IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.43 OF 2023

M/S. TRULY PEST SOLUTION PRIVATE LIMITED (BEING A MSME) ..PETITIONER

VS.

PRINCIPAL CHIEF MECHANICAL ENGINEERING (P.C.M.E.) CENTRAL RAILWAY. ..RESPONDENT

Adv. Shekhar Jagtap a/w. Adv. Ishan Paradkar i/b. J. Shekhar & Associates for petitioner.
Adv. Savita Ganoo a/w. Adv. D. P. Singh for respondent-UOI

CORAM	:	Rajesh S. Patil, J.
RESERVED ON	:	11th September 2024.
PRONOUNCED ON	:	11th November 2024.

JUDGMENT :

1. The present petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Arbitration Act'), by the original claimant seeking to quash and set aside the arbitral award dated 4th February 2022, passed by the sole arbitrator.

FACTS

2. On 5th May 2016, a tender was published by the Divisional Railway Manager (Mechanical), Central Railway, Mumbai (for short 'Railways') towards the work of Pest and Rodent Control, in railway

passenger coaches maintained at CSTM, WB, MZN, DRT and LDT, Coaching Depots and Rodent Control in Coaching Depots yard and premises. The petitioner participated in the tender process and on 7th June 2016, was declared as the successful bidder. Accordingly, the contract work of the said tender was awarded to the petitioner, for an amount of Rs.1,96,32,255/-. The contract period was for three years i.e. from 30th November 2016 to 29th November 2019.

3. Meanwhile, Government issued Notification on 19th January 2017, by which the rates of minimum wages payable to labourers were increased. Additionally, the railways issued a Joint Procedure Order (for short 'JPO') dated 20th December 2017, wherein all the contractors were permitted to foreclose their contracts on the condition that the contractors would continue the ongoing work till the finalisation of a new contract, and the minimum wages would be paid to the labourer till the foreclosure of the contract and no dues financial or otherwise shall be staked by the contractor.

4. The petitioner vide their letter dated February 2018 and a further letter dated January 2019 communicated their intention to withdraw from the contracted work as per the terms of the JPO. The railways accordingly on 8th January 2019 issued a new contract for

the balance work and foreclosed the contract with the petitioner.

5. The petitioner claimed an additional manpower expense of Rs.20,91,522/- along with interest from the railways. As the said amount was disputed, the petitioner, on 7th December 2020, issued a legal notice to the railways and invoked Arbitration Clause, thereby calling upon them to pay the differential wages of Rs.20,91,522/- along with interest.

6. Subsequently on 18th December 2020 the petitioner signed and stamped the "Waiver off agreement", under Section 12(5) of Arbitration Act. The Railways accordingly proceeded further and on 28th April 2021 appointed Shri D. K. Tripathi, Deputy Mechanical Engineer (D), Central Railway, Mumbai, CSMT, to act as a 'Sole Arbitrator".

7. The petitioner/claimant, on 8th June 2021, filed their Statement of Claim along with all the relevant annexures with the sole Arbitrator. The Railways being the respondents filed their reply to the statement of claim before the sole Arbitrator.

8. On 1st October 2021, the Railways issued Work Completion Certificate, to the petitioner in respect of the contracted work, mentioning therein that the work completed on 10th January 2019,

amounting to Rs.1,29,74,966/-.

9. The proceedings before the Arbitral Tribunal, consisting of Sole Arbitrator went ahead and after hearing both the sides the Sole Arbitrator, on 4th February 2022 passed an Award, thereby dismissing the claim of the petitioner.

10. Being dissatisfied with the dismissal of their claim by impugned Award dated 4th February 2022 the petitioner/claimant have challenged the same by way of present Arbitration Petition, filed under Section 34 of the Arbitration Act.

SUBMISSIONS

11. Mr. Shekhar Jagtap appeared on behalf of the petitioner/claimant and made his submissions.

(i) He submitted that the sole Arbitrator was appointed by the Railways, therefore, under the provisions of Section 12 (5) read with Schedule VII of the Arbitration Act, the award passed by the Sole Arbitrator who was himself *de jure* ineligible to be an Arbitrator, hence, the Award is *void ab initio*.

(ii) The Waiver mentioned in the proviso of Section 12(5) of the Arbitration Act is required to be exercised in true letter and spirit and not in a mechanical manner or under implied coercion, whereby the

party waiving the right of raising objection is left with no choice but to accept the Waiver, since the other party is at dominating position.

(iii) He relied upon the judgment of the Supreme Court passed in *Bharat Broadband Network Limited Versus United Telecom Limited*[1].

(iv) He submitted that the Waiver as mentioned under Section 12(5) of the Arbitration Act, was sought by the Railways, as per their demand. The Railways had by their letter dated 22nd February 2021 enclosed a standard proforma of the Waiver agreement which was made mandatory to be signed by both the parties. Therefore, the petitioner had no other option but to sign the Waiver Agreement under Section 12(5) of the Arbitration Act and thereafter, to proceed with the arbitration. On this issue, he relied upon the judgment of the Supreme Court passed in *Ellora Papermills Limited vs. State of Madhya Pradesh*[2].

(v) He submitted that as per the agreement, there was an Arbitration Clause, therefore, the petitioner was prohibited from approaching the Civil Court for their grievances.

(vi) He submitted that the condition for foreclosure of the contract laid down in the JPO dated 20th December 2017 by the Railway

1 (2019) 5 SCC 755
2 (2022) 3 SCC 1

Authorities are illegal and bad in law.

(vii) He submitted that the No Claim Certificate sought by the respondents/Railways from the petitioner was under implied coercion. To adhere to the procedure of reimbursement of the claim, the petitioner had no other option but to sign the No Claim Certificate. So also, the petitioner was incapable to express its protest for want of any Forum, for this domination by the Railways.

(viii) The Railways deliberately neglected the representations made by the petitioner, requesting to invoke the price variation clause in the Contract Agreement and reimburse the increased amount payable in the form of wages to the workers.

(ix) The increase of 45% in the minimum wages of the workers in term of the Notification dated 19th January 2017, was during the period of the contract, which resulted into the petitioner paying a sum of Rs.523/- to each worker per day, instead of Rs.374/- per day.

(x) The Railways deliberately delayed the procedure of foreclosure of the contract, despite various communications made by the petitioner.

(xi) He submitted that in a similar kind of a situation this Court has dealt with the issue in the proceedings of *A 2 Z Infra Services Limited*

vs. Union of India[3]. The said ratio is applicable to the present proceedings.

(xii) He submitted that the sole Arbitrator has passed impugned award which is against the public policy, hence, it is liable to be quashed and set aside. He also relied upon the judgment of the Supreme Court in the proceedings of *Associate Builders Vs. Delhi Development Authority*[4].

(xiii) He submitted that the impugned award requires to be quashed and set aside, and the claim to be allowed.

12. Mrs. Savita Ganoo appeared for the respondent-Railways and made her submissions.

(i) She submitted that a bare reading of Section 34 of the Arbitration Act makes it clear that the grounds for raising a challenge to the Arbitral Award are restricted to those in Section 34(2). The petitioner in the present case except for making a feeble attempt to raise an objection to the appointment of the Arbitrator has not made out any case to set aside the award on any of the grounds under Section 34(2) of the said Act.

(ii) The grounds raised by the petitioner are not grounds which can

3 Writ Petition No.1996 of 2017.
4 (2015) 3 SCC 49

be urged under Section 34(2) of the Arbitration Act, in view of the settled position in law that the Arbitrator is the final arbiter of facts. It is submitted that the Arbitrator has passed a well-reasoned Award and the objections to the impugned award are beyond the grounds which can be urged under Section 34 of the said Act and hence cannot be considered as valid objections.

(iii) Arbitration and Conciliation (Amendment) Act, 2015, Section 8 thereof introduced a new regime i.e. sub-section (5) to Section 12 of the said Act.

(iv) She submitted that ordinarily under Section 12(5) of the Arbitration Act, an Arbitrator who has a relationship with a party as contemplated under VII Schedule of the said Act, is ineligible to act as arbitrator. However, this ineligibility is not permanent and admits of one crucial exception - as provided under the proviso to Section 12(5) of the said Act. Under the said proviso, a party can waive the applicability of the sub-section by an express agreement in writing, subsequent to disputes having arisen. In other words, in cases where waiver would operate, objection/grounds on the basis of VII Schedule and Section 12(5), cannot be sustained.

(v) The letter dated 18th December 2020 addressed to Senior

Divisional Mechanical Engineer (Coaching), Divisional Railway Manager (Mechanical) forwarded an Agreement signed by the petitioner and the respondent expressly waiving the applicability of Section 12(5) of the said Act.

(vi) The documents of waiver are in writing and the same are executed post the dispute having arisen.

(vii) As regards the case of (a) *Bharat Broadband Network Ltd. vs. United Telecoms Ltd.*[5] and (b) *JMC Projects (India) Ltd. vs. Indure Private Limited*[6] relied by petitioner in support of its contention that the learned Arbitrator's appointment does not suffer from any *de jure* inability. The said judgments categorically state that if as per the proviso subsequent to the disputes having arisen between the parties there is an express agreement in writing whereby the parties have agreed to waive the applicability of Section 12(5) of the said Act the ineligibility would cease to exist.

(viii) The Petitioner by invoking Arbitration Clause sought for an Arbitrator to be appointed in accordance with Clause No. 64 (3) (a) (i) of the General Conditions of Contract, hence, the Petitioner always knew that the Arbitral Tribunal shall consist of a Sole

5 (2019) 5 SCC 755
6 2020 Scc OnLine Del 1950

Arbitrator who shall be a Gazetted Officer of Railway not below JA Grade, nominated by the General Manager. Therefore, the Petitioner was fully conscious of what appointment was being sought by them.

(ix) The waiver by the Petitioner being in response to the letter dated 14th December 2020 addressed by the Respondent therefore reflects (i) awareness on the part of the Petitioner to the applicability of the said provision as well as the resultant invalidation of the learned Arbitrator to arbitrate on the disputes between them and (ii) the conscious intention to waive the applicability of the said provision in the cases of disputes between them. Being conscious of the proviso to Section 12(5), the Petitioner has executed the aforesaid documents. In view thereof, it is respectfully submitted that the contention of the Petitioner is without merit and deserves to be rejected.

(x) The proviso of Section 12(5) squarely applies to the present case. The judgment referred by petitioner in the case of *Ellora Paper Mills Limited vs. State of Madhya Pradesh*[7] does not apply to the facts of the present case. In the case of *Ellora Paper Mills Limited vs. State of Madhya Pradesh* there was no waiver between the parties at all, and therefore the said decision is distinguishable on facts. Hence, the

7 (2022) 3 SCC 1

principle enunciated therein would not be applicable to the facts of the present case.

(xi) If the petitioner was ever aggrieved by the Arbitration clause and not agreeable to waiving its objections under Section 12(5), Petitioner could have taken recourse to filing an application under Section 11 of the said Act for appointment of an arbitrator. Respondent submits that this has not been done by the Petitioner, which only shows that the Petitioner had never doubted the independence and impartiality of the Learned Arbitrator.

(xii) The Petitioner during the arbitration proceedings also never filed any form of application raising any objections with regard to the independence and impartiality of the learned Arbitrator. Such applications of bias would have to be filed with the Arbitrator, as per provisions of the said Act.

(xiii) Infact the Petitioner in paragraph 9 of the Statement of Claim expressly states that the learned Arbitrator had jurisdiction to adjudicate the disputes between the parties.

(xiv) The impugned Award is a reasoned Award passed after considering the oral and documentary evidence and arguments advanced by both sides. The Ld. Arbitrator has considered each of the

claims raised the Petitioner and given detailed reasons for rejecting the same.

(xv) Prior to the Petitioner being awarded the Contract, on 1st September 2016, a draft proposal was published through Gazette Notification SO 2836 (E) by Ministry of Labour and Employment wherein notice of two months was given for proposed revision in minimum wages for various scheduled employment. The said proposal would also apply to labourers under the subject contract. Subsequently, vide Gazette notification dated 19th January 2017, the minimum wage was increased to Rs.523/- which was applicable for the period from 19th January 2017.

(xvi) Since the draft proposal for minimum wage revision by the Ministry of Labour and Employment was notified even before award of contract to the Petitioner, the Petitioner was fully aware of the expected rise in the minimum wages. Thus the Petitioner cannot be heard to say that the increase in the minimum wages rendered the contract financially unfeasible.

(xvii) In the case of *A2Z Infraservices Limited vs. Union of India* (Writ Petition No.1996 of 2017), the contract was in existence between the parties. In the present proceedings, the petitioner had

asked for foreclosure of the agreement in January 2018 itself. Therefore, the principle held in the judgment would be inapplicable to the facts of the present case.

(xviii) The Railways issued a JPO dated 20th December 2017 to deal with foreclosure of contracts wherein request for foreclosure of contract were received from the contractor owing to inability expressed by the contractor to pay the increased minimum wages to labour. As per the said JPO, the contractor was required to issue an unambiguous undertaking.

(xix) The undertaking was a pre-requisite for processing foreclosure of the contract awarded to the petitioner. The petitioner vide its letter dated 24th January 2018 had expressed its intent to foreclose the contract claiming inability to continue the work on account of increased wages. Despite, a clear communication to submit an undertaking as per the JPO, petitioner failed to give an undertaking by its letter dated 24th January 2018 as well as its letter dated 5th February 2018.

(xx) Respondent vide their letters dated 9.02.2018 and 21.02.2018 had clearly stated that payment of wages, PF, ESIC, etc. to the labour were not clearly substantiated with documentary

evidence by the Petitioner. Further, the authorized personnel of the Petitioner had also refused to sign the measurement of work done in order to further process the bills. Being the Principal Employer, payment of wages and remittance of PF, ESIC, etc. needs to be ensured. Further, the Petitioner was not providing an undertaking as stipulated in the JPO.

(xxi) The Petitioner had issued an unambiguous undertaking duly accepting all of the conditions only on 16.05.2018. The subject contract was processed for foreclosure thereafter. The Petitioner themselves had prolonged their communication of acceptance of the conditions of the JPO as is evident from the fact that the submission of the unambiguous undertaking was submitted only on 16.05.2018 whereas the JPO for foreclosure was offered in December, 2017.

(xxii) By accepting the terms of the JPO, the Petitioner had themselves exercised the option of continuing with the contract till finalization of new contract. Before passing of the monthly bills, Petitioner was required to submit due compliances and the bills of the Petitioner got delayed due to non-submission of compliances. The Petitioner in the said letter dated 16 May, 2018 admits that it would have no claims against the Respondent financial or otherwise on the

foreclosure of the Contract. Despite having issued a no claim certificate, the Petitioner has invoked the Arbitration Clause and filed the present petition.

(xxiii) The contentions of the Respondent as stated hereinabove have been accepted by the learned Arbitrator with cogent reasons and therefore, the same cannot be interfered with, since the same would amount to deal with findings on facts.

(xxiv) She submitted that the present Petition be dismissed with costs.

ANALYSIS AND FINDINGS

13. The contract period in the present proceedings was from 30th November 2016 to 29th November 2019. Out of the contract value, admittedly a sum of Rs.1,12,00,000/- has been paid by the respondent (railways) to the petitioner/the claimant. Therefore, the claim is only with regard to the additional manpower expense of Rs.20,91,553/-. The claim of the petitioner/applicant was rejected by Award, passed by the Arbitral Tribunal.

14. The challenge of the petitioner to the Award is on various grounds. It is the case of the petitioner that they had no choice but to agree to the name suggested of the Sole Arbitrator by the

Railways/respondent as per the Clauses of the Agreement which specifically mentioned that the sole Arbitrator would be an employee of the respondent (Railways). Hence, the claimant could not even go to the Civil Court to file their dispute as there was an arbitration clause.

15. The petitioner further submitted that Schedule VII specifically stated that it was in fact the duty of the Sole Arbitrator to disclose his linkage with the respondent (railways). The petitioner further submitted that since the contract between the parties post the amendment to the Arbitration and Conciliation (Amendment) Act, 2015, the learned Arbitrator should have disclosed his link with the respondent (railways). He submitted that due to such clause in the contract, the claimant could not have raised the issue before the Arbitrator himself and the issue being that of law, the same can be raised even under Section 34 of the Arbitration Act before this Court.

16. It is the case of the petitioner/claimant that the Arbitral Tribunal consisting of Sole Arbitrator who was an employee of the respondent (railways), hence, he could not have being adjudicating the issue between the claimant and the respondent. It is the case of the claimant that after the amendment to the Arbitration Act, in the

year 2015, there were major changes made in Section 12 of the said Act. Section 12 of the Arbitration Act mentions about the grounds for challenge. One of such ground of challenge is sub-clause (5) which mentions that any person whose relationship with the parties or the subject matter of the dispute which falls under the VII Schedule shall not be eligible to be appointed as an Arbitrator. The VII Schedule refers to about 19 sub-clauses under which, if the Arbitrator has relationship with the parties or the counsel, he would be ineligible to be appointed as an Arbitrator. The first of such clause mentions about an Arbitrator being an employee, consultant or advisor in past or present with one of the parties, then he would be ineligible to be appointed as an Arbitrator.

17. In the present proceedings, the petitioner/claimant invoked the arbitration clause by its letter dated 7th December 2020. Paragraph 16 of the said letter reads as under:-

> "16. I, under my client instructions, do hereby call upon you to pay the minimum differential wages of Rs. 20,91,522/- (Rupees Twenty Lakhs Ninety One Thousand Five Hundred & Twenty Two Only) along with an with accrued interest, within a period of 7 days from the receipt of this notice, failing which, this Notice be treated as Notice under clause No.64 of the General Condition of Contract Invoking the Arbitration clause and requests your office to appoint Arbitrator as per clause No.64 (3) (a) (i) to put at rest the controversy/disputes amongst the parties and agree both the parties in the General Conditions of the Contract."
>
> (Emphasis supplied)

Hence, at the time of invocation itself the claimant themselves have referred to Clause 64 of the contract. It will be necessary to look into Clause 64 (3) (a)(i) which reads as under:-

> "64.(3)(a)(i) In cases where the total value of all claims in question added together does not exceed Rs.25,00,000/- (Rupees twenty five lakh only), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below JA Grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM."
>
> [Emphasis supplied]

Therefore, the claimants have themselves invoked Arbitration Clause, wherein it is specifically mentioned that the Sole Arbitrator, would be employee of Railways. Being aware of this fact they have chose to go ahead with the Arbitration. The claimant had invoked the Arbitration clause by their letter dated 7th December 2020. The said letter was addressed by the claimant through their advocates hence, the claimant cannot now take a defence that they were not aware about the legal implications while they issued the letter of invocation of arbitration.

In my opinion, even at that stage, if the claimant desired to appoint Sole Arbitrator by mutual consent, the claimant could have filed an application u/s. 11 of the Arbitration Act, whereby they could have sought for appointment of the Sole Arbitrator to decide the

dispute between the parties. Admittedly, the claimants have not taken any such steps.

18. Further, the respondent (railways) by their letter dated 14th December 2020 replied to the letter of the claimant of invocation of Arbitration clause. The said letter of the respondent (railways) dated 18th December 2020 mentioned that if there is an invocation of the Arbitration clause, the claimant should first waive the condition of applicability of sub-section (5) of Section 12. Adhering to this letter of the respondent (railways), the claimant by their letter dated 18th December 2020 agreed to waive away the provisions as mentioned in sub-section (5) of Section 12. So also, they attached a waiver letter duly signed by them. It will be necessary to note the provisions of Section 12(5) of the Arbitration Act which reads as under:-

> **12. Grounds for challenge:**
>
> 1[(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,-
>
> (a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and
>
> (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.
>
> Explanation 1.- The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.
>
> Explanation 2.- The disclosure shall be made by such person in the form

specified in the Sixth Schedule.]
(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.
(3) An arbitrator may be challenged only if-
(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or
(b) he does not possess the qualifications agreed to by the parties.
(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.
(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator :
Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.]

(Emphasis supplied)

Sub-section (5) was inserted to Section 12 of Arbitration Act with effect from 23rd October 2015. To canvas this point the learned counsel appearing for railways also relied upon the judgment passed in *JMC Projects* (supra) delivered by Single Judge of Delhi High Court. In the said judgment, in paragraph Nos. 37 and 38, it is held that parties must expressly agree in writing to waiver of Section 12(5) of the Arbitration Act.

18.1 In *Bharat Broad Band* (supra), the Supreme Court held that if as per the Section 12(5) *proviso,* parties in writing agree to waive the provisions of Section 12(5) would not be applicable.

18.2 Similarly, in the judgment of *Ellora Papermills Limited* (supra),

there was no waiver between the parties, and hence the ratio laid down in said judgment would not be applicable.

18.3 Though Section 12 (5) specifically mentions that the Arbitrator should disclose his relationship with the parties, however, *proviso* to Section 12(5) mentions about waiver in writing. In the present proceedings, the claimant by express agreement in writing had waived the applicability of sub-section 5 of Section 12. Therefore, according to me, the claimant at the stage of section 34 is bared from taking up a ground under Section 12(5) for challenging the award.

19. After invocation of the arbitration clause on 7th December 2020, it was not binding on the claimant to grant a waiver as contemplated under the proviso to Section 12(5) of the Arbitration Act. The claimant has specifically by letter dated 18th December 2020, signed waiver form and on their signature they had sent it across to the respondent (railways). The waiver letter also had a covering letter of the claimant wherein the claimant repeated its desire to waive as per the provisions of the proviso to Section 12(5) of the Arbitration Act.

19.1. Supreme Court in the case of *M/s.Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation Ltd.*- reported in *(2017) 4 SCC 665*

has considered Section 12(5) and the VII Schedule to the Arbitration Act, and has held that under Section 12(5) of the Act, notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator. It is held that in such an eventuality, when the arbitration clause finds foul with the amended provisions i.e. Section 12(5), the appointment of an arbitrator would be beyond pale of arbitration agreement, empowering the Court to appoint such arbitrator(s), as may be permissible. Other party cannot insist for appointment of an arbitrator in terms of the arbitration agreement. In such situation, that would be the effect of non-obstante clause contained in Section 12(5) of the Arbitration Act.

19.2. In my view, the ratio laid down by Supreme Court in *M/s.Voestalpine Schienen GMBH* (supra) will not be applicable to the present proceedings. According to me, under Section 12, when a person is approached in connection with his possible appointment as an arbitrator, he is bound to disclose in writing any circumstances, such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the

subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months. Various grounds are set out in the Fifth Schedule as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. The disclosure shall be made by such person in the form specified in the Sixth Schedule. An appointment of arbitrator may be challenged by the parties only if any circumstances referred to Section 12 (3) subject to Sub-section (4) of Section 13 which provides for an agreement between the parties for such procedure for challenge. If such challenge is unsuccessful, the party have an option to take this ground while preferring an application for setting aside an arbitral award in accordance with Section 34 of Arbitration Act.

20. Subsequently, when the arbitration proceedings commenced, the claimant had an option to file an application before the Arbitral Tribunal u/s. 16 read with Section 13 (2) of the Arbitration Act. However, the claimant has not taken up any such steps as contemplated u/s. 16 of the said Act. Section 16 of the Arbitration

Act, envisages the jurisdiction of the Arbitral Tribunal wherein if a party has to take an objection about the jurisdiction of the Arbitral Tribunal, the same can be made before the Arbitral Tribunal, and the Arbitral Tribunal can decide the same. If the said application is allowed, the Arbitral Tribunal proceedings come to an end. However, if such an application is not allowed, the same can be taken as a ground along with the other grounds while challenging to the Arbitral award, if it is against the said party. In the present proceeding, no such steps were taken up by the claimant, as contemplated under Section 13(2).

20.1. Supreme Court in case of *HRD Corporation (Marcus Oil and Chemical Division) Vs. Gail (India) Limited (Formerly Gas Authority of India Ltd.)*, 2017 SCC OnLine SC 1024 has held that if the arbitrator fails to file disclosure in terms of section 12(1) read with Fifth Schedule of the Arbitration and Conciliation Act, 1996, the remedy of the party in that event would be to apply under section 14(2) of the Arbitration and Conciliation Act, 1996 to the court to decide about the termination of the mandate of the arbitral tribunal on that ground.

20.2. Under section 16, the arbitral tribunal is empowered to rule on

its own jurisdiction including ruling on any objection with respect to the existence or validity of arbitration agreement. Such plea shall be raised not later than the submission of the statement of defence. If such plea is rejected by the arbitral tribunal, it has to proceed with the arbitral proceedings and declare an award. If plea of jurisdiction is accepted by the arbitral tribunal, the respondent may file an appeal under section 37. If plea of jurisdiction is not accepted, the respondent may challenge such ruling along with award under section 34.

21. For the first time in the present proceedings which is filed u/s. 34, the claimants have raised an issue about sub-section (5) of Section 12. According to me, as discussed in earlier paragraphs, the claimants at least had three occasions before challenging the Award u/s. 34, to raise the issue of Arbitrator not been qualified/eligible to conduct the proceedings. The petitioner/claimant chose not to take any such steps. Again, I would like to mention here that the claimants themselves had invoked Arbitration Clause, knowing fully well that as per Clause 64 (3)(a)(i) the Sole Arbitrator would be a railway employee. Only after the award is passed, in the present proceedings such an issue has been raised by the claimant. According to me, the same is a complete afterthought, hence is rejected.

22. The learned counsel appearing for the respondent (railways) has also raised an issue that if the claimant could have desired, they could have opt for "foreclosure" immediately. Such an option was given by railways on 20th December 2017, for all the pending contracts. As per clause B-3 an option of foreclosure was available to the claimant. However, the claimant desired to go ahead with the contract and not opt for foreclosure. Subsequently, after a period of almost one year on petitioner's request after the balance work was awarded to another contractor, the petitioner's contract was foreclosed. The claimant did not raise any issue about foreclosure before the Arbitrator. The claimant referred to the judgment of *A2Z Infraservices Limited* (supra) on the issue of foreclosure. In my view, the facts in *A2Z Infraservices Limited* (supra) were quite different, as in the said judgment the contract was in existence between the parties. However, in the present proceedings the petitioner/claimants had asked for foreclosure of the Agreement. Therefore, the ratio of *A2Z Infraservices Limited* (supra) will not be applicable to the present proceedings. Hence, according to me, even the issue as regards foreclosure is to be answered against the claimant.

23.1 In *MMTC Limited v/s. Vedanta Limited, reported in (2019) 4 SCC 163,* Supreme Court held that the Court does not sit in appeal

over the arbitral award and may interfere on merits on limited grounds as provided under Section 34(2)(b)(ii) i.e. "if the award is against the public policy of India". It is only if one of these conditions set out in Section 34(2)(b)(ii) is met that the Court may interfere with an arbitral award under the said provision but such interference does not entail a review on the merits of the dispute and is limited to situations where the findings of the arbitrator are perverse or arbitrary or when the conscience of the Court is shocked or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. The Court cannot travel beyond the restrictions laid down under Section 34. The Court cannot undertake an independent assessment of the merits of the award and must only ascertain that the exercise of power by the Court under Section 34 has not exceeded the scope.

23.2 Supreme Court in case of *Ssangyong Engineering & Construction Co. Ltd. v/s. National Highways Authority of India,* reported in *2019 SCC OnLine SC 677* has held that under Section 34 (2A) of the Arbitration Act, a decision which is perverse while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of

the award. A finding based on the documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties and therefore would also have to be characterised as perverse. It is held that a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

23.3 Similarly, Supreme Court in case of Associate Builders vs. Delhi Development Authority – (2015) 3 SCC 49, has held that the interference with an arbitral award is permissible only when the findings of the arbitrator are arbitrary, capricious or perverse or when conscience of the Court is shocked or when illegality is not trivial but goes to the root of the matter. It is held that once it is found that the arbitrator's approach is neither arbitrary nor capricious, no interference is called for on facts. The arbitrator is ultimately a master of the quantity and quality of evidence while drawing the arbitral award. Patent illegality must go to the root of the matter and cannot be of trivial nature. Apart from the grounds which are dealt with in the preceding paragraphs, the petitioner/claimants have not raised any other grounds on merits to show any kind of perversity in

the impugned Award. In the present proceedings, I find no patent illegality or perversity in the Award passed by Sole Arbitrator.

23.4 Single Judge of Bombay High Court in the case of Star Track Fasteners Private Limited Vs. Union of India, 2019 SCC OnLine Bom 1453 has held that the Court has no power to allow any claim which is rejected by the arbitral tribunal as the Court cannot correct errors made by the learned arbitrator. Court can either set aside the award or can upheld the award or in appropriate case, modify the award if such part is severable.

24. Taking into consideration the facts of the present proceedings as discussed above and the dicta as laid down in the judgments referred above, there is no merits in the present Arbitration Petition, hence the same is rejected. No costs.

(Rajesh S. Patil, J.)