2026:HHC:40036

IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

CARBA Nos. 10 & 11 of 2025
Reserved on: 21.08.2026
Pronounced on: 18.09.2026
Uploaded on : 18.09.2026

State of Himachal Pradesh ***...Appellant(s)***

Versus

BMD Pvt. Ltd. ***…Respondent(s)***

Coram:

The Hon'ble Mr. Justice G.S. Sandhawalia, Chief Justice.
The Hon'ble Mr. Justice Jiya Lal Bhardwaj, Judge.

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

For the Appellant(s): Mr. Vinay Kuthiala, Senior Advocate with Ms. Vandana Kuthiala, Mr. Diwan Singh Negi, Advocates, in both the appeals.

For the Respondent(s): Mr. Ankush Dass Sood, Senior Advocate with Mr. Abhishek Dulta, Advocate, for the respondent in CARBA No. 10 of 2025.

Mr. Manish Kumar and Mr. Vishal Verma, Advocates for the respondent in CARBA No. 11 of 2025.

G.S. Sandhawalia, Chief Justice

This judgment shall dispose of two appeals filed by the State of Himachal Pradesh against the common

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

judgment passed by the learned Single Judge, in CARBC Nos. 16 & 17 of 2025, both titled ***State of Himachal Pradesh Vs. BMD Private Limited***, whereby the petitions were dismissed, challenging the common ex-parte award dated 29.04.2023, passed by the learned Arbitrator in the two claim petitions filed by the respondent herein, which were upheld.

2. The primary reason that prevailed with the learned Single Judge in upholding the award was that on an earlier occasion, the State as such had opted to invoke the provisions of Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') by filing Arbitration Case Nos.5 & 6 of 2020, which were dismissed by the learned Single Judge of this Court vide order dated 02.06.2022, wherein the challenge to the appointment of Justice S.N. Jha, (Retired) Chief Justice of the High Courts of Rajasthan and Jammu & Kashmir, had apparently been rejected and those findings as such had attained finality, as the State did not lay any further challenge thereto. Having submitted to the jurisdiction of the learned Arbitrator, it could not challenge the award ex-parte passed in proceedings under Section 34 of the Act. Accordingly, it was held by the learned Single Judge that an application under

Sections 13(2) and 13(3) of the Act having been filed and the necessary challenge to the appointment of the learned Arbitrator having not been raised therein and the fact that the learned Arbitrator had awaited for the outcome of the application filed under Section 11(6) of the Act and thereafter went on to adjudicate and decide the arbitration claims which were not contested by the State by putting in appearance, at that stage barred them to raise challenge to the award by raking up again the plea that the appointment of the learned Arbitrator was not in consonance with the arbitration clause. The proceedings while deciding the application under Section 11(6) of the Act were held to be judicial in nature, though the appointment might have been an administrative act. The learned Single Judge thus came to conclusion that once the application for appointment of an Arbitrator under Section 11(6) of the Act had been rejected by another learned Single Judge, the State was estopped as such from raising a challenge, having chosen not to appear before the learned Arbitrator after dismissal of its application under Section 11(6) of the Act and raising objections with regard to the constitution of the Arbitral Tribunal.

3. It is thus the case of the learned Counsel for the State that the unilateral appointment of the Arbitrator by the respondent-Contractor would go to the root of the matter and the learned Single Judge has thus erred in not setting aside the award in question, keeping in view the fact that the Arbitration Act as such provides for an interplay of equal treatment of parties and party autonomy. It is thus submitted that party autonomy makes the arbitration agreement an essential feature of the proceedings and would also apply to the issue of the choice of the Arbitrator, which is the core principle of the Act in question. Any violation of the same amounts to unilateral nomination and having raised objection to the same, and having brought it to the notice of the Arbitrator by filing the requisite application under Section 13 of the Act, the Arbitrator was under a bounden duty as such to rule on the same, rather than decide the arbitration case on merits. It is accordingly submitted that the learned Single Judge was not right in holding that the application filed before the Arbitrator as such did not contain the requisite objections of the unilateral appointment and non-consent of the appointment by the State.

4. The application should have been read in its totality rather than just focusing on the prayer clause, which the learned Single Judge has erred in doing so. Thus, the contention is that once the appointment is quashed, as the Tribunal lacks the jurisdiction as the principle of *coram non judice* would come into play. Such objection could be taken at any stage, including in proceedings under Section 34 of the Act and, now under Section 37 of the Act, as it goes to the root of the matter. Once the Arbitrator lacks the jurisdiction to make the award on merits, the very appointment of the Arbitrator becomes the subject matter of challenge. It is also contended that the contractor could not approbate and reprobate, having raised the challenge before the learned Single Judge under Section 11(6) of the Act that the appointment was not bad and could be challenged by taking recourse to the proceedings under Section 34 of the Act, having objected to the appointment of an independent Arbitrator on the ground that an Arbitrator had already been appointed unilaterally and it now could not argue that the proceedings under Section 34 of the Act were not maintainable.

5. Reliance was placed by the learned Counsel for the appellant on the judgments passed by the Apex Court in ***Newton Engineering and Chemicals Ltd. Vs. Indian Oil Corporation Ltd., (2013) 4 SCC 44, Walter Bau AG v. Municipal Corporation of Greater Mumbai, (2015) 3 SCC 800, Bharat Broadband Network Limited vs United Telecoms Limited, 2019 (5) SCC 755,*** **Bhadra International (India) Pvt. Ltd. v. Airport Authority of India*, 2026 SCC OnLine SC 7, Suzuki Parasrampuria Suitings Pvt. Ltd. v. Official Liquidator of Mahendra Petrochemicals Ltd. (2018) 10 SCC 707***, to contend that there was an apparent error as such and the learned Single Judge had failed to appreciate the same. He accordingly contended that the appointment, being apparently void and unilateral, was not permissible and prayed that the same be set aside, while placing reliance upon the judgment of the Apex Court in ***Re***: ***Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899 (2024) 6 SCC 1.*** It was accordingly contended that even having not submitted to the jurisdiction of the Tribunal, but having raised the objections under Section 13(2) of the Act, the

Arbitrator was under bounden duty to decide the same, even if the State did not put in appearance. Therefore, falling back on the judgment of the Apex Court in ***Rajasthan State Road Transport Corporation & others v. Zakir Hussain***, ***(2005) 7 SCC 447,*** it was argued that there was a lack of inherent jurisdiction and the award passed by the learned Arbitrator was objected to, and the same had wrongly been upheld by the learned Single Judge.

6. Reliance was placed upon the judgment of the Apex Court in ***Suzuki Parasrampuria Suitings Pvt. Ltd. v. Official Liquidator of Mahendra Petrochemicals Ltd, (2018) 10 SCC 707,*** to contend that a party cannot approbate and reprobate and take inconsistent stands, while referring to the view taken by the learned Single Judge under Section 11(6) of the Act.

7. Mr. Ankush Dass Sood, learned Senior Counsel, on the other hand, assisted by Mr. Manish Kumar, Advocate, for the respondent-Contractor has submitted that having failed to put in appearance before the learned Arbitrator and having not pressed the application under Section 13 of the Act, it is not permissible for the State as such now to object. It is

accordingly contended that notice having been served on 19.12.2019, for preliminary hearing and authorized representative, namely Shri Shanti Swaroop Bhatti, Legal Consultant, having put in appearance, the application should have been pressed before the Arbitrator. The State could not turn its back and watch the proceedings from behind the curtain. It is contended that in the said application also, prayer clause was only to the effect that the matter was *sub judice* and however, the findings recorded on 02.06.2022 by another Single Bench were against it and these were not challenged. The learned Single Judge was thus well justified in respecting the judgment passed by the other Co-ordinate Bench as not to take a different view.

8. Reference was made to the list of dates referred to by the learned Arbitrator, showing that various opportunities were given, paper publication was also done, and the sittings were held and only thereafter the award was passed. Resultantly, reliance was placed upon Section 4 of the Act that there was a waiver of right to object.

9. Reliance was placed upon the judgment in ***Quippo Construction Equipment Ltd. v. Janardan Nirman Pvt. Ltd.,***

(2020) 18 SCC 277, to *cont*end that there is no challenge to the order dated 02.06.2022. While placing reliance upon the judgment in **Gayatri Project Ltd. v. M.P. Road Development Corpn. Ltd.**, (***2025) 10 SCC 750*** and ***AC Chokshi Share Broker Private Limited vs. Jatin Pratap Desai & another***, ***(2025) 5 SCC 321,*** it was contended that the State now could not raise any objection having not participated in the proceedings. The judgment in ***Bhadra's*** case, *(supra)* was distinguished on the ground that it concerned a sole Arbitrator under Section 12 of the Act.

10. The State having submitted to the jurisdiction of the Tribunal and, therefore, it could not contend that the award would not be binding upon it, or that the sole Arbitrator, not having been appointed under Section 11(6) of the Act, had no jurisdiction, rendering the appointment void *ab initio* and non-est in the eyes of law.

11. The following issues arise for consideration:

(i) Whether the unilateral appointment of the Arbitrator of the respondent-contractor would confer jurisdiction on the said Arbitrator to continue proceedings, since the State had never consented to his appointment and in light

of the non-decision of the application filed under Section 13(3) of the Act?

(ii) Whether the respondent-Contractor having strongly opposed the appointment of an independent Arbitrator in the proceedings under Section 11(6) of the Act at the instance of the State after the unilateral appointment and having taken the objection that the appointment could be challenged under Section 34 of the Act, could now object to the arguments and proceedings under Sections 34 & 37 of the Act that they would not be maintainable against the unilateral appointment and non-decision of the objections raised against the unilateral appointment of the Arbitrator himself?

(iii) Whether the objections to the appointment of the sole Arbitrator in the application under Section 34 of the Act, could be raised on the said ground having got a decision against itself by the appellant-State and having allowed the said decision to become final.

Factual Matrix:

12. The brief background of the case as such necessary to appreciate the legal controversy, as summarized above, is that the Contractor as such was issued a letter of allotment by the State through its Director, Directorate of Energy, Himachal Pradesh, on 04.05.2011 for execution of

Dancho Hydro Electric Project (12 MW) and Malana-III (30 MW) Hydro Electric Project. A pre-implementation Agreement was executed on 26.05.2011 **(Annexure C-6).** As per Clause 53 thereof, any dispute arising at any time between the parties was to be resolved by way of mutual negotiations, failing which the matter was to be referred to the Arbitrator appointed as per the provisions of Arbitration & Conciliation Act, 1996. The relevant clause reads as under:-

> *"53. Any difference and/or disputes arising at any time between the parties out of this PIA/IA or Interpretation thereof shall be endeavoured to be resolved by the parties hereto by mutual negotiations failing which the matter shall be referred to the Arbitrator to be appointed as per the provisions of the Arbitration & Conciliation Act, 1996. However, all disputes shall be settled within the jurisdiction of Courts of Himachal Pradesh."*

13. The Detailed Project Report was submitted on 26.08.2013 **(Annexure C-16**) in terms of the Agreement dated 26.05.2011, however on 21.01.2019 **(Annexure C-18),** a request was made for the surrender of the project and refund of 100% upfront premium amounting to a total of Rs. 8.40 crore due to uncertainty in the implementation of the above projects, alongwith interest thereon at market rates. Apparently, the said request was not accepted and upon the proposal being put up

before the Cabinet, the Cabinet Memorandum (CMM) on 08.08.2019 decided to cancel the allotment of both projects. Resultantly, a formal letter dated 03.10.2019 **(Annexure C-19)** cancelling the allotment and terminating the pre-implementation agreements was issued on account of the failure to sign the implemention agreement within the prescribed period alongwith the forfeiture of the upfront premium, and the projects stood forfeited to the Government without any liability on the Government.

14. On 30.10.2019 **(Annexure C-20),** a legal notice was served upon the State for refund of the amounts which had been paid towards the upfront premium, requesting that the said notice be treated as a notice invoking arbitration and proposing name of a sole member as an Arbitrator, namely, Justice S.N. Jha (Retd. Chief Justice), while reserving its right to institute appropriate proceedings at the risk and cost of the noticee-State. Resultantly, it was mentioned that if necessary steps were not taken within 30 days from the receipt of the notice, the contractor would be constrained to take appropriate steps in accordance with law for the appointment and

constitution of the Arbitral Tribunal through a court of law. The relevant portion of the said notice reads as under:-

> "*15. That in case you the Noticee do not refund the aforesaid amount, then you may please treat the present notice to be an arbitration invoking notice as provided in clause 53 of the Pre-Implementation Agreement dated 26.05.2011. Consequently, Our Client through us proposes for a Sole Member Arbitral Tribunal consisting of Hon'ble Mr. Justice S. N. Jha (Retd. Chief Justice of High Court of Rajasthan & Jammu & Kashmir).*
> *16. That take notice, in the event of your failure in concurring and agreeing to the aforesaid proposal made by Our Client within a period of 30 days from the date of receipt of this notice, Our client shall be constrained to take appropriate steps in accordance with law in getting appointment and constitution of the Arbitral Tribunal through the Court of Law entirely at your risk and costs."*

15. No action having been taken by the State, letter dated 07/09.12.2019 **(Annexure C-21)** was addressed to the nominated Arbitrator, with a copy forwarded to the State of Himachal Pradesh, requesting him to preside as an Arbitrator and adjudicate the dispute between the parties to the Pre-implementation Agreement dated 31.10.2019 without taking recourse to the appointment to be validated through any Court of law. The relevant portion of the said letter reads as under:-

> *"Thereafter, our Client had approached the Respondent to release the sum deposited as upfront premium for investigation via legal notice*

> *dated 30.10.2019 (Enclosed herewith as Encl.2). It is in furtherance to the aforementioned notice and the subsequent failure of the Respondent to refund the called up amount that our Client deems fit to initiate arbitration proceedings as per Clause 53 of the said Agreement.*
> *In the above background as no proceeding is initiated or pending before any court of law. We, therefore, by this letter request upon you to kindly preside as the Sole Arbitrator and adjudicate the dispute between the parties to the Pre Implementation Agreement Dated 31.10.2019 and fix up a date directing parties to appear before you in order to initiate the arbitration proceedings."*

16. State on 13.12.2019 **(Annexure P-1)** responded to both to the legal notice dated 30.10.2019 and the letter dated 07.12.2019 and intimating the contractor that neither it gives its consent to the appointment of the Arbitrator nor it should be taken as implied consent on its behalf and requested the respondent-claimant-contractor to act in accordance with the relevant provisions of the Act. The said letter reads as under:-

> *"This is in reference to your letter dated 07.12.2019 to Hon'ble Mr. Justice S.N Jha (Former Chief Justice of High Court of Rajasthan & J&K) copy of which is endorsed to this office alongwith legal notice dated 30.10.2019 regarding Dhancho Hydro Electric Project (12MW) in Chamba District of Himachal Pradesh.*
> *In this regard, I am directed to intimate that neither this office has given its consent to the name of Hon'ble Mr. Justice S.N Jha (Former Chief Justice of High Court of Rajasthan &J&K) as Sole Arbitrator in this matter as proposed by*

> *you nor it should be taken as implied consent on behalf of this office. As such, you are requested to act according to relevant provisions of Arbitration and Conciliation Act 1996 (as amended time to time) in this matter."*

17. On 19.12.2019 **(Annexure C-22),** the parties were put to notice by the Arbitrator that he had fixed the date of hearing on 21.01.2020 to decide the modalities of arbitration and the parties were directed to appear in person through their authorized representatives.

18. Thereafter on 30.12.2019 **(Annexure C-23),** the respondent was put to notice that the State was proceeding to approach this Court against the unilateral appointment since the Arbitrator had fixed the hearing for 21.01.2020. The relevant portion of the said letter reads as under:-

> *"**1.** That on 26.05.2011, Pre-Implementation Agreement (PIA) was signed between GoHP and respondent for execution of Dhancho HEP in Chamba District (12MW) of Himachal Pradesh.*
>
> ***2.** That vide letter dated: 26.08.2013 DPR submitted by you with Directorate of Energy as per the terms of PIA.*
>
> ***3.** That you failed to sign the Implementation Agreement (IA) within the time period allowed in the PIA. Consequently the project was terminated & up-front premium of Rs. 2.40 Crore was forfeited by GoHP.*
> ***4.** That a legal notice dated: 30.10.2019, was received from you for the refund of up-front*

premium of Rs. 2.40 Crore on the ground that the project has become unviable. That it was also asserted in that notice that in case amount of up-front premium was not refunded then the legal notice be treated as notice invoking arbitration by proposing the name of Hon'ble Justice S.N.Jha (Retired Chief Justice).

5. *That we have also received a copy of letter dated: 07.12.2019 from Munish Kumar & associates, Advocates authorized by you, to Hon'ble Justice S.N.Jha (Retired Chief Justice), unilaterally requesting Hon'ble Justice S.N.Jha (Retired Chief Justice) to preside as sole arbitrator and adjudicate the dispute between the parties to the PIA dated: 26.05.2011.*

6. *That vide letter dated: 13.12.2019, it was intimated on behalf of GoHP that neither Directorate of Energy has consented to the name of Hon'ble Justice S.N.Jha (Retired Chief Justice) as sole arbitrator in this matter as proposed by you nor it should be taken as implied consent on behalf of this office. That the copy of this letter was also sent to Hon'ble Justice S.N.Jha (Retired Chief Justice) as well as to your counsel. However, letter dated: 13.12.2019 was ignored by all concerned persons.*

7. *That a notice dated: 19.12.2019 from Hon'ble Justice S.N.Jha (Retired Chief Justice) was received by this office, wherein Hon'ble Justice S.N.Jha (Retired Chief Justice) informed that he has been appointed as sole arbitrator by you & further informed that 21.01.2020 is fixed for preliminary hearing to be held at 2:00 PM in his office at C/41(Lower Ground Floor), Jangpura Extension) New Delhi-110014.*

That in view of above, this office is left with no other option but to approach Hon'ble High Court of H.P. against the unilateral appointment of arbitrator made by you & also for appointment of independent & impartial arbitrator by Hon'ble High Court of H.P."

19. Resultantly, two Arbitration Cases No. 5 & 6 of 2020 were filed for appointment of an Arbitrator on 31.12.2019, mentioning the necessary facts that the Arbitrator had been appointed without consent and that he was continuing with the proceedings, giving rise to a justifiable doubt with regard to independence or impartiality. The relevant objections taken in the petition under Section 11(6) of the Act read as under:-

> *"11. That the Respondent has not followed the procedure laid down in the Arbitration and Conciliation Act 1996 (as amended from time to time) and has unilaterally appointed Hon'ble Justice S.N. Jha retired Chief Justice as Sole-Arbitrator without the consent of the Petitioner and contrary to the provisions of Arbitration and Conciliation Act 1996. Its also apparent that the respondent failed to resolve the alleged dispute by mutual negotiations as per clause 53 of PIA before invoking arbitration proceedings by appointing sole Arbitrator without the consent of the petitioner.*
> *12. That the petitioner never consented for the appointment of aforesaid arbitrator and disputed his appointment and despite the fact that the petitioner never accepted him as arbitrator, he is still continuing his proceedings giving rise to a justifiable doubt with regard to his independence or impartiality.*
> *13. That the petitioner craves the indulgence of this Hon'ble Court that an arbitrator from Shimla or from the adjoining place may kindly be appointed as it will save a lot of public exchequer money and also the official man power as the public money is involved in the present case.*

> *14. That the respondent had followed a procedure for appointment of arbitrator which is unknown to law and the procedure which they have adopted is neither prescribed in the arbitration agreement nor in any other law."*

20. On notice being issued on 10.01.2020 by the Court and in the meantime, an application was filed by the State under Section 13(2) and 13(3) of the Act before the Arbitrator highlighting the issue of unilateral appointment and non-consent as well as the fact that this Court had been approached for appointment of an Arbitrator and requesting that in the meantime, further proceedings be closed. Reference was also made to the notice received by the Arbitrator, whereby the date had been fixed on 21.01.2020, for preliminary hearing . The contents of the application dated 21.01.2020 read as under:-

> *"APPLICATION UNDER SECTION 13(3) READ WITH SECTION 13(2) OF THE ARBITRATION AND CONCILIATION ACT, 1996 FOR CLOSURE OF THE ARBITRAL PROCEEDINGS.*
>
> *Respectfully Showeth*
> *1. That the aforesaid proceedings are pending before this Hon'ble Arbitrator and fixed for today i.e. 21.01.2020. It is further submitted that the Arbitrator has been nominated by the Non applicant/Claimant himself unilaterally, whereas the Applicant/Respondent has objected for the same.*
> *2. That the applicant vide its Communication dated 13.12.2019, has conveyed to the Non-applicant that Applicant has never consented for the appointment of the Arbitrator and it should not be taken as implied consent on behalf of the*

> *Applicant/Respondent. The copy of this letter was also forwarded to your goodself through registered AD.*
> *3. That the applicant has already approached the Hon'ble Chief Justice of High Court of Himachal Pradesh, vide Arbitration Case No. 5 of 2020 titled State of HP through Director, Directorate of Energy Versus M/s BMD Pvt. Ltd. through its Vice President, for the appointment of the independent and impartial Arbitrator and the matter was listed before the Hon'ble Court on 10.01.2020 and following order was passed "Notice to the respondent, returnable within Six weeks, on taking steps within one week. The certified copy of order is enclosed for kind perusal of this Hon'ble Arbitral Tribunal.*
> *4. That the matter is sub-judice before the Hon'ble High Court of Himachal Pradesh. Hence, it would not be appropriate for your good-self to conduct further proceedings in the aforesaid matter, till the final decision of the Hon'ble Court.*
> *5. That we have received a notice dated 19.12.2019 from your good self, whereby it has been informed that 21.01.2020 is fixed for preliminary hearing, to be held at 2:00 PM at your office at Lower Ground Floor, Jangpura Extension, New Delhi-110014.*
> *It is, therefore, humbly prayed that this application may kindly be allowed and keeping in view the fact that the matter is sub-judice before the Hon'ble High Court of H.P, further proceedings in this matter may kindly be closed."*

21. As per the minutes of the arbitration proceedings, held on 21.01.2020, the learned Arbitrator had come to the conclusion that *prima-facie* the appointment was valid, but it was necessary to await the fate of the petition filed under Section 11 of the Act, accepting the argument that the

respondent has given up his right to contest that the appointment of the Arbitrator was valid and had forfeited its right. The relevant part of the minutes of the arbitration proceedings dated 21.01.2020 read as under:-

> *"Arbitration proceedings were initiated against the Government of Himachal Pradesh ("Go. H.P" for short), the matter was scheduled for 21.01.2010 in front of the sole arbitrator Hon'ble Mr. Justice S. N. Jha (Retd. Chief Justice of the High Court of Rajasthan & Jammu & Kashmir).*
> *That on the scheduled date, the Representative of the Himachal Pradesh Government Shri. Shanti Swaroop Bhatti was present for the arbitration proceedings. At the very outset the Representative of the Government moved an application under Section 13 (3) read with section 13(2) of the Arbitration & Conciliation Act, 1996 as amended by Arbitration and Conciliation, Act, 2015 (Hereinafter referred to as the "Act") annexing therewith a copy of order dated. 10.01.2020 passed by the Hon'ble High Court of Himachal Pradesh issuing notice in a petition under Section 11 of the Act for appointment of arbitrator by the Government. The aforementioned Petition is numbered as Arbitration Case No. 5/2020 and titled as State of Himachal Pradesh Vs. M/s BMD Pvt. Ltd.*
> *Submissions by the counsel for the Government of Himachal Pradesh were as follows:*
> *1. That the claimant did not try to amicably settle the dispute between the parties.*
> *2. That the claimant did not give the Respondent an opportunity to mutually decide/recommend an arbitrator to adjudicate the dispute between the parties.*
> *Contentions of Mr. Manish Kumar, Advocate for the Claimant were as follows:*
> *1. That there is no specific stay by the High Court on the arbitration proceedings initiated by the Claimant.*

> *2. That the Respondent has forfeited its right to appoint an arbitrator as recommended by the claimant by not replying to the notice dated 30.10.2019.*
> *3. That the Claimant had given ample opportunity to the Respondent to settle the matter.*
> *4. That pursuant to the ignorance of the Respondent, the Respondent has given up the right to contend the appointment of the arbitrator.*
> *5. That the Petition filed by the GoHP does not disclose any ground rendering the appointment of the Ld. Arbitrator as invalid.*
> *OBSERVATIONS MADE BY THE SOLE ARBITRATOR (Order dated. 21.01.2020 is Awaited). That prima facie the appointment of the arbitrator is valid, but it is in the best interest of the parties that the fate of the petition filed under Section 11 of the Act by the government be decided first. In the meanwhile, the Claimant shall file a reply to the Application filed by the Respondent. Further it was observed by the Ld. Arbitrator, since the case filed by the Government is returnable in 6 weeks the present arbitration proceedings be posted on a date after 6 weeks."*

22. Before the learned Single Judge, in the matter under Section 11(6) of the Act was hotly contested, wherein the plea taken was that an application had been filed under Section 13(3) of the Act, which was pending adjudication and, therefore, the said Court had no jurisdiction. It was further pleaded that having failed to appoint an Arbitrator within 30 days, the appointment was to be made on the application of the party. Resultantly, the learned Single Judge came to the conclusion

that once the parties had invoked arbitration proceedings and an Arbitrator had been appointed, the application under Section 11(6) of the Act would not be maintainable and the order passed in the petition under Section 13 of the Act could be challenged by way of petition under Section 34 of the Act.

23. It is pertinent to notice that the said defence as such had been taken by the respondent itself, while opposing the appointment of an independent Arbitrator under Section 11(6) of the Act by this Court. Resultantly, the petitions had been dismissed on 02.06.2022 on the ground that the State had itself subjected to the jurisdiction of the Arbitrator, it could not approach this Court for appointment of an Arbitrator, which was not permissible. The relevant part of the said order reads as under:-

> *"11. Mr. Manish Kumar and Mr. Vishal Verma, learned counsel for the respondent, while referring to reply filed by respondent, vehemently argued that once petitioner approached arbitrator in application under S. 13(3) and 13(2)of the Act, laying therein challenge to appointment of arbitrator, it is estopped from filing the petition at hand, seeking appointment of an arbitrator. He argued that till the time application filed under S. 13(3) is decided by the arbitrator, present petition under S.11(6) cannot be entertained. He further submitted that order if any passed under S. 13(3) can be laid challenge by aggrieved party under S.34 of Act but definitely not under S.11(6) of Act, which*

empowers Hon'ble Chief Justice to appoint arbitrator in terms of agreement if any arrived inter se parties. He argued that when petitioner itself by way of an application under S.13(3) has prayed for termination of mandate of the arbitrator, which is pending adjudication, present application deserves outright dismissal being not maintainable at this stage. While inviting attention of this Court to S.11(4) and 11(5) of the Act, learned counsel for the respondent argued that since the petitioner failed to respond within a period of thirty days, from the date of receipt of notice from the respondent with regard to appointment of arbitrator, appointment is required to be made on application of parties as per provisions contained in Sub-section (4), which clearly provides that if a party fails to appoint an arbitrator, within 30 days on receipt of other party, appointment shall be made on the application of the party. In support of his submission, learned counsel for the respondent placed reliance upon judgment rendered by Hon'ble Apex Court in SP Singla Construction v. State of Himachal Pradesh (2019) 2 SCC 488 and Perkins Eastman Architects. Besides above, learned counsel for the respondent also invited attention of this court to latest judgment of Hon'ble Apex Court in Swadesh Kumar Agarwal v. Dinesh Kumar Agarwal, Civil Appeal Nos. 2935-2938 of 2022, decided on 5.5.2022, whereby Hon'ble Apex Court placing reliance upon its earlier judgment in SP Construction supra, reiterated that application under S.11 (6) of the act is not maintainable if party seeking appointment of arbitrator has subjected itself to jurisdiction of the arbitrator by filing application under S.13(3) of the Act, praying therein for termination of mandate of the arbitrator.

12 to 23. x x x x x x x x x x

24. Learned counsel for the respondent while relying upon aforesaid judgment stated that no such ground came to be urged in application under S. 11(6) as such, this judgment is of no help to the case of the petitioner. Hon'ble Apex

Court in S.P. Singla supra held that when if any party is dissatisfied or aggrieved by the appointment of arbitrator in terms of the agreement by other party/parties, his remedy would be by way of petition under Section 13 of the 18 of 1996 Act, and, thereafter while challenging the award under Section 34 of the 1996 Act……..

25. x x x x x x x x x x

26. *Hon'ble Apex Court in S.P. Singla, while placing reliance upon earlier judgment passed in Antrix Corporation Limited v. Devas Multimedia Private Ltd. (2014) 11 SCC 560, reiterated that where the parties fail to act in terms of the procedure agreed upon by them, provisions of sub-section (6) of S.11 of the Act can be invoked by any of the parties, praying therein for appointment of arbitrator. However, where in terms of the agreement, arbitration clause has already been invoked by one of the parties thereto, provisions of sub-section (6) of S.11 cannot be invoked and in that case, the aggrieved party has remedy to file petition under S.13 of the Act before arbitrator laying therein challenge to the appointment of arbitrator by the other party in terms of the agreement. Order passed in the petition under S.13 thereafter can be laid further challenge by way of petition under S.34 of the Act.*

27 to 34. x x x x x x x x x x x x

35. S.13(2) provides that a party who intends to challenge appointment of an arbitrator shall, within fifteen days after becoming aware of the

> *constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section(3) of section 12 shall send a written statement of the reasons for the challenge to the arbitral tribunal. In the case at hand, on one hand, the petitioner subjected itself to the jurisdiction of the learned arbitrator by way of an application under S.13 of the Act, praying therein for termination of the mandate of the arbitrator and, on the other hand, approached this Court in the instant proceedings, under S. 11 of the Act, praying therein for appointment of another arbitrator, which is not permissible, as has been discussed in detail herein above.*
>
> *36. Consequently, in view of detailed discussion made herein above as well as law taken into consideration, this court does not find present petitions under S.11(6) of the Act to be maintainable and the same are accordingly dismissed. All pending applications in both the petitions stand disposed of. Interim directions, if any, also stand vacated."*

24. On the dismissal of the said petition, the respondent, through its Counsel, had requested the Arbitrator on 14.06.2022 to proceed with the matter since there was no stay order and informed them of the date when its next sitting was taking place. The Arbitrator accordingly fixed the sitting of the Tribunal on 23.07.2022 vide a communication on 23.06.2022 by way of video conferencing and directed the claimant to file the statement of claim. Resultantly, the respondent, filed its statement of claim in July 2022.

25. The State chose not to appear on 23.07.2022 and the Tribunal as such had given an opportunity to file the statement of defence, while fixing the next date of hearing as 06.09.2022. While fixing a sum of Rs. 13,60,668/- as the Arbitrator's fees, it directed that a sum of Rs. 5.00 lakh each, be paid online, on account, towards the Arbitrator's fees. Thereafter, on 06.09.2022, due to the absence as such of the State, one more opportunity was given to the State to submit its statement of defence, and it was recorded that the claimant had paid Rs.5.00 lakh. The matter was adjourned to 10.10.2022.

26. The sitting was held virtually and on account of non-appearance *ex-parte*, paper publication was also directed. The same was accordingly complied with and the matter was fixed for 07.11.2022, on which date, the *ex-parte* proceedings were initiated, taking note of the fact that despite service having been effected, there was a deliberate absence. The respondent-claimant was required to pay the fees of the State share as well under the relevant provisions of Section 38 of the Act and a sum of Rs. 8,60,668/- was directed to be paid before 10.12.2022.

27. Necessary evidence as such was led by way of an affidavit of the authorized representative and the matter was then fixed for final arguments and the sitting was to be held at Shimla. Resultantly, on 04.02.2023, the arguments were heard and the award was reserved. Thereafter, the award came to be passed on 29.04.2023.

28. In the award itself while recording the chronology of events, the learned Arbitrator has recorded that the appellant had not filed any response denying the claim or objecting to the arbitration in Paragraph 2. Though, it is not disputed that way back on 20.01.2020, an application under Section 13(2) of the Act had been filed which had already been noticed by the learned Arbitrator in its order dated 21.01.2022, which has been reproduced in para 16 above.

29. Eventually, the claim petitions were allowed and following amounts were awarded by way of one consolidated award on the two separate claims:

> *"12.1 Accordingly, award is passed in favour of the claimant and against the respondent, for payment of Rs.8,41,04,572 (Eight Crores Fourty One Lacs Four Thousand Five Hundred Seventy Two) (6,00,73,973 + 2,40,29,589) with interest @15% per annum under claim heads (a) and (b); Nil under claim head (c); and Rs.33,60,668 Thirty Three Lacs Sixty Thousands Six Hundred Sixty Eight)*

(Rs.13,60,668.00 +20 lacs) under claim head (d).
12.2 The Respondent shall pay the award money to the claimant within a period of three months."

Findings on Issue No.(i):-

30. A perusal of the provisions of the Act would go on to show that an "arbitration agreement," as defined under Section 7 **'Arbitration Agreement'** of the Act, means an agreement by which the parties submit to arbitration all or certain disputes which have arisen, or which may arise, between them in respect of a defined legal relationship, whether contractual or not.

31. In sum and substance, Section 8 of the Act talks about **'Power to refer parties to arbitration where there is an arbitration agreement'** and provides that a judicial authority before which an action is brought in a matter that is the subject of an arbitration agreement shall, if a party or any person claiming through or under them applies not later than the date of submitting their first statement on the substance of the dispute, would refer the parties to arbitration. This applies notwithstanding any judgment, decree, or order of the Supreme

Court or any other court, unless the authority finds that *prima facie* no valid arbitration agreement exists.

32. The procedure for the appointment of arbitrators is provided under Section 11 **'Appointment of arbitrators'** of the Act which states that parties are free to agree on a procedure for appointing the arbitrator or arbitrators. If a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party, the High Court may be approached by an application by the aggrieved party.

33. Section 12 provides for **'Grounds for challenge'** of the Act and makes it mandatory for a nominated arbitrator to disclose in writing any circumstances such as the existence, direct or indirect, of any past or present relationship with or interest in any of the parties or the subject-matter in dispute (financial, business, professional, or otherwise) that are likely to give rise to justifiable doubts as to their independence or impartiality. This disclosure must be made in the form prescribed in the Sixth Schedule. Furthermore, Section 12(4) of the Act provides that a party may challenge an arbitrator appointed by them, or in whose appointment they participated,

only for reasons of which they become aware after the appointment has been made.

34. Section 13 lays down the **'Challenge procedure'** and gives the right to a party to challenge the appointment of an arbitrator. A party intending to do so must, within fifteen days after becoming aware of the constitution of the Arbitral Tribunal or any circumstances referred to in Section 12(3) of the Act, send a written statement of the reasons for the challenge to the Arbitral Tribunal. Section 13(3) of the Act makes it mandatory for the Arbitral Tribunal to decide on the challenge. If the challenge under any procedure agreed upon by the parties or under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award, as provided under sub-section (4). Under sub-section (5), if an arbitral award is made, the party who challenged the arbitrator may make an application for setting aside such an award in accordance with Section 34 of the Act. Section 13 of 'the Act' reads as under:-

> *"13. Challenge procedure.-(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.*
> *(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral*

> *tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.*
> *(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.*
> *(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.*
> *(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.*
> *(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees."*

35. Section 16 refers to **'Competence of arbitral tribunal to rule on its jurisdiction'** of the Act and further provides that the Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. The issue of jurisdiction must be raised not later than the submission of the statement of defence. Furthermore, a party is not precluded from raising such a plea merely because they have appointed, or participated in the appointment of an arbitrator. Section 16(5) of the Act further provides that the Arbitral Tribunal shall decide on a plea referred to in sub-section (2) or sub-section

(3), where the Arbitral Tribunal rejects the plea, it shall continue with the arbitral proceedings and make an arbitral award. A party aggrieved by this decision may then make an application to set aside the arbitral award in accordance with Section 34 of the Act. Section 16 reads as under:-

> ***"16. Competence of arbitral tribunal to rule on its jurisdiction.***
> *(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,*
>
> *(a) An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and*
>
> *(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*
>
> *(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.*
>
> *(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.*
>
> *(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-*

> *section (3), admit a later plea if it considers the delay justified.*
>
> *(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.*
>
> *(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."*

36. Section 18 **'Equal treatment of parties'** of the Act mandates that equal treatment must be afforded to the parties.

37. Section 21 provides for **'Commencement of arbitral proceedings'** of the Act and specifies that, unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

38**.** Section 34 of the Act, governs the **'procedure for setting aside an arbitral award',** and provides that recourse to a Court against an arbitral award may be made only through an application for setting aside such an award in accordance with sub-sections (2) and (3). Specifically, Section 34(2)(a)(v) of the Act provides that an award may be set aside, if the composition of the Arbitral Tribunal or the arbitral procedure

was not in accordance with the agreement of the parties. Meanwhile, sub-section (iii) provides for setting it aside, if the party making the application was not given proper notice of the appointment of an Arbitrator or of the arbitral proceedings.

39. Thus, a conjoint reading of these Sections demonstrates that party autonomy is paramount to ensure equal treatment and equal participation. Resultantly, the contracting parties must have an equal say in the constitution of the Arbitral Tribunal. The performance of the contract, as acted upon by the respondent at a later stage, took place bilaterally, therefore, one party cannot unilaterally assume jurisdiction and proceed independently. The only exception to this Rule is found under the proviso to Section 12(5) of the Act, where the applicability of the sub-section may be waived by an express agreement in writing subsequent to disputes having arisen between them. In the present case, it is undisputed that no such waiver exists.

40. Unilateral appointments have a profound impact, and in this regard, reliance can be placed upon the judgment of the Apex Court in ***Dharma Prathishthanam Vs. Madhok Construction (P) Limited (2005) 9 SCC 868.*** The principle

established therein must be kept in mind, as the Apex Court laid down the following position, the relevant paragraph reads as under:-

> *"**12.** On a plain reading of the several provisions referred to hereinabove, we are clearly of the opinion that the procedure followed and the methodology adopted by the respondent is wholly unknown to law and the appointment of the sole arbitrator Shri Swami Dayal, the reference of disputes to such arbitrator and the ex parte proceedings and award given by the arbitrator are all void ab initio and hence nullity, liable to be ignored. In case of arbitration without the intervention of the Court, the parties must rigorously stick to the agreement entered into between the two. If the arbitration clause names an arbitrator as the one already agreed upon, the appointment of an arbitrator poses no difficulty. If the arbitration clause does not name an arbitrator but provides for the manner in which the arbitrator is to be chosen and appointed, then the parties are bound to act accordingly. If the parties do not agree then arises the complication which has to be resolved by reference to the provisions of the Act. One party cannot usurp the jurisdiction of the Court and proceed to act unilaterally. A unilateral appointment and a unilateral reference both will be illegal. It may make a difference if in respect of a unilateral appointment and reference the other party submits to the jurisdiction of the arbitrator and waives its rights which it has under the agreement, then the arbitrator may proceed with the reference and the party submitting to his jurisdiction and participating in the proceedings before him may later on be precluded and estopped from raising any objection in that regard. According to Russell (Arbitration, 20th Edition, p. 104)*
> *"An Arbitrator is neither more nor less than a private judge of a private court (called an arbitral tribunal) who gives a private judgment (called an*

> *award). He is a judge in that a dispute is submitted to him;... He is private insofar as (1) he is chosen and paid by the disputants (2) he does not sit in public, (3) he acts in accordance with privately chosen procedure so far as that is not repugnant to public policy, (4) so far as the law allows he is set up to the exclusion of the State courts, (5) his authority and powers are only whatsoever he is given by the disputants' agreement, (6) the effectiveness of his powers derives wholly from the private law of contract and accordingly the nature and exercise of these powers must not be contrary to the proper law of the contract or the public policy of England, bearing in mind that the paramount public policy is that freedom of contract is not lightly to be interfered with."*

41. There is no dispute regarding the fact that Clause 53, as reproduced in paragraph 12, would go on to show that the dispute must be resolved by mutual negotiations, failing which, the matter shall be referred to an arbitrator appointed as per the provisions of the Arbitration and Conciliation Act, 1996.

42. By the letter dated 03.10.2019 **(Annexure C-19),** the allotment was cancelled, and a legal notice was subsequently served upon the State on 30.10.2019 **(Annexure C-20).** This notice requested a refund of the amount, suggested the name for an Arbitrator, and formally proposed the said Arbitrator.

43. Pursuant to Section 21 of the Arbitration and Conciliation Act, 1996, the cause of action accrued, when the

State chose not to appoint an arbitrator within thirty days of receiving the notice. Resultantly, the Contractor had failed to take the necessary steps to have the arbitrator appointed and the Arbitral Tribunal constituted through a Court of law, a procedure prescribed under Section 11 of the Act and explicitly mentioned in the Contractor's own letter. Similarly, the Contractor took no action against the State, even though it could have followed the procedure outlined in the notice itself.

44. Instead, via a letter dated 09.12.2019 **(Annexure C-21),** the Contractor had unilaterally requested the proposed/nominated arbitrator to preside over the matter without following the statutory procedure, solely on the grounds that the State had failed to respond. Immediately thereafter, on 13.12.2019 (Annexure P-1), the State had raised an objection, asserting that it had neither given express nor implied consent to the proposed arbitrator, and directed the Contractor to act in accordance with the relevant provisions of the Act.

45. Thereafter, the Arbitrator had fixed a hearing date for 21.01.2020 to decide the modalities of the arbitration. The State had given immediate notice on 30.12.2019 that it was

approaching the Court for intervention and objected to the unilateral appointment.

46. Thus, it is very apparent that the State had never consented to the appointment of the Arbitrator. Resultantly, the Arbitrator was bound to decide the application under Sections 13(2) & (3) of the Act which had been filed initially. It was also stated in the said application under Section 13 of the Act that the Court had been approached for the appointment of an independent and impartial Arbitrator, and that notice of the same had already been issued.

47. It is not disputed that the Arbitrator recorded this in his proceedings on 21.01.2020 and wrongly held *prima facie*, that the appointment of the Arbitrator is valid without giving any valid reasons. However, he further held that it is in the best interest of the parties that the fate of the petition under Section 11 of the Act filed by the State be decided first. The claim of the contractor was that the State had forfeited its right to appoint an Arbitrator as recommended by the claimant by not replying to the notice dated 30.10.2019.

48. The Arbitrator was under a bounden statutory duty to decide the application under Section 13 of the Arbitration and

Conciliation Act, 1996 ('the Act'). This duty arose after the Contractor successfully rebutted and dislodged the plea filed by the State under Section 11(6) of the Act, which had sought the appointment of an Arbitrator on the ground that only a challenge under Section 34 of the Act would be applicable. However, while passing the impugned award on 29.04.2023, the Arbitrator had completely failed to consider the Section 13 application. Despite being fully aware of the application moved under Sections 13(2) and 13(3) of the Act, the Arbitrator ignored the statutory mandate under Sections 13 and 16 of the Act, which explicitly obligates the Tribunal to rule on challenges to its credentials and jurisdiction. The Apex Court has time and again appreciated and emphasized the unique procedural autonomy of the Act, stressing that parties must strictly adhere to its prescribed procedures. By failing to follow this mandatory procedure, the Arbitrator's mandate suffers from a patent illegality and an inherent lack of jurisdiction, thereby rendering the final award void ab initio.

49. The Apex Court in ***Rajasthan State Road Transport Corporation and Others v. Zakir Hussain (2005) 7 SCC 447,*** has held that jurisdiction cannot be conferred by any

order of a Court. Once an Act provides a specific remedy and creates an obligation to enforce performance in a designated manner, that performance cannot be enforced in any other way. Therefore, when a worker approaches a Civil Court instead of utilizing the prescribed statutory remedy under the Industrial Disputes Act, 1947, it acts without inherent jurisdiction. Furthermore, if the parties agreed to arbitration under an agreement, resort to arbitration must follow the agreed procedure, a unilateral appointment of an Arbitrator would be void *ab initio*. This goes to the root of the matter a fundamental illegality that the learned Single Judge had failed to appreciate while rejecting the petition under Section 34 of the Act.

50. In ***Dharma Prathishthanam*** *(supra)*, a judgment under the Arbitration Act, 1940, it was held that where an appointment of an arbitrator is unknown to law and done unilaterally by one party, the appointment, the reference, and the resulting award are all void *ab initio*. A party cannot usurp the jurisdiction of the Court and proceed to act unilaterally. It was further held that mere inaction by a party when called upon by the other party to act, does not lead to an inference of implied consent or acquiescence. Accordingly, the award was

declared a nullity. The relevant observations are found in paragraphs 31 & 32, which read as under:-

> *"31. Three types of situations may emerge between the parties and then before the Court. Firstly, an arbitration agreement, under examination from the point of view of its enforceability, may be one which expresses the parties' intention to have their disputes settled by arbitration by using clear and unambiguous language, then the parties and the Court have no other choice but to treat the contract as binding and enforce it. Or, there may be an agreement suffering from such vagueness or uncertainty as is not capable of being construed at all by culling out the intention of the parties with certainty, even by reference to the provisions of the Arbitration Act, then it shall have to be held that there was no agreement between the parties in the eye of law and the question of appointing an arbitrator or making a reference or disputes by reference to Sections 8, 9 and 20 shall not arise. Secondly, there may be an arbitrator or arbitrators named, or the authority may be named who shall appoint an arbitrator, then the parties have already been ad idem on the real identity of the arbitrator as appointed by them before hand; the consent is already spelled out and binds the parties and the Court. All that may remain to be done in the event of an occasion arising for the purpose, is to have the agreement filed in the Court and seek an order of reference to the arbitrator appointed by the parties. Thirdly, if the arbitrator is not named and the authority who would appoint the arbitrator is also not specified, the appointment and reference shall be to a sole arbitrator unless a different intention is expressly spelt out. The appointment and reference both shall be by the consent of the parties. Where the parties do not agree, the Court steps in and assumes jurisdiction to make an appointment, also to make a reference, subject to the jurisdiction of the Court being invoked in that*

regard. We hasten to add that mere inaction by a party called upon by the other one to act does not lead to an inference as to implied consent or acquiescence being drawn. The appellant not responding to respondent's proposal for joining in the appointment of a sole arbitrator named by him could not be construed as consent and the only option open to the respondent was to have invoked the jurisdiction of Court for appointment of an arbitrator and an order of reference of disputes to him. It is the Court which only could have compelled the appellant to join in the proceedings.

32. In the present case, we find that far from submitting to the jurisdiction of the Arbitrator and conceding to the appointment of and reference to the Arbitrator-Shri Swami Dayal, the appellant did raise an objection to the invalidity of the entire proceedings beginning from the appointment till the giving of the Award though the objection was belated. In ordinary course, we would have after setting aside the impugned judgments of the High Court remanded the matter back for hearing and decision afresh by the learned Single Judge of the High Court so as to record a finding if the award is a nullity and if so then set aside the same without regard to the fact that the objection petition under Section 30 of the Act filed by the appellant was beyond the period of limitation prescribed by Article 119(b) of the Limitation Act, 1963. However, in the facts and circumstances of the case, we consider such a course to follow as a futile exercise resulting in needless waste of public time. On the admitted and undisputed facts, we are satisfied, as already indicated hereinabove, that the impugned Award is a nullity and hence liable to be set aside and that is what we declare and also do hereby, obviating the need for remand."

51. In ***Newton Engineering's case*** *(supra)*, since the designated office of the arbitrator no longer existed, Indian Oil Corporation Limited unilaterally appointed its Director (Marketing) as the arbitrator. The Contractor had approached the Delhi High Court under Section 11(6)(c), read with Sections 13 and 15 of the Act, seeking the appointment of a retired Judge of that Court as the sole arbitrator to adjudicate the claims raised in the petition. A learned Single Judge of the High Court had dismissed the Contractor's petition, observing that the challenge to the arbitrator's appointment should be raised before the Arbitral Tribunal itself. Resultantly, the matter was taken up before the Apex Court. The Apex Court had held that it was not open to either party to unilaterally appoint an arbitrator to resolve disputes. Resultantly, the appointment was set aside, leaving the parties free to pursue appropriate ordinary civil proceedings for the redressal of their grievances in view of the peculiar facts of the case.

52. In the ***Walter Bau AG's case*** *(supra),* the appointment had been made by the petitioner-company, the second arbitrator was to be appointed by the Corporation, and the third arbitrator was to be chosen as per the agreement.

Thereafter, the matter was referred to the International Centre for Alternative Dispute Resolution in India (for short, "ICADR") for the appointment of an arbitrator on behalf of the party that failed to act, or for the appointment of the third arbitrator, as the case may be. The “ICADR” is governed by specific norms contained in Rules 5 and 35 of the “ICADR” Rules, 1996, which govern the procedure for appointing arbitrators. However, the “ICADR's” power to make an appointment from a panel of three names, does not include an independent right to appoint an outside arbitrator, which was nevertheless done. This procedure was objected to as being *non est* in law and contrary to the agreed procedure, since the appointment could only have been made from the panel. Resultantly, the appointment of the retired Judge was set aside, and a fresh appointment was made by the Apex Court. Thus, it is apparent that sanctity has to be given to the agreement *inter se* the parties.

53. In ***Bharat Broadband Network’s case*** *(supra),* the arbitrator was nominated by the Managing Director of the appellant-company. Subsequently, an application was filed seeking the arbitrator's withdrawal on the grounds of a *de jure* inability to perform his functions. Although this application was

rejected on the pretext that the company itself could not object in view of the law laid down in ***TRF Limited Vs. Energo Engineering Projects Limited (2017) 8 SCC 377*** ("*TRF Ltd.*"). Taking provisions of Sections 12 and 14 of the Act into consideration, it was held that the Arbitral Tribunal must first decide the challenge before it can continue to proceed, keeping in mind the *de jure* inability of an arbitrator to act as such, and that party autonomy must be respected. The relevant paragraphs read as under:-

> *"14. From a conspectus of the above decisions, it is clear that Section 12(1), as substituted by the Arbitration and Conciliation (Amendment) Act, 2015 ["Amendment Act, 2015"], makes it clear that when a person is approached in connection with his possible appointment as an arbitrator, it is his duty to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality. The disclosure is to be made in the form specified in the Sixth Schedule, and the grounds stated in the Fifth Schedule are to serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Once this is done, the appointment of the arbitrator may be challenged on the ground that justifiable doubts have arisen under sub-section (3) of Section 12 subject to the caveat entered by sub-section (4) of Section 12. The challenge procedure is then set out in Section 13 together with the time limit laid down in Section 13(2). What is important to note is that the arbitral tribunal must first decide on the said challenge, and if it is not successful, the tribunal shall continue the proceedings and make an award. It*

> *is only post award that the party challenging the appointment of an arbitrator may make an application for setting aside such an award in accordance with Section 34 of the Act.*
> *15. Section 12(5), on the other hand, is 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. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5), by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.*

54. It is in such circumstances, the appointment was set aside, even though the proceedings under Section 34 of the Act were still pending before the Delhi High Court, thereby rendering them infructuous.

55. In ***Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899 (2024) 6 SCC 1,*** the Constitution Bench has addressed the issue of stamped and unstamped instruments. The Apex Court has applied the doctrine of *kompetenz-kompetenz* (competence-competence), adopted from German jurisprudence, which mandates that Arbitral Tribunals must first rule on their own jurisdiction. This principle supports the separability presumption meaning the arbitration clause exists independently of the underlying contract. By giving Arbitrators the first opportunity to hear jurisdictional challenges, Court's intervention at the referral stage was held to be kept to a minimum. The initial rulings by the Arbitral Tribunal remain subject to subsequent judicial review by Courts, reinforcing the primacy of the Arbitration and Conciliation Act, 1996, as a special statute over general acts like the Indian Stamp Act, 1899. The relevant paragraphs reads as under:-

> *"123. The doctrine of kompetenz-kompetenz (also known as competence-competence), as originally developed in Germany, was traditionally understood to imply that arbitrators are empowered to make a final ruling on their own jurisdiction, with no subsequent judicial review of the decision by any court. However,*

many jurisdictions allow an Arbitral Tribunal to render a decision on its jurisdiction, subject to substantive judicial review.

124. It is a well-recognized principle of public international law that a legal authority possessing adjudicatory powers has the right to decide its own jurisdiction. Similarly, it is a general rule of international arbitration law that an Arbitral Tribunal has the power to determine its own jurisdiction. The ability of an Arbitral Tribunal to determine its own jurisdiction is an important facet of arbitration jurisprudence because it gives effect to the separability presumption. The separability presumption insulates the arbitration agreement from the defects of the underlying contract, and thereby ensures the sustenance of the tribunal's jurisdiction over the substantive rights and obligations of the parties under the underlying contract even after such a contract is put to an end. The doctrine of competence-competence allows the tribunal to decide on all substantive issues arising out of the underlying contract, including the existence and validity of the arbitration agreement.

125 to 130 x x x x x x x x x

131. Section 16 empowers the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of arbitration agreement. Importantly, the parties have a right under Sections 16(2) and 16(3) to challenge the jurisdiction of the Arbitral Tribunal on grounds such as the non-existence or invalidity of the arbitration agreement. The Arbitral Tribunal is obligated to decide on the challenge to its jurisdiction, and where it rejects the challenge, it can proceed with the arbitral proceedings and make an arbitral award. It is the principle of procedural competence-competence which recognizes the power of an Arbitral Tribunal to hear and decide challenges to its jurisdiction. Once the Arbitral Tribunal makes an arbitral award, Section 16(6) allows the aggrieved party to make an application for

setting aside the award under Section 34. Sections 16(5) and 16(6) further show that Parliament has completely ousted the jurisdiction of Courts to interfere during the arbitral proceedings-courts can intervene only after the tribunal has made an award. Thus, Section 16 is intended to give full effect to the procedural and substantive aspects of the doctrine of competence-competence.

132. Section 34 of the Arbitration Act deals with applications for setting aside arbitral awards. Section 34(2) provides that an arbitral award may be set aside by the Court only if the party making the application establishes, on the basis of the record of the Arbitral Tribunal, any of the following five grounds:

132.1. A party was under some incapacity; or

132.2. The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

132.3. The party making an application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

132.4. The arbitral award deals with a dispute not contemplated by or not failing within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

132.5. The composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of Part I from which the parties cannot derogate, or failing such agreement, was not in accordance with Part I.

132.6. Moreover, the Court can set aside an arbitral award if it finds that:

132.6.1. The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force; or
132.6.2. The arbitral award is in conflict with the public policy of India.
133. Under Section 34, the grounds for setting aside an arbitral award are specific. The provision requires a party challenging an award to plead and prove the existence of one or more such grounds. The scheme of the Arbitration Act shows that although an Arbitral Tribunal is given priority to determine all issues pertaining to its jurisdiction based on the principle of competence-competence, the tribunal's decision is subject to judicial review at the stage when an award is challenged. Moreover, one of the grounds on which an arbitral award can be set aside is that the arbitration agreement is not valid under law. This indicates that the Arbitration Act does not contemplate the Court determining the validity of an arbitration agreement at a pre-arbitral stage.
134 to 135 x x x x x x x x x
136. In view of the above discussion, the issue that comes up for our consideration is whether an issue of stamping is a jurisdictional issue. Jurisdiction is generally defined as the power of a court or tribunal to hear and determine a cause, and to adjudicate or exercise any judicial power in relation to such cause. Jurisdiction refers to the authority of a court or tribunal to decide matters that are litigated before it or to take cognizance of matters presented before it in a formal way for its decision. In Official Trustee v. Sachindra Nath Chatterjee, this Court held that for a court to have jurisdiction to decide a particular matter, it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought. In NTPC Ltd. v. Siemens Atkeingesellschaft, this Court observed that any refusal to go into the merits of a claim may be in the realm of jurisdiction. Accordingly, it was observed that the issue of limitation goes to jurisdiction because if a claim is barred by limitation, a tribunal can refuse to exercise its jurisdiction.

137 to 138 x x x x x x x x x

139. The international arbitration law as well as domestic law prioritize the arbitral tribunal by permitting them to initially decide challenges to their authority instead of the courts. The policy consideration behind this approach is two-fold: first, to recognize the mutual intention of the parties of choosing the arbitrator to resolve all their disputes about the substantive rights and obligations arising out of contract; and second, to prevent parties from initiating parallel proceedings before courts and delaying the arbitral process. This is the positive aspect of the doctrine of competence-competence.

140. The negative aspect, in contrast, speaks to the national courts. It instructs the courts to limit their interference at the referral stage by deferring to the jurisdiction of the arbitral tribunal in issues pertaining to the existence and validity of an arbitration agreement. Thus, the negative aspect of the doctrine of competence-competence suggests that the courts should refrain from entertaining challenge to the jurisdiction of the arbitral tribunal before the arbitrators themselves have had an opportunity to do so. Allowing arbitral tribunals to first rule on their own jurisdiction and later allowing the courts to determine if the tribunal exercised its powers properly safeguards both the power and authority of the arbitral tribunal as well as the courts. The negative aspect of the doctrine has been expressly recognized by Indian courts. Considering both the positive and negative facets, the principle can be defined as a rule whereby arbitrators must have the first opportunity to hear challenges relating to their jurisdiction, which is subject to subsequent review by courts.

141. In Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., one of the issues before this Court was whether the court at the referral stage under Section 45 is required to determine the validity of an arbitration agreement. This Court recognized that the doctrine of competence-competence has both the positive and the negative aspects. It was

> *observed that while the positive aspect enables the arbitrator to rule on its own jurisdiction, the negative aspect deprives the courts of their jurisdiction. However, this Court noted the absence of a provision similar to Section 16 in Part II to conclude that the referral court is required to test for the ingredients of Section 45 at the threshold stage itself."*

56. Reliance was also placed upon the Constitution Bench judgments of the Apex Court in ***Khardah Company Ltd. Vs. Raymon & Co. (India) Private Ltd. AIR 1962 SC 1810*** and ***Waverly Jute Mills Co. Ltd. Vs. Raymon & Co. (India) Private Ltd. AIR 1963 SC 90,*** holding that where there is no such agreement, there is an initial want of jurisdiction which could not be cured by acquiescence and consent.

57. In ***Hindustan Zinc Limited (HZL) Vs. Ajmer Vidyut Vitran Nigam Limited (2019) 17 SCC 82,*** a three-Judge Bench came to the conclusion that there was a statutory provision as such that the matter had to be decided otherwise and the arbitrator could not be appointed by the State Commission. Furthermore, the Court held that if there is an inherent lack of jurisdiction, the plea can be taken up at any stage and even in collateral proceedings.

58. In ***Central Organization for Railway Electrification Vs. ECI SPIC SMO MCML (JV) (2025) 4 SCC 641,*** a Constitution Bench re-examined party autonomy regarding consensual agreements to submit disputes to a decision-maker chosen by or for the parties. The Apex Court has also held that the right to arbitrate makes dispute resolution a private right for *in personam* matters, subject to the Arbitration and Conciliation Act, 1996, which allows parties freedom to agree unless otherwise provided while balancing challenges under Section 34 of the Act, the provisions of Section 12 of the Act, equality in arbitration proceedings under Section 18 of the Act, and the self-contained nature of Court intervention. Ultimately, the unilateral appointment of arbitrators was held to violate the equality clause under Section 18 of the Act and Article 14 of the Constitution of India. The Apex Court further held that any clause allowing a single party to make such an appointment gives rise to justifiable doubts regarding the arbitrator's impartiality and independence. The relevant paragraphs reads as under:-

> *"127. Reference of disputes to a sole arbitrator has various advantages, including easy arrangements of meetings or hearings, reduced expenses since the parties will only have to bear*

> *the expense of one arbitrator, and speedy decision-making. In the case of the appointment of a sole arbitrator, the decision-making vests in the hands of one person. This poses a greater risk of bias against the weaker party, especially if the arbitrator is unilaterally appointed by the other party.*
>
> *128. x x x x x x*
>
> *129. Equal treatment of parties at the stage of appointment of an arbitrator ensures impartiality during the arbitral proceedings. A clause that allows one party to unilaterally appoint a sole arbitrator is exclusive and hinders equal participation of the other party in the appointment process of arbitrators. Further, arbitration is a quasi-judicial and adjudicative process where both parties ought to be treated equally and given an equal opportunity to persuade the decision-maker of the merits of the case. An arbitral process where one party or its proxy has the power to unilaterally decide who will adjudicate on a dispute is fundamentally contrary to the adjudicatory function of arbitral tribunals."*

59. Justice P.S. Narasimha, while delivering a concurring judgment and summarizing his conclusions, held that party autonomy is the brooding and guiding spirit of arbitration. However, arbitration agreements enabling one of the parties to unilaterally constitute an Arbitral Tribunal do not inspire confidence in its independence and may violate the public policy requirement of constituting an independent and impartial tribunal. The relevant paragraphs read as under:-

> *"288.2. Party autonomy in making of an arbitration agreement is an essential feature of arbitration. It commences with choosing the members of the Arbitral Tribunal, extends to the procedure that would apply for its conduct, and concludes with the method by which an award could be challenged before a court. It is thus a brooding and guiding spirit of arbitration. Party autonomy is sufficiently incorporated in the Arbitration Act, along with a restraint on judicial intervention.*
>
> *288.3. to 288.5. x x x x x x x*
>
> *288.6. The power to ensure that the arbitration agreement is complaint of the public policy requirement of establishing an independent and impartial tribunal is always of the Court. This principle is recognised and statutorily incorporated in the Contract Act and the Arbitration Act. It is the duty of the Court to ensure that the arbitration agreement inspires confidence and it will enable establishment of an independent and impartial Arbitral Tribunal.*
>
> *288.7. Neither public policy considerations under the Contract Act or the Arbitration Act restrain the parties to the arbitration from maintaining a panel of arbitrators in any manner. However, arbitration agreements enabling one of the parties to unilaterally constitute Arbitral Tribunal do not inspire confidence of independence and may violate the public policy requirement of constituting an independent and impartial tribunal. The Court will, therefore, scrutinise the agreement and hold them to be invalid if it considers it appropriate."*

60. Reliance can also be placed upon the Division Bench judgment of the Delhi High Court in ***M/s Mahavir Prasad Gupta and Sons v. Govt. of NCT of Delhi (2025) SCC OnLine Delhi 4241,*** on the issue of unilateral

appointments. The Court addressed whether proceedings and awards by a unilaterally appointed, ineligible arbitrator are nullities, violate the public policy of India, and can be set aside under Section 34 of the Arbitration and Conciliation Act.

61. In ***Bhadra's case*** *(supra),* the issues that arose concerned the appointment of a sole arbitrator, the right of challenge under Section 34 of the Act, and unilateral appointments that were inconsistent with the basic tenet of arbitration-namely, mutual confidence in the arbitrator. It was also held not unreasonable for a party to apprehend that an arbitrator unilaterally appointed by the opposite party may not act with complete impartiality. Resultantly, it was held that the ineligibility of an Arbitrator can be raised at any stage of the proceedings. A unilateral appointment is inherently exclusionary, violates the principle of equal treatment and procedural equality between the parties, and leaves the Arbitrator lacking jurisdiction. Such an Arbitrator cannot make an award on the merits, as the defect goes to the root of the matter and strikes at the very authority of the Arbitrator. Instead, the principle was laid down that it is the duty of the Arbitrator to ensure that the parties are genuinely willing to

participate in the proceedings and to insist upon a written agreement waiving the requirement of Section 12(5) of the Arbitration and Conciliation Act, 1996. If any party fails to appear despite receiving notice, the Arbitrator must not proceed further and should immediately withdraw from the arbitral proceedings. The Arbitrator must record the minutes along with the waiver agreement, even when the parties are cooperating. This practice was held certainly to save time and avoid a multiplicity of proceedings. The relevant paragraphs reads as under:-

> *"113. A challenge to an arbitrator's ineligibility could be raised at any stage because an award passed in such circumstance is non-est, i.e., it carries no enforceability or recognition in law. We say so because an arbitrator does not possess the jurisdiction to pass an award. In arbitration, the parties vest the jurisdiction in the tribunal by virtue of a valid arbitration agreement and an appointment made in accordance with the provisions of the Act, 1996. This jurisdiction is grounded in the consent of the parties as explained in the foregoing paragraphs of this judgment.*
> *114 to 115 x x x x x x x*
> *116. This Court, in catena of decisions, has held that the validity of a decree can be challenged even in execution proceedings if the court passing such decree lacked subject-matter jurisdiction over the dispute. As a decree passed by a court without jurisdiction goes to the root of the matter. Any decision passed by a court lacking jurisdiction would be coram non judice, since a court cannot give itself jurisdiction. No*

> *act of the parties can cure an inherent lack of jurisdiction.*
>
> *117 to 123 x x x x x x x*
>
> *124. For all the foregoing reasons, we have reached the conclusion that the High Court committed an egregious error in passing the impugned judgment. We are left with no other option but to set aside the impugned judgment. As a result, the arbitral awards dated 30.07.2018 passed by the sole arbitrator are also set aside."*

62. In such circumstances, we are of the considered opinion that having unilaterally appointed the Arbitrator in question without the consent of the State, the said appointment was void *ab initio* and needs to be commenced afresh. Resultantly, we answer Issue No.(i) by holding that the appointment of the Arbitrators was void *ab initio* without the consent of the State and contrary to the prescribed procedure, as agreed. Furthermore, the contractor himself had stated that he would be taking steps to seek the constitution of the Arbitral Tribunal through a Court of law, in his communication dated 30.10.2019.

Findings on issue No.(ii):-

63. We have already reproduced the challenge and the objections raised by the respondent-contractor when the petition under Section 11(6) of the Act was filed and

subsequently dismissed on 02.06.2022. That dismissal was based primarily on the ground that the law allowed for a challenge under Section 34 of the Act, since an application under Section 13 had already been filed. The issue now arises regarding the argument that the objections filed under Section 34 against the appointment would be invalid and not maintainable in proceedings under Section 37 of the Act, given that they were not argued before the Arbitrator.

64. We are of the considered opinion that the parties cannot be allowed to approbate and reprobate. Having taken a calculated stand while opposing the proceedings under Section 11(6) of the Act, the party cannot now be permitted to turn around and submit that a challenge cannot be made under Section 34 to the award and proceedings that were void *ab initio.*

65. Reliance can be placed upon the established principle that inconsistent pleas cannot be taken by parties, as well as the doctrine of estoppel, which operates as a rule in equity to prevent prolonged proceedings. This principle is supported by the Apex Court judgment in ***Joint Action***

Committee of Air Line Pilots' Association of India Vs. Director General of Civil Aviation (2011) 5 SCC 435.

66. In ***Suzuki Parasrampuria Suitings Pvt. Ltd., case*** *(supra),* the three-Judge Bench held that a litigant cannot take a contradictory stand at different times in the same case. The relevant paragraph reads as under:-

> *"12. A litigant can take different stands at different times but cannot take contradictory stands in the same case. A party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands. The untenability of an inconsistent stand in the same case was considered in Amar Singh Vs. Union of India, observing as follows: (SCC p.86, para 50)*
> *"50. This Court wants to make it clear that an action at law is not a game of chess. A litigant who comes to court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions."*

67. In such circumstances, it does not lie in the mouth of the respondent-Contractor to argue that because the Arbitrator had issued a notice, and despite the fact or solely on account of the fact that the State did not appear before the Arbitrator after the Section 11(6) proceedings, the State is now estopped from raising these issues. Having successfully got rejected the petition under Section 11(6), whereby the State sought the appointment of an independent Arbitrator, it would

not lie in the mouth of the Contractor to claim that an objection to the Arbitrator's appointment cannot be raised under Section 34 of the Act, as a party cannot be allowed to blow hot and cold. Furthermore, it was the bounden duty of the Arbitrator, being an expert in the field, to decide the said issue in order to cut short the litigation. However, a review of the arbitral award dated 29.04.2023 reveals that it fails to even refer to the application filed under Section 13(2), the relevant part of which reads as under:

> ***"2. Chronology of Events:-***
>
> *Difference and dispute having arisen between the parties, the claimant invoked the arbitration clause vide letter/notice dated 30.10.2019 suggesting arbitration by a single member arbitral tribunal comprising of Mr. Justice S.N. Jha, former Judge of Patna High Court and Chief Justice of Jammu & Kashmir and Rajasthan High Courts. The respondent did not send any response denying the claim and/or objecting to the arbitration. On 07.12.2019 the claimant set request letter to Mr. Justice S.N. Jha to adjudicate the disputes between the parties. Mr. Justice S.N. Jha vide letter dated 19.12.2019 accepted the nomination and called upon the parties to appear before him on 21.01.2020 to decide the modalities of arbitration. On 21.01.2020 the first sitting of the arbitral tribunal was held which was attended by representatives of both sides. The respondent however did not appear on the next date viz. 19.03.2020, and instead filed arbitration applications (Nos.5 & 6 of 2020) in the High Court of Himachal Pradesh under section 11 (6) of the Arbitration and Conciliation Act, 1996 for*

> *appointment of arbitrator. The said applications were dismissed by the High Court as not maintainable on 02.06.2022. On receipt of letter dated 14.06.2022 from the claimant's lawyer to proceed with the arbitration in view of the High Court's order, on 23.06.2022 the tribunal issued notice to the parties for hearing on 23.07.2022. On 23.07.2022 the claimant filed Statements of Claim (SoC); however, the respondent did not appear. The respondent chose not to appear on the next date also viz. 06.09.2022 as, indeed, on subsequent dates viz. 10.10.2022 and 07.11.2022. In the circumstances, by a speaking order dated 07.11.2022 the proceedings were fixed for ex-parte hearing taking note of the recalcitrant conduct of the respondent and the legislative mandate of section 29A of the Act to conclude the arbitration within a time frame. On 10.12.2022 the evidence of the sole witness on behalf of the claimant was recorded and on 04.02.2023 final arguments were heard, and the award was reserved."*

68. The award suffers from patent illegality because the tribunal had failed to notice that the application filed under Section 13 of the Act was still pending before it. This oversight occurred despite the Tribunal's noting, on an earlier occasion three years prior on 20.01.2020 that it *prima facie* had jurisdiction and was merely awaiting the outcome of proceedings under Section 11 of the Act application.

Findings on issue No.(iii):-

69. Keeping in view the law laid down, we are of the considered opinion that the Contractor cannot now turn around and contend that because the application under Section 11(6)

of the Act had not been challenged further, the issues cannot be raised under Section 34 of the Act. The reliance placed by the learned counsel(s) for the parties on the judgment of the Apex Court in the ***Quippo Construction Equipment Ltd. case*** *(supra)* could not be of much help. In that case, an ex-parte award was passed by the arbitrator, and the respondents had failed to participate in the arbitration proceedings. Resultantly, the Apex Court had interfered and held that the High Court was in error in setting aside the award, as no objections had been raised by the respondents, who were therefore deemed to have waived their right to raise any such objections. In the present case, however, as has been noticed, the objections under Sections 13(2) & 13(3) of the Act were pending before the Arbitrator, who failed to decide the said issue, even though it was his bounden duty to do so.

70. The judgment in ***A.C. Chokshi Share Broker Private Limited v. Jatin Pratap Desai case*** *(supra)* could not be of much help. It was recorded that the High Court had erred in holding that the respondents had raised a jurisdictional objection at any stage. Since no such objection was raised

before the Arbitral Tribunal under Section 16 of the Act, but was only brought up under Section 37 of the Act, the Division Bench of the High Court was not justified to set aside in appeal.

71. Similarly, in ***Gayatri's case*** *(supra),* it was held that if a right is waived under Section 4 of the Act, then the issue cannot be allowed to be raised under Section 34 of the Act.

72**.** In the facts and circumstances of the case, as noticed right from day one, the State has always objected to the appointment of the learned Arbitrator and had rather filed an application before this Court for the appointment of an independent Arbitrator. The Arbitrator had chosen to proceed in spite of the fact that there was a lack of consent, and then had chosen not to decide the application under Section 13 of the Act. Therefore, it can be safely said that this was the manner in which the unilateral appointment had taken place. It was a further requirement flowing from the contractual rights of the parties; however, the parties' autonomy has been compromised. The contractor could not have pushed through with the proposed Arbitrator having successfully opposed the

appointment of a fresh Arbitrator before this Court, with the plea that all the issues could be challenged by filing a petition under Section 34, as provided under the Act. In such circumstances, the State did not need to challenge the order dated 02.06.2022, as it was given the right to raise the issue under Section 34. Rather, the said fact should have been highlighted by the Contractor before the Arbitrator and it should have ruled on its own jurisdiction before proceeding to decide on merits and therefore, the Tribunal committed a grave irregularity and illegality which has led to the quandary giving us jurisdiction to interfere under Section 34(2)(a)(v) as the composition of the Arbitral Tribunal was void *ab initio.*

73. We are conscious of the limited jurisdiction under Section 37 of the Act. The Appellate Court's power under Section 37 of the Act is not equivalent to the normal appellate jurisdiction of Civil Courts; thus, this Court's review is limited.

74. Once a case for interference is made out, and the unilateral appointment strikes at the root of the matter, affecting the core issue of jurisdiction, the principle applies that the Award is void and the learned Single Judge had failed to exercise proper jurisdiction. A party cannot be allowed to

suffer from such a fundamental infirmity; therefore, this Court must interfere and set aside the award. The limits on exercising arbitral power were established in the judgment of the Apex Court in ***MMTC Limited Vs. Vedanta Ltd. (2019) 4 SCC 163,*** which held that when there is a manifest error apparent on the face of the record, including legal perversity by the Arbitrator, or an exercise of power beyond the terms of the agreement, this Court has no choice but to set aside the award and the subsequent orders passed by the learned Single Judge on 14.07.2025.

75. In such circumstances, we are of the considered opinion that the State can raise this issue at this stage also, as the appointment is void *ab initio.* Keeping in view the three questions as answered, we are of the considered opinion that the ex-parte award dated 29.04.2023, passed by the learned Arbitrator cannot be sustained.

76. Accordingly, we set aside the judgment dated 14.07.2025, passed by the learned Single Judge and allow the present appeals and set aside the award dated 29.04.2023. Pending miscellaneous application(s), if any, shall also stand disposed off.

77. The parties are, therefore, free to appoint an independent Arbitrator in accordance with their agreed-upon procedure. The amount deposited by the State will be refunded to it and the respondent-Contractor will re-deposit the amount, it had withdrawn under the order of the Apex Court on the principle of restitution.

(G.S. Sandhawalia)
Chief Justice.

(Jiya Lal Bhardwaj)
Judge.

September 18, 2026
(Hemlata/Munish Thakur)