYONG terminated the said contract with SBE on 02.06.2009 on the ground that SBE had failed to perform the work under the agreement.

5. On 10.06.2009, a Notice was issued by SBE invoking arbitration in terms of Clause 19 of the works contract which contained an Arbitration Clause. Said clause reads as under :-

> *"19. All disputes relating to this agreement will be settled amicably by mutual discussion and in case of subsisting differences, the same will be decided through arbitration by a sole Arbitrator appointed by SSANGYONG, who shall adjudicate the said differences and dispose of in accordance with the provisions of the Arbitration and Conciliation Arbitration Act as amended from time to time. The venue of arbitration shall be Jabalpur and the Courts at Jabalpur shall have exclusive jurisdiction."*

6. By its reply dated 30.06.2009 SSANGYONG offered to settle the disputes as per the terms of the contract. As SSANGYONG did not appoint a Sole Arbitrator as per term no. 19 of the contract, SBE, on 16.07.2009, filed an application under section 11(6) of the Arbitration Act read with section 151 of CPC before the Chief Justice of this High Court for appointment of an Arbitrator. Said application was registered as Arbitration Case No. 32/2009.

7. Although said arbitration application for appointment of arbitrator by the person designated by the Chief Justice of this Court was opposed by SSANGYONG, but objection with regard to lack of jurisdiction of the Chief Justice of the High Court on the ground that SSANGYONG was a Korean Company and an application to the Chief Justice of the High Court was not maintainable was not taken. Said application was allowed on 17.11.2009 and Justice P.C. Naik (Retd.), former Judge of the Orissa and Chhattisgarh High Court was appointed as the Sole Arbitrator.

8. SBE filed its claim before the learned Sole Arbitrator and SSANGYONG also participated in the arbitration proceedings and filed its counter claim. Before the sole Arbitrator, the jurisdictional issue was not raised by SSANGYONG. The sole Arbitrator passed the award on 31.01.2016 allowing the claim and counter-claim in part. The Arbitrator directed SSANGYONG to pay Rs. 4,88,25,815/- along with interest @ 18% per annum till the realisation of the amount by SBE. By the same award, in the counter claim, SBE was directed to

pay Rs. 1,52,97,930/- along with interest @ 18% per annum to SSANGYONG.

9. An application was moved by SBE under section 33 of the Arbitration Act for correction of the award, which was allowed and the award amount was corrected to Rs. 7,62,19,367/- payable by SSANGYONG to SBE and Rs. 2,38,51,311/- by SBE to SSANGYONG.

10. SSANGYONG filed an application under section 34 of the Arbitration Act before the Commercial Court, Jabalpur for setting aside the arbitral award which was registered as MJC (MV)/96/2016. SBE also filed an application under section 34 of Arbitration Act, which was registered as MJC(AC)/90/2016.

11. SSANGYONG raised the objection, before the Commercial Court, that in view of the provisions of section 2(1)(f) and section 2(1)(e) of the Arbitration Act, the Commercial Court at Jabalpur did not have the territorial jurisdiction to entertain the application filed under section 34 of the Arbitration Act.

12. Said objection of the SSANGYONG was turned down by the Commercial Court holding that the amended provisions of the definition of “Court” which came into force on 23.10.2015 were not applicable to the case in hand as the proceedings were initiated prior to the 2015 Amendment came into force. The Court held that in light of the provisions of section 42 of the Arbitration Act, the Commercial

Court at Jabalpur had the jurisdiction to hear the matter, as earlier the parties had approached the said Court under section 9 of the Arbitration Act prior to the 2015 amendment.

13. Before the Commercial Court, Jabalpur, the competency of the Sole Arbitrator to decide the dispute was not raised by any of the parties. The Commercial Court by its order dated 13.12.2022 dismissed the petition preferred by SSANGYONG on the ground that the application had not been filed by an authorised person and was time barred. At the same time, the application moved on behalf of SBE was also dismissed by the Commercial Court.

14. Said order is under challenge in the instant Arbitration Appeals filed under section 37 of the Arbitration Act by both the parties. SSANGYONG has challenged the entire award whereas SBE has challenged the award to the limited extent of award in favour of SSANGYONG.

15. Before this Court for the first time SSANGYONG has raised the issue with regard to the validity and legality of the appointment of the Sole Arbitrator by this Court under section 11(6) of the Arbitration Act on the ground that dispute between the parties under the contract was between a foreign entity SSANGYONG having its registered office in Korea and a partnership firm registered in India, therefore, the arbitration was an “International Commercial Arbitration”, as defined under Section 2(1)(f)(ii) of the Arbitration Act and, thus, the

jurisdiction to appoint an Arbitrator was exclusively with the Chief Justice of the Supreme Court of India under section 11(6) read with 11(9) and 11(12) of the Arbitration Act and consequently the appointment of Sole Arbitrator was without jurisdiction and a nullity and thus the whole proceedings and the award as well as the order passed by the Commercial Court are vitiated.

16. Although other grounds have been also pleaded in the appeal memos, but arguments were advanced by the parties only on issue of jurisdiction. SBE preferred the appeal on several other grounds, but no other ground was pressed in arguments by SBE also and arguments were restricted to the question of validity of the award passed in an "International Commercial Arbitration".

17. The questions that arise for determination in these Appeals are:

(a) Whether the High Court of Madhya Pradesh had jurisdiction to appoint an Arbitrator in a dispute, where one of the parties is a company registered outside India?

(b) Whether the award passed by the Sole Arbitrator appointed by the High Court in an International Commercial Arbitration is void ab initio and a nullity and thus unenforceable?

(c) Whether the principles of waiver or acquiescence can be made applicable or whether the objection with regard to jurisdiction to appoint an Arbitrator can be raised by a party to the proceedings for the first time in an Arbitration Appeal preferred under section 37 of the Arbitration Act?

SUBMISSIONS ON BEHALF OF SSANGYONG :

18. Mr. Ravindra Singh Chhabra, learned Senior Advocate appearing on behalf of appellant SSANGYONG submits that appellant SSANGYONG is a Korean Company incorporated under the laws of Republic of Korea, having its registered office in Korea, therefore, the dispute between a Korean Company and a registered Indian Partnership Firm falls under the definition of "International Commercial Arbitration" (ICA) in view of the provisions of section 2(1)(f) of Arbitration Act.

19. He further contends that Section 11(9) of the Arbitration Act provides that in the case of appointment of sole or third arbitrator in an International Commercial Arbitration, the Chief Justice of India or the person or institution designated by him will have the jurisdiction to appoint the arbitrator.

20. Learned Senior Counsel for SSANGYONG relied on the judgment of the Supreme Court of India in *Amway India Enterprises Private Limited Vs. Ravindranath Rao Sindhia and another (2021) 8 SCC 465* to contend in that terms of Section 2(1)(f) of Arbitration Act, whatever be the transaction between the parties, if it happens to be entered into between persons, at least one of whom is either a foreign national, or habitually resident in, any country other than India or by a body corporate, which is incorporated in any country other than India or by the government of a foreign country, the arbitration becomes an

International Commercial Arbitration notwithstanding the fact that the individual, body corporate, or government of a foreign country referred to in section 2(1)(f) carries on business in India through a business office in India.

21. Mr. Chhabra, learned senior counsel further submits that the power to appoint Sole Arbitrator was vested in the Chief Justice of the Supreme Court of India and no such power was conferred on the Chief Justice of the High Court for appointment of arbitrator in International Commercial Arbitration. Thus he submits that the appointment of the Arbitrator by this Court was without jurisdiction and the Arbitrator had no authority to conduct the arbitration proceedings or pass the arbitral award.

22. He further submits that failure on the part of SSANGYONG to raise the question of jurisdiction in proceedings initiated under section 11(6) of the Arbitration Act; during the arbitration proceedings and the application under section 34 of the Arbitration Act has no effect as the same cannot be treated as acquiescence or waiver. Even if a party chooses not to object to the composition of arbitral tribunal, it, *ipso facto,* would not confer jurisdiction on the arbitral tribunal to conduct the proceedings contrary to the mandatory provisions of the Act. He submits that it is a settled position of law that even by mere agreement, parties cannot confer jurisdiction to a Court or Forum, which otherwise does not having jurisdiction.

23. He relied on the judgment of the Delhi High Court in *Suresh Shah Vs. Tata Consultancy Services, (2024) SC Online Delhi 8552* wherein it has been held that section 2(1)(f) of the Arbitration Act, being a definition provision, is not derogable. He relies upon the provisions of UNCITRAL Model Law on International Commercial Arbitration 1985 and submits that the High Court could not have entertained the application filed under section 11(6) of the Arbitration Act by SBE for appointment of an Arbitrator in International Commercial Arbitration and thus the appointment of the Sole Arbitrator by the High Court by its order dated 17.11.2009 was *ex facia* illegal and *void ab initio* and all proceedings thereafter are vitiated. He submits that such a jurisdictional error is incurable and objection in respect of the jurisdictional error can be raised at any stage of the litigation between the parties.

24. He relies upon the judgments delivered by the Supreme Court in *Hindustan Zinc Ltd.(HZL) Vs. Ajmer Vidyut Vitran Nigam Ltd., (2019) 17 SCC 82, and Chief Engineer, Hydel Project Vs. Ravinder Nath, (2008) 2 SCC 350, and Lion Engineering Consultants vs. State of Madhya Pradesh and ors. (2018) 16 SCC 758* to contend that if an award is passed by a Tribunal having lack of jurisdiction, such a plea can be raised at any stage and even in the collateral proceedings.

25. Learned Counsel submits that the Supreme Court in those cases permitted the parties to the proceedings to raise a jurisdictional issue even in proceedings initiated under section 34 of Arbitration Act for

the first time. He further submits that the issue of lack of jurisdiction goes to the very root of the matter. If an award is passed by an arbitral tribunal having no jurisdiction, it is nullity in the eye of law. It is immaterial as to whether any objection was raised by party to the proceedings or not.

26. Mr. Chhabra, further submits that if a party fails to raise an objection of jurisdiction before the Arbitrator or during Section 34 proceedings, such an objection can be raised at any stage and the failure to raise such a plea, will not attract the provisions of Section 4 of the Arbitration Act as the provisions of Section 11 of the Arbitration Act are mandatory and non-derogable, thus, cannot be waived. Reliance is placed on the judgment of the Supreme Court in *Central Organization for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Co. (2024) SCC OnLine SC 3219,* to contend that the provisions of Section 11(6) of the Arbitration Act are not derogable and even in the absence of objection raised by the party to the proceedings, the Chief Justice of India or his designate alone can appoint an arbitrator and the designate of the Chief Justice of the High Court had no jurisdiction to appoint an arbitrator.

27. Further reliance is placed on the judgment of the High Court of Judicature at Bombay in *Soham Shah vs. Indian Film Company Ltd. and another, 2016 (3) MHLJ 476,* wherein a similar issue was raised and the order of appointment of an arbitrator by the High Court was recalled on the ground that the then designate Judge of the Chief

Justice had no jurisdiction to appoint an arbitrator in International Commercial Arbitration and merely because the objection was not raised at the time of appointment of arbitrator by a party to the proceedings, it would not amount to waiver under Section 4 of the Arbitration Act as the same is non-derogable.

28. He submits that it was the duty of the Court to ensure that it possessed the jurisdiction to entertain an application and it is immaterial whether a party to the proceedings had raised the issue of jurisdiction or not. He further submits that the appointment of the Sole Arbitrator was without jurisdiction, consequently the proceedings were *void ab initio* and thus, the award passed by learned Arbitrator is a nullity and liable to be set aside.

SUBMISSIONS ON BEHALF OF SBE :

29. Mr. Om Prakash, learned counsel appearing for SBE submits that undisputedly SSANGYONG did not raise any jurisdictional issue in the Arbitration Case No. 32/2009 filed by SBE before the High Court for appointment of an arbitrator under Section 11 of the Arbitration Act. Not only SSANGYONG participated in the arbitration proceedings without raising any jurisdictional objection and submitted its counter claim also. Even in the proceedings initiated by SBE under Section 9 of the Arbitration Act, no such plea was raised by SSANGYONG. In Section 34 application, SSANGYONG did not challenge the jurisdiction of the arbitrator and the challenge

was only limited to the jurisdiction of the Commercial Court. At this stage, for the first time under Section 37 of the Arbitration Act in an appeal, SSANGYONG cannot be permitted to raise this issue and failure to raise this issue at initial stage amounts to a waiver on behalf of SSANGYONG.

29. He relies on the provisions of Section 4 of the Arbitration Act to contend that as the objection was not raised by SSANGYONG, it is deemed that they have waived their right to object.

30. Mr. Om Prakash learned counsel for SBE further submits that as SSANGYONG is deemed to have waived its rights to object in terms of Section 4 of the Arbitration Act, therefore an objection to the composition and constitution of the Arbitral Tribunal cannot be permitted to be raised particularly when SSANGYONG failed to object before the learned Arbitrator under Section 16 of the Arbitration Act. It amounted to acceptance of the appointment of the Arbitrator by SSANGYONG unconditionally, and thus, as SSANGYONG participated in the proceedings without any objection, even if an Arbitral Tribunal was appointed irregularly, it amounts to the acceptance of the party, who submits the case to the Arbitral Tribunal.

31. He submits that Parties are having full authority to take a decision even in respect of the procedure for appointment of the arbitrator as provided under Section 11 (2) of the Arbitration Act, and

the provisions of Sections 12, 13 and 16 of the Arbitration Act are derogable in nature. Reliance is placed on the judgment of the Supreme Court in *Quippo Construction Equipment Limited vs Janardan Nirman Private Limited 2020 (18) SCC 277*.

32. He further submits that Section 2 (2) of Arbitration Act provides that where the place of arbitration is in India then Part-I of the Act shall apply to the arbitration proceedings. Section 2(7) of the Arbitration Act provides that award made under Part-I shall be considered as a domestic award and in view of the above provisions, the award passed by the learned Sole Arbitrator cannot be treated as a foreign award, even if, one of the parties to the arbitration agreement is incorporated in any country other than India. He further submits that the Sole Arbitrator was appointed in a fair, free and transparent manner by this Court and the Supreme Court in *Quippo Construction (Supra)* has held that, if a party fails to raise the objection, it has waived the right to object.

33. He submits that the Supreme Court in the case of *M.P. Rural Road Development Authority v. L.G. Chaudhary Engineers and Contractors, (2018) 10 SCC 826* has held that, after passing the award, it cannot be set aside on the ground of jurisdiction. Reliance is also placed on the judgments of the Supreme Court in *Sweta Construction v. Chhattisgarh State Power Generation Co. Ltd., (2024) 4 SCC 722; JMC Projects (India) Ltd v. Madhya Pradesh Road Development Corporation (2024) 4 SCC 729* and *AC Chokshi Share*

Broker (P) Ltd. v. Jatin Pratap Desai, (2025) SCC OnLine SC 281. He contends that the scope of Section 37 of the Arbitration Act is very limited and this Court cannot examine the material afresh.

34. Learned Counsel relies upon the judgment of the Supreme Court in *Gyatri Project Ltd. vs. M.P. Road Development Corporation Ltd., (2025) SCC Online SC 1136*, to contend that once the award has been passed and no objection as to jurisdiction of the Arbitral Tribunal has been taken at relevant stage, then the award could not have been set aside by the High Court only on the ground of lack of jurisdiction.

35. Reliance is also placed on the judgment of the Division Bench of the Delhi High Court in *Bhadra International India Pvt. Ltd. vs. Airports Authority of India, (2025) SCC Online Delhi 698,* to contend that once a party had failed to raise the objection at the relevant stage and no objection was raised under Section 16 and 34 of the Arbitration Act, it cannot be permitted to be raised later on and the appointment of arbitrator cannot be held *ab initio* illegal.

36. He submits that in the proceedings dated 21.12.2009 the learned Arbitrator recorded that parties agreed to the proceedings to be held at Jabalpur and to be conducted in English Language. He further submits that said order was passed with the consent of the parties, and therefore, parties had impliedly conferred authority to the learned Sole Arbitrator by their conduct and consent and now SSANGYONG

cannot be permitted to raise this issue at this stage. He further submits that the objection raised by SSANGYONG in respect of lack of jurisdiction is devoid of merit and is liable to be rejected.

37. Learned counsel further relied on the judgment of a single judge of the High Court of judicature at Bombay *in Zee Sports Ltd. vs Nimbus Media Pte. Ltd. 2017 SCC OnLine Bom 1009*, wherein an application for amendment of the objections under section 34 of the Arbitration Act to incorporate a similar challenge to the appointment of the arbitrator by the High Court in International Commercial Arbitration was disallowed as a new ground was sought to be introduced after the period of limitation. It is contended that said order has been upheld upto Supreme Court.

38. Learned counsel for SBE submits that in the case in hand also no objection was raised by SSANGYONG earlier therefore no permission can be granted to SSANGYONG to raise a new plea in this appeal under Section 37 of the Arbitration Act.

CONSIDERATION AND CONCLUSION :

39. It is not in dispute that one of the parties to the arbitration proceeding, Ssangyong Engineering & Construction Company Limited is a Korean Company incorporated under the laws of Republic of Korea, having its registered office at Korea and projects of it in India.

40. Section 2 (1) (f) of the Arbitration Act reads as under :-

> *"**2. Definitions.**-(1)(f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—*
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> *(i) an individual who is a national of, or habitually resident in, any country other than India; or*
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> *(ii) a body corporate which is incorporated in any country other than India; or*
>
> *(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or*
>
> *(iv) the Government of a foreign country;"*

41. Section 2 (1) (f) of the Arbitration Act defines "International Commercial Arbitration" to mean an arbitration relating to disputes arising out of legal relationships considered as commercial *inter alia* if one of the parties is a body corporate and is registered in any country other than India.

42. In the application filed under Section 11 of the Arbitration by SBE before this Court, it was mentioned that SSANGYONG is a Korean Company incorporated under the laws of republic of Korea and having its registered office in Korea and site office at Narsinghpur. Clearly, it is not a dispute that SSANGYONG is a Korean Company and as per the definition given in the Section 2(1) (f) of the Arbitration Act, the arbitration between SSANGYONG and SBE is an "International Commercial Arbitration".

43. As per SSANGYONG no arbitrator could have been appointed by the Chief Justice of the Madhya Pradesh High Court or any person designated by him in respect of the subject disputes as Section 11 (6) read with 11 (9) and 11(12) of the Arbitration Act did not empower the Chief Justice of a High Court to appoint an arbitrator in an "International Commercial Arbitration" and only the Chief Justice of India or any person designated by him could have appointed an Arbitrator.

44. Reference may be had to the judgment of the three judge bench of the Supreme Court in *Hindustan Zinc (Supra)***,** wherein the Supreme Court has held that an award passed by an Arbitration Tribunal where there is inherent lack of jurisdiction is a nullity and such plea can be taken at any stage and also in collateral proceedings.

45. The Supreme Court in *Hindustan Zinc (Supra)* has held as under:

> *"**17.** We are of the view that it is settled law that if there is an inherent lack of jurisdiction, the plea can be taken up at any stage and also in collateral proceedings. This was held by this Court in Kiran Singh v. Chaman Paswan [1] as follows: (SCR p. 121: AIR p. 342, para 6)*
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> > *"6. ... It is a fundamental principle well-established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the*

[1] Kiran Singh v. Chaman Paswan, (1955) 1 SCR 117 : AIR 1954 SC 340

> *action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was coram non judice, and that its judgment and decree would be nullities."*
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> ***18.*** *Therefore, it is a little difficult to countenance Shri Vaidyanathan's argument that having consented, the respondent cannot now turn around and challenge the very appointment of the arbitrator as being invalid and without jurisdiction.*
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> ***** ***** *****
>
> ***23.*** *This being the case, the High Court is right in stating that the arbitrator could not, in law, have been appointed by the State Commission under Section 86 of the Electricity Act. The award based on such appointment would be non est in law."*

46. The Supreme Court in *Hindustan Zinc (supra)* has held that if there is an inherent lack of jurisdiction, the plea can be taken up at any stage and also in collateral proceedings. A decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. The Supreme Court negated the argument that after having consented the party could not turn around and challenge the very appointment of the arbitrator as being invalid

and without jurisdiction. The award based on an appointment by the High Court without jurisdiction would be *non est* in law.

47. Reference may also be had to the Judgment of the five judges Bench of the Supreme Court in *Central Organization for Railway Electrification (supra)* wherein the Supreme Court has held that though parties are free to agree on the procedure to be followed by arbitral tribunal, the place of arbitration, the date of commencement of arbitral proceedings, the language to be used in arbitral proceedings, the procedure for hearing and written proceedings, consequence of default by a party, appointment of experts and the manner of decision making by the arbitral tribunal, but mandatory provisions of the Act cannot be waived by the parties.

48. The Supreme Court in *Central Organization for Railway Electrification (supra)* has held as under:

> ***"25.*** *Additionally, the parties are free to agree on the procedures to be followed by the Arbitral Tribunal,[2] the place of arbitration,[3] the date of commencement of arbitral proceedings, [4]the language to be used in the arbitral proceedings,[5] procedure for hearings and written proceedings,[6] consequence of a default by a party,[7] appointment of experts[8], and the manner of decision-making by the Arbitral Tribunal.[9] Thus, the Arbitration Act recognises and enforces mutual commercial bargains and understanding between the parties at all stages of the arbitration*

[2] Section 19, Arbitration Act.
[3] Section 20, Arbitration Act.
[4] Section 21, Arbitration Act.
[5] Section 22, Arbitration Act.
[6] Section 24, Arbitration Act.
[7] Section 25, Arbitration Act.
[8] Section 26, Arbitration Act.
[9] Section 29, Arbitration Act.

proceedings. However, the autonomy of the parties under the Arbitration Act is not without limits. It is limited by certain mandatory provisions of the Arbitration Act.

(ii) Mandatory provisions

26. *Part I of the Arbitration Act applies where the place of arbitration is in India[10]. Section 4 deals with a waiver of the right of a party to object in the following terms:*

> *"**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."*

27. *Section 4 is a deeming provision.[11] It deems that a party has waived its right to object if it proceeds with the arbitration without stating its objection to non-compliance of any provisions from which the parties may derogate or of any requirement under the arbitration agreement.[12] Importantly, Section 4 distinguishes between derogable (non-mandatory) and mandatory provisions. [13]*

28. *Section 4 is based on Article 4 of the Model Law.[14] The purpose of incorporating Section 4 is to inform the arbitrators of*

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[10] Section 2(2), Arbitration Act.

[11] Shree Subhlaxmi Fabrics (P) Ltd. v. Chand Mal Baradia, (2005) 10 SCC 704 : (2005) 124 Comp Cas 811, para 9

[12] BSNL v. Motorola India (P) Ltd., (2009) 2 SCC 337, p. 349, para 39 : (2009) 1 SCC (Civ) 524"39. Pursuant to Section 4 of the Arbitration and Conciliation Arbitration Act, a party which knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object."

[13] A/CN.9/246 (44)

[14] Article 4, Model Law. It reads:

the principle of waiver.[15] Peter Binder suggests that Article 4 aims to prohibit the adoption of delay tactics by parties and contribute to the fluency of the proceedings[16]. A party to arbitration has a right to object to any non-compliance with procedural requirements. Section 4 implies a waiver of this right under certain conditions based on the principle of waiver or estoppel.[17] The procedural default at issue must be stipulated either in the arbitration agreement or a non-mandatory provision under Part I of the Arbitration Act. If the arbitration agreement is silent on a procedural point, the provisions of the Arbitration Act take effect. According to Section 4, a party cannot insist on compliance with non-mandatory provisions of the Arbitration Act if it fails to make a timely objection.[18] Section 4 of the Arbitration Act necessarily implies that the parties cannot proceed with arbitration in derogation of a mandatory provision.

29. *The initial draft of Article 4 of the Model Law did not make an exception for mandatory provisions. Therefore, suggestions were made to "soften" the provision by limiting "the waiver rule to non-compliance with non-mandatory provisions".[19] Further, a proposal was also made to include a list of mandatory provisions under the Model Law. It was suggested that such a list "would make it unnecessary to include in the non-mandatory provisions such wording as "unless otherwise agreed by the parties".[20] The Secretariat considered it unnecessary to include a list of mandatory provisions given the overall scheme of the Model Law.*

"4. Waiver of right to object.—A party who knows that any provision of this Law from which the parties may derogate or 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 therefor, within such period of time, shall be deemed to have waived his right to object."

[15] Howard Holtzmann and Joseph Neuhaus, A Guide to the Uncitral Model Law on International Commercial Arbitration, p. 196.

[16] Peter Binder, International Commercial Arbitration and Conciliation in Uncitral Model Law Jurisdiction, (2nd Edn., 2005) p. 49.

[17] A/CN.9/264 (17)

[18] Howard Holtzmann and Joseph Neuhaus, A Guide to the Uncitral Model Law on International Commercial Arbitration, (Kluwer Law) p. 197.

[19] A/CN.9/245 [178]

[20] Composite draft text of a Model Law on international commercial arbitration: some comments and suggestions for consideration, A/CN.9/WG.II/WP.50.

[21]It was also of the opinion that mandatory provisions could be discerned from the content of such provisions.

30. *Holtzmann and Neuhaus give the following examples of mandatory provisions under the Model Law:*

> *"Examples of provisions that appear to be mandatory and therefore cannot be waived under Article 4 are the following : the requirement that the arbitration agreement be in writing [Article 7(2)]; the requirement that the parties be treated with equality and that each party be given a full opportunity of presenting his case (Article 18); the requirement that a party be given notice of any hearing and be sent any materials supplied to the Arbitral Tribunal by the other party [Articles 24(2), (3)]; the requirement that an award-including an award on agreement terms-be in writing, that it state its date and place, and that it be delivered to the parties [Articles 30(2), 31(1), (3), (4)]."[22]*

31*. The above extract suggests that an arbitration agreement entered into by the parties is subject to certain well-defined and mandatory legal principles. For instance, Section 34(2)(a)(v) allows for refusal of enforcement of arbitral awards if the composition of the Arbitral Tribunal or arbitral procedure was not following the agreement of the parties unless such agreement conflicts with the mandatory provisions of the law [23] . The*

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[21] Composite draft text of a Model Law on international commercial arbitration: some comments and suggestions for consideration: note by the Secretariat (A/CN.9/WG.II/WP.50) [The Secretariat gave the following reasons for not providing a list of mandatory provisions in the Model Law itself: "Firstly, a considerable number of provisions are obviously by their content of a mandatory nature. Secondly, there are a number of provisions granting freedom to the parties, accompanied by suppletive rules failing agreement by the parties; here the question of mandatory nature seems to be a philosophical one and equally redundant. Thirdly, with respect to some draft articles only a part of the provisions (e.g. a time-limit) is non-mandatory. Fourthly, in respect of some of the provisions already decided to be non-mandatory, the Working Group was of the view that this should, for the sake of emphasis, be expressed in the individual provision, despite the general listing in Article 3. Fifthly, it is suggested that, in addition to the provisions already decided to be non-mandatory and drafted accordingly, […] there are only few further provisions which may be regarded as non-mandatory and, if so, could be easily marked as such by adding the words "unless otherwise agreed by the parties;"]

[22] Howard Holtzmann and Joseph Neuhaus, A Guide to the Uncitral Model Law on International Commercial Arbitration, p. 198.

[23] Section 34(2)(a)(v), Arbitration Act. It reads: "34. (2)(a)(v) the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties,

composition of the Arbitral Tribunal or the arbitral procedure must not only be in accordance with the agreement of the parties but also be consistent with the mandatory standards laid down under the Arbitration Act.[24] *In case of a conflict, mandatory provisions of the Arbitration Act prevail over the arbitration agreement between the parties.*[25]

32. *Under the Arbitration Act, the mandatory provisions must be deduced from their content. For instance, the use of the phrase "unless otherwise agreed by the parties" is an indicator of the fact that the provision is derogable because it gives priority to the agreement of the parties. In contrast, the use of the word "shall" in a provision is an indicator that the legislature intended to give it a mandatory effect. However, the use of "shall" is not the sole indicator to determine the mandatory nature of a provision. The provision must be interpreted by having regard to its text and the context to determine its nature.*[26]

33. *As opposed to the Indian approach, the UK Arbitration Act lists the mandatory provisions under Schedule I.*[27] *In this context, Section 4 provides that the mandatory provisions have effect notwithstanding any agreement to the contrary.*[28] *It further*

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unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or failing, such agreement, was not in accordance with this Part;"

[24] Report of the United Nations Commission on International Trade Law on the work of its Eighteenth Session (3-6-1985 to 21-6-1985) Supplement No. 17 (A/40/17) [290]. The Report states: "290. As regards the standards set forth in the sub-paragraph, it was understood that priority was accorded to the agreement of the parties. However, where the agreement was in conflict with a mandatory provision of "this Law" or where the parties had not made an agreement on the procedural point at issue, the provisions of "this Law", whether mandatory or not, provided the standards against which the composition of the Arbitral Tribunal and the arbitral procedure were to be measured."

[25] A/CN.9/246, para 135.

[26] State of U.P. v. Babu Ram Upadhya, 1960 SCC OnLine SC 5, para 29 : AIR 1961 SC 751 : (1961) 2 SCR 679, para 29; Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur, 1964 SCC OnLine SC 119, para 8

[27] Schedule I, UK Arbitration Arbitration Act. [Section 33 which imposes a legal duty on the tribunal to act fairly and impartially is one of the mandatory provisions under the UK legislation.]

[28] Section 4, UK Arbitration Act. It reads:

"4. Mandatory and non-mandatory provision.—(1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.(2) The other provisions of this Part (the "non-mandatory provisions") allow the parties to make their own arrangements by agreement by provide rules which apply in the absence of such agreement.(3) The parties may make such arrangements by agreeing to the implication of institutional rules or providing any other means by which a matter may be decided.(4) It is

provides that the non-mandatory provisions allow the parties to make their arrangements by agreement. Lord Mustill and Stewart Boyd term Section 4 as one of the "four pillars" of the UK Arbitration Act.[29] *They observe that the provision is one of the instances indicating the influence of the State on the internal law of arbitration.*[30]

(iii) Appointment of arbitrator

34. *Section 10 provides that "parties are free to determine the number of arbitrators, provided that such number shall not be an even number".* [31] *If parties fail to determine the number of arbitrators, the Arbitral Tribunal shall consist of a sole arbitrator. Section 11 pertains to the appointment of arbitrators. Section 11(2) provides that subject to Section 11(6), the parties "are free to agree on a procedure for appointing the arbitrator or arbitrators". Section 11 provides recourse to the following contingencies if the parties fail to adhere to the agreed procedure for the appointment of an arbitrator or arbitrators:*

> *"**11. (3)** Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.*
>
> ***(4)** If the appointment procedure in sub-section (3) applies and—*

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immaterial whether or not the law applicable to the parties' agreement is the law of England and Wales or, as the case may be, Northern Ireland.(5) The choice of law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter. For this purpose an applicable law determined in accordance with the parties' agreement, or which is objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties."

[29] Lord Mustill and Stewart Boyd, Commercial Arbitration (2nd Edn., Butterworths, 2001) p. 23.

[30] Id, p. 57.

[31] Section 10, Arbitration Act. It reads:

"10. Number of arbitrators.—(1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.(2) Failing the determination referred to in sub-section (1), the Arbitral Tribunal shall consist of sole arbitrator."

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, on an application of a party, by the Supreme Court or, as the case may be, by the High Court or any person or institution designated by such Court.

(5) *Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.*

(6) *Where, under an appointment procedure agreed upon by the parties—*

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

35. *In terms of the legislative scheme in Section 11, parties are free to agree on a procedure for appointing the arbitrator or*

> *arbitrators. The procedure for appointment agreed by the parties is subject to the power of the Supreme Court or the High Courts under Section 11(6) to appoint an arbitrator in cases where the parties do not agree on a procedure or if the parties or the arbitrator fail to act following the agreed procedure. Thus, Section 11(6) allows judicial involvement as a default mechanism and not as an independent basis for choosing the arbitrators irrespective of the parties' agreement. Further, the parties can invoke Sections 11(3), 11(4) or 11(5), as the case may be, only upon the failure of the agreed procedure for appointment of arbitrators."*

49. In *Central Organization for Railway Electrification (supra)* the Supreme Court has held that parties are free to agree on the procedures to be followed by the Arbitral Tribunal, the place of arbitration, the date of commencement of arbitral proceedings, the language to be used in the arbitral proceedings, procedure for hearings and written proceedings, consequence of a default by a party, appointment of experts, and the manner of decision-making by the Arbitral Tribunal. The Arbitration Act recognises and enforces mutual commercial bargains and understanding between the parties at all stages of the arbitration proceedings. However, the autonomy of the parties under the Arbitration Act is not without limits. It is limited by certain mandatory provisions of the Arbitration Act.

50. With regard to Section 4 of the Arbitration Act, i.e. waiver to object, the Supreme Court in *Central Organization for Railway Electrification (supra)* has held that Section 4 is a deeming provision. It deems that a party has waived its right to object if it proceeds with the arbitration without stating its objection to non-compliance of any provisions from which the parties may derogate or of any requirement

under the arbitration agreement. Pursuant to Section 4 of the Arbitration and Conciliation Arbitration Act, a party which knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object. It has further been held that Section 4 distinguishes between derogable (non-mandatory) and mandatory provisions.

51. The Supreme Court in *Central Organization for Railway Electrification (supra)* noticed that Section 4 of the Arbitration Act is based on Article 4 of the UNCITRAL Model Law on International Commercial Arbitration. The Supreme Court held that a party to arbitration has a right to object to any non-compliance with procedural requirements. Section 4 implies a waiver of this right under certain conditions based on the principle of waiver or estoppel. The procedural default at issue must be stipulated either in the arbitration agreement or a non-mandatory provision under Part I of the Arbitration Act. If the arbitration agreement is silent on a procedural point, the provisions of the Arbitration Act take effect. According to Section 4, a party cannot insist on compliance with non-mandatory provisions of the Arbitration Act if it fails to make a timely objection. Section 4 of the Arbitration Act necessarily implies that the parties cannot proceed with arbitration in derogation of a mandatory provision.

52. If one were to examine the language of Section 4 of the Arbitration Act, it talks of party knowing (a) that any provision of Part 1 from which parties may derogate or (b) any requirement of under the arbitration agreement has not been complied with and proceeds with the arbitration without objecting then it is deemed to have waived its right to object. The two situations are: provisions of part 1 of the Arbitration Act that are non mandatory from which parties may derogate and noncompliance of any clause which parties have agreed to in the agreement.

53. The key expression used in the first clause is ‘may derogate’. The expression ‘may derogate’ when used in conjunction with the expression ‘any provision of this part’ implies those provisions in respect of which parties have the autonomy to negotiate and agree upon. Such provisions must not be mandatory and are such in respect of which parties have the autonomy to agree to the contrary for example: the procedures to be followed by the Arbitral Tribunal, the place of arbitration, the date of commencement of arbitral proceedings, the language to be used in the arbitral proceedings, procedure for hearings and written proceedings, consequence of a default by a party, appointment of experts, and the manner of decision-making by the Arbitral Tribunal. However, clauses of the Arbitration Act that are mandatory and in respect of which parties do not have autonomy to negotiate or agree upon cannot be considered to be covered in the clause ‘may derogate’.

54. The Supreme Court in *Central Organization for Railway Electrification (supra)* has held that an arbitration agreement entered into by the parties is subject to certain well-defined and mandatory legal principles. Some of the instances given by the Supreme Court for refusal of enforcement of arbitral awards is if the composition of the Arbitral Tribunal or arbitral procedure was not following the agreement of the parties unless such agreement conflicts with the mandatory provisions of the law; 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 a provision of this Part from which the parties cannot derogate; the composition of the Arbitral Tribunal or the arbitral procedure must not only be in accordance with the agreement of the parties but also be consistent with the mandatory standards laid down under the Arbitration Act. In case of a conflict, mandatory provisions of the Arbitration Act prevail over the arbitration agreement between the parties.

55. The Supreme Court in *Central Organization for Railway Electrification (supra)* has further held that under the Arbitration Act, the mandatory provisions must be deduced from their content. For instance, the use of the phrase "unless otherwise agreed by the parties" is an indicator of the fact that the provision is derogable because it gives priority to the agreement of the parties. In contrast,

the use of the word "shall" in a provision is an indicator that the legislature intended to give it a mandatory effect.

56. Reliance placed by learned counsel appearing for SBE on the judgments of the Supreme Court in *Quippo Construction Equipment Limited (supra), L.G. Chaudhary Engineers and Contractors, (supra), Sweta Construction (supra), JMC Projects (India) Ltd (supra), AC Chokshi Share Broker (P) Ltd. (supra)* and *Gyatri Project Ltd.(supra)* is misplaced as none of the cases pertain to International Commercial Arbitration and the disputes pertain to domestic arbitration.

57. Further reliance placed by learned Counsel for SBE on the judgment of the Delhi High Court in *Bhadra International India Pvt Ltd (supra)* to contend that once a party had failed to raise the objection at the relevant stage and no objection was raised under Section 16 and 34 of the Arbitration Act, it cannot be permitted to be raised later on and the appointment of arbitrator cannot be held *ab initio* illegal is misplaced. Firstly because that case also was of domestic arbitration and secondly and more importantly said judgment has already been set aside by the Supreme Court in *Bhadra International India Pvt. Ltd. vs. Airports Authority of India 2026 SCC onLine SC 7.*

58. We may note that the judgment of the Supreme Court overruling the view of the Delhi High Court was passed after the case was reserved for judgment. Normally a judgment that has been passed

by a court after the case is reserved for judgment is not to be referred without giving an opportunity to a party against whom that judgment is applied. However in the present case, as the Supreme Court has reiterated the principles laid down in *Hindustan Zinc Ltd (supra),* which has also been referred to by us hereinabove, we are of the view that no purpose would be served in listing the case for a rehearing on this aspect.

59. In light of the above, we may now examine the provisions of Section 11 of the Arbitration Act. Since in the present case, the appointment of arbitrator by the High Court happened prior to the amendment of Section 11 of the Arbitration Act, we are referring to the unamended provisions, which prior to its amendment read as under:

> ***"11. Appointment of arbitrators****.—(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.*
>
> *(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.*
>
> *(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.*
>
> *(4) If the appointment procedure in sub-section (3) applies and—*
>
> *(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or*

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to—

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or

the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the "Chief Justice of India".

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of Section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court."

60. In terms of Section 11 of the Arbitration Act (as it stood prior to its amendment) *inter alia* parties are free to agree on a procedure for appointment of arbitrator. Failing any such agreement in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator. If a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party or if the two appointed arbitrators fail to agree on the third

arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

61. Section 11(5) provides that if there is no agreement for appointment of arbitrator, in an arbitration with a sole arbitrator, if parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party the appointment shall be made, by the Chief Justice or any person or institution designated by him. Section 11(6) *inter alia* stipulates that if there is an procedure agreed upon by the parties and if a party fails to act as required under that procedure or the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure a party may request the Chief Justice or any person or institution designated by him to take the necessary measure.

62. Section 11(9) stipulates that in the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities. Section 11(12) stipulates that in an "International Commercial Arbitration", the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the "Chief Justice of India" and in any other arbitration, the reference to "Chief Justice" in those sub-sections

shall be construed as a reference to the Chief Justice of the High Court.

63. Thus the intention of the legislature is clear, in International Commercial Arbitrations, in case appointment of the arbitrator or the umpire is to be made by an intervention of the Court then it is only the Chief Justice of India or any person or institution designated by him who alone has the power to appoint the arbitrator. The Supreme Court in *Amway India Enterprises Private Limited Vs. Ravindranath Rao Sindhia and another (supra)* has held that whatever be the transaction between the parties, if the is an International Commercial Arbitration the High Court has no jurisdiction to appoint an arbitrator.

64. The Bombay High Court in *Soham Shah (Supra)* considered the appointment of an arbitrator by the designate of the Chief Justice the of Bombay High Court by consent of parties in a matter falling under the definition of International Commercial Arbitration and held as under :

> *"**7.** A perusal of the application filed under section 11 by the original applicant clearly indicates that the original applicant No. 1 was a company incorporated in Cyprus i.e. in a country other than India. A perusal of the statement of claim filed by the applicant before the learned arbitrator also indicates that even today it is the claim of the applicant No. 1 that the applicant No. 1 company was incorporated in Cyprus i.e. country other than India. It is not in dispute that the review petitioner however did not raise any objection before the learned designate while opposing the Arbitration Application No. 166 of 2013.*
>
> ***8.** Under section 11(9) of the Arbitration and Conciliation Arbitration Act, <u>if any application for appointment of a sole or third arbitrator is required to be made in any international commercial arbitration, the Chief Justice of India or the person or</u>*

> *institution designated by him only is empowered to appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities. The power of the Chief Justice of High Court under section 11(6) of the Arbitration and Conciliation Arbitration Act can be exercised only in case of a domestic arbitration. Admittedly, one of the parties to the arbitration agreement was a body incorporated in the country other than India. The arbitration relating to disputes between such two parties would fall within the definition of the international commercial arbitration defined under section 2(1)(f) of the Arbitration and Conciliation Arbitration Act. In my view the learned designate of the Hon'ble Chief Justice of this Court thus has no jurisdiction to appoint an arbitrator in the facts of this case.*
>
> ***9.*** *In my view even if the party did not bring these facts to the notice of the learned designate of the Hon'ble Chief Justice when application under section 11 of the Arbitration Act was heard, even by consent of parties, the learned designate of the Chief Justice of this Court could not have appointed an arbitrator in case of international commercial arbitration. The question of waiver will thus not apply to the facts of this case in view of there being inherent lack of jurisdiction."*
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> *(underlining supplied)*

65. In the present case, it was clearly mentioned in the application filed under section 11(6) of the Arbitration Act that one of the parties to the agreement was incorporated under the laws of republic of Korea. Despite the failure on the part of SSANGYONG to raise a competence issue the designated person of the Chief Justice of this Court was under an obligation to examine the same before appointing a sole arbitrator. Though parties may appoint any arbitrator out of court by consent or agreement, but where one of the parties has sought an intervention of the Court, it was obligatory on the part of the Court to examine the matter *suo motu* as to whether the request could be considered by the Court or not and whether it had the competence and

jurisdiction to appoint an arbitrator. Section 11(6) of the Arbitration Act does not empower the person designated by the Chief Justice of High Court to appoint an arbitrator in International Commercial Arbitration but only empowers the Chief Justice of the Supreme Court of India. The provisions are mandatory in nature and cannot be waived.

66. It is a settled position of law that if the Court or forum is *corum non judice*, parties cannot confer jurisdiction on the said court or forum even by consent or acquiescence. In the case in hand, the main objection of the respondent SBE is that SSANGYONG did not raise the objection in the proceedings of Section 11(6) of the Arbitration Act, and it is deemed to have been waived and thus the appointment of the arbitrator was valid.

67. We are unable to accept said arguments advanced by learned counsel for SBE as no provision of the Arbitration Act confers jurisdiction upon the Chief Justice of a High Court to appoint an arbitrator in International Commercial Arbitration. Therefore the appointment order dated 17.11.2009 itself was without jurisdiction and was *non est*. Consequently, the arbitrator had no authority to conduct the arbitration proceedings as he was appointed by an incompetent authority and was *corum non judice* and thus the award passed by him is a nullity.

68. A conjoint reading of Sections 2(1)(f), 4 and 11 of the Arbitration Act, shows that the jurisdiction to appoint the sole or third arbitrator in an International Commercial Arbitration lies only with the Chief Justice of India or the person or institution designated by him and it is a mandatory provision and is not derogable. A party can derogate from something, which is within the discretionary power of said party. One cannot derogate from a provision which is mandatory and binding in law on the party. Section 11 contemplates a forum, i.e. the Chief Justice of India alone to be approached, in case of "International Commercial Arbitration". It does not give any discretion to the parties to either approach the Chief Justice of India or the Chief Justice of a High Court. Derogation was permissible if there was any discretion with a party and not where there is no option and the forum is mandatorily prescribed by the statute.

69. Thus neither by consent nor by acquiescence jurisdiction can be conferred on the Chief Justice of a High Court or a person or institution designated by him to appoint a sole or third arbitrator in the "International Commercial Arbitration". Lack of jurisdiction hits at the very root of the case and cannot be waived even by consent or merely because of participation in the arbitral proceedings without any demur. Failure of a party to raise any objection of jurisdiction in the proceedings under Section 11; before the Arbitrator during arbitration proceedings or under Section 34 of the Arbitration Act would not validate an otherwise *non est* proceedings. Objection to

such a *non est* proceedings can be raised at any stage and failure of not raising such objection will not amount to waiver in terms of Section 4 of the Arbitration Act as the provisions of Section 11 are non-derogable and mandatory and cannot be waived.

70. The appointment of the sole Arbitrator by the designate of the Chief Justice of the High Court cannot be treated valid as said designated person was not competent to appoint the Arbitrator in "International Commercial Arbitration". If proceedings are initiated before an authority, which has not been appointed in accordance with law, such proceedings are *void ab initio* and any order or award passed by such authority is a nullity.

71. The entire proceedings suffer from a patent illegality. If the very seed of the arbitration proceedings is tainted then the tree would be tainted. If the very appointment of the Arbitral Tribunal was without jurisdiction then the entire proceedings and the result of the proceedings would be without any jurisdiction, *non est* and *void ab inito.*

72. The questions that arose for consideration are thus answered as under:

(a) It is held that the High Court of Madhya Pradesh had no jurisdiction to appoint the Arbitrator as the subject dispute is an International Commercial Arbitration

because one of the parties is a company registered outside India. The arbitrator was *coram non judice*.

(b) The award passed by the Sole Arbitrator appointed by the High Court in the subject International Commercial Arbitration is *non est* and *void ab initio* and a nullity and thus unenforceable.

(c) The principles of waiver or acquiescence cannot be made applicable in respect of the mandatory provisions of the Arbitration Act and the objection with regard to jurisdiction to appoint an Arbitrator can be raised by a party to the proceedings at any time even in an Arbitration Appeal preferred under section 37 of the Arbitration Act.

73. In view of the above, Arbitration Appeal 14 of 2023 filed by SSANGYONG is allowed and the Arbitration Appeal 25 of 2023 filed by SBE is dismissed. Consequently, the Arbitral Award passed by the Sole Arbitrator is set aside. No order as to costs.

(SANJEEV SACHDEVA)
CHIEF JUSTICE

(VINAY SARAF)
JUDGE

TG/Irfan/P