IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Arb. Case No. 581 of 2023 a/w
Arb. Case Nos. 582 to 584 of 2023

Reserved on: December 13, 2024

Decided on: January 2, 2025

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1. Arb. Case No. 581 of 2023

The Chief General Manager
H.P. Telecom Circle & ors. ...Petitioners

Versus

Sh. Kashmir Singh (Government Contractor) ...Respondent

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2. Arb. Case No. 582 of 2023

Sh. Kashmir Singh (Government Contractor)
...Petitioner

Versus

The Chief General Manager
H.P. Telecom Circle & ors. ...Respondents

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3. Arb. Case No. 583 of 2023

Sh. Kashmir Singh (Government Contractor)
...Petitioner

Versus

The Chief General Manager
H.P. Telecom Circle & ors. ...Respondents

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4. Arb. Case No. 584 of 2023

The Chief General Manager
H.P. Telecom Circle & ors. ...Petitioners

Versus

Sh. Kashmir Singh (Government Contractor) ...Respondent

Coram:

Ms. Justice Jyotsna Rewal Dua, Judge

[1]*Whether approved for reporting?* ***Yes****.*

For the petitioner	:	Mr. Navlesh Verma, Advocate, for the petitioner(s) in Arb. Case Nos. 581 and 584 of 2023. Mr. H.S. Rangra, Advocate, for the petitioner(s) in Arb. Case Nos. 582 and 583 of 2023.
For the respondents	:	Mr. H.S. Rangra, Advocate, for the respondent(s) in Arb. Case Nos. 581 and 584 2023 Mr. Navlesh Verma, Advocate, for the respondent(s) in Arb. Case Nos. 582 and 583 of 2023.

Jyotsna Rewal Dua, Judge

Background of the case

A dispute arose between Sh. Kashmir Singh, a Government Contractor and the Telecom Department in relation to two works awarded to him in Division Mandi Himachal Pradesh. Sh. Kashmir Singh moved two Arbitration Case Nos. 37 & 38 of 2019 under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short 'the Act') for appointment of arbitrator. Considering total value of claim in both cases at around Rs. 11 lacs, a learned Advocate was appointed as arbitrator for deciding both the claims. The arbitrator entered into the references and passed separate awards in two cases on 11.11.2022 directing the Telecom Department to

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[1]*Whether reporters of Local Papers may be allowed to see the judgment? Yes.*

pay Rs. 4,40,521/- alongwith interest @ 6% p.a. from the date of filing of the claim petition in one claim and Rs. 2,26,554/- in the other alongwith interest @ 6% p.a. from the date of filing of the claim petition. Respondents were also directed to refund the security amount within 30 days failing which interest @ 6% p.a. was chargeable. Sh. Kashmir Singh filed objections under Section 34 of the Act before the learned District Judge, Mandi. Learned District Judge considered the provisions of Section 2(1)(e), Section 11 & Section 42 of the Act, judicial precedents of various Hon'ble High Courts & Hon'ble Supreme Court and held that arbitrator was appointed by the High Court of Himachal Pradesh, which is vested with original civil jurisdiction, therefore, it will fall within the definition of 'Court' under Section 2(i)(e), hence by virtue of Section 42 of the Act, all subsequent applications are required to be filed before the High Court and not before the District Court. Accordingly learned District Judge held that it did not have jurisdiction to entertain the objections filed by Sh. Kashmir Singh. Objections were ordered to be returned to him for presentation before the appropriate Court i.e. this Court. Learned District Judge had also observed that all arbitration proceedings were conducted at Shimla, therefore, the District Judge Mandi will have no jurisdiction to entertain the objections.

Consequently, these objections i.e. Arbitration Case Nos. 582 & 583 of 2023 have been filed by Sh. Kashmir Singh under Section 34 of the Act challenging the awards passed by the learned arbitrator on 11.11.2022. Counter Arbitration Case Nos. 581 & 584 of 2023 have been filed by the Telecom Department assailing the same awards passed by the learned arbitrator.

2. The Point involved

Before embarking upon merits of the objections, the first question that needs addressing is: Whether upon appointment of arbitrator under Section 11(6) of the Act by the High Court more particularly where the High Court also exercises original civil jurisdiction, the objections against the award are to be filed before the High Court or the District Judge.

In the instant case, applications under Section 11(6) of the Act were moved by Sh. Kashmir Singh in this Court seeking appointment of arbitrator in Arbitration Case Nos. 37 & 38 of 2019. Sole arbitrator was appointed by the High Court on 02.08.2019. So whether the High Court which also exercises original civil jurisdiction has exclusive jurisdiction to entertain objections under Section 34 of the Act, is the point to be delved upon. Learned Counsel for the parties have been heard accordingly.

2(i). Legal Provisions

Sections 42, 2(1)(e) & 11 of the Act have bearing on the question concerned:-

2(i)(a) **"**42. Jurisdiction. – Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.**"**

Section 42 starts with a non-obstante clause i.e. 'notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force'. The words 'this Part' refers to Part-I which encompasses Sections 1 – 43. As per Section 42, where an application with respect to an arbitration agreement under Part-I has been made to a Court then that Court alone will have the jurisdiction over (a) arbitral proceedings & (b) all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

2(i)(b) 'Court' has been defined in Section 2(1)(e) of the Act to mean:-

2(1)(e) "Court" means –

"(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original

> jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;
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> (ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;"

2(1)(c) Section 11 of the Act pertains to appointment of arbitrators. Relevant portion of this Section is as follows:-

> '11. Appointment of arbitrators.—(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
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> (2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
>
> (3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.
>
> (3A) The Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under Section 43-I, for the purposes of this Act:
>
> Provided that in respect of those High Court jurisdictions, where no graded arbitral institution are available, then, the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institution and any reference to the arbitrator shall be deemed to be an arbitral institution for the purposes of this section and

the arbitrator appointed by a party shall be entitled to such fee at the rate as specified in the Fourth Schedule:

Provided further that the Chief Justice of the concerned High Court may, from time to time, reviews the panel of arbitrators.

(4) If the appointment procedure in sub-section (3) applies and—

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

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

the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made on an application of the party in accordance with the provisions contained in sub-section (4).

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

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

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

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

The appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.

(6A) xxx xxx

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.

(7) – 11(A) xxx xxx”

2(ii) Comparison of Section 11(6) as it stood before and after the amendment of the Arbitration and Conciliation Act, 1996 on 23.10.2015 (by Act 3 of 2016) , may first be noticed:-

Section 11(6) before 2015 amendment.	Section 11(6) after 2015 amendment.
(6) Where, under an appointment procedure agreed upon by the parties,— (a) a party fails to act as required under that procedure; or (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.	(6) Where, under an appointment procedure agreed upon by the parties,— (a) a party fails to act as required under that procedure; or (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.

The words ‘Chief Justice’ existing in Section 11 (4), (5) & (6) were substituted with ‘Supreme Court’ or, as the case may the ‘High Court’. The other provisions of Section 11 were also amended accordingly.

Use of the words 'High Court' in Section 11(6) of the Act instead of 'Chief Justice' has given rise to the question in the present case that when the appointment of the arbitrator is not by the Chief Justice but by the High Court of Himachal Pradesh and incidentally this High Court exercises original civil jurisdiction and falls within the definition of 'Court' under Section 2(1)(e) then by virtue of Section 42 of the Act, objections challenging the arbitral award should also be filed before this Court.

3. Legal Position

The question – Whether appointment of arbitrator by the Chief Justice under the Act (prior to 2015 amendment) was an administrative or judicial act came up for consideration in several cases.

3(i). *Konkan Railway Corpn. Ltd. & others vs. Mehul Construction Co.*[2], held that order of appointment of arbitrator passed under Section 11(6) was administrative in nature. The Chief Justice does not function as a Court or a Tribunal. The said order cannot be subjected to judicial scrutiny of the Supreme Court. The nature of function performed by the Chief Justice being essentially to aid, constitution of the Arbitral Tribunal cannot be held to be a judicial function or otherwise legislature would have used the

[2] (2000) 7 SCC 201

words 'Court' or 'a judicial authority' instead of choosing the expression 'the Chief Justice or his nominee'. Relevant paras from the judgment are as under:-

> **"4**. … … In fact a Bench of this Court in *Sundaram Finance case*[3] while considering the scope of Section 9 of the Act has approached the problem from this perspective and incidental observation has been made that Section 11 does not require the Court to pass a judicial order appointing arbitrator. The nature and function performed by the Chief Justice or his nominee under sub- section (6) of Section 11 being essentially to aid the constitution of the arbitral tribunal cannot be held to be a judicial function as otherwise the legislature could have used the expression 'court' or 'judicial authority' instead of choosing the expression 'the Chief Justice or his nominee'. If a comparison is made with the English Arbitration Act 1996 it would appear that under the English Act it is the Court which has been vested with the function of appointment of an arbitrator upon failure of the agreed appointment procedure and an order made by the Court becomes appealable under Section 11(5) whereas under the Arbitration and Conciliation Act of 1996 in India the power of appointment is vested with the Chief Justice or his nominee.
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> **5.** An analysis of different sub-sections of Section 11 would indicate the character of the order, which the Chief Justice or his nominee passes under Sub-section (6) of Section 11. Sub-section (3) and sub-section (4) deals with cases, in which a party fails to appoint an arbitrator or the arbitrators fail to agree on the third arbitrator and thus seeks

[3] (1999) 2 SCC 479

to avoid frustration or unreasonable delay in the matter of constitution of the arbitral tribunal. It authorises the Chief Justice of India or the Chief Justice of a High Court concerned, or any person or institution designated by him to make the appointment upon request of a party, if the other party has failed to appoint an arbitrator within thirty days from the receipt of a request to that end. Sub-sections 4, 5 and 6 designedly use the expression 'Chief Justice' in preference to a Court or other authority as in paragraphs (3) and (4) of Article 11 of the Model Law, obviously for the reason that the Chief Justice acting in his administrative capacity, is expected to act quickly without encroaching on the requirements that only competent persons are appointed as arbitrators. Sub-section (4) does not lay down any time limit within which the Chief Justice or his nominee, designated by him, has to make the appointment. It however expects that these functionaries would act promptly. While sub-sections (4) and (5) deal with removal of obstacles arising in the absence of agreement between the parties on a procedure for appointing the arbitrator or arbitrators, sub-section (6) seeks to remove obstacles arising when there is an agreed appointment procedure. These obstacles are identified in Clauses (a), (b) and (c) of sub-section(6). Sub-section(6) provides a cure to these problems by permitting the aggrieved party to request the Chief Justice or any person or institution designated by him to take the necessary measure i.e. to make the appointment, unless the agreement on the appointment procedure provides other means for securing the appointment. Sub-section(6), therefore, aims at removing any dead-lock or undue delay in the appointment process. **This being the position, it is reasonable to hold**

that while discharging the functions under sub-section(6), the Chief Justice or his nominee will be acting in his administrative capacity and such a construction would subserve the very object of the new Arbitration Law.

6. The nature of the function performed by the Chief Justice being essentially to aid the Constitution of the Arbitration Tribunal immediately and the legislature having consciously chosen to confer the power on the Chief Justice and not a Court, it is apparent that the order passed by the Chief Justice or his nominee is an administrative order, as has been held by this Court in *Ador Samia case*[4] and the observations of this Court in *Sundaram Finance Ltd.*[3] *case* also is quite appropriate and neither of those decisions require any re-consideration. This being the position even an order refusing to appoint an arbitrator will not be amenable to the jurisdiction of this Court under Article 136 of the Constitution. Needless to mention such an order refusing to appoint an arbitrator after deciding the contentious issues would be an act of non-performance of duty and in view of what has been stated earlier the concerned authority could be directed by mandamus to perform its duty.**"**

3(ii) *Konkan Railway Corpn. Ltd. & others*[2] was approved by the Constitution Bench of the Apex Court in *Konkan Railway Corporation Ltd. & another vs. Rani Construction Pvt. Ltd.*[5] holding that nature of function performed by the Chief Justice or his nominee under Section 11(6) of the Act is purely administrative. It is

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[4] (1999) 8 SCC 572
[5] (2002) 2 SCC 388

neither judicial nor quasi judicial. No contentious issue can be decided while performing functions under Section 11(6) of the Act.

3(iii) *SBP & Co. vs. Patel Engineering Ltd. & another*[6], overruled *Konkan Railway Corporation Ltd. vs. Rani Construction Pvt. Ltd.*[5]. The majority decision held that under Section 11(6) there are several preliminary matters to be determined by the Chief Justice or his designate before appointment of an arbitrator viz. Whether application for appointment of arbitrator has been moved before the High Court having jurisdiction; Whether valid arbitration agreement exists between the parties; Whether dispute between the parties is arbitrable etc. For deciding these questions before appointing arbitrator, the Chief Justice or his designate can proceed either on the basis of affidavits or documents produced or take such evidence as may be necessary. It was held that once the statute creates an authority, confers on it power to adjudicate and makes its decision final on matters to be decided by it, normally, that decision cannot be said to be purely administrative though power to appoint arbitrator is not conferred on the Supreme Court or the High Court but on the Chief Justice of India or the Chief Justice of the High Court. One possible reason for this is that conferment of power upon the High Court would be governed by normal procedure of the Court

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[6] (2005) 8 SCC 618

including right of appeal. However this situation is to be avoided since object of the Act itself is to restrict interference by the Courts. Therefore, power is conferred on highest judicial authority in the country & in the states in their capacities as Chief Justices. But the power so conferred is not as *persona designata*. The mere fact that power is conferred upon Chief Justice and not on the Court presided by him, would not mean that power conferred is only administrative and not judicial. Relevant paragraphs of the judgment read as under:-

> **"9.** Normally, any tribunal or authority conferred with a power to act under a statute, has the jurisdiction to satisfy itself that the conditions for the exercise of that power existed and that the case calls for the exercise of that power. Such an adjudication relating to its own jurisdiction which could be called a decision on jurisdictional facts, is not generally final, unless it is made so by the Act constituting the tribunal. Here, sub-section (7) of Section 11 has given a finality to the decisions taken by the Chief Justice or any person or institution designated by him in respect of matters falling under sub-sections (4), (5) and (6) of Section 11. Once a statute creates an authority, confers on it power to adjudicate and makes its decision final on matters to be decided by it, normally, that decision cannot be said to be a purely administrative decision. It is really a decision on its own jurisdiction for the exercise of the power conferred by the statute or to perform the duties imposed by the statute. Unless, the authority satisfies itself that the conditions for

exercise of its power exist, it could not accede to a request made to it for the exercise of the conferred power. While exercising the power or performing the duty under Section 11(6) of the Act, the Chief Justice has to consider whether the conditions laid down by the section for the exercise of that power or the performance of that duty, exist. Therefore, unaided by authorities and going by general principals, it appears to us that while functioning under Section 11(6) of the Act, a Chief Justice or the person or institution designated by him, is bound to decide whether he has jurisdiction, whether there is an arbitration agreement, whether the applicant before him, is a party, whether the conditions for exercise of the power have been fulfilled and if an arbitrator is to be appointed, who is the fit person, in terms of the provision. Section 11(7) makes his decision on the matters entrusted to him, final.

10. The very scheme, if it involves an adjudicatory process, restricts the power of the Chief Justice to designate, by excluding the designation of a non-judicial institution or a non-judicial authority to perform the functions. For, under our dispensation, no judicial or quasi-judicial decision can be rendered by an institution if it is not a judicial authority, court or a quasi-judicial tribunal. This aspect is dealt with later while dealing with the right to designate under Section 11(6) and the scope of that designation.

11. The appointment of an arbitrator against the opposition of one of the parties on the ground that the Chief Justice had no jurisdiction or on the ground that there was no arbitration agreement, or on the ground that there was no dispute subsisting which was capable of being arbitrated upon or that the conditions for exercise of power under

Section 11(6) of the Act do not exist or that the qualification contemplated for the arbitrator by the parties cannot be ignored and has to be borne in mind, are all adjudications which affect the rights of parties. It cannot be said that when the Chief Justice decides that he has jurisdiction to proceed with the matter, that there is an arbitration agreement and that one of the parties to it has failed to act according to the procedure agreed upon, he is not adjudicating on the rights of the party who is raising these objections. The duty to decide the preliminary facts enabling the exercise of jurisdiction or power, gets all the more emphasized, when sub-section (7) designates the order under sub-sections (4), (5) or (6) a 'decision' and makes the decision of the Chief Justice final on the matters referred to in that sub-Section. **Thus, going by the general principles of law and the scheme of Section 11, it is difficult to call the order of the Chief Justice merely an administrative order** and to say that the opposite side need not even be heard before the Chief Justice exercises his power of appointing an arbitrator. Even otherwise, when a statute confers a power or imposes a duty on the highest judicial authority in the State or in the country, that authority, unless shown otherwise, has to act judicially and has necessarily to consider whether his power has been rightly invoked or the conditions for the performance of his duty are shown to exist.

…

13. It is common ground that the Act has adopted the UNCITRAL Model Law on International Commercial Arbitration. But at the same time, it has made some departures from the model law. Section 11 is in the place of Article 11 of the Model Law. The Model Law provides for the

making of a request under Article 11 to "the court or other authority specified in Article 6 to take the necessary measure". The words in Section 11 of the Act, are "the Chief Justice or the person or institution designated by him". The fact that instead of the court, the powers are conferred on the Chief Justice, has to be appreciated in the context of the statute. 'Court' is defined in the Act to be the principal civil court of original jurisdiction of the district and includes the High Court in exercise of its ordinary original civil jurisdiction. The principal civil court of original jurisdiction is normally the District Court. **The High Courts in India exercising ordinary original civil jurisdiction are not too many.** So in most of the States the concerned court would be the District Court. Obviously, the Parliament did not want to confer the power on the District Court, to entertain a request for appointing an arbitrator or for constituting an arbitral tribunal under Section 11 of the Act. **It has to be noted that under Section 9 of the Act, the District Court or the High Court exercising original jurisdiction, has the power to make interim orders prior to, during or even post arbitration. It has also the power to entertain a challenge to the award that may ultimately be made. The framers of the statute must certainly be taken to have been conscious of the definition of 'court' in the Act. It is easily possible to contemplate that they did not want the power under Section 11 to be conferred on the District Court or the High Court exercising original jurisdiction.** The intention apparently was to confer the power on the highest judicial authority in the State and in the country, on Chief Justices of High Courts and on the Chief Justice of India. Such a provision is necessarily intended to add the greatest

credibility to the arbitral process. The argument that the power thus conferred on the Chief Justice could not even be delegated to any other Judge of the High Court or of the Supreme Court, stands negatived only because of the power given to designate another. The intention of the legislature appears to be clear that it wanted to ensure that the power under Section 11(6) of the Act was exercised by the highest judicial authority in the concerned State or in the country. This is to ensure the utmost authority to the process of constituting the arbitral tribunal.

…

18. It is true that the power under Section 11(6) of the Act is not conferred on the Supreme Court or on the High Court, but it is conferred on the Chief Justice of India or the Chief Justice of the High Court. **One possible reason for specifying the authority as the Chief Justice, could be that if it were merely the conferment of the power on the High Court, or the Supreme Court, the matter would be governed by the normal procedure of that Court, including the right of appeal and the Parliament obviously wanted to avoid that situation, since one of the objects was to restrict the interference by Courts in the arbitral process. Therefore, the power was conferred on the highest judicial authority in the country and in the State in their capacities as Chief Justices.** They have been conferred the power or the right to pass an order contemplated by Section 11 of the Act. We have already seen that it is not possible to envisage that the power is conferred on the Chief Justice as *persona designata*. Therefore, the fact that the power is conferred on the Chief Justice, and not on the court presided over by him is not

sufficient to hold that the power thus conferred is merely an administrative power and is not a judicial power.**"**

The conclusions were summed up by the Hon'ble Court in the following paragraph:-

> **"47.** We, therefore, sum up our conclusions as follows:
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> i) **The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power**.
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> ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court.
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> iii) In case of designation of a judge of the High Court or of the Supreme Court, the power that is exercised by the designated, judge would be that of the Chief Justice as conferred by the statute.
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> iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the judge designated would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order

appointing the arbitrator could only be that of the Chief Justice or the judge designate.

v) Designation of a district judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

vi) Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

vii) Since an order passed by the Chief Justice of the High Court or by the designated judge of that court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution of India to the Supreme Court.

viii) **There can be no appeal against an order of the Chief Justice of India or a judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act**.

ix) In a case where an arbitral tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

x) Since all were guided by the decision of this Court in *Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd.*[5] and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that

appointments of arbitrators or arbitral tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.

xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending Page 1824 before them as on this date will stand transferred, to be dealt with by the Chief Justice of the concerned High Court or a Judge of that court designated by the Chief Justice.

xii) **The decision in Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd.[5] is overruled**."

3(iv) In *Garhwal Mandal Vikas Nigam Ltd. Vs. Krishna Travel Agency*[7], the contention raised before the Hon'ble Apex Court was since the arbitrator had been appointed by the Apex Court, it alone would have the jurisdiction to decide the objections against the award. The answer given was that once an arbitrator is appointed then the appropriate forum for filing and challenging the award will be the Principal Civil Court of Original Jurisdiction. Parties will have the right to move under Sections 34 and 37 of the Act accordingly. In scheme of things if appointment is made by the

[7] (2008) 6 SCC 741

High Court or the Supreme Court, Principal Civil Court of Original Jurisdiction remains the same as contemplated under Section 2(1)(e) of the Act. It was also observed that in case objections to the award were to lie to High Court/Supreme Court that appointed the arbitrator that would mean that in every case the High Court/Supreme Court will become the Principal Civil Court of Original Jurisdiction under Section 11(6) of the Act. A valuable right of appeal will be lost. The expression 'court' used in Section 34 of the Act will have to be understood ignoring the definition of 'court' in the Act.

The Apex Court also affirmed the view taken in *State of Goa vs. Western Builders*[8] that in case of appointment of arbitrator by High Court under Section 11(6), the Principal Civil Court of Original Jurisdiction remained the District Court and not the High Court. If arbitrator is appointed by the Supreme Court, the objections can be filed before the Principal Civil Court of Original Jurisdiction as defined in Section 2(1)(e). It was also held that converse position would result in depriving the party of its valuable right to appeal under Section 37 of the Act. The Court also held that it was not the intention of the Legislature to make the High Court as Principal Civil Court of Original Jurisdiction when arbitrator is

[8] (2006) 6 SCC 239

appointed by the High Court under Section 11(6) of the Act. Once an arbitrator is appointed then the appropriate forum for filing the award and for challenging the same will be the Principal Civil Court of Original Jurisdiction.

Relevant paragraphs of the judgment read as under:-

> **"8.** Apart from these four cases, which have been brought to our notice, the position of law is very clear that in case the argument of learned counsel is accepted, **that would mean that in every case where this court passes an order, be it on appeal, from the order passed by the High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996, this court will become a Principal Civil Court of Original Jurisdiction**. If the argument is further taken to its logical conclusion that would mean that the parties will have to approach this Court by making an application under Section 34 i.e. for setting aside the award. **The expression 'Court' used in Section 34 of the Act will also have to be understood ignoring the definition of 'Court' in the Act**.
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> **9.** There is another facet of the problem. The party will be deprived of the right to file an appeal under Section 37(i)(b) of the Arbitration and Conciliation Act. This means that a valuable right of appeal will be lost. Therefore, in the scheme of things, the submission of the learned counsel cannot be accepted. Taking this argument to a further logical conclusion, when the appointment is made by the High Court under Section 11(6) of the Conciliation Act, then in that case, in every appointment made by the High Court in exercise of its power under Section 11 (6), the High Court will become the Principal Civil Court of Original Jurisdiction, as defined in

Section 2(1)(e) of the 1996 Act. **That is certainly not the intention of the legislature. Once an arbitrator is appointed then the appropriate forum for filing the award and for challenging the same, will be the Principal Civil Court of Original Jurisdiction. Thus, the parties will have the right to move under Section 34 of the 1996 Act and to appeal under Section 37 of the 1996 Act. Therefore, in the scheme of things, if appointment is made by the High Court or by this Court, the Principal Civil Court of Original Jurisdiction remains the same as contemplated under Section 2(1)(e) of the 1996 Act.**

10. We further reiterate that the view taken by this Court in *National Aluminium Co. Ltd. Vs. Pressteel & Fabrications (P) Ltd.*[9] and *State of Goa vs. Western Builders*[8] is the correct approach and **we reaffirm the view that in case any appointment of arbitrator is made by the High Court under Section 11(6), the principal Civil Court of Original Jurisdiction remains the District Court and not the High Court.** And likewise, if an appointment of the arbitrator is made by this Court, in that case also, the objection can only be filed before the Principal Civil Court of Original Jurisdiction as defined in Section 2(1)(e) of the 1996 Act. Thus, in this view of the matter, we hold that the plea raised by learned counsel for the petitioner that this Court should entertain the award given by the arbitrator appointed by this Court and all objections to at should be disposed of by this Court is inacceptable and consequently, the prayer made in the application is rejected.**"**

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[9] (2004) 1 SCC 540

3(v) In *State of Maharashtra through Executive Engineer vs. Atlanta Limited*[10], the Hon'ble Supreme Court considered Section 2(1)(e) of the Act and said that where the High Court exercised ordinary civil jurisdiction over a district, the High Court will have preference to the Principal Civil Court of Original Jurisdiction in that district. In that case one party had moved under Section 34 before the District Judge and the other party challenged the award before the High Court. It was held that 'Court' for the purpose of Section 42 will be the High Court and not the District Court. Reasons assigned *inter alia* were that firstly inclusion of the High Court in definition of the 'Court' in Section 2(1)(e) would become nugatory if the above conclusion was not accepted as the Principal Civil Court of Original Jurisdiction would always be court lower in grade than the High Court. Secondly, it is the superior court exercising orginal jurisdiction which has been chosen to adjudicate the disputes arising out of arbitration agreement. Relevant paragraphs of the judgments read as under:-

> **"32.** All the same, it is imperative for us to determine, which of the above two courts which have been approached by the rival parties, should be the one, to adjudicate upon the disputes raised. For an answer to the controversy in hand, recourse ought to be made first of all to the provisions

[10] (2014) 11 SCC 619

of the Arbitration Act. On the failure to reach a positive conclusion, other principles of law, may have to be relied upon. Having given out thoughtful consideration to the issue in hand, we are of the view, that the rightful answer can be determined from Section 2(1)(e) of the Arbitration Act, which defines the term “Court”. We shall endeavour to determine this issue, by examining how litigation is divided between a High Court exercising “ordinary original civil jurisdiction”, and the “principal civil court of original jurisdiction” in a district. What needs to be kept in mind is, that the High Court of Bombay is vested with “ordinary original civil jurisdiction” over the same area, over which jurisdiction is also exercised by the “principal Civil Court of original jurisdiction” for the District of Greater Mumbai (i.e. the Principal District Judge, Greater Mumbai). Jurisdiction of the above two courts on the “ordinary original civil side” is over the area of Greater Mumbai. Whilst examining the submissions advanced by the learned counsel for the appellant under Section 15 of the Code of Civil Procedure, we have already concluded, that in the above situation, jurisdiction will vest with the High Court and not with the District Judge. The aforesaid choice of jurisdiction has been expressed in Section 2(1)(e) of the Arbitration Act, without any fetters whatsoever.

33. It is not the case of the appellants before us, that because of pecuniary dimensions, and/or any other consideration(s), jurisdiction in the two alternatives mentioned above, would lie with the Principal District Judge, Greater Mumbai. Under the scheme of the provisions of the Arbitration Act therefore, if the choice is between the High Court (in exercise of its “ordinary original civil jurisdiction”) on the one hand, and the “principal civil court of original

jurisdiction" in the District i.e. the District Judge on the other; Section 2(1)(e) of the Arbitration Act has made the choice in favour of the High Court. This in fact impliedly discloses a legislative intent. **To our mind therefore, it makes no difference, if the "principal civil court of original jurisdiction", is in the same district over which the High Court exercises original jurisdiction, or some other district. In case an option is to be exercised between a High Court (under its "ordinary original civil jurisdiction") on the one hand, and a District Court (as "principal Civil Court of original jurisdiction") on the other, the choice under the Arbitration Act has to be exercised in favour of the High Court**.

34. In the present controversy also, we must choose the jurisdiction of one of two courts i.e. either the "ordinary original civil jurisdiction" of the High Court of Bombay; or the "principal civil court of original jurisdiction" in District Thane i.e. the District Judge, Thane. In view of the inferences drawn by us, based on the legislative intent emerging out of Section 2(1)(e) of the Arbitration Act, we are of the considered view, that legislative choice is clearly in favour of the High Court. We are, therefore of the view, that the matters in hand would have to be adjudicated upon by the High Court of Bombay alone.**"**

3(vi) In *State of West Bengal & others vs. Associated Contractors*[11], the question of law before the Hon'ble Supreme Court was as to which Court will have the jurisdiction to entertain and decide applications under Section 34 of the Act. Under Section

[11] (2015) 1 SCC 32

9 of the Act an interim order was passed by the High Court. In an application under Section 11 of the Act, arbitrator was appointed to adjudicate the dispute between the parties. An argument was raised that by virtue of Section 42 of the Act it is only the High Court that will have jurisdiction to decide the applications under Section 34 of the Act. Hon'ble Apex Court held that definition of word 'Court' in Section 2(1)(e) of the Act is exhaustive as the Section uses the expression "means and includes". Under this definition Principal Civil Court of Original Jurisdiction or the High Court in exercise of its original civil jurisdiction will be 'Court' as defined under Section 2(1)(e) of the Court. Apex Court also affirmed the view taken in *State of Maharashtra through Executive Engineer*[10] and held that the expression 'with respect to an arbitration agreement' widens the scope of Section 42 to include all matters which directly or indirectly pertain to an arbitration agreement. Applications made to Courts whether before, during or after arbitral proceedings, made under Part-I of the Act, are all covered by Section 42. The essential ingredient of the Section is that an application under Part-I must be made in a 'Court'. It was held that Section 11 applications are not to be moved before the 'court' as defined but before the Chief Justice either of the High Court or the Supreme Court, as the case may be, or their delegates. This is despite the fact that the Chief Justice or

his delegate has now to decide judicially and not administratively. Section 42 would not apply to applications made before the Chief Justice or his delegate for the simple reason that the Chief Justice or his delegate is not 'court' as defined by Section 2(1)(e). The Chief Justice does not represent the High Court. In contrast to applications moved under Sections 8 and 11 of the Act, the applications under Section 9 are moved to the 'court' for passing of interim orders before or during arbitral proceedings or at any time after the making of the arbitral award but before its enforcement. Therefore, they attract Section 42 to preclude the making of all subsequent applications under Part-I to any court except the court to which an application has been made under Section 9 of the Act. The Court gave following reasons for holing that when the Apex Court appoints arbitrator it will not be construed as Court within the meaning of Section 2(1)(e):--

> **"20**. As noted above, the definition of "court" in Section 2(1)(e) is materially different from its predecessor contained in Section 2(c) of the 1940 Act. **There are a variety of reasons as to why the Supreme Court cannot possibly be considered to be "court" within the meaning of Section 2(1)(e) even if it retains seisin over the arbitral proceedings.** Firstly, as noted above, the definition is exhaustive and recognizes only one of two possible courts that could be "court" for the purpose of Section 2(1)(e).

Secondly, under the 1940 Act, the expression “civil court” has been held to be wide enough to include an appellate court and, therefore would include the Supreme Court as was held in the two judgments aforementioned under the 1940 Act. Even though this proposition itself is open to doubt, as the Supreme Court exercising jurisdiction under Article 136 is not an ordinary Appellate Court, suffice it to say that even this reason does not obtain under the present definition, which speaks of either the Principal Civil Court or the High Court exercising original jurisdiction. Thirdly, if an application would have to be preferred to the Supreme Court directly, the appeal that is available so far as applications under Sections 9 and 34 are concerned, provided for under Section 37 of the Act, would not be available. Any further appeal to the Supreme Court under Article 136 would also not be available. The only other argument that could possibly be made is that all definition sections are subject to context to the contrary. The context of Section 42 does not in any manner lead to a conclusion that the word “court” in Section 42 should be construed otherwise than as defined. The context of Section 42 is merely to see that one court alone shall have jurisdiction over all applications with respect to arbitration agreements which context does not in any manner enable the Supreme Court to become a “court” within the meaning of Section 42. It has aptly been stated that the rule of forum conveniens is expressly excluded by section 42. See: JSW Steel Ltd. vs. Jindal Praxair Oxygen Co.Ltd., (2006) 11 SCC 521 at para 59. Section 42 is also markedly different from Section 31(4) of the 1940 Act in that the expression “has been made in a court competent to entertain it” does not find place in Section 42. This is for the

> reason that, under Section 2(1)(e), the competent Court is fixed as the Principal Civil Court exercising original jurisdiction or a High Court exercising original civil jurisdiction, and no other court. For all these reasons, we hold that the decisions under the 1940 Act would not obtain under the 1996 Act, and the Supreme Court cannot be "court" for the purposes of Section 42.**"**

It was also held that Section 42 applies to all proceedings with respect to arbitration agreements including the applications made after the final award as under:-

> **"21**. One other question that may arise is as to whether Section 42 applies after the arbitral proceedings come to an end. It has already been held by us that the expression "with respect to an arbitration agreement" are words of wide import and would take in all applications made before during or after the arbitral proceedings are over. In an earlier judgment, Kumbha Mawji v. Dominion of India, AIR 1953 SC 313, the question which arose before the Supreme Court was whether the expression used in Section 31(4) of the 1940 Act "in any reference" would include matters that are after the arbitral proceedings are over and have culminated in an award. It was held that the words "in any reference" cannot be taken to mean "in the course of a reference", but mean "in the matter of a reference" and that such phrase is wide enough and comprehensive enough to cover an application made after the arbitration is completed and the final Award is made. (See Paras 317-18). As has been noticed above, the expression used in Section 42 is wider

being “with respect to an arbitration agreement” and would certainly include such applications.**”**

Following conclusions were drawn by the Court:-

> **“25**. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:
>
> (a) **Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as “court” for the purpose of Part-I of the Arbitration Act, 1996.**
>
> (b) **The expression “with respect to an arbitration agreement” makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an Award is pronounced under Part-I of the 1996 Act**.
>
> (c) **However, Section 42 only applies to applications made under Part-I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42**.
>
> (d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.
>
> (e) **In no circumstances can the Supreme Court be “court” for the purposes of Section 2(1)(e), and**

whether the Supreme Court does or does not retain seisin after appointing an Arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil court having original jurisdiction in the district as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part-I.

(g) If a first application is made to a court which is neither a Principal Court of original jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject matter jurisdiction would be outside Section 42.

The reference is answered accordingly.**"**

3(vii). *Emm Enn Associates vs. Commander Works Engineer & others*[12] relied upon *SBP & Co. Vs. Patel Engg. Ltd*. Case[6] to hold that exercise of power under Section 11(6) is judicial in nature; While exercising this power, the Chief Justice can examine whether the claim is live and needs to be adjudicated. In cases of stale claims the applications can be rejected.

4. Learned Counsel for the claimant – Sh. Kashmir Singh falls back upon *State of Maharashtra through Executive Engineer*

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[12] (2016) 13 SCC 61

vs. Atlanta Ltd. Case[10] to support the order passed by the learned District Judge and submits that this High Court exercises ordinary original Civil jurisdiction. The arbitrator was appointed by this Court. Between the High Court that exercises original civil jurisdiction and the Principal Civil Court of Original Jurisdiction, the choice is to be exercised in favour of the High Court for filing the objections against the award passed by the arbitrator as it would make no difference if the Principal Civil Court of Original Jurisdiction is in the same district over which the High Court exercises original jurisdiction or some other district. Learned Counsel for the claimant also pressed into service the amendment of Section 11(6) under Act 3 of 2016 that came into force w.e.f. 23.10.2015 and replaced the words 'Chief Justice' with 'High Court' in case of other than international commercial arbitration as under:-

> "(6) Where, under an appointment procedure agreed upon by the parties,—
>
> (a) a party fails to act as required under that procedure; or
> (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
> (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,
>
> The appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than

> international commercial arbitration, as the case may be to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment."

Learned Counsel for the Telecom Department outlined the development of law on the subject and contended that in the instant cases it is the Principal Civil Court of Original Jurisdiction that ought to have decided the objections against the arbitral award and prayed for setting aside the judgments passed by the learned District Judge. It was submitted that Telecom Department filed its two Arbitration Cases bearing Nos. 581 & 584 of 2023 in this Court only to avoid conflicting orders and in light of impugned orders passed by the learned District Judge.

5. Consideration

5(i). It was by way of Act 3 of 2016 that the words 'Chief Justice or any person or institution designated by him' in Section 11(6) of the Act were substituted by the words 'Supreme Court', or as the case may be, the 'High Court', or any person or institution designated by such Court'.

It would be appropriate to first examine the reasons for amending Section 11(6) of the Arbitration and Conciliation Act, 1996 by Act 3 of 2016. Report No. 246 of the Law Commission of India,

the basis for amending the Arbitration and Conciliation Act 1996 by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) would be a relevant factor.

5(i)(a) In para-24 of the report, the Commission proposed changing the existing scheme of power of appointment being vested in the 'Chief Justice' to the 'High Court' & the 'Supreme Court' and clarified that delegation of power of appointment (as opposed to a finding regarding the existence/nullity of the arbitration agreement) shall not be regarded as a judicial act. This was proposed to rationalize the law and provide greater incentive for the High Court and/or Supreme Court to delegate the power of appointment (being a non-judicial act) to specialized, external persons or institutions. The Commission further recommended amendment of Section 11(7) so that the decisions of the High Court regarding existence/nullity of the arbitration agreement are final where the arbitrator has been appointed and as such are non-appealable. Para of the report relevant to the context reads as under:-

> **"24**. Two further sets of amendments have been proposed in this context. First, it is observed that a lot of time is spent for appointment of arbitrators at the very threshold of arbitration proceedings as applications under section 11 are kept pending for many years. In this context, the

> Commission has proposed a few amendments. The Commission has proposed changing the existing scheme of the power of appointment being vested in the "Chief Justice" to the "High Court" and the "Supreme Court" and has expressly clarified that delegation of the power of "appointment" (as opposed to a finding regarding the existence/nullity of the arbitration agreement) shall not be regarded as a judicial act. This would rationalize the law and provide greater incentive for the High Court and/or Supreme Court to delegate the power of appointment (being a non-judicial act) to specialized, external persons or institutions. The Commission has further recommended an amendment to section 11 (7) so that decisions of the High Court (regarding existence/nullity of the arbitration agreement) are final where an arbitrator has been appointed, and as such are non-appealable. The Commission further proposes the addition of section 11 (13) which requires the Court to make an endeavor to dispose of the matter within sixty days from the service of notice on the opposite party.**"**

5(i)(b). The Law Commission also took note of *SBP & Co. Vs. Patel Engineering Ltd*. Case[6] wherein power to appoint an arbitrator under Section 11 had been held to be judicial power and also the law laid down in *National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd.*[13], as under:-

> "30. After a series of cases culminating in the decision in SBP v Patel Engineering, (2005) 8 SCC 618, the Supreme Court held that the power to appoint an arbitrator under

[13] (2009) 1 SCC 267

section 11 is a “judicial” power. The underlying issues in this judgment, relating to the scope of intervention, were subsequently clarified by Raveendran J. in National Insurance Co. Ltd. v Boghara Polyfab Pvt. Ltd., (2009) 1 SCC 267, where the Supreme Court laid down as follows –

“1. The issues (first category) which Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court?

(b) Whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such an agreement?

2. The issues (second category) which the Chief Justice/his designate may choose to decide are:

(a) Whether the claim is a dead (long barred) claim or a live claim?

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection?

3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are:

(a) Whether a claim falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration)?

(b) Merits of any claim involved in the arbitration.”

The Law Commission recommended amending Sections 8 and 11 of the Arbitration and Conciliation Act 1996 observing that

scope of judicial intervention is only restricted to a situation where Court/judicial authority finds that arbitration agreement does not exist or is null & void. Insofar as nature of intervention is concerned, the Commission recommended that in the event the Court /judicial authority is *prima facie* satisfied against the argument challenging the arbitration agreement it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that judicial authority shall not refer the parties to arbitration only if it finds that there does not exist arbitration agreement or that it is null & void. If the judicial authority is of the opinion that *prima facie* the arbitration agreement exists, the dispute shall be referred to arbitration and leave the existence of arbitration agreement to be finally determined by the Arbitral Tribunal. However, if the judicial authority concludes that the arbitration agreement does not exist, then the conclusion will be final and not *prima facie.* In the event the judicial authority refers the dispute to arbitration and appoints arbitrator under Sections 8 and 11 respectively such decision would be final and non-appealable. An appeal can be maintained under Section 37 only in the event of refusal to refer the parties to arbitration or refusal to appoint arbitrator. Relevant paragraph of the report reads as under:-

“33. It is in this context, the Commission has recommended amendments to sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void. In so far as the nature of intervention is concerned, it is recommended that in the event the Court/Judicial Authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void. In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator, under sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained under section 37 only in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator.**”**

5(ii) The High Court in exercise of its original civil jurisdiction and Principal Civil Court of Original Jurisdiction are 'Court' as defined in Section 2(1)(e) of the Act. With respect to an arbitration agreement Section 42 of the Act delineates jurisdiction of the Court and states where an application under Part-I of the Act (i.e. under Sections 1 – 43) in relation to an arbitration agreement has been moved in a Court then that Court alone will have jurisdiction not only over the arbitral proceedings but also over all subsequent applications arising out of that agreement. All arbitral proceedings can be made in that Court alone. Section 42 applies to all applications whether made before or during arbitral proceedings or after an award is pronounced under Part-1 of the Act. The only rider is that such an application must have been made to a Court as defined.

5(iii) In the instant case, application in question was moved under Section 11(6) of the Act for appointment of arbitrator. Application was thus under Part-1 of the Act. The application was made to the High Court of Himachal Pradesh, which incidentally also exercises original civil jurisdiction. The High Court of Himachal Pradesh, therefore, technically falls within the definition of 'Court' under Section 2(1)(e) of the Act but the arbitrator was not appointed by the High Court in exercise of its original civil jurisdiction. The

appointment was made in exercise of Section 11(6) of the Act. Further, the pecuniary limit/ordinary original civil jurisdiction of the High Court of Himachal Pradesh is over the matters where value exceeds rupees one crore.

5(iv) The arbitrator was appointed on 02.08.2019 when the Act stood amended and the words 'Chief Justice' stood replaced with the words 'High Court'. Hence appointment of arbitrator was by the High Court. The object behind replacing the words 'Chief Justice' with 'High Court' in Section 11(6) as given by the Law Commission is that "delegation of the power of 'appointment' as opposed to a finding regarding the existence/nullity of the arbitration agreement shall not be regarded as a judicial act". The amendment has been proposed "for rationalizing the law and providing greater incentive for the High Court and/or Supreme Court to delegate the power of appointment 'being a non-judicial act' to specialized, external persons or institutions". 'In the event the judicial authority refers the dispute to arbitration and/or appoints an arbitrator under Sections 8 and 11, such a decision will be final and non-appealable. Section 11(7) of the Act had also been amended. An appeal can be maintained under Section 37 only in the event of refusal to refer parties to arbitration or refusal to appoint an arbitrator'. Section 11(7), however was omitted by Act 33 of 2019. The arbitrator was

appointed by the High Court not because this High Court exercises original civil jurisdiction or in exercise of its original civil jurisdiction but because of the power given in Section 11(6) of the Act. In *Garhwal Mandal Vikas Nigam Ltd.*[7] Hon'ble Apex Court held 'Once an arbitrator is appointed then the appropriate forum for filing the award and for challenging the same will be the Principal Civil Court of Original Jurisdiction. The expression 'Court' used in Section 34 of the Act will also have to be understood ignoring the definition of 'Court' in the Act. Thus the parties will have the right to move under Section 34 of the Act and to appeal under Section 37 of the Act. Therefore, in the scheme of things, if appointment is made by the High Court or by this Court, the Principal Civil Court of Original Jurisdiction remains the same as contemplated under Section 2(1)(e) of the Act.'

5(iv) Appointing an arbitrator under Section 11(6) of the Act by the Court which exercises original civil jurisdiction may not even otherwise vest the Court with jurisdiction under Section 42 of the Act to entertain objections under Section 34 of the Act, if the Court does not have pecuniary jurisdiction to entertain the objections. In the instant cases, in both the claims put together, the total amount involved is around Rs. 11 lacs. In *M/s Ravi Ranjan Developers Pvt.*

Ltd. vs. Aditya Kumar Chatterjee[14], the Supreme Court noted that "Section 42 cannot possibly have any application to an application under Section 11(6), which necessarily has to be made before a High Court…..". This is regardless of whether that High Court has original jurisdiction to decide suits or jurisdiction related to subject matter of arbitration. Consequently the definition provided in Section 2(1)(e) does not directly apply even where appointment of arbitrator is by a High Court that exercises original jurisdiction.

5(v). The sum total of above discussion is that the High Court of Himachal Pradesh, which exercises original civil jurisdiction cannot be classified as 'Court' for the purpose of Section 42 of the Arbitration and Conciliation Act when it merely appointed arbitrators under Section 11(6) of the Act. Section 42 of the Act will not be attracted where High Court of Himachal Pradesh has only appointed the arbitrator and has not undertaken any other exercise.

6. The next point to be deliberated upon is which Court will have the jurisdiction to hear objections against the arbitral awards involved in the instant case. Learned District Judge Mandi has held that it will not have any jurisdiction over the objections arising out of the arbitral awards. I am inclined to agree with this conclusion drawn by the learned Court.

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[14] 2022 SCC Online SC 568

In *Hindustan Construction Company Limited vs. NHPC Limited & another*[15], contract was executed between the parties at Faridabad and part of cause of action also arose there. However, New Delhi was the chosen seat of the parties. Learned Additional District Judge held that though seat of arbitration was at New Delhi yet by virtue of *BALCO vs. Kaiser Aluminium Technical Services Inc.*[16], since both Delhi as well as Faridabad Courts would have jurisdiction as the contract was executed & part of cause of action arose in Faridabad, Faridabad Court would have the jurisdiction to decide all other applications as Section 42 of the Act would kick in. Relying upon *BGS SGS Soma JV vs. NHPC*[17], Hon'ble Apex Court held that Courts at New Delhi alone would have jurisdiction for the purposes of challenge to the award. Relevant paras of the report read as under:-

> **"3.** This Court in Civil Appeal No. 9307 of 2019 entitled *BGS SGS Soma JV vs. NHPC Ltd.*[17] delivered a judgment on 10.12.2019 i.e. after the impugned judgment was delivered, in which reference was made to Section 42 of the Act and a finding recorded thus:
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> > "59. Equally incorrect is the finding in *Antrix Corporation Ltd. Vs. Devas Multimedia (P) Ltd*. (supra)[18] that Section 42 of the Arbitration Act, 1996 would be rendered ineffective and useless. Section 42

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[15] (2020) 4 SCC 310
[16] (2012) 9 SCC 552
[17] (2020) 4 SCC 234
[18] 2018 SCC OnLine Del 9338

is meant to avoid conflicts in jurisdiction of Courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one Court exclusively. This is why the section begins with a non-obstante clause, and then goes on to state '*…where with respect to an arbitration agreement any application under this Part has been made in a Court…'* It is obvious that the application made under this part to a Court must be a Court which has jurisdiction to decide such application. The subsequent holdings of this Court, that where a seat is designated in an agreement, the Courts of the seat alone have jurisdiction, would require that all applications under Part I be made only in the Court where the seat is located, and that Court alone then has jurisdiction over the arbitral proceedings and all subsequent applications arising out of the arbitral agreement. So read, Section 42 is not rendered ineffective or useless. Also, where it is found on the facts of a particular case that either no "seat" is designated by agreement, or the so-called "seat" is only a convenient "venue", then there may be several Courts where a part of the cause of action arises that may have jurisdiction. Again, an application under Section 9 of the Arbitration Act, 1996 may be preferred before a court in which part of the cause of action arises in a case where parties have not agreed on the "seat" of arbitration, and before 3 such "seat" may have been determined, on the facts of a particular case, by the Arbitral Tribunal under Section 20(2) of the Arbitration Act, 1996. In both these situations, the earliest application having been made to a Court in which a part of the cause of action arises would then be the exclusive Court under Section 42, which would have control over the arbitral proceedings. For all these reasons, the law stated by the Bombay[19], [20] and Delhi[18] High Courts in this regard is incorrect and is overruled."

4. This was made in the backdrop of explaining para 96 of the *Balco*[16] (supra), which judgment read as a whole declares that once the seat of arbitration is designated, such

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[19] Konkola Copper Mines vs. Stewarts & Lloyds of India Ltd. 2013 SCC OnLine Bom 777.
[20] Nivaran Solutions vs. Aura Thia Spa Services (P) Ltd., 2016 SCC OnLine Bom 5062.

clause then becomes an exclusive jurisdiction clause as a result of which only the courts where the seat is located would then have jurisdiction to the exclusion of all other courts.

5. Given the finding in this case that New Delhi was the chosen seat of the parties, even if an application was first made to the Faridabad Court, that application would be made to a court without jurisdiction. This being the case, the impugned judgment is set aside following *BGS SGS Soma JV*[17] (supra), as a result of which it is the courts at New Delhi alone which would have jurisdiction for the purposes of challenge to the Award.

6. As a result of this judgment, the Section 34 application that has been filed at Faridabad Court will stand transferred to the High Court of Delhi at New Delhi. Any objections taken on the ground that such objection filed under Section 34 is out of time hence cannot be countenanced. The appeal is disposed of accordingly.**"**

In *Inox Renewables Limited vs. Jayesh Electricals Limited*[21] the parties had agreed for holding arbitration at Jaipur. However, an application for appointment of arbitrator was made before the High Court of Gujarat. The arbitrator was appointed. Arbitral proceedings were held at Ahmedabad. The arbitral award was assailed before the Courts at Vadorara. The jurisdiction of Courts at Vadodara was unsuccessfully resisted. The matter

[21] (2023) 3 SCC 733

reached Hon'ble Apex Court. It was held that by mutual agreement parties had shifted venue/place of arbitration from Jaipur to Ahmedabad. The moment seat is chosen as Ahmedabad, it is akin to an exclusive jurisdiction clause, thereby vesting the Courts at Ahmedabad with exclusive jurisdiction to deal with the arbitration. It was observed as follows:-

> **"11.** In *BGS SGS* [17] (supra), this Court, after an exhaustive review of the entire case law, concluded thus :
>
> > "32. It can thus be seen that given the new concept of "juridical seat" of the arbitral proceedings, and the importance given by the Arbitration Act, 1996 to this "seat", the arbitral award is now not only to state its date, but also the place of arbitration as determined in accordance with Section 20. However, the definition of "court" contained in Section 2(1)(c) of the Arbitration Act, 1940, continued as such in the Arbitration Act, 1996, though narrowed to mean only principal civil court and the High Court in exercise of their original ordinary civil jurisdiction. Thus, the concept of juridical seat of the arbitral proceedings and its relationship to the jurisdiction of courts which are then to look into matters relating to the arbitral proceedings - including challenges to arbitral awards - was unclear, and had to be developed in accordance with international practice on a case by case basis by this Court.
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> > 48. The aforesaid amendment carried out in the definition of "Court" is also a step showing the right direction, namely, that in international commercial arbitrations held in India, the High Court alone is to exercise jurisdiction over such proceedings, even where no part of the cause of action may have arisen within the jurisdiction of such High Court, such High Court not having ordinary original jurisdiction. In such cases, the "place" where the award is delivered alone is looked at, and the High Court given jurisdiction to supervise the arbitration proceedings, on the footing

of its jurisdiction to hear appeals from decrees of courts subordinate to it, which is only on the basis of territorial jurisdiction which in turn relates to the "place" where the award is made. In the light of this important change in the law, Section 2(1)(e)(i) of the Arbitration Act, 1996 must also be construed in the manner indicated by this judgment.

49. Take the consequence of the opposite conclusion, in the light of the facts of a given example, as follows. New Delhi is specifically designated to be the seat of the arbitration in the arbitration clause between the parties. Part of the cause of action, however, arises in several places, including where the contract is partially to be performed, let us say, in a remote part of Uttarakhand. If concurrent jurisdiction were to be the order of the day, despite the seat having been located and specifically chosen by the parties, party autonomy would suffer, which BALCO[16] specifically states cannot be the case. Thus, if an application is made to a District Court in a remote corner of the Uttarakhand hills, which then becomes the court for the purposes of Section 42 of the Arbitration Act, 1996 where even Section 34 applications have then to be made, the result would be contrary to the stated intention of the parties - as even though the parties have contemplated that a neutral place be chosen as the seat so that the courts of that place alone would have jurisdiction, yet, any one of five other courts in which a part of the cause of action arises, including courts in remote corners of the country, would also be clothed with jurisdiction. This obviously cannot be the case. If, therefore, the conflicting portion of the judgment of BALCO[16] in para 96 is kept aside for a moment, the very fact that parties have chosen a place to be the seat would necessarily carry with it the decision of both parties that the courts at the seat would exclusively have jurisdiction over the entire arbitral process.

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53. In *Indus Mobile Distribution (P) Ltd.*[22], after clearing the air on the meaning of Section 20 of the Arbitration Act, 1996, the Court in para 19 (which has already been set out hereinabove) made it clear that the moment a seat is designated by agreement between the parties, it is akin to an exclusive

[22] (2017) 7 SCC 678

jurisdiction clause, which would then vest the courts at the “seat” with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

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82. On a conspectus of the aforesaid judgments, it may be concluded that whenever there is the designation of a place of arbitration in an arbitration clause as being the “venue” of the arbitration proceedings, the expression “arbitration proceedings” would make it clear that the “venue” is really the “seat” of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as “tribunals are to meet or have witnesses, experts or the parties” where only hearings are to take place in the “venue”, which may lead to the conclusion, other things being equal, that the venue so stated is not the “seat” of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings “shall be held” at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a “venue” and not the “seat” of the arbitral proceedings, would then conclusively show that such a clause designates a “seat” of the arbitral proceedings. In an International context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that “the venue”, so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the “stated venue”, which then becomes the “seat” for the purposes of arbitration.

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98. However, the fact that in all the three appeals before us the proceedings were finally held at New Delhi, and the awards were signed in New Delhi, and not at Faridabad, would lead to the conclusion that both parties have chosen New Delhi as the “seat” of arbitration under Section 20(1) of the Arbitration Act,

> 1996. This being the case, both parties have, therefore, chosen that the courts at New Delhi alone would have exclusive jurisdiction over the arbitral proceedings. Therefore, the fact that a part of the cause of action may have arisen at Faridabad would not be relevant once the "seat" has been chosen, which would then amount to an exclusive jurisdiction clause so far as Courts of the "seat" are concerned."

12. This case would show that the moment the seat is chosen as Ahmedabad, it is akin to an exclusive jurisdiction clause, thereby vesting the courts at Ahmedabad with exclusive jurisdiction to deal with the arbitration. However, learned counsel for the Respondent referred to and relied upon paragraphs 49 and 71 of the aforesaid judgment. Paragraph 49 only dealt with the aspect of concurrent jurisdiction as dealt with in BALCO [16] (supra) which does not arise on the facts of the present case. Paragraph 71 is equally irrelevant, in that, it is clear that the parties have, by mutual agreement, entered into an agreement to substitute the venue at Jaipur with Ahmedabad as the place/seat of arbitration under Section 20(1) of the Arbitration and Conciliation Act, 1996.

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16. The reliance placed by learned counsel for the Respondent on *Indus Mobile*[22] (supra), and in particular, on paragraphs 18 and 19 thereof, would also support the Appellant's case, inasmuch as the "venue" being shifted from Jaipur to Ahmedabad is really a shifting of the venue/place of arbitration with reference to Section 20(1), and not with reference to Section 20(3) of the Arbitration and Conciliation Act, 1996, as it has been made clear that Jaipur does not continue to be the seat of arbitration and

> Ahmedabad is now the seat designated by the parties, and not a venue to hold meetings. The learned arbitrator has recorded that by mutual agreement, Jaipur as a “venue” has gone and has been replaced by Ahmedabad. As clause 8.5 of the Purchase Order must be read as a whole, it is not possible to accept the submission of Shri Malkan that the jurisdiction of Courts in Rajasthan is independent of the venue being at Jaipur. The two clauses must be read together as the Courts in Rajasthan have been vested with jurisdiction only because the seat of arbitration was to be at Jaipur. Once the seat of arbitration is replaced by mutual agreement to be at Ahmedabad, the Courts at Rajasthan are no longer vested with jurisdiction as exclusive jurisdiction is now vested in the Courts at Ahmedabad, given the change in the seat of arbitration.”

In the present case, even though part of cause of action arose in District Mandi yet all arbitral proceedings were conducted at Shimla. It is not the case of either of the parties that any sitting was held within the jurisdiction of Court of learned District Judge Mandi. Parties have not even placed on record copy of agreement to show that they had agreed for fixing seat of arbitration at Mandi. For all these reasons and keeping in view the law laid down by the Apex Court, District Judge Mandi will not have jurisdiction over the objections under Section 34 of the Act against the arbitral awards.

7. Conclusion

For the foregoing discussion, the judgments passed by the learned District Judge Mandi on 12.01.2023 in Case Nos. (i) Objection Pet. No. 02/2022 (Reg. No. 03/2022) and Objection Pet. No. 03/2022 (Reg. No. 04/2022) are set aside to the extent they hold that this Court alone will have the jurisdiction to entertain & decide the objections preferred under Section 34 of the Arbitration and Conciliation Act against the arbitral awards. It is held that in the instant case, jurisdiction to decide the objections preferred under Section 34 of the Act against the arbitral awards will be before the Principal Court of original jurisdiction at Shimla. As a result, Arb. Case Nos. 582 & 583 of 2023 filed by claimant – Kashmir Singh and Arb. Cases Nos. 581 & 584 filed by the Telecom Department are disposed of as not maintainable before this Court. The petitioners in these cases shall be at liberty to move the appropriate Court having jurisdiction for filing objections against the arbitral awards. In case such objections are preferred within two weeks from today, the same shall be decided in accordance with law.

Petitions stand disposed of in the aforesaid terms, so also the pending miscellaneous application(s), if any.

Jyotsna Rewal Dua,
Judge

January 02, 2025 **(PK)**