$~1 to 19 (Original Side)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 01.04.2026

Judgment pronounced on: 01.09.2026

\+ O.M.P. (COMM) 356/2016 & I.A. 9148/2016

HANSON AGRO LIMITED .....Petitioner

versus

GAIL (INDIA) LIMITED .....Respondent 2

\+ O.M.P. (COMM) 404/2016

M/S. ORDYN TECHNOLOGIES PVT. LTD. & ORS.

.....Petitioners

versus

TECHNOLOGY DEVELOPMENT BOARD & ORS.

.....Respondents 3

\+ O.M.P. (COMM) 405/2016

SREERAJ S & ORS.

.....Petitioner

versus

TECHNOLOGY DEVELOPMENT BOARD, & ORS.

.....Respondent 4

\+ O.M.P. (COMM) 127/2017

M/S VIPIN GUPTA & ASSOCIATES

.....Petitioner

versus

THE DELHI STATE INDUSTRIAL & INFRASTRUCTURE DEVELOPMENT CORPORATION LTD

.....Respondent 5

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+ O.M.P. (COMM) 128/2017

DSIIDC

.....Petitioner

versus

M/S VIPIN GUPTA & ASSOCIATES

.....Respondent

6

+ O.M.P. (COMM) 262/2017 & I.A. 7921/2017

NAVAYUGA ENGINEERING COMPANY LIMITED

.....Petitioner

versus

NTPC LIMITED

.....Respondent

7

+ O.M.P. (COMM) 44/2018 & I.A. 1454/2018

NATIONAL THERMAL POWER CORPORATION LTD. (NTPC)

.....Petitioner

versus

NAVAYUGA ENGINEERING COMPANY LTD. (NECL)

.....Respondent

8

+ O.M.P. (COMM) 329/2017

SUGAM CONSTRUCTION PVT.LTD.

.....Petitioner

versus

UNION OF INDIA

.....Respondent

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+ O.M.P. (COMM) 355/2017 , I.A. 13836/2019 & I.A. 5771/2022

V.A. AZEEZ PROPRIETOR OF SELMEC ENGINEERING CONSTRUCTION

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.....Petitioner

versus

DSC LIMITED THRUOGH ITS MANAGING DIRECTOR

.....Respondent

10

+ O.M.P. (COMM) 384/2017 & I.A. 2053/2020

ADWEL ADVERTISING SERVICE & ANR.

.....Petitioner

versus

SOUTH DELHI MUNICIPAL CORPORATION

.....Respondent

11

+ O.M.P. (COMM) 168/2020 & I.A. 12126/2014

SURENDER PAL SINGH

.....Petitioner

versus

HINDUSTAN PETROLEUM CORPORATION LTD

.....Respondent

12

+ O.M.P. (COMM) 198/2020

CELEBI DELHI CARGO TERMINAL MANAGEMENT INDIA PVT LTD

.....Petitioner

versus

AMIT DHUPAR

.....Respondent

13

+ O.M.P. (COMM) 205/2020

M/S ISHVAKOO INDIA PVT LTD

.....Petitioner

versus

AIRPORT AUTHORITY OF INDIA & ANR

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.....Respondent

14

+ O.M.P. (COMM) 236/2020

MASTER ABHISHEK MEHRA & ORS

.....Petitioner

versus

M/S DLF COMMERCIAL DEVELOPERS LTD & ORS

.....Respondent

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+ O.M.P. (COMM) 362/2020

M/S BHARGAVA & ASSOCIATES PVT LTD

.....Petitioner

versus

RITES LTD

.....Respondent

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+ O.M.P. (COMM) 385/2021, I.A. 17489/2021, I.A. 17490/2021 & I.A. 17491/2021, I.A. 131/2022

HINDUSTANT PREFAB LTD

.....Petitioner

versus

M/S NCC LIMITED

.....Respondent

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+ O.M.P. (COMM) 329/2022 & I.A. 12447/2022

BHARAT UDYOG

.....Petitioner

versus

INTEC CAPITAL LIMITED & ORS.

.....Respondent

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+ O.M.P. (COMM) 101/2024 & I.A. 4106/2024

DISHA IMPEX PVT LTD

.....Petitioner

versus

NATIONAL AGRICULTURAL CO OP MARKETING FEDERATION OF INDIA LIMITED

.....Respondent

19

+ OMP (ENF.) (COMM.) 200/2024 & EX.APPL.(OS) 1401/2024

NATIONAL AGRICULTURAL COOPERATIVE MARKETING FEDERATION OF INDIA NAFED

.....Decree Holder

versus

DISHA IMPEX PVT. LTD

.....Judgement Debtor

MEMO OF APPEARANCE:

FOR PETITIONER(S):

Mr Jay Savla, Sr. Adv. with Mr. Jasdeep Singh Dhillon, Mr. Anirudh Jamwal, Mr. Aditya Bajaj & Ms. Kenisha Savla, Advs. in Item 13.

Mr. Pallav Saxena, Mr. Nipun Sharma, Mr. Akshat, Ms. Supreeti Chauhan & Mr. Rudra Chauhan, Advs. in Item 10.

Ms. Manisha Singh, Adv. in Item 11.

Mr. Aaditya Vijaykumar, Mr. Naman Garg, Adv. in Item 19.

Mr. Gautam Khazanchi, Mr. Rohan kothari, Ms Aditi kukreja, Ms. Shwetha, Advs. in Item 2.

Ms. Niti Sudhakar, Mr. Aayushmaan Vatsyayana, Ms. Aditi Warrier, Mr. Gourav, Mr. Vansh Pandey, Advs. in Item 12.

Mr. Kartik Yadav, Mr. Sidhant Kaushik & Mr. Sankalp Singh, Advs. in

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Item 18.

FOR RESPONDENT(S):

Mr. Vivek Kohli, Sr. Adv. with Mr. Anish Chawla, Ms. Suhasini Singh, Advs. in Item 1

Dr. Amit George, Mr. S.K. Chandwani, Mr. Sameer Chandwani, Mr. Dushyant Kishan Kaul, Ms. Rupam Jha, Mr. Adhishwar Suri, Ms. Medhavi Bhatia, Mr. Bhrigu Pamidighantam, Mr. Vaibhav Gandhi, Mr. Kartikay Puneesh, Mr. Shivam Parashar, Advs. in Item 16.

Ms. Geeta Malhotra and Ms. Swati, Advs. in Item 2 & 3.

Mr. Sandeep Kumar Mahapatra, CGSC, Ms. Mrinmayee Sahu, Mr. Tribhuvan, and Ms. Anushka Sarraf, Advs. in Item 8.

Ms. Kanika Agnihotri, Ms. Vagmi Singh, Mr. Vidit Pratap Singh & Ms. Shivani Patil, Advs. for NTPC in Item 6, 7 and 14.

Mr P S Singh, CGSC, Ms. Annu Singh, Ms. Shivangi Sharma, Mr. Rajneesh K. Sharma, Advs. in Item 2 and 3.

Mr. Sarul Jain, Adv. for R-1 in Item 3 & 4.

Mr. Aaditya Vijaykumar, Mr. Naman Garg, Adv. in Item 18.

Mr. Sanjay Poddar, Sr. Adv. with Ms. Beenashaw N. Soni, Standing Counsel, MCD with Mr. Govind, Mr. Apurv, Ms. Mansi Jain, Ms. Ann Joseph and Ms. Katyani Malhotra, Advs. in Item 10 for MCD.

Mr. Sonal kumar Singh, Mr. Ratik sharma, Ms. Muskan Agarwal, Ms. Dimple Kathuria, Mr. Gagan Kochar, Ms. Pragya Bansal, Advs. in Item 13.

Mr. Rajat Aneja, Mr. Saubhagya Chauriha, Mr. Karandeep Singh, Advs. in Item 12.

Mr. Kartik Yadav, Mr. Sidhant Kaushik & Mr. Sankalp Singh, Advs. in Item 19.

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CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

For convenience, this judgment is divided into the following parts:-

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INTRODUCTION

1. These are a batch of nineteen petitions filed under Section 34 or 36 of the Arbitration and Conciliation Act, 1996, (***"1996 Act"***) challenging the respective Arbitral Awards on various grounds. Although the factual matrix in each petition is distinct, common legal issues arise concerning the validity of the constitution of the Arbitral Tribunal, particularly where the Arbitrator was appointed unilaterally by one of the contracting parties.

2. During the course of hearing, learned counsels for the parties submitted that, for the purposes of adjudication, the petitions may conveniently be classified into distinct categories depending upon the stage at which the Arbitral proceedings, the Arbitral Award and the court proceedings occurred vis-à-vis the coming into force of the Arbitration and Conciliation (Amendment) Act, 2015 (***"2015 Amendment Act"***) on 23.10.2015. Accordingly, the petitions have been grouped as under:

Category A: Cases where both the commencement of Arbitral proceedings and the Arbitral Award preceded 23.10.2015, whereas the proceedings under Section 34 were instituted after the 2015 Amendment Act came into force.

Category B: Cases where the Arbitral proceedings commenced prior to 23.10.2015, but the Arbitral Award and the proceedings under Section 34 of the Act were instituted after the commencement of the 2015 Amendment Act.

Category C: Cases where the Arbitral proceedings and the

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challenge thereto arose prior to the 2015 Amendment Act, but the arbitration agreement expressly stipulated that any statutory modification or re-enactment of the arbitration law would govern the Arbitral proceedings, thereby raising the issue whether the provisions introduced by the 2015 Amendment Act would nevertheless become applicable by virtue of such contractual stipulation.

3. Since the principal questions of law arising in these petitions substantially overlap, the submissions advanced on behalf of the parties have been dealt category wise.

4. Further, the matter *M/s Adwel Advertising Service & Anr. v. South Delhi Municipal Corporation,* OMP (COMM) 384/2017, has been excluded at the request of learned counsel for respondent/SDMC communicated *vide* email dated 04.04.2026 as the present matter does not fall under any category and shall be mentioned separately before the Roster Bench.

SUBMISSIONS ON BEHALF OF THE PETITIONERS

5. At the outset, learned senior counsels and counsels appearing for the petitioners submit that the issue of unilateral appointment of Arbitrators now stands authoritatively settled by the Constitution Bench of the Hon'ble Supreme Court in *Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV), (2025) 4 SCC 641 (**"CORE"**).* It has been contended that the Constitution Bench held that the principle of equal treatment embodied in Section 18 of

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the 1996 Act extends to every stage of the Arbitral process, including the constitution of the Arbitral Tribunal. Consequently, a contractual clause conferring upon one party the exclusive power to appoint the sole Arbitrator is fundamentally inconsistent with the requirement of impartial adjudication and violates the rule against bias.

6. In this view, it was submitted that in *CORE (supra)* the Hon'ble Supreme Court has reaffirmed the principles laid down in *TRF Ltd. v. Energo Engineering Projects Ltd., (2017) 8 SCC 377,* and *Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2020) 20 SCC 760*, holding that unilateral appointment of an Arbitrator by a contracting party creates justifiable doubts regarding the independence and impartiality of the Tribunal and is therefore impermissible in law.

7. According to the petitioners, the only aspect to which the Constitution Bench accorded prospective operation was its ruling concerning the appointment procedure for three-member Arbitral Tribunals. No such prospective limitation has been placed upon the law governing unilateral appointment of sole Arbitrators.

8. Learned counsels further submitted that the controversy in the present batch is not whether unilateral appointment is impermissible after the 2015 Amendment, as that issue is no longer *res integra*. The main question is whether the principles governing unilateral appointment would equally apply to arbitrations which commenced before 23.10.2015 but culminated in Awards/Court proceedings after the 2015 Amendment Act came into force.

Categories A and B

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9. In respect of Categories A and B, learned counsels submit that the issue is squarely covered by the decision of the Hon'ble Supreme Court in *BCCI v. Kochi Cricket Pvt. Ltd., (2018) 6 SCC 287* ***("BCCI")*** wherein the Court interpreted Section 26 of the 2015 Amendment Act and held that a distinction must be maintained between Arbitral proceedings and Court proceedings arising therefrom.

10. It was contended by learned counsels for the petitioners that while Arbitral proceedings commenced before 23.10.2015 continue to be governed by the unamended provisions unless otherwise agreed, court proceedings instituted after the 2015 Amendment Act came into force are governed by the amended provisions of the Act. Consequently, every petition under Section 34 instituted after 23.10.2015 is liable to be examined from the lens of the amended statutory framework irrespective of the date on which arbitration commenced.

11. Learned counsels also submit that once the amended provisions become applicable to proceedings under Section 34, the Court is required to examine the validity of the constitution of the Arbitral Tribunal in the light of Sections 12, 18 and 34 of the 2015 Amendment Act. It was argued that a unilaterally appointed Arbitrator suffers from statutory ineligibility, thereby rendering the composition of the Tribunal contrary to Section 34(2)(a)(v). It was further contended that such an Award also conflicts with the most basic notions of justice and morality within the meaning of Explanation 1(iii) to Section 34(2)(b)(ii), having been rendered by a Tribunal constituted in violation of the principles of natural justice.

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12. In order to buttress their submissions, reliance was placed upon *Ellora Paper Mills Ltd. v. State of Madhya Pradesh, (2022) 3 SCC 1* to contend that even Arbitral Tribunals constituted before the Amendment Act were held liable to be reconstituted upon the coming into force of the amended provisions. Hence, indicating that the requirement of independence and impartiality is not merely procedural in nature but affects the jurisdiction of the Tribunal.

13. Learned counsels further relied upon several decisions of this Court, including *Supreme Infrastructure India Ltd. v. Freyssinet Memard India Pvt. Ltd., 2025 SCC Online Del 3305, Bharat Forge v. Tarsem Jain, 2025 SCC Online Del 4090 and other judgments following Dharma Prathishthanam v. Madhoc Construction, (2005) 9 SCC 686* and *Bhadra International (India) (P) Ltd. v. Airports Authority of India, 2026 SCC OnLine SC 7* ***("Bhadra International")*** to submit that even in arbitrations commenced prior to the 2015 Amendment Act, Awards rendered by unilaterally appointed Arbitrators have consistently been treated as nullities.

Category C

14. Insofar as Category C is concerned, it was submitted that the arbitration agreements themselves contain an express stipulation providing that the Arbitration Act, 1940 or any statutory modification or re-enactment thereof shall govern the arbitration proceedings.

15. Learned counsels submit that although some of the agreements originally referred to the Arbitration Act, 1940, the parties consciously proceeded under the 1996 Act and accepted the applicability of the statutory re-enactment. It was therefore argued that once the parties

accepted and acted upon the statutory modification clause, the subsequent amendments introduced by the 2015 Amendment Act equally became applicable to the Arbitral proceedings.

16. Reliance was placed upon the decision of this Court in *Jagdish Chand Gupta v. Union of India, 2025 SCC OnLine Del 7278* to submit that where parties have expressly accepted and acted upon a statutory modification clause, the amended provisions become applicable notwithstanding the original date of commencement of arbitration.

17. It was contended that the present cases are distinguishable from decisions such as *Union of India v. Parmar Construction Co., (2019) 15 SCC 682, S.P. Singla Constructions (P) Ltd. v. State of H.P., (2019) 2 SCC 488,* and *Ratnam Sudesh Iyer v. Jackie Shroff, 2021 SCC OnLine SC 1032,* as those decisions dealt with general references to statutory modification and not situations where the parties had consciously accepted and acted upon the statutory modification by conducting the arbitration under the re-enacted legislation.

18. The last limb of the petitioners' submission is that permitting Awards rendered by unilaterally appointed Arbitrators to survive merely because the arbitration commenced prior to 23.10.2015 would defeat the very object underlying the 2015 Amendment, which sought to eliminate bias and reinforce the neutrality of Arbitral Tribunals. It is therefore prayed that all Awards falling within the aforesaid categories be set aside as being contrary to the mandatory provisions of the Act, the law declared in *CORE (Supra).*

19. Learned counsels also state that the reliance placed by the respondents on the decision of this Court in *Avneet Soni v. Kavita Agrawal, 2026*

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SCC OnLine Del 3236 is misplaced and the said judgment is clearly distinguishable.

20. It is stated that the dispute in *Avneet Soni (supra)* arose between private parties and the challenge to the appointment of the Arbitrator, the Arbitral Award as well as the proceedings before the Court had all substantially arisen in the context of the unamended regime. It was further submitted that the Court therein did not undertake an examination of the effect of the Constitution Bench judgment in *CORE (supra)* particularly with respect to Section 18 of the 1996 Act and Article 14 of the Constitution on the validity of unilateral appointments.

21. According to the petitioners, *Avneet Soni (supra)* cannot, therefore, be treated as laying down the law applicable to the present batch of petitions, especially those arising from public-private contracts.

22. Learned counsels further submitted that *CORE (supra)* operates prospectively only insofar as it concerns the law relating to the appointment of Arbitrators in three-member Arbitral Tribunals**.** It was argued that no such prospective limitation has been imposed in respect of unilateral appointment of a sole Arbitrator.

23. It was next submitted that the amended provisions of Section 12(5) are attracted to this category and the only statutory exception to the ineligibility contemplated therein is contained in the proviso to Section 12(5), which permits waiver only by an express agreement in writing entered into after disputes have arisen.

24. It has also been argued that the objection to the unilateral appointment of the Arbitrator goes to the very jurisdiction and competence of the

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Arbitral Tribunal and is not a mere procedural irregularity. It was contended that the issue pertains to the inherent eligibility of the Arbitrator to act and, consequently, can validly be raised in proceedings under Section 34 of the Act even if it was not accepted during the Arbitral proceedings.

25. It was lastly submitted that accepting the respondents' contention that unilateral appointments made prior to 23.10.2015 would remain immune from judicial scrutiny would defeat the very object underlying the 2015 Amendment Act as well as the law subsequently declared by the Constitution Bench in *CORE (supra)*. According to the petitioners, such an interpretation would render Arbitral proceedings conducted by Tribunals lacking the minimum standards of independence and impartiality, contrary to the mandate of Sections 12 and 18 of the Act, and the principles of natural justice.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

26. Learned senior counsels and counsels appearing for the respondents submit that the present petitions falling under Category A are governed by the legal position prevailing prior to the 2015 Amendment Act. It was submitted that the Arbitral proceedings in the present matters had commenced upon issuance of the notice under Section 21 prior to 23.10.2015 and the sole Arbitrators had also been appointed before the 2015 Amendment Act came into force. Merely because Award/ Court proceedings under Section 34 were instituted after the 2015 Amendment Act, the law applicable to the constitution of the Arbitral Tribunal would not undergo any change.

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27. Further, it is submitted that Section 26 of the 2015 Amendment Act expressly provides that the amendments introduced by the Amendment Act shall not apply to Arbitral proceedings commenced prior to 23.10.2015 unless the parties have otherwise agreed. According to the respondents, the appointment of the Arbitrator forms an integral part of the Arbitral proceedings and, therefore, the legality of such appointment must necessarily be examined with reference to the unamended provisions of the Act.

28. Reliance was placed upon the judgment of the Hon'ble Supreme Court in *BCCI (supra)* to contend that the distinction drawn therein between Arbitral proceedings and court proceedings cannot be interpreted so as to retrospectively invalidate the constitution of an Arbitral Tribunal which was validly constituted under the unamended Act. It was submitted that *BCCI (supra)* does not alter the legal regime governing the commencement or constitution of Arbitral proceedings which had already commenced prior to 23.10.2015.

29. Learned counsels further submitted that the prospective nature of the 2015 Amendment Act stands consistently recognised by the Supreme Court in *Hindustan Construction Co. Ltd. v. Union of India*, (*2020) 17 SCC 324*, *Union of India v. Pradeep Vinod Construction Co., (2020) 2 SCC 464* and *S.P. Singla Constructions (P) Ltd. v. State of H.P., (2019) 2 SCC 488.* It was argued that these decisions affirm that the amended provisions cannot be retrospectively imported into Arbitral proceedings which had already commenced prior to the 2015 Amendment Act. Reliance was also placed on *Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151* to state that agreed procedure

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of appointment should be given primacy as per the principle of party autonomy.

30. It was also contended that under the 1996 Act, primacy was accorded to the appointment procedure contractually agreed upon between the parties and unilateral or departmental appointments were not, by themselves, invalid. According to the respondents, the principles subsequently laid down in *TRF Ltd. (supra)* and *Perkins Eastman Architects DPC (supra)* cannot be retrospectively applied to arbitrations which commenced prior to the 2015 Amendment Act.

31. Reliance was placed on *Avneet Soni (supra)*, wherein, after considering the decisions of the Supreme Court as well as various judgments of this Court, it was held that the legality of a unilateral appointment is required to be examined with reference to the law prevailing on the date of commencement of the Arbitral proceedings. It was submitted that the said judgment reaffirms that the prohibition against unilateral appointments introduced through the post-amendment jurisprudence cannot be extended retrospectively to pre-amendment arbitrations.

32. It was further submitted that the decisions relied upon by the petitioners, including *Mahavir Prasad Gupta & Sons v. State (NCT of Delhi), 2025 SCC OnLine Del 4241*, *Bhadra International (India) (P) Ltd. v. Airports Authority of India, 2026 SCC OnLine SC 7,* and *Vineet Dujodwala v. Phoenix ARC Pvt. Ltd., 2024 SCC OnLine Del 5940* are distinguishable on facts.

33. According to the respondents, those cases either arose from Arbitral proceedings commenced after the Amendment Act or did not consider

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the effect of Section 26 of the 2015 Amendment Act and the binding precedents of the Hon'ble Supreme Court governing pre-amendment arbitrations. It was further submitted that *Jagdish Chand Gupta v. Union of India, 2025 SCC OnLine Del 7278* itself recognises that the Amendment Act would apply to pre-amendment arbitrations only where the arbitration agreement specifically provides that statutory amendments or modifications shall govern the arbitration proceedings, which stipulation is absent in the present cases.

34. Learned counsels also submitted that in several of the petitions the respondent had proposed a panel of independent retired judicial officers in accordance with the arbitration agreement and the petitioners either failed to exercise the option available to them or participated in the appointment process without objection. It was argued that the Arbitrators appointed were independent retired judicial officers having no relationship whatsoever with the respondents.

35. It was further contended that the petitioners participated in the Arbitral proceedings without demur, filed their statements of defence and, in several cases, also preferred counter-claims before the learned Arbitrator. No objection to the appointment of the Arbitrator was raised either before the Arbitral Tribunal or in the petitions under Section 34 of the Act. According to the respondents, the challenge to the unilateral appointment has been raised for the first time during the course of arguments or by way of written submissions and, therefore, the petitioners, having voluntarily submitted to the jurisdiction of the Arbitral Tribunal, are precluded from questioning its constitution at this belated stage.

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36. It is also argued that permitting a party to participate fully in the Arbitral proceedings and thereafter assail the constitution of the Tribunal after suffering an adverse Award would amount to permitting the party to approbate and reprobate simultaneously. Such conduct, according to the respondents, disentitles the petitioners from invoking either the principles of natural justice or Article 14 of the Constitution.

37. On the aforesaid grounds, learned counsels submitted that the unilateral appointments made in accordance with the contractual procedure prevailing under the 1996 Act were valid and legal. It was therefore prayed that the challenge to the constitution of the Arbitral Tribunal be rejected and the petitions be treated on a case to case basis.

ANALYSIS AND FINDINGS

38. I have heard the learned senior counsels and counsels for the parties and perused the material on record.

39. For ease of exposition, I shall first examine the scheme of the 1996 Act, followed by the changes introduced by the 2015 amendment. I shall then deal with the interplay between the two regimes as the arbitrations started in the 1996 Act were continued/ concluded after the 2015 amendment or a Section 34 petition was filed post 2015 amendment, with emphasis on the scope and interpretation of Section 26 of the 2015 Amendment Act. I shall thereafter consider the relevant judicial pronouncements leading up to *Bhadra International (supra)*, examine the ratio and implications of *Bhadra International (supra)*, and finally determine whether, in light of the said decisions, the amended provisions can be applied to the present set of petitions.

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i. The Law Before the Change: The Pre-2015 Arbitration Regime

40. Prior to the 2015 Amendment, the statutory scheme of the 1996 Act recognised and gave primacy to the procedure agreed upon by the parties for constitution of the Arbitral Tribunal or appointment of an Arbitrator. Section 11(2) expressly stated that the parties are free to agree upon a procedure for appointment of the Arbitrator or Arbitrators. The legislative scheme was thus founded upon the principle of party autonomy, under which the parties, having consciously agreed upon a particular mechanism for appointment, were ordinarily bound by the same.

41. The position was explained by the Hon'ble Supreme Court in ***Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd., (2009) 8 SCC 520***, where, the following issues were before the Court.

> ***"12.*** *....*
>
> *(i) Whether the learned Chief Justice was justified in assuming that when an employee of one of the parties to the dispute is appointed as an Arbitrator, he will not act independently or impartially?*
>
> *(ii) In what circumstances, the Chief Justice or his designate can ignore the appointment procedure or the named Arbitrator in the arbitration agreement, to appoint an Arbitrator of his choice?*
>
> *(iii) Whether the respondent herein had taken necessary steps for the appointment of an Arbitrator in terms of the agreement, and the appellant had failed to act in terms of*

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the agreed procedure, by not referring the dispute to its Director (Marketing) for arbitration?"

42. After examining Sections 11, 12 and 18 of the 1996 Act, the Court held as follows:

*"**15.** It is now well settled by a series of decisions of this Court that arbitration agreements in government contracts providing that an employee of the Department (usually a high official unconnected with the work or the contract) will be the Arbitrator, are neither void nor unenforceable. We may refer to a few decisions on this aspect."*

43. The reason for the above observation was that Section 11(2) permitted parties to agree upon the procedure for appointment of the Arbitrator and that the power of the Court under Section 11 was not intended to nullify a specific term of the arbitration agreement naming the Arbitrator.

44. Arbitration, the Court held, is a binding voluntary alternative dispute resolution process by a private forum chosen by the parties; where a party, with open eyes and full knowledge of the clause, enters into a contract with a Government/statutory corporation/PSU providing that one of its own officers shall be the Arbitrator, it cannot later accept the benefit of the arbitration mechanism while repudiating the named-Arbitrator term, unless that part is impossible of performance or void for repugnancy to the Act and severable from the rest.

45. The Court then traced a long and consistent line of authorities, *Executive Engineer v. Gangaram Chhapolia,* 1984 (3) SCC 627, *Eckersley v. Mersey Docks and Harbour Board,* 1894 (2) QB 667,

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Secy. to Govt., Transport Deptt. v. Munuswamy Mudaliar, 1988 (Supp) SCC 651, *International Airports Authority of India v. K.D. Bali*, 1988 (2) SCC 360, *S. Rajan v. State of Kerala*, 1992 (3) SCC 608, *and Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.*, 2007 (5) SCC 304, all holding that arbitration agreements naming a senior officer of the Government/statutory corporation/PSU as Arbitrator are neither void nor unenforceable, and that mere apprehension of bias without tangible/specific evidence is not a ground for removal.

46. It further rejected the respondent's argument that the 1996 Act's heightened emphasis on independence and impartiality (Sections 11(8), 12(1), 12(3) and 18) rendered such clauses *per se* invalid, holding that these provisions operate as safeguards within the employee-Arbitrator framework (disclosure obligations, challenge procedure, duty of equal treatment) rather than as a statutory bar on naming an employee as Arbitrator, and that nothing in Sections 11, 12 or 18 suggests such a clause is invalid merely because the named Arbitrator is an employee of a party.

47. On this basis the Court arrived at its finding that, the fact that the named Arbitrator is an employee of one of the parties is not *ipso facto* a ground to presume bias, partiality, or lack of independence.

48. The Court held that apprehension of bias arises only where there is something concrete, such as the Arbitrator being the controlling/dealing authority under the contract or a direct subordinate of the decision-maker. Where the nominated officer had no involvement in the contract or decision in question, his independence

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could not be doubted merely because he was an employee of the State or its instrumentality.

49. Thus, the Court rejected the blanket presumption of bias and upheld the contractual appointment mechanism in the absence of specific circumstances indicating bias. However, it cautioned Governments and PSUs to reconsider the desirability of appointing their own employees as Arbitrators, distinguishing legal validity from the policy desirability of such clauses.

50. Similarly, in ***Denel (Proprietary) Ltd. v. Bharat Electronics Ltd. & Anr., (2010) 6 SCC 394***, it was stated that the Courts cannot ordinarily interfere with the appointment of an Arbitrator in accordance with the procedure agreed upon by the parties, unless grounds such as legal misconduct, fraud or disqualification are pleaded and established. The authority of an Arbitrator appointed with the consent of the parties cannot be revoked at the unilateral pleasure of one party; there must be just and sufficient cause for such revocation.

51. Likewise, in ***Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523***, the Hon'ble Supreme Court held that the Arbitral Tribunal ought to be constituted in accordance with the procedure prescribed in the arbitration agreement. It recognised that arbitration clauses in contracts entered into by the Government, statutory authorities and government companies commonly provided for appointment of serving officers as Arbitrators, and held that such clauses were required to be given effect to, subject to the requirements of independence and impartiality. At the same time, the Court recognised

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that exceptional circumstances may warrant departure from the agreed mechanism.

52. The Court, however, expressed a policy concern regarding the continued practice of appointing serving officers as Arbitrators, observing that such provisions frequently give rise to resistance from the opposite party once disputes arise. It suggested that the Government, statutory authorities and government companies should consider phasing out such clauses and encouraging greater professionalism in arbitration.

53. The underlying principle was therefore that an arbitration clause constituted a package of contractual rights and obligations. A party which had agreed to arbitration could not ordinarily accept the arbitration clause while simultaneously repudiating the agreed mechanism for appointment of the Arbitrator. As the Hon'ble Supreme Court observed, parties who had entered into the contract with full knowledge of its terms could not subsequently seek to wriggle out of the agreed appointment procedure merely on the ground that they would prefer a different Arbitrator.

54. Thus, under the pre-2015 regime, unilateral or party-nominated appointments were not, by that fact alone, rendered invalid. Although the Courts did caution against this practice, it was believed that since both the parties had agreed to a certain procedure in a voluntary adjudication process, primacy needs to be accorded to that procedure of appointment. It is against this legal position that the significance of the 2015 Amendment and, subsequently, the decisions examining the

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interface between the pre- and post-amendment regimes needs to be considered.

ii. The 2015 Amendment: Object and Legislative Intent

55. If the pre-2015 position was founded upon the primacy of party autonomy, the genesis of the 2015 Amendment lies in the legislative recognition that such autonomy could not be permitted to operate at the expense of the fundamental requirements of independence and impartiality of the Arbitral Tribunal. It is, therefore, necessary to examine the recommendations of the 246th Report of the Law Commission of India, which formed the principal basis for the 2015 Amendment Act.

56. The Law Commission undertook an extensive examination of the Arbitral framework then prevailing and, in particular, considered the concerns arising from the practice of one of the contracting parties having the power to appoint the Arbitrator. The Commission was of the view that the existing position had tilted the balance unduly in favour of party autonomy, notwithstanding that independence and impartiality constitute the very foundation of adjudication through arbitration.

57. The Commission considered that party autonomy, though central to arbitration, could not be stretched to a point where it undermined the requirement of an independent and impartial adjudicator. Paragraphs 56 and 57 of the Report, record this concern in the following terms:

> *"56. The limits of this provision has been tested in the Indian Supreme Court in the context of contracts with*

State entities naming particular persons/designations (associated with that entity) as a potential Arbitrator. It appears to be settled by a series of decisions of the Supreme Court (see Executive Engineer, Irrigation Division v. Gangaram Chhapolia [Executive Engineer, Irrigation Division v. Gangaram Chhapolia, (1984) 3 SCC 627] , Transport Deptt. v. Munuswamy Mudaliar [Transport Deptt. v. Munuswamy Mudaliar, 1988 Supp SCC 651] , International Airports Authority v. K.D. Bali [International Airports Authority v. K.D. Bali, (1988) 2 SCC 360] , S. Rajan v. State of Kerala [S. Rajan v. State of Kerala, (1992) 3 SCC 608] , Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd. [Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd., (1996) 1 SCC 54] , Union of India v. M.P. Gupta [Union of India v. M.P. Gupta, (2004) 10 SCC 504] and ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd. [ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd., (2007) 5 SCC 304] that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd. [Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd., (2009) 8 SCC 520 : (2009) 3 SCC

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(Civ) 460] , carved out a minor exception in situations when the Arbitrator 'was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject-matter of the dispute' (SCC p. 533, para 34) and this exception was used by the Supreme Court in Denel (Proprietary) Ltd. v. Ministry of Defence [Denel (Proprietary) Ltd. v. Ministry of Defence, (2012) 2 SCC 759 : (2012) 2 SCC (Civ) 37 : AIR 2012 SC 817] and Bipromasz Bipron Trading Sa v. Bharat Electronics Ltd. [Bipromasz Bipron Trading Sa v. Bharat Electronics Ltd., (2012) 6 SCC 384 : (2012) 3 SCC (Civ) 702] , to appoint an independent Arbitrator under Section 11, this is not enough.

57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the Arbitral Tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles –

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even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the Arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an Arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr. PK Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee Arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous – and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes.

58. Large-scale amendments have been suggested to address this fundamental issue of neutrality of

Arbitrators, which the Commission believes is critical to the functioning of the arbitration process in India. In particular, amendments have been proposed to Sections 11, 12 and 14 of the Act."

(emphasis added)

58. The explanatory note appended by the Law Commission to the proposed amendment to Section 12 of the 1996 Act is equally important and is reproduced below:

*"[**NOTE**: This amendment is intended to further goals of independence and impartiality in arbitrations, and only gives legislative colour to the phrase "independence or impartiality" as it is used in the Act. The contents of the Fourth Schedule incorporate the Red and Orange lists of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration. While Mr. Malhotra was of the view that the said provisions should not apply to the public sector, excluding the public sector will render the provision susceptible to a challenge under article 19 of the Constitution of India.]*

59. A perusal of the above shows that the concern of the legislature was not confined to the identity of the Arbitrator but extended to the circumstances which could give rise to justifiable doubts as to his independence or impartiality. The explanatory note accompanying the proposed amendment to Section 12 is instructive in this regard. It

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stated that the amendment was intended to further the goals of independence and impartiality and to give legislative content to these concepts by incorporating objective standards based upon the Red and Orange Lists of the IBA Guidelines on Conflicts of Interest in International Arbitration.

60. The 2015 Amendment must, therefore, be understood against this background. It cannot be said that it merely clarified the 1996 Act. As seen from the above observations, the Commission identified a problem plaguing the system and it recalibrated the relationship between two competing principles, party autonomy on the one hand, and the independence and impartiality of the Arbitral Tribunal, on the other. What was earlier regarded principally as a matter of contractual choice was, to the extent specifically addressed by the amended provisions, subjected to mandatory statutory standards designed to ensure the neutrality of the Arbitral process.

iii. The Interplay Between the Pre and Post-2015 Regimes

61. The principal question arising in the present case is whether the provisions introduced by the 2015 Amendment Act can be invoked in respect of an arbitration which had commenced prior to 23.10.2015, merely because the Arbitral Award was made and/or the proceedings under Section 34 of the 1996 Act were instituted after the 2015 Amendment Act came into force.

62. Detailed submissions were advanced on behalf of both sides. The principal contention of the petitioners is that the principles of neutrality, impartiality and equal treatment of parties were already

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embedded in the unamended Act and, consequently, a unilateral appointment of an Arbitrator was impermissible even prior to the 2015 Amendment. In support of this proposition, reliance has been placed upon *BCCI (supra)*, particularly to contend that Section 26 of the 2015 Amendment Act draws a distinction between the applicability of the amendments to Arbitral proceedings and their applicability to court proceedings. According to the petitioners, since proceedings under Section 34 constitute court proceedings, the amended provisions ought to govern the present batch of petitions.

63. In furtherance of the aforesaid submission, reliance has been placed upon the decisions in *Ellora Paper Mills Ltd. (supra)*, *Supreme Infrastructure India Ltd. (supra)*, *Bharat Broadband Network Ltd. (supra)*, *Dharma Pratishthanam (supra)*, *Vineet Dujodwala (supra)*, *Dharamvir Singh (supra)* and *Bhadra International (supra)*, amongst others.

64. *Per contra*, the respondents contend that the 2015 Amendment Act brought about substantive changes in the statutory framework governing arbitration and cannot, therefore, be applied retrospectively in the absence of an express legislative mandate. It is their submission that the amendments were not merely clarificatory in nature. Reliance has further been placed upon *BCCI (supra)* to contend that the judgment dealt with the retrospective applicability of Section 36 and did not hold that the amended provisions governing Section 34 would retrospectively apply to arbitrations commenced prior to 23.10.2015.

65. According to the respondents, at the relevant time, agreements providing for unilateral appointment of Arbitrators were recognised by

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law and the primacy of the parties' agreed appointment procedure had also been affirmed by the Hon'ble Supreme Court. In support of this proposition, reliance has been placed upon *S.P. Singla Constructions (supra), Pradeep Vinod Construction (supra), Parmar Construction Co. (supra), Aravali Power Co. (P) Ltd. v. Era Infra Engineering Ltd., (2017) 15 SCC 32, Avneet Soni (supra)* and *Rajasthan Small Industries Corp. Ltd. (supra)*.

66. The petitioners opening submission proceeds on the premise that, in view of the interpretation accorded to Section 26 by the Hon'ble Supreme Court in *BCCI (supra)*, the mere fact that the proceedings under Section 34 were instituted after 23.10.2015 would attract the amended provisions. On this basis, it is contended that this Court can, at the present stage, examine the validity of the Arbitral Tribunal and consequently declare the Award to be null and void on the ground that the Arbitrator was unilaterally appointed.

iv. Section 26: The Bridge Between the Old and the New

67. It would be apposite to reproduce Section 26 of the 2015 Amendment Act, which reads as under:

> *"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."*
>
> ***(emphasis added)***

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68. Before examining the interpretation of Section 26 of the 2015 Amendment Act, it is necessary to briefly examine its legislative history as well.

69. The Arbitration and Conciliation (Amendment) Act, 2019 (***"2019 Amendment Act"***) sought to fundamentally alter the regime governing the applicability of the 2015 amendments. By Section 15 of the 2019 Amendment Act, Section 26 of the 2015 Amendment Act was retrospectively omitted, while Section 13 inserted Section 87 into the 1996 Act.

70. Section 87 reads as under:

> *"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;*
>
> *(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."*

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71. Section 87 provided that the amendments introduced by the 2015 Amendment Act would apply only to Arbitral proceedings commenced on or after 23.10.2015, and to Court proceedings arising out of or in relation to such Arbitral proceedings. The effect of this provision was to revive the pre-amendment position, including the automatic stay on enforcement of Arbitral Awards.

72. However, in ***Hindustan Construction Co. Ltd. v. Union of India*, *(2020) 17 SCC 324***, a three-Judge Bench of the Hon'ble Supreme Court struck down both the insertion of Section 87 and the retrospective deletion of Section 26 as manifestly arbitrary and violative of Article 14 of the Constitution. The Court held that these amendments defeated the very object of the 2015 Amendment Act and the recommendations of the 246th Law Commission by retrospectively reviving the automatic-stay regime, thereby depriving successful Award-holders of the fruits of their Awards. The Court observed:

> *"63. ....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."*

73. The Court further clarified that the validity of 23.10.2015 as the cut-off date was never under challenge. What was held to be constitutionally impermissible was the legislative attempt to obliterate the distinction between Arbitral proceedings and Court proceedings. Accordingly, the Court concluded:

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"66. 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."

74. Consequently, after ***Hindustan Construction Company (supra)***, Section 26 of the 2015 Amendment Act continues to govern the applicability of the 2015 amendments, while Section 87 stands effaced from the statute. The interpretation of Section 26 as laid down in ***BCCI (supra)*** therefore remains the governing position in law and is examined hereinafter.

75. The relevant paras of ***BCCI (supra)*** read as under:

"33. *What can be seen from the above is that Section 26 has, while retaining the bifurcation of proceedings into arbitration and court proceedings, departed somewhat from Section 85-A as proposed by the Law Commission.*

34. *That a provision such as Section 26 has to be construed literally first, and then purposively and pragmatically, so as to keep the object of the provision also in mind, has been laid down in Thyssen [Thyssen Stahlunion GmbH v. SAIL, (1999) 9 SCC 334] in para 26 as follows: (SCC pp. 370-71)*

"26. Present-day courts tend to adopt a purposive approach while interpreting the statute which repeals the old law and for that purpose to take into account the objects and reasons which led to the enacting of the new Act. We have seen above that this approach was adopted by this Court

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in MMTC Ltd. case [MMTC Ltd. v. Sterlite Industries (India) Ltd., (1996) 6 SCC 716] . Provisions of both the Acts, old and new, are very different and it has been so observed in Sundaram Finance Ltd. case [Sundaram Finance Ltd. v. NEPC India Ltd., (1999) 2 SCC 479] . In that case, this Court also said that provisions of the new Act have to be interpreted and construed independently and that in fact reference to the old Act may actually lead to misconstruction of the provisions of the new Act. The Court said that it will be more relevant, while construing the provisions of the new Act, to refer to the UNCITRAL Model Law rather than the old Act. In State of Kuwait v. Frederick Snow & Partners [State of Kuwait v. Frederick Snow & Partners, 1984 AC 426 : (1984) 2 WLR 340 : (1984) 1 All ER 733 (HL)] the Award was given before Kuwait became a party to the New York Convention recognised by an Order-in-Council in England. The House of Lords held that though a foreign Award could be enforced in England under the (UK) Arbitration Act, 1975 as when the proceedings for enforcement of the Award were initiated in England Kuwait had become a party to the Convention. It negatived the contention that on the date the Award was given Kuwait was not a party to the New York Convention."

***35.** Similarly, in Milkfood Ltd. [Milkfood Ltd. v. GMC Ice Cream (P) Ltd., (2004) 7 SCC 288] , this Court, while construing Section 85 of the 1996 Act, had this to say: (SCC*

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p. 315, para 70)

"70. Section 85 of the 1996 Act repeals the 1940 Act. Sub-section (2) of Section 85 provides for a non obstante clause. Clause (a) of the said sub-section provides for saving clause stating that the provisions of the said enactments shall apply in relation to Arbitral proceedings which commenced before the said Act came into force. Thus, those Arbitral proceedings which were commenced before coming into force of the 1996 Act are saved and the provisions of the 1996 Act would apply in relation to Arbitral proceedings which commenced on or after the said Act came into force. Even for the said limited purpose, it is necessary to find out as to what is meant by commencement of Arbitral proceedings for the purpose of the 1996 Act wherefor also necessity of reference to Section 21 would arise. The Court is to interpret the repeal and savings clauses in such a manner so as to give a pragmatic and purposive meaning thereto. It is one thing to say that commencement of arbitration proceedings is dependent upon the facts of each case as that would be subject to the agreement between the parties. It is also another thing to say that the expression "commencement of arbitration proceedings" must be understood having regard to the context in which the same is used; but it would be a totally different thing to say that the arbitration proceedings commence only for the purpose of limitation upon issuance of a notice and for no other

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purpose. The statute does not say so. Even the case laws do not suggest the same. On the contrary, the decisions of this Court operating in the field beginning from Shetty's Constructions [Shetty's Constructions Co. (P) Ltd. v. Konkan Railway Construction, (1998) 5 SCC 599] are ad idem to the effect that Section 21 must be taken recourse to for the purpose of interpretation of Section 85(2)(a) of the Act. There is no reason, even if two views are possible, to make a departure from the decisions of this Court as referred to hereinbefore."

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

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cannot bear the aforesaid meaning, but serves only to separate the two distinct parts of Section 26.

…

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

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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 – (i) Arbitral proceedings themselves, and (ii) 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,

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"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."

(emphasis added)

76. The scheme of Section 26 is thus clear: that the 2015 Amendment Act is prospective in nature, and will apply to those Arbitral proceedings that have commenced, as understood by Section 21 of the 1996 Act, on or after the 2015 Amendment Act, and to court proceedings which have commenced on or after the 2015 Amendment Act came into force.

77. The petitioners' submission, at first blush, appears attractive. Section 26 expressly refers to "Arbitral proceedings" and ***BCCI (supra)*** recognised a distinction between the applicability of the 2015 Amendment Act to Arbitral proceedings and its applicability to proceedings before a Court. On that basis, it may be argued that, since a petition under Section 34 is a proceeding before a Court and was instituted after 23.10.2015, the amended Act must necessarily govern the Court's consideration of the Award.

78. However, such an interpretation, in my view, would overlook the precise nature of the distinction drawn in ***BCCI (supra)***. The Hon'ble Supreme Court held that the 2015 Amendment Act is prospective in operation. This cannot be understood to mean that the amended Act applies prospectively to the Section 34 proceeding but retrospectively to the Arbitral proceedings which form the very foundation of that

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proceeding. What cannot be done directly - namely, applying a substantive amendment to an arbitration which had already commenced before 23.10.2015 - cannot be achieved indirectly merely by treating the subsequent Section 34 proceeding as an entirely new and independent proceeding, divorced from the arbitration whose Award is under challenge.

79. A proceeding under Section 34 does not arise in a vacuum. It is a proceeding instituted to challenge to an Award rendered in an Arbitral proceeding. The Award, the constitution of the Tribunal, the appointment of the Arbitrator and the conduct of the arbitration are all elements of the same Arbitral process. Consequently, while the Court may apply the procedural law applicable to the Section 34 proceeding as on the date of its institution that does not necessarily mean that every substantive alteration made to the law governing the Arbitral Tribunal can be retrospectively imported into an arbitration which had already commenced.

80. This distinction is necessary in the present batch of petitions because the challenge concerns the eligibility and constitution of the Arbitral Tribunal. Section 12(5), introduced by the 2015 Amendment Act, did not merely regulate the manner in which a pending proceeding was to be conducted. It created a new statutory disqualification and declared certain persons to be "ineligible" to be appointed as Arbitrators, notwithstanding any prior agreement to the contrary. The question, therefore, is whether a Tribunal validly constituted under the law applicable on the date of its appointment can subsequently become retrospectively invalid solely because Parliament altered the

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substantive law governing eligibility after the arbitration had commenced.

81. At this juncture it becomes relevant to refer to the authorities cited. Starting with the case of ***Rajasthan Small Industries Corporation Ltd. (supra)*** the Court considered the applicability of Section 12(5) to an arbitration which had commenced in 2009. The Court held as under:

> *"23. After the amendment to the Arbitration and Conciliation Act, 2015, Section 12(5) prohibits the employee of one of the parties from being an Arbitrator. In the present case, the agreement between the parties was entered into on 28.01.2000 and the arbitration proceedings commenced way back in 2009 and thus, the respondent cannot invoke Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015. As per Section 26 of the Act, the provisions of the amended Act 2015 shall not apply to the Arbitral proceedings commenced in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree."*

82. The Court thereafter expressly referred to ***BCCI (supra)*** and observed as under:

> *"24. In Board of Control for Cricket in India v. Kochi Cricket Private Limited and others, (2018) 6 SCC 287, this Court held that the provisions of Amendment Act, 2015 (with effect from 23.10.2015) cannot have retrospective operation*

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in the Arbitral proceedings already commenced unless the parties otherwise agree. In the present case, there is nothing to suggest that the parties have agreed that the provisions of the new Act shall apply in relation to the Arbitral proceedings."

(emphasis added)

83. In the aforesaid case, the arbitration clause provided for "arbitration by the Managing Director himself or his/her nominee for the sole arbitration". At the request of the respondent, the petitioner appointed an Arbitrator on 21.02.2005. However, as the arbitration proceedings did not progress satisfactorily, the said Arbitrator was removed on 26.03.2009 and, in his place, the Chairman-cum-Managing Director of the Corporation was appointed as the sole Arbitrator with the consent of both parties.

84. As the proceedings continued to remain pending, the respondent-contractor, on 13.05.2015, preferred an application under Sections 11(6) and 15 of the 1996 Act before the High Court, seeking appointment of an independent sole Arbitrator for adjudication of the disputes. The High Court allowed the said application and appointed a former District Judge as the sole Arbitrator. In the meantime, the previously appointed sole Arbitrator proceeded with the arbitration and ultimately passed an ex parte Award on 21.01.2016.

85. Notably, the application under Sections 11(6) and 15 of the 1996 Act had been instituted prior to the coming into force of the 2015 Amendment Act. It was, therefore, held that the 2015 Amendment Act

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had no application to the proceedings and that the matter was to be governed by the statutory regime prevailing prior to the commencement of the 2015 Amendment Act.

86. The next case is ***Parmar Construction Co., (supra)*** where the Hon'ble Supreme Court held 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.*
>
> *28…the applications/requests made by the respondent contractors deserve to be examined in accordance with the principal Act, 1996 without taking resort to the 2015 Amendment Act which came into force from 23-10-2015."*

87. The factual context was that a notice seeking appointment of an Arbitrator was issued on 23.12.2013. Upon the appellants' failure to appoint an Arbitrator, an application under Section 11(6) of the Act was filed before the High Court of Rajasthan. One of the issues that arose for consideration in those proceedings was whether the constitution of the Arbitral Tribunal was precluded by the execution of a "no claim/discharge certificate".

88. In this context, while considering whether the scope of examination was circumscribed by the amended Section 11(6A), the above observations were made. Thus, the issue of the eligibility of the

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Arbitrator/Arbitral Tribunal on the touchstone of Section 12(5), read with the VIIth Schedule thereof, did not fall for consideration in the aforesaid case. Rather, it was expressly clarified that where there was an issue as regards impartiality of the Arbitral Tribunal, it was open to the Court to appoint an independent Arbitrator to adjudicate the disputes between the parties.

89. In ***S.P. Singla Constructions (P) Ltd. (supra)***, the Hon'ble Supreme Court observed as under:

> *"16. Considering the facts and circumstances of the present case, we are not inclined to go into the merits of this contention of the appellant nor examine the correctness or otherwise of the above view taken by the Delhi High Court in Ratna Infrastructure Projects case [Ratna Infrastructure Projects (P) Ltd. v. Meja Urja Nigam (P) Ltd., 2017 SCC OnLine Del 7808] ; suffice it to note that as per Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015, the provisions of the amended 2015 Act shall not apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the principal Act before the commencement of the Amendment Act unless the parties otherwise agree. In the facts and circumstances of the present case, the proviso in Clause (65) of the general conditions of the contract cannot be taken to be the agreement between the parties so as to apply the provisions of the amended Act. As per Section 26 of the Act, the*

provisions of the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after the date of commencement of the Amendment Act, 2015 (w.e.f. 23-10-2015). In the present case, arbitration proceedings commenced way back in 2013, much prior to coming into force of the amended Act and therefore, provisions of the amended Act cannot be invoked."

90. Since the termination of the arbitration proceedings was found to be improper, it was directed that "*In the interest of justice, in our considered view, an opportunity is to be afforded to the appellant to go before the departmental Arbitrator (as agreed by the parties in Clause (65) of the general conditions of contract) and the proceedings of the Arbitrator dated 06-08-2014 terminating the proceedings is to be set aside. ....."*

91. The same approach is evident from ***M/s Shree Vishnu Constructions v. Engineer-in-Chief, Military Engineering Service*, *2023 SCC Online SC 600.*** There, the notice invoking arbitration under Section 21 had been served on 20.12.2013, whereas the petition under Section 11(6) was instituted only on 27.04.2016, after the 2015 Amendment Act had come into force. Nevertheless, the Court held that the unamended Act applied. The decision is instructive because the subsequent court proceeding was itself instituted after the statutory cut-off date, yet that circumstance did not alter the law applicable to the underlying arbitration.

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92. The principle emerging from these authorities is thus that the date of commencement of arbitration under Section 21 determines the applicability of the substantive Arbitral regime. The subsequent institution of proceedings before a Court does not, by itself, alter that position. This distinction is particularly material where the challenge concerns the very constitution or eligibility of the Arbitral Tribunal.

93. The position is further reinforced by ***Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755***, where the Hon'ble Supreme Court described Section 12(5) in the following terms:

> *"15. Section 12(5), on the other hand, a new provision which relates to the de jure inability of an Arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non-obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be 'ineligible' to be appointed as Arbitrator..."*

94. The characterisation of Section 12(5) as a "new provision" creating a statutory state of "ineligibility" is important. The provision does not merely prescribe a procedure for the conduct of an arbitration; it alters the legal status of persons who could previously be appointed as Arbitrators and, in doing so, overrides prior contractual arrangements. It therefore operates upon the substantive legal position governing the constitution of the Tribunal. Such a provision cannot ordinarily be

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presumed to operate retrospectively, particularly where Parliament has expressly enacted Section 26 to preserve the applicability of the unamended Act to arbitrations already commenced.

95. In ***Ssangyong Engineering & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131***, the Court observed as under:

> *"Applicability of the Arbitration and Conciliation (Amendment) Act, 2015*
>
> *16. Since the Section 34 petition in the present case is dated 30-7-2016, an important question as to the applicability of the parameters of review of Arbitral Awards would arise in this case. More particularly, radical changes have been made by the Arbitration and Conciliation (Amendment) Act, 2015 (the 2015 Amendment Act) with effect from 23-10-2015 — in particular, in the "public policy of India" ground for challenge of Arbitral Awards. The question which arises is whether the amendments made in Section 34 are applicable to applications filed under Section 34 to set aside Arbitral Awards made after 23-10-2015.*
>
> *18. There is no doubt that the amendments made in Explanations 1 and 2 to Section 34(2)(b)(ii) have been made for the avoidance of any doubt, which language, however, is not found in Section 34(2-A). Apart from the anomalous position which would arise if the section were to be applied piecemeal, namely, that Explanations 1 and 2 were to have retrospective effect, being only to remove doubts, whereas*

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sub-section (2-A) would have to apply prospectively as a new ground, with inbuilt exceptions, having been introduced for the first time, it is clear that even on principle, it is the substance of the amendment that is to be looked at rather than the form. Therefore, even in cases where, for avoidance of doubt, something is clarified by way of an amendment, such clarification cannot be retrospective if the earlier law has been changed substantively. Thus, in SEDCO Forex International Drill. Inc. v. CIT [SEDCO Forex International Drill. Inc. v. CIT, (2005) 12 SCC 717] (SEDCO), this Court held: (SCC p. 724, para 17)

> *"17. As was affirmed by this Court in Goslino Mario [CIT v. Goslino Mario, (2000) 10 SCC 165] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. CIT [Reliance Jute and Industries Ltd. v. CIT, (1980) 1 SCC 139 : 1980 SCC (Tax) 67] .) An explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an explanation can add to and widen the scope of the main section (See Sonia Bhatia v. State of U.P. [Sonia Bhatia v. State of U.P., (1981) 2 SCC 585 : AIR 1981 SC 1274] , SCC at p. 598, AIR at p. 1282, para*

> *24). If it is in its nature clarificatory then the explanation must be read into the main provision with effect from the time that the main provision came into force [See Shyam Sunder v. Ram Kumar , SCC para 44; Brij Mohan Das Laxman Das v. CIT [Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352] , SCC at p. 354; CIT v. Podar Cement (P) Ltd. [CIT v. Podar Cement (P) Ltd., (1997) 5 SCC 482] , SCC at p. 506]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts"."*
>
> *...*

19. There is no doubt that in the present case, fundamental changes have been made in the law. The expansion of "public policy of India" in ONGC v. Saw Pipes Ltd. and ONGC v. Western Geco International Ltd. ["Western Geco"] has been done away with, and a new ground of "patent illegality", with inbuilt exceptions, has been introduced. Given this, we declare 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.

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(emphasis added)

96. ***Ssangyong (supra)*** concerned the amended scope of the public policy ground and the introduction of patent illegality. The Court was concerned with the grounds on which a Court could review an Arbitral Award. It clearly stated that the nature of the amendment has to be looked at and held that the 2015 amendment was prospective in nature.

97. Similarly in ***KRR Infra Projects (P) Ltd. v. Union of India, 2018 SCC OnLine Del 12418***, the Court was concerned with a situation where the notice under Section 21 had been issued and an Arbitrator was also appointed, prior to commencement of the Amendment Act; however, upon resignation of the said Arbitrator, an employee of the respondent therein was appointed as the substitute Arbitrator on 27.05.2016.

98. The Court relied on the case of ***Aravali Power Co. (P) Ltd. (supra)*** and held as under:

> *"5. I have considered the submissions made by the counsels for the parties. Admittedly, though first Arbitrator was appointed on 24.10.2014, the arbitration proceedings did not culminate into an Award due to resignation of the first Arbitrator. The present Arbitrator was appointed on 27.05.2016, that is, after coming into force of the Amending Act.*
>
> *…*
>
> *8. In view of the above, merely because the Arbitration*

Agreement had been invoked prior to the coming into force of the Amending Act and the arbitration proceedings had commenced before the earlier Arbitrator prior to coming into force of Amending Act, the respondent could not have proceeded to appoint an ineligible Arbitrator under Section 12(5) read with the Seventh Schedule of the Act after coming into force of the Amending Act. At the time of such appointment, the eligibility of the Arbitrator had to be considered in accordance with the laws applicable to such appointment, including Section 12(5) and the Seventh Schedule of the Act. The Arbitrator being a serving employee of the respondent, was ineligible to be appointed in terms of Entry 1 of the Seventh Schedule to the Act and therefore, all proceedings that were conducted by him were not in accordance with the law."

99. A perusal of the above shows that the Court assessed the eligibility of the substitute Arbitrator with reference to the law applicable at the time of appointment. Since the appointment of the substitute Arbitrator took place on 27.05.2016, after the 2015 Amendment Act had come into force, and Section 12(5) was therefore applicable, the Court in view of the same set aside the Award.

100. The position under the unamended Act is also reflected in ***Aravali Power Co. (P) Ltd. (supra)***, where the Supreme Court observed:

"22.1.1. The fact that the named Arbitrator is an employee of one of the parties is not ipso facto a ground to raise a

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presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an employee Arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate to the officer whose decision is the subject-matter of the dispute."

101. The above judgment has clearly explained the difference between the legal position under the unamended Act and that introduced by Section 12(5) read with the Seventh Schedule. Under the former regime, the mere fact that an Arbitrator was an employee of one of the parties did not, by itself, render the appointment invalid. The Court examined whether circumstances existed giving rise to a justifiable apprehension of bias or lack of independence. Section 12(5), by contrast, introduced an automatic statutory disqualification in the circumstances specified in the Seventh Schedule.

102. It would therefore be impermissible to apply Section 12(5) to a pre-23.10.2015 arbitration merely because the Section 34 proceeding was instituted thereafter. Such an approach would effectively substitute the legal standard introduced by Parliament in 2015 for the standard which governed the parties' arbitration proceedings when it was commenced and the Tribunal was constituted. That would amount to giving retrospective operation to a substantive amendment notwithstanding the express language of Section 26 of the 2015 amendment.

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103. The position has been stated in particularly clear terms in ***Avneet Soni (supra),*** where the Court held:

> *"55. Consequently, the legality or otherwise of the unilateral appointment of a sole Arbitrator in the present case must necessarily be examined in the context of the law as it stood on the date of commencement of the Arbitral proceedings, having due regard to Section 21 of the A&C Act and the express mandate of Section 26 of the 2015 Amendment Act.*
>
> *56. The consistent position that has emerged is that Arbitral proceedings commenced prior to 23.10.2015 are not affected by the substantive amendments introduced by the 2015 Amendment Act, including those relating to unilateral appointment of Arbitrators."*

104. The reasoning in ***Avneet Soni (supra)*** directly addresses the controversy involved in the present case. The legality of a unilateral appointment is to be examined with reference to the law applicable on the date of commencement of the Arbitral proceedings, having regard to Section 21 and the express mandate of Section 26. Thus, where the arbitration commenced prior to 23.10.2015, the subsequent amendment cannot retrospectively convert an appointment which was legally permissible when made into one which was statutorily prohibited.

105. The same reasoning has also found application in proceedings under Section 34. In ***West Bengal Housing Board v. M/s Abhisek Construction,*** **AP 189 of 2019**, where the arbitration had commenced

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in 2012, the Court declined to set aside the Award on the ground of unilateral appointment, holding that there was no statutory prohibition against such appointment at the time when the appointment was made.

106. Recently, a Division bench of this Court in ***DV Anand v. Hindustan Petroleum Corporation Ltd., FAO (OS) COMM 139/2018,*** was faced with the same question of unilateral appointment and while relying on ***Rajasthan Small Industries Corporation Ltd. (supra)*** the Court held that the amended regime cannot be applied retrospectively to arbitrations commenced prior to the cut-off date**.**

107. The cumulative effect of the aforesaid authorities is that the distinction between "Arbitral proceedings" and "court proceedings" recognised in ***BCCI (supra)*** cannot be stretched to the extent contended by the petitioners. ***BCCI (supra)*** does not hold that the institution of a Section 34 petition after 23.10.2015 retrospectively subjects the underlying arbitration to every substantive amendment introduced by the 2015 Amendment Act. Such an interpretation would effectively render the first limb of Section 26 otiose in cases where an Award is challenged after the cut-off date.

108. Accordingly, the mere fact that the Arbitral Award was rendered after 23.10.2015, or that the petition under Section 34 was instituted thereafter, cannot by itself attract Section 12(5) or the Seventh Schedule to an arbitration which had already commenced before that date. To hold otherwise would amount to giving retrospective operation to a substantive amendment through the medium of a subsequent court proceeding, contrary to the express scheme of Section 26.

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109. The petitioners' contention that the principles of neutrality, impartiality and equal treatment were already inherent in the unamended Act does not lead to a different conclusion. The existence of those general principles does not mean that the specific statutory disqualification subsequently enacted in Section 12(5) existed in the same form under the unamended Act.

110. As ***Aravali Power Co. (P) Ltd. (supra)*** demonstrates, the pre-amendment law adopted a more fact-sensitive approach to the independence of an employee Arbitrator. The 2015 Amendment Act altered that position by creating specified categories of statutory ineligibility. The question, therefore, is not whether neutrality was a principle of arbitration before 2015; plainly, it was. The question is whether Parliament intended a new consequence of ineligibility to operate upon arbitrations which had already commenced. Section 26 answers that question in the negative, unless the parties otherwise agree.

111. The argument based upon ***BCCI (supra)***, therefore, cannot be accepted in the broad form in which it is advanced. The fact that a Section 34 proceeding is a court proceeding does not sever it from the Arbitral proceedings whose Award is under challenge, nor does it retrospectively alter the law governing the constitution of the Arbitral Tribunal.

112. The authorities relied upon by the petitioner also need to be examined. In ***D. Swamy v. Karnataka State Pollution Control Board, (2023) 20 SCC 469,*** it has been held as under:

> *"36. <u>It is, however, well settled that words and phrases</u>*

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and/or sentences in a judgment cannot be read in the manner of a statute, and that too out of context…."

113. The first judgment that the petitioners have relied upon is the case of ***Ellora paper mills Ltd. (supra)*** which in my view was in very peculiar facts of the case and cannot be applied to the present batch of petitions. In ***Ellora paper mills Ltd. (supra)*** the Tribunal was reconstituted after lapse of approximately 18 years and in the meantime the amendment was notified.

114. In ***Dharamvir (supra)*** the question before the Court was that whether the amended provisions would apply, considering that the arbitration commenced prior to the coming into force of the 2015 Amendment Act. However, on a closer look at the facts it is clear that the parties had agreed to be bound by the Amended Act and had even appointed an independent Arbitrator in terms of the 2015 amendment.

115. Similarly in ***Vineet Dujodwala (supra)*** even though the Section 34 was filed before the cut-off date, the Arbitrator had appeared in 215 cases against the same respondent which was not disclosed in terms of Section 12(1) of the 1996 Act.

116. Even the case of ***Bharat Forge (supra)*** does not aid the petitioners case as the issue before the Court was that whether an Arbitrator appointed by one party alone with the other side's silence treated as "deemed consent" is validly constituted. The Court held that unilateral appointment is *void ab initio*, deemed-consent clauses does not substitute for actual, express consent, and participation in the arbitration "under protest" does not cure the defect or amount to acquiescence.

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117. In ***Supreme Infrastructure India Limited (supra)***, the factual position was materially different as the petitioner was not served with the notice and nor was informed about the appointment of the Arbitrator which ultimately resulted in an *ex-parte* Award.

118. Similarly the other judgments relied upon by the petitioners also do not aid the petitioners' case as the factual position was materially different. The Arbitrators in those cases were appointed after the 2015 amendment was notified. Since the date of commencement of Arbitral proceedings was after the cut-off date, the rigors of the amended Act would apply.

v. The Ratio in Bhadra International

119. The petitioners have also placed reliance on certain paras (Paras 37-39) of ***Bhadra International (supra)*** to state that it lays down the position that the changes made by the 2015 amendment were always present in the Act and what was implicit was only made explicit by way of the Amendment and therefore an Arbitrator appointed unilaterally prior to the 2015 Amendment Act is bad in law and can be set aside at this stage.

120. Recently, the High Court of Bombay in ***M/s. S. E. Investments Ltd. (now known as Paisalo Digital Limited) v. Star Bazaar Private Limited, 2026 SCC OnLine Bom 8602*** has dealt with the interpretation in the case of ***Bhadra International (supra)*** and held as under:

> *"24. The decision in the case of Bhadra International (India) Pvt. Ltd. (supra) was concerned with the invocation*

of arbitration post 2015 amendment. The issue before the Hon'ble Supreme Court was not of pre- 2015 amendment. The decision has to be read holistically and not by reading few observations dehors the context. The Court did refer to Section 18 dealing with equal treatment of parties and did emphasised upon ensuring impartiality and preserving fairness of the Arbitral process but that would not mean that prior to 2015 this decision can be made applicable. When in paragraph 37 of Bhadra International (India) Pvt. Ltd. (supra), the Hon'ble Supreme Court says what was implicit prior to 2015 has been made explicit by the Amendment Act of 2015, it does not flow therefrom that the unilateral appointments made prior to 2015 are void. This reading would be contrary to the decision of the 5 Judge Constitution Bench decision in the case of CORE (supra) and also would amount to saying something which the Hon'ble Supreme Court has not said.

25. Section 12(5) of the Act, 1996 expressly provides for ineligibility of a person who is appointed as an Arbitrator if he falls under any of the categories specified in the Seventh Schedule of the Act. Post 23 October 2015, there is an express provision making a person ineligible to be appointed as an Arbitrator and, therefore, any proceedings pursuant to such an appointment are bad in law. Prior to 23 October 2015, there was no such express provision making a person ineligible. The basic tenets of the Arbitral proceedings

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enshrined in Sections 7, 11, 12 and 18 of the Act, 1996 which existed even prior to 23 October 2015 may indicate that categories specified in Seventh Schedule of the Act were implicit or enshrined in these provisions but merely because they were implicit providing for impartiality, unbiased, equal treatment etc., that would not lead to appointment of an Arbitrator being illegal and consequently, the proceedings arising therefrom being illegal. If a party had any apprehension that any provision of the Act or basic tenets of Arbitral proceedings were not followed or were being violated then such a party always had a remedy to challenge the same in accordance with law and if such a challenge is upheld, then certainly the proceedings would be bad in law but if such a challenge is unsuccessful then the party is estopped from making such a grievance during execution proceedings. Accepting submissions of the judgment debtor would amount to attributing disqualification to Arbitrator appointed prior to 23 October 2015 and such an attribution cannot be interpreted retrospectively.

…

If the intention of the legislature was to disqualify a person on the basis of Fifth Schedule or Seventh Schedule read with Section 12(5) on an implicit basis, then nothing stopped them from making the law retrospectively applicable from the date when 1996 Act came into force or from providing

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that an Arbitrator would be ineligible even if appointed prior to 23 October 2015. The fact that Section 12(5) has been inserted by Act 3 of 2016 with retrospective effect from 23 October 2015 and not prior thereto clearly demonstrates that the legislature did not intend to disqualify a person from being an Arbitrator whose appointment was made even prior to 23 October 2015 on the basis of the Schedule which never existed though impliedly existed in various provisions of the Act viz., Sections 10, 11, 12, 18 etc. There can be no doubt that what has been made explicit by virtue of Fifth Schedule and Seventh Schedule were implicit prior to 23 October 2015, but by virtue of these implicit provisions, the appointments are not treated statutorily as illegal unless a party aggrieved successfully challenges the same in accordance with the provisions of the Act based on provisions existing prior to 23 October 2015.

…….It is settled that disqualification cannot be ascribed impliedly and retrospectively which would be the case if submission made by the judgment debtor is to be accepted. Prior to 2015 Amendment, there was no express provision disqualifying a person to be an Arbitrator on such implied criteria

35……The issue before the Court as per paragraph 29 was with regard to the appointment of an Arbitrator being ineligible by virtue of Section 12(5) of the Act and whether by conduct, there can be a waiver of such appointment and

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whether such a point can be raised for the first time in an application under Section 34 of the Act. On these facts, the Hon'ble Supreme Court relied upon Section 18 and its own decision in the case of Dharma Prathishthanam (supra) while observing that what was implicit earlier has now been made explicit by way of statutory amendment. It stops there. The Hon'ble Supreme Court nowhere in the said decision has observed that appointments made prior to 23 October 2015, even if hit by implicit disqualifications would render the appointment bad in law. Reading such a conclusion, as sought by the judgment debtor cannot, in my view, be correct reading of judgment of the Hon'ble Supreme Court. The observations made in paragraphs 32 to 37 were for deciding whether the appointments made contrary to the provisions of Section 12(5) were illegal. It is settled position that a judgment of the Hon'ble Supreme Court cannot be read as a statute dehors the context and the issue."

121. The aforesaid observations to my mind, correctly make it clear that the decision in ***Bhadra International (supra)*** cannot be read in isolation or construed as laying down a general proposition that every appointment which, under the post-2015 statutory regime, would attract disqualification under the Fifth or Seventh Schedule was rendered *void ab initio* even where such appointment had been made prior to 23.10.2015.

122. The Bombay High Court has clearly held that the observations of the Hon'ble Supreme Court in ***Bhadra International (supra)*** were

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rendered in the context of an appointment governed by Section 12(5), as introduced by the 2015 Amendment, and were principally concerned with the question whether an ineligible Arbitrator could continue in office and whether such ineligibility could be waived by conduct. The reference to the line that certain principles were "implicit" in the unamended Act has to be understood in that context.

123. In particular, the said expression cannot be understood to mean that the legislature had already enacted a statutory disqualification identical to Section 12(5), despite the absence of any such provision in the unamended Act. There is a material distinction between the existence of general principles of impartiality, independence and equal treatment under the 1996 Act and the creation of ineligibility under Section 12(5), read with the Seventh Schedule. The former could furnish a ground for challenge under the pre-amendment statutory framework; the latter operates as an express statutory bar to appointment.

124. The validity of appointments prior to cut off date has to be examined with reference to the law applicable on the date on which the appointment was made. The subsequent introduction of Section 12(5) and the Seventh Schedule cannot, merely by characterising the underlying principles as having existed implicitly, retrospectively convert an appointment which was not statutorily prohibited when made into one which is now void in law. Such an interpretation would effectively give retrospective operation to a statutory disqualification which Parliament expressly made applicable from 23.10.2015.

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125. The judgment in ***Bhadra International (supra)*** must also be read harmoniously with the Constitution Bench decision in ***CORE (supra)***. The observations in ***Bhadra International (supra)*** concerning the pre-existing requirement of impartiality and fairness cannot be elevated into a standalone rule that any appointment which would subsequently fall within the Seventh Schedule was void from its inception. The judgment itself did not determine the legal consequences of an appointment made before the insertion of Section 12(5), nor did it hold that every such appointment stood retrospectively invalidated by the 2015 Amendment.

126. Thus, ***Bhadra International (supra)*** supports the proposition that the principles of independence, impartiality and fairness are fundamental to arbitration and were not unknown to the pre-amendment statutory scheme. However, it does not follow that the statutory consequence subsequently attached to breach of those principles by Section 12(5) can automatically be imported into an arbitration governed by the unamended Act. Prior to 23.10.2015, an objection to the independence or impartiality of an Arbitrator had to be pursued within the remedial framework then available under the 1996 Act. The 2015 Amendment altered that position by introducing an express statutory prohibition in specified circumstances.

127. The contrary interpretation would lead to an anomalous consequence. An appointment validly made under the statutory regime existing on the date of appointment could subsequently be rendered void solely because Parliament, several years later, introduced an express disqualification. Such an approach would not merely apply the 2015

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Amendment to pending proceedings; it would retrospectively alter the legal character of an act completed before the amendment came into force. In the absence of clear legislative language evincing such an intention, such retrospective operation cannot be attributed to the 2015 Amendment Act.

128. To read ***Bhadra International (supra)*** otherwise would be to read isolated observations dehors their context and to attribute to the Supreme Court a conclusion which it did not expressly reach.

129. The correct approach, therefore, is to examine the applicability of the 2015 Amendment with reference to the statutory regime governing the arbitration and, in particular, the date on which the relevant appointment was made. Where the appointment of the Arbitral Tribunal was made prior to 23.10.2015, the subsequent insertion of Section 12(5) cannot, by itself, render that appointment invalid. If the appointment was liable to challenge under the unamended Act on the ground of lack of independence, impartiality or other statutory infirmity, the remedy had to be pursued in accordance with the law then prevailing. What cannot be done is to retrospectively substitute the post-amendment statutory consequence for the legal position which existed on the date of appointment.

130. Accordingly, ***Bhadra International (supra)*** does not lay down that every Arbitral Tribunal constituted prior to 23.10.2015, but whose constitution would have been impermissible under Section 12(5) read with the Seventh Schedule, stood rendered illegal by the 2015 Amendment.

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131. In this view of the matter, in terms of Category A and B it is clear that Section 34 filed raising the ground of unilateral appointment, filed after the cutoff date will be analysed on the pre amendment regime and not the post amended regime.

132. Much reliance is placed on ***CORE (supra)*** making its decision prospective in respect of appointments to three-member Arbitral Tribunals, and it is contended that, by necessary implication, the 2015 Amendment would apply to a sole Arbitrator appointed prior to the cut-off date. I am unable to accept this submission.

133. The Constitution Bench in ***CORE (supra)*** considered the entire law relating to independence, impartiality, bias, party autonomy and unilateral appointment, including the statutory framework both prior to and after the 2015 Amendment. However, it did not overrule the decisions permitting unilateral appointment under the pre-2015 regime and expressly made its ruling prospective. Consequently, those decisions cannot be treated as having been impliedly overruled in respect of arbitrations invoked prior to 23.10.2015.

134. The same contention has been dealt by the High Court of Bombay in ***M/s. S. E. Investments Ltd (supra)*** and the relevant observation reads as under:

> *"23.....CORE (supra) was concerned with post 2015 amendment and the Constitution Bench has considered all the aspects of the ingredients of arbitration proceedings viz., party autonomy, independence, impartiality, equality, public private arbitration, quasi judicial function, nemo judex rule, natural justice, bias, unilateral appointment, Indian*

Contract Act, etc. This decision also analysed all the provisions of the Act existing prior to 2015 amendment and post 2015 amendment viz., Sections 11, 12, 18 etc. However. after analysing the whole law on the subject including automatic disqualification, likelihood of bias etc., the Hon'ble Supreme Court approved the decision in the case of TRF Ltd vs. Energo Engineering Projects Ltd.29 and Perkins Eastman DPC vs. HSCC (India) Ltd.30 which were decisions dealing with post 2015 amendment but disagreed with the decision in the case of Voestalpine Schienen GmbH (supra) which too was post 2015 amendment dealing with appointment of three member Arbitral Tribunal from panel and in paragraph 169, the Hon'ble Supreme Court made its decision in the case of CORE (supra) applicable prospectively to appointment of Arbitrator from panel after the date of the judgment and that too only to three member Tribunal. In my view, the submissions made by the learned senior counsel Mr. Kamat on neutrality, independence, bias, equality, etc. have all been considered by this decision and also the decision rendered prior to 2015 on unilateral appointment were also considered but the Constitution Bench of the Hon'ble Supreme Court did not overrule the decisions rendered prior to 2015, rather it expressly disagreed with decision rendered qua panel appointment post 2015 amendment. This clearly indicates that the Constitutional Bench did not disapprove or impliedly

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overrule the decisions rendered on unilateral appointment prior to 2015 though all the aspects of the qualification of an Arbitrator were examined in great detail. Therefore, to say that earlier decisions of the Hon'ble Supreme Court dealing with unilateral appointment are no longer good law even in case of invocation prior to 23 October 2015 and Awards passed pursuant thereto are void, cannot be accepted."

CATEGORY C:

Cases where the Arbitral proceedings and the challenge thereto arose prior to the Amendment Act, but the arbitration agreement expressly stipulated that any statutory modification or re-enactment of the arbitration law would govern the Arbitral proceedings, thereby raising the issue whether the provisions introduced by the Amendment Act would nevertheless become applicable by virtue of such contractual stipulation.

135. The law with regard to this category is fairly settled in view of various Supreme Court and High Court judgments.

136. In ***Ratnam Sudesh Iyer (supra)*** the Section 34 proceedings were commenced prior to the cutoff date. The Court held as under:

"25. *The contention of the appellant, faced with the aforesaid judicial pronouncements, solely rests on the wording of Clause 9 of the deed of settlement, which provides that*

"the arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 of India or any amendment thereto."

(emphasis supplied)

The submission thus was that this phraseology of Clause 9 included the possibility of any future amendments to the said Act being made applicable to the arbitration in question.

…

27. *In the context of the Arbitration Act, 1940 (hereinafter referred to as "the Old Act") and the said Act, there are some observations in Thyssen Stahlunion GmbH v. SAIL , which are relevant for the purposes of this discussion. While opining that the provisions of the Old Act would apply in relation to Arbitral proceedings which had commenced before the coming into force of the said Act, this Court referred to the "repeal and savings" provision in Section 85(2)(a) of the said Act. It was observed that the phrase "in relation to Arbitral proceedings" cannot be given a narrow meaning so as to mean only pendency of arbitration proceedings before the Arbitrator, but would also cover proceedings before the court…*

28. *However, the general observations aforesaid cannot come to the aid of the appellant in view of a*

number of judicial pronouncements by this Court which deal with a similar issue.

29. *In S.P. Singla Constructions (P) Ltd. v. State of H.P. , the arbitration clause provided that the arbitration would be subject to the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof. A plea was raised that the amended provisions would apply in accordance with Section 26 of the 2015 Amendment Act. This contention was repelled by the Court which opined that such general conditions of the contract cannot be taken to be an agreement between the parties to apply the provisions of the 2015 Amendment Act. As a result, the provisions of the 2015 Amendment Act would apply only in relation to Arbitral proceedings commenced on or after the date of commencement of the 2015 Amendment....*

31. *While S.P. Singla and Parmar Construction Co. opined on the topic of Arbitral proceedings, we may note here that the matter concerns Section 34 proceedings for setting aside the Award. In this case, the Section 34 proceedings had already commenced when the 2015 Amendment Act came into effect. The court proceedings were already subject to the pre-2015 legal position. In a conspectus of the aforesaid, a generally worded clause such as Clause 9 of the deed*

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of settlement cannot be said to constitute an agreement to change the course of law that the Section 34 proceedings were subject to.

…

34. *We may note that the line of reasoning in Ssangyong Engg. & Construction Co. Ltd. [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] itself shows that to prevent any uncertainty in law, while seeking to fine tune the law to restrict the scope of interference in Awards the legislature took a conscious decision to make applicable the amendments only from the date it came into force. Thus, the general phraseology of a clause which seeks to include any amendment to the Act would not be able to be availed of to expand the scope of scrutiny as it would appear to run contrary to the legislative intent of Section 26 of the Amendment Act."*

(emphasis added)

137. Similarly in the case of ***Jagdish Chand Gupta (supra)*** the Court in view of peculiar facts and circumstances held as under:

"35. Learned Counsel of the petitioner places reliance on APR Constructions Ltd. (supra) wherein the Hon'ble Karnataka High Court dealt with a similar arbitration clause. It was held that where the arbitration clause uses the expression "statutory modification," the amendments

brought to the 1996 Act, including the 2015 Amendment, would automatically apply to the arbitral proceedings unless expressly waived in writing under the proviso to section 12(5). It was emphasized that in the absence of a written waiver, the amended provisions must govern, and the appointment of ineligible Arbitrators cannot be sustained…..

37. A perusal of the aforesaid two judgments make it clear that the words "statutory modification" are of wide import and signify a forward-looking intention of the parties to adopt any amendments or modifications to the governing law. In the present case, Clause 64(7) of the GCC evidences the parties' mutual understanding that subsequent legislative amendments including those introduced by the 2015 Amendment Act would apply to their arbitration. This inference is further strengthened by the conduct of the respondent, who itself invoked the amended provisions of the 1996 Act while filing an application under section 33 of the 1996 Act seeking correction of the Award.

38. On perusal and more particularly of paragraph 1, it becomes evident that the respondent itself referred to and invoked the "Arbitration and Conciliation Act, 1996 as amended by the Amendment Act, 2015." This conduct unequivocally demonstrates the parties' understanding that the Amended Act governed the proceedings, thereby satisfying the requirements of section 26 of the Amendment

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Act, 2015.

…

41. The conduct of both parties in invoking the amended provisions first by the petitioner and later by the respondent constitutes strong evidence of an implied agreement to apply the Amendment Act, 2015. The parties had, in effect, opted into the amended regime. Consequently, the arbitral proceedings must be seen in light of the 2015 Amendment and not the pre-amendment position.

138. In ***Ratnam Sudesh Iyer (supra)***, the arbitration clause provided that the proceedings would be governed by the 1996 Act "or any amendment thereto". It was held that such general and forward-looking language, by itself, did not constitute an agreement to apply the 2015 Amendment Act to proceedings which had already commenced. The Court particularly noted that, where Section 34 proceedings were already pending when the 2015 Amendment Act came into force, a general reference to future amendments could not be construed as altering the legal regime applicable to those proceedings.

139. ***Jagdish Chand Gupta (supra)*** on which the petitioners have placed reliance, however, involved a materially different clause referring to "statutory modification". The Court found that the language of the clause, read in its context, demonstrated an intention to adopt subsequent legislative modifications. This conclusion was further strengthened by the subsequent conduct of the parties, who themselves invoked the amended provisions of the 1996 Act. The Court

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accordingly found an implied agreement under Section 26 to apply the amended regime.

140. Hence it can be said that where the clause contains only a general reference to future amendments, ***Ratnam Sudesh Iyer (supra)*** would govern. Where the clause contains specific language indicating an intention to adopt statutory modifications, the Court must examine the clause in its entirety followed by the subsequent conduct of the parties. If such language and conduct establish a clear mutual intention to adopt the amended regime, then the amended regime would be applicable.

141. In view of the above it is clear that applicability of the amendments would rest on how the clause is worded, first the specific intention of the parties to be bound by the amendments, second, the conduct of the parties.

CONCLUSION

142. In view of the foregoing discussion, the questions referred are answered as follows:

i. An objection relating to the unilateral appointment or de jure ineligibility of an Arbitrator is maintainable in proceedings under Section 34 in accordance with the principles laid down in ***Bhadra International (supra).***

ii. The 2015 amendment was substantive in nature and cannot be referred as merely clarificatory. Therefore it will only be applicable prospectively.

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iii. In case the arbitration clause provided for applicability of an amended act or any amendment then the application would depend on the language of the clause and conduct of the parties.

143. Learned counsel for the parties agree that all the petitions may be listed before the Roster Bench for further proceedings, as this Court was required only to answer the questions of law as framed. Accordingly, this Court has confined its consideration to the three issues so framed and has not examined the factual aspects of the individual petitions.

144. List the batch along with *M/s Adwel Advertising Service & Anr. v. South Delhi Municipal Corporation, OMP (COMM) 384/2017*, separately on 14.09.2026, before the roster bench.

JASMEET SINGH, J

1st September, 2026/DE

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