

  
**HIGH COURT OF JUDICATURE FOR RAJASTHAN**  
**BENCH AT JAIPUR**

S.B. Arbitration Application No. 145/2023

Surendra Sarda S/o Late Shri Kanhaiyalal Sharda, Aged About 64 Years, R/o Plot No. 7, Rameshwar Colony, Tonk Road, Jaipur, Rajasthan.

-----Petitioner

Versus

1. Shri Maheshwari Samaj, Jaipur Registered Office-Shree Maheshwari Bhavan, Singhi Ji Ka Rasta, Chowda Rasta, Jaipur And Administrative Address-3Rd Floor, M.p.s. International School, MHS Complex, Vijay Path, Tilak Nagar, Jaipur (Raj.) 302004.
2. President, Maheshwari Samaj Jaipur Registered Office-Shree Maheshwari Bhavan, Singhi Ji Ka Rasta, Chowda Rasta, Jaipur And MHS Complex, Vijay Path, Tilak Nagar, Jaipur, (Raj.) 302004.
3. General Secretary, Maheshwari Samaj Jaipur Registered Office-Shree Maheshwari Bhavan, Singhi Ji Ka Rasta, Chowda Rasta, Jaipur And Administrative Address Third Floor, MPS International School, M.h.s. Complex, Vijay Path, Tilak Nagar, Jaipur, (Raj.) 302004.
4. Treasurer(Session 2019-2022), Shree Maheshwari Samaj Jaipur Registered Office-Jaipur And Administrative Bhavan, Singhi Ji Ka Rasta, Chowda Rasta, Jaipur And Administrative Address- 3rd Floor, Mps Internation School, MHS Complex, Vijay Path, Tilak Nagar, Jaipur (Raj.) 302004.
5. Deputy Registrar, Institutions Jaipur Address Community Center, Dev Nagar, Tonk Road, Jaipur (Raj.).

-----Respondents

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For Petitioner(s) : Mr. Pratyush Sharma

For Respondent(s) : Mr. Prakul Khurana through VC

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**HON'BLE MR. JUSTICE SUDESH BANSAL**

**Order**

**08/11/2024**

1. Instant Arbitration Application has been filed under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "A&C Act") by the applicant for constitution of an Arbitral Tribunal to adjudicate/ resolve the

dispute in respect of amendment made in the Constitution of 'Shri Maheshwari Samaj' in view of Clause 39 of the original constitution (Clause 50 of amended constitution) to settle such dispute through arbitration.

2. This is an admitted and undisputed fact that 'Shri Mahehwari Samaj, Jaipur' is a registered body as society bearing Registration No. 60-1960-61 dated 02.11.1960 under the provisions of the Rajasthan Societies Act, 1958 and a written constitution is available to govern the activities and functionalities of 'Shri Mahehwari Samaj'. Applicant is one of the member of 'Shri Mahehwari Samaj'. The Mahehwari Samaj in the present arbitration application is represented through its elected General Secretary and authorized representative.

3. Applicant has come up with a case that after the General Election of 'Shri Mahehwari Samaj', held in the year 2019, Members of Executive Committee were elected for a period of three years and the then Executive Committee carried out certain amendments in the existing and original constitution of 'Shri Mahehwari Samaj' by calling an extraordinary General Body Meeting on 23.02.2020 but such amendments were made arbitrarily and as per whims of the Executive Committee, without obtaining occurrence of all the members who attended and participated in the extraordinary General Body Meeting. It has been stated that the amendment made in the constitution is arbitrary, illegal and against the interest of Samaj whereby the membership of General Body has been restricted and the provisions of co-optation of a member has been deleted from the constitution. Majority of members of the Samaj are against such

amendments made in the constitution and therefore a written representation dated 23.02.2020 (Ann-2) under the signatures of several members including the applicant, was presented before the then President/ General Secretary of 'Shri Mahehwari Samaj', disputing the amendments made in the constitution of 'Shri Mahehwari Samaj' without obtaining occurrence and without having deliberations with the majority of members who were present and attended the General Body Meeting. According to the applicant, such dispute needs to be adjudicated/ resolved through arbitration and hence, neutral, independent and impartial Arbitration Tribunal of sole Arbitrator is required to be constituted to settle such dispute.

4. Learned counsel for the applicant has pointed out that in the original constitution of 'Shri Mahehwari Samaj', Clause 39 provides a mechanism to resolve the dispute in respect of constitution of Samaj through Arbitration and a high level Committee comprising five members to be appointed by the Executive Committee of 'Shri Mahehwari Samaj' would decide the dispute, whose decision shall be final and binding upon all parties. It has further been pointed out that in the amended constitution as well, Clause 50 stipulates a provision for formation of a high level Committee comprising five members, to be constituted by the newly elected Executive of Samaj, to resolve any kind of dispute and the decision of Committee shall be final and binding upon all the parties, as much as, be non-assailable before the Court of law. Thus, it has been submitted that in the original constitution as also in the amended constitution, there is a provision to adjudicate the dispute through Arbitration, but such

provision suggest and authorize the elected Executive Committee of 'Shri Mahehwari Samaj', to appoint members of high level Committee comprising five members to act as Committee for Dispute Resolution and since the present dispute is against the action of elected Executive Committee of 'Shri Mahehwari Samaj' itself, and the elected Executive Committee is one of the party to the dispute and has adverse interest against the applicant and other members of the Samaj, who are opposing the amendment in the constitution because newly elected Executive Committee too is supporting the amendment in the Constitution, therefore, in the peculiar situation and considering the nature of dispute, the Executive Committee, being an interested party in the dispute, would be dis-entitled to make appointment of the Arbitrator(s) i.e. the members of Dispute Resolution Committee at least to settle the present dispute. Strong reliance has been placed upon the judgment of Hon'ble Supreme Court delivered in case **Perkins Eastman Architects DPC Vs. HSCC (India) Limited [(2020) 20 SCC 760]** and reference has also been made to the recent judgment of the Constitution Bench of the Supreme Court delivered on **08.11.2024**, deciding the reference in **Civil Appeal Nos.9486-9487 of 2019: Central Organisation for Railway Electrification Vs. M/s ECI SPIC SMO MCML (JV) A Joint Venture Company (for short "C.O.R.E.")**, wherein it has been observed that a unilateral appointment of Arbitrator gives rise to justifiable doubts as to the independence and impartiality of the Arbitrator.

5. Therefore, it has been prayed that the appointment of a high level Committee of five members to act as Dispute Resolution

Committee in the present matter to settle the dispute in question, is against the spirit of the A&C Act, since such Committee of Mediation/ Arbitrators has been appointed unilaterally by the non-applicant, who itself is one of the interested party in the dispute and there is no involvement of applicant in appointment of Arbitrators, hence, in the situation, an independent, impartial and neutral Arbitration Tribunal is required to be constituted by this Court to adjudicate/ resolve the dispute related to the constitution of 'Shri Mahehwari Samaj'. For ready reference, the Arbitration Clause incorporated in Clause 39 of the original constitution and Clause 50 of the amended constitution, are being reproduced hereunder:-

<p>39.विधान सम्बन्धित एवं समाज के संबंधित किसी भी अन्य विवाद विषय पर:- विधान सम्बन्धित अथवा अन्य किसी भी प्रकार का विवाद उत्पन्न होने पर उसकी मध्यस्थता कार्यवाहारिणी द्वारा नियुक्त पीठ मध्यस्थता की एक उच्चस्तरीय समिति द्वारा फैसला/निर्णय किया जावेगा। इसका गठन नवगठित कार्यकारिणी द्वारा कार्यभार संभालने के तीन माह में पूर्ण सत्र हेतु किया जायेगा। उक्त समिति में पांचों मध्यस्थ कार्यकारिणी के बाहर से लिये जावेंगे एवं एक संयोजक भी मनोनीत किया जायेगा। इस समिति का निर्णय/फैसला अंतिम एवं समस्त पक्षों को मान्य होगा तथा इस समिति के निर्णय/फैसले को किसी भी न्यायालय में चुनौती नहीं दी जा सकेगी।</p>	<p>50.मध्यस्थता एवं विवाद निराकरण समिति:- नवगठित कार्यकारिणी द्वारा कार्यभार संभालने के एक माह में पूर्ण सत्र हेतु एक उच्च स्तरीय मध्यस्थता एवं विवाद निराकरण समिति का श्री माहेश्वरी समाज के सदस्यों में से गठन किया जाएगा जिसमें संयोजक सहित पांच सदस्य होंगे। इस समिति में सदस्य श्री माहेश्वरी समाज, जयपुर की कार्यकारिणी एवं श्री माहेश्वरी समाज के अन्तर्गत/तत्वावधान में संचालित संस्थाओं/समितियों के पदाधिकारी/संयोजक नहीं हो सकेंगे। समिति के गठन के समय संयोजक/सदस्यों की आयु 55 वर्ष अथवा उससे अधिक होनी आवश्यक होगी। उपरोक्त समिति को चुनाव प्रक्रिया (मुख्य चुनाव अधिकारी की नियुक्ति के पश्चात्) के अतिरिक्त श्री माहेश्वरी समाज, जयपुर की कार्यकारिणी/समाज के सदस्य द्वारा प्रेषित किसी भी प्रकार का विवाद पर</p>
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मध्यस्थता एवं निराकरण करने का पूर्ण अधिकार प्राप्त होगा। इस समिति का निर्णय/फैसला अन्तिम एवं समस्त पक्षों को मान्य होगा तथा इस समिति के निर्णय/फैसले को किसी भी न्यायालय में चुनौती नहीं दी जा सकेगी।

6. It has been pleaded and pointed out by the applicant that the dispute was put forth before the Committee on 23.02.2020, which was constituted by the Executive Committee of 'Shri Mahehwari Samaj', elected for term 2019-22 through written complaint (Ann-3) whereupon the Committee took cognizance and observed that it is desirable to extend hearing to the elected Executive Committee of the Samaj and to look into the record, therefore, vide order dated 24.02.2020, the entire record of the General Body Meeting dated 23.02.2020 was summoned and the next hearing was deferred for 01.03.2020 and till then, it was held that the Executive Committee of 'Shri Mahehwari Samaj' shall not proceed with regard to amended constitution before the Registrar of Societies. The copy of proceedings and order dated 24.02.2020 passed by the Committee has been placed on record as Ann-4.

7. It has further been pleaded that even thereafter the office bearers of 'Shri Mahehwari Samaj', submitted application before the Registrar of Societies to record the entry of amendments made in the constitution, in the General Body Meeting dated 23.02.2020, irrespective of the order of the Arbitration Committee dated 24.02.2020 and thereafter, the members of Arbitration Committee wrote letters dated 31.03.2021 and 12.04.2021 to the President of Samaj, but nothing concrete decision came forward.

8. A legal notice dated 20.01.2022 (Ann-8) by and on behalf of the applicant was also served upon the non-applicants to withdraw the amendments made in the constitution, but same was not responded.

9. It has further been pleaded and pointed out by the applicant that thereafter a civil suit for declaration and permanent injunction, raising the similar dispute, was also filed by the applicant on 04.03.2022 against the non-applicants before the Court of Additional Civil Judge and Metropolitan Magistrate No.2, Jaipur Metropolitan-II. In the civil suit, non-applicants raised a preliminary objection that since Arbitration Clause exists to resolve such dispute, therefore, the Civil Court may not exercise its jurisdiction and an application under Order 7 Rule 11 CPC dated 10.03.2022 was moved by the non-applicants. The Civil Court, vide order dated 06.04.2022 rejected the civil suit in view of availability of Arbitration Clause between parties to resolve such dispute raised in the civil suit. The copy of the civil suit, application under Order 7 Rule 11 CPC and the order dated 06.04.2022 have been placed on record.

10. It is further the case of applicant that thereafter again an application dated 29.04.2022 was filed by the applicant before the Arbitration Committee pointing out that initially only four members were appointed in the Committee and now fifth member has also been appointed, in the meanwhile, who himself has remained one of the supporter to the Executive Committee for the questionable amendments in the constitution, therefore, such newly appointed member cannot act as Arbitrator in the Committee. It was prayed in the application that applicant has to approach before the High

Court for appointment of new Arbitration Tribunal. The copy of application dated 29.04.2022 is enclosed with the arbitration application as Ann-12.

11. In the meanwhile, it appears that the term of erstwhile elected Executive Committee of Samaj expired in the month of July, 2022 and after elections, new Executive Committee of Samaj for a next term of three years from 2022-25 came in existence and a new Dispute Resolution Committee was also formed by the new Executive. The applicant through Legal Notice dated 17.10.2022 (Ann-15) raised his grievance before the Convener of the newly elected Dispute Resolution Committee for pondering over the pending dispute about the amendment in the constitution and it was indicated in the legal notice that proceedings before the High Court for appointment of a neutral, independent and impartial Arbitrator shall be filed.

12. This legal notice was replied by the non-applicant -Shri Mahehwari Samaj through newly elected General Secretary and Authorized Representative vide reply notice dated 19.10.2022 and it was appointed that the newly formed Dispute Resolution Committee is expected to ponder over the pending dispute as per rules. The copy of the reply notice dated 19.10.2022 is enclosed with the arbitration application as Ann-16.

13. Thereafter, the applicant has filed the instant Arbitration Application on 31.10.2023 before this Court imploring the inaction of the Dispute Resolution Committee as also pointing out the illegality and perversity for taking up the dispute by the Dispute Resolution Committee appointed by the non-applicants who are interested parties in the dispute, hence, if the present dispute is



taken up and adjudicated by the Dispute Resolution Committee, same would be against the law as expounded by the Hon'ble Supreme Court in case of **Perkins Eastman (supra)** and recently in case of **C.O.R.E. (supra)**. Hence, it has been prayed that in such backdrop of factual matrix, the Arbitration Tribunal of sole Arbitrator be constituted to adjudicate/resolve the dispute in respect of amendments in the constitution of 'Shri Maheshwari Samaj' and other ancillary disputes.

14. The Arbitration Application has been resisted by the non-applicant 'Shri Maheshwari Samaj' and reply has been filed raising objection that an Arbitration Committee comprising five members, headed by Shri Bhram Prakash Mundra has already been formed by the elected Executive Committee of 'Shri Maheshwari Samaj' in terms of the Arbitration Clause contained in the constitution, who shall hear and decide the present dispute as well. It has been submitted that the application has already been submitted to the jurisdiction of such Arbitration Committee where the dispute is pending under consideration, therefore, the present application for appointment of a new Arbitration Tribunal is misconceived and not maintainable, hence, liable to be dismissed at threshold.

15. It has also been contended by the non-applicants that if the applicant has any grudges against the members of the Arbitration Committee, the only remedy lies under Section 14/15 of the A&C Act, seeking termination of the mandate of Arbitration Tribunal for which the jurisdiction lies before the Commercial Court, hence, the present application is ex facie illegal and cannot be maintainable before the High Court.

16. On merits of the amendments made in the constitution, it has been replied and urged by the non-applicants that the amendment in the constitution was made in the extraordinary General Body Meeting, after following the due procedure and provisions of the Constitution, however, it has simultaneously been stated that, it is the subject matter to be decided by the Arbitration Committee, which has already been constituted and is functional. Reliance has been placed by the counsel for non-applicants on the order dated **04.01.2018** passed by the Coordinate Bench of the Rajasthan High Court in **S.B. Arbitration Application No.18/2017 titled Doshion Private Limited Vs. Hindustan Zinc Limited.**

17. It is noteworthy that the non-applicants have not disputed the *locus standi* of the applicant to pursue the dispute being member of 'Shri Maheshwari Samaj' and has also not disputed the existence of dispute so also the existence of Arbitration Agreement as contained in Clause 39 of the Original constitution and Clause 50 of the amended constitution extracted hereinabove. The fundamental objection of the non-applicant 'Shri Maheshwari Samaj' is that since the Arbitration Tribunal in form of Dispute Resolution Committee comprising five members has already been constituted by the non-applicants in terms of the Arbitration Clause stipulated in the constitution of 'Shri Maheshwari Samaj' and before the Arbitration Committee, the present dispute is also *sub judice* and further the applicant has also submitted to jurisdiction of Arbitration Committee, hence, at this stage the arbitration application for appointment of an another Arbitration

Tribunal cannot be entertained, therefore, the present arbitration application is liable to be dismissed.

18. Heard. Considered.

19. Having adverted to the pleadings of both parties and the rival contentions made by the respective counsels for both parties, it has transpired that the non-applicant 'Shri Maheshwari Samaj, Jaipur' is a registered society and has its own constitution. It is revealed that election of the Officiating Members of Shri Maheshwari Samaj, was held in the year 2019 and the elected Executive Committee through its President and General Secretary, called an extraordinary General Body Meeting on 23.02.2020. In such extraordinary General Body Meeting, certain amendments in the constitution of Shri Maheshwari Samaj have been decided to be carried out. There appears some dispute among the members of Shri Maheshwari Samaj as also with the elected Executive Committee and Officiating Members of Shri Maheshwari Samaj in respect of such amendment in the constitution and a dispute exists as to whether to sustain or to delete or not to give effect to such amendments in the constitution of Shri Maheshwari Samaj, obviously in the larger interest of the members of Shri Maheshwari Samaj?

20. Undeniably, in the original constitution as also in the amended constitution, there exists a mechanism for adjudication/resolution of such nature of dispute through arbitration. The relevant arbitration clauses have already been extracted hereinabove which are undisputed between parties.

21. It is also undisputed that in furtherance to the Arbitration Clause, a Committee comprising five members to act as Mediation, Arbitration/ Dispute Resolution Committee has been formulated by the elected Executive Committee of Shri Maheshwari Samaj, which is a general formed committee as per Rule and Procedure to deal with all kinds of disputes. The elected Executive Committee in the election of 2019 had constituted Committee of four members and before such Committee, the present dispute was put forth and the Committee took cognizance of such dispute as transpires by perusal of the order dated 24.02.2020 (Ann-4). It reveals that though the Committee took cognizance of such dispute, but could not adjudicate/ resolve such dispute finally and later on after appointment of fifth member of the Committee, applicant raised objection in respect of his impartiality to the subject matter of dispute, through letter dated 29.04.2022 (Ann-12). Be that as it may, this Committee did not take any final decision and dispute remained pending. Undeniably, the applicant also approached before the Civil Court seeking adjudication of such dispute, but on the objection of non-applicants, the Civil Court declined to exercise its jurisdiction to adjudicate such dispute in view of availability of the Arbitration Clause to resolve such dispute. The order passed by the Civil Court dated 06.04.2022 is available on record, which has attained finality.

22. Thereafter, it appears that in the meanwhile, the term of three years of the then elected Executive Committee was over by July, 2022 and fresh elections in Shri Maheshwari Samaj were held. New members were elected and new Executive Committee

came in existence, who appointed a new redressal Committee of five members headed by Convener Shri B.P. Mundra. The applicant brought to the notice of the Officiating Members of the newly elected Executive Committee of Shri Maheshwari Samaj as also to the newly constituted Dispute Resolution Committee to take up and resolve the pending dispute, which has been left undecided by the erstwhile Committee. The Legal Notice dated 17.10.2022 (Ann-15) was issued by and on behalf of the applicant. This notice was replied by the non-applicant Shri Maheshwari Samaj through its elected General Secretary vide reply notice dated 19.10.2022 (Ann-16) wherein in respect of the present pending dispute, it was informed that action by the newly constituted Arbitration Committee is expected to be taken. For ready reference, the relevant portion of the reply notice from Para No.4 of Ann-16 is being extracted hereunder:-

"यह कि आपके द्वारा प्रेषित नोटिस की मद संख्या-4 में तथ्य जिस प्रकार से वर्णित किये गये हैं, गलत होने से अस्वीकार है। जबकि वास्तविक स्थिति यह है कि नवनिर्वाचित मध्यस्थता समिति द्वारा उक्त प्रकरण में नियमानुसार कार्यवाही किया जाना अपेक्षित है।"

Thus, in the backdrop of such factual matrix when the dispute was not adjudicated/ resolved by the newly constituted Arbitration Committee and even no proceedings thereupon were proceeded, the applicant filed the present arbitration application on 31.10.2023 for appointment of an Arbitration Tribunal of sole Arbitrator to adjudicate such dispute.

23. The core question which emanates from the afore-referred factual matrix and falls for consideration by this Court in the present arbitration application is as to 'whether in spite of having existence of a Dispute Resolution Committee, comprising five members appointed by the non-applicant before whom the present dispute is pending, the present arbitration application can be entertained to appoint an Arbitration Tribunal by this Court in exercise of its jurisdiction under Section 11 of the A&C Act, to resolve such dispute in terms of the arbitration clause existing between the parties?'

24. The legal proposition is no more *res integra* that a party or an official or an authority having interest in the dispute would be dis-entitled to make appointment of an Arbitrator. The rationale underlying to such proposition of law is well recognized that the person, who has interest in the outcome of decision of the dispute, must not have powers to appoint the Arbitrator. In support of such proposition of law, reference of a celebrated judgment of the Hon'ble Supreme Court delivered in case of **Perkins Eastman (supra)**, is suffice.

25. It can be observed by this Court that the applicant and other similarly situated members of Shri Maheshwari Samaj, who are against the amendment carried out in the constitution of Shri Maheshwari Samaj, have raised the dispute against the officiating members of Shri Maheshwari Samaj as also against the members, who are supporting the amendment. Undisputedly, the amendment was brought by the then elected Executive Committee of Shri Maheshwari Samaj certainly through convening the

extraordinary General Body Meeting on 23.02.2020 by the Executive Committee of Shri Maheshwari Samaj in an adversarial party to the dispute, since same is being constituted by the non-applicant only. Similar is the situation with the newly elected Executive Committee. Thereafter, although, a new Executive Committee has come in existence after the elections held in the year 2022, yet the Officiating Members including the present General Secretary of Shri Maheshwari Samaj, Jaipur, who is authorized by the Executive Committee, too has an adversarial interest in the present dispute against the applicant and other similarly situated members. Shri Maheshwari Samaj, Jaipur is obviously an interested party to the dispute and is also one of the contesting party to the dispute. The present arbitration application has also been contested and opposed by Shri Maheshwari Samaj, Jaipur, who is the non-applicant.

26. This is an admitted and undisputed fact that the Dispute Resolution Committee comprising five members, to act as Mediator/ Arbitrator has been constituted by the elected Executive Committee of Shri Maheshwari Samaj and applicant has no role to play in formation of such Committee. In respect of one member of the erstwhile Resolution Committee, the applicant had raised objections about his impartiality. There is nothing on record that the new Committee has taken up the dispute or the applicant submitted to the jurisdiction before the new Committee, at least before or up to filing of the present arbitration application. A perusal of the reply notice dated 19.10.2022 given by and on behalf of the non-applicant No.1- Shri Maheshwari Samaj, goes to

show that the action by the new Committee over the dispute was accepted to be taken. The contention of the non-applicant made in the reply notice has already been extracted hereinabove. Thus, as far as considering the present nature of dispute, which itself has arisen against the Executive Committee of Shri Maheshwari Samaj, the Dispute Resolution Committee constituted by the Executive Committee of Shri Maheshwari Samaj cannot be held to be an independent and impartial Committee, though, same Committee may be held valid for resolution of other disputes of the Samaj. This Court is of firm opinion that in order to adjudicate/ resolution of the dispute in question, the Dispute Resolution Committee of five members headed by Convener Shri B.P. Munda, which has been constituted under the appointment of members by the Executive Committee, that without having any consensus or role of the applicant or other similarly situated members, is not liable to be affirmed by this Court as a valid Committee of Arbitration. At the same time, this Court records that the impression may not be taken otherwise in respect of the competence and standing of the members of Dispute Resolution Committee, which obviously may be held and treated as valid for resolution of other nature of disputes but not for the present dispute to which this Court is concerned in the present arbitration application.

27. The similar issue also came up for consideration before the Hon'ble Supreme Court in case of **Perkins Eastman (supra)** where despite of appointment of an arbitrator by the respondent, the arbitration application was entertained and Arbitration Tribunal



was constituted by the Supreme Court. For ready reference, Para No. 26, 27 and 28 are being extracted hereunder:-

"26. The further question that arises is whether the power can be exercised by this Court under Section 11 of the Act when the appointment of an arbitrator has already been made by the respondent and whether the appellant should be left to raise challenge at an appropriate stage in terms of remedies available in law. Similar controversy was gone into by a Designated Judge of this Court in *Walter Bau AG* and the discussion on the point was as under:-

"9. While it is correct that in *Antrix and Pricol Ltd.*, it was opined by this Court that after appointment of an arbitrator is made, the remedy of the aggrieved party is not under Section 11(6) but such remedy lies elsewhere and under different provisions of the Arbitration Act (Sections 12 and 13), the context in which the aforesaid view was expressed cannot be lost sight of. In *Antrix*, appointment of the arbitrator, as per the ICC Rules, was as per the alternative procedure agreed upon, whereas in *Pricol Ltd.*, the party which had filed the application under Section 11(6) of the Arbitration Act had already submitted to the jurisdiction of the arbitrator. In the present case, the situation is otherwise.

10. Unless the appointment of the arbitrator is *ex facie* valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a *fait accompli* to debar the jurisdiction under Section 11(6) cannot be countenanced in law. In the present case, the agreed upon procedure between the parties contemplated the appointment of the arbitrator by the second party within 30 days of receipt of a notice from the first party. While the decision in *Datar Switchgears Ltd* may have introduced some flexibility in the time frame agreed upon by the parties by extending it till a point of time anterior to the filing of the application under Section 11(6) of the Arbitration Act, it cannot be lost sight of that in the present case the appointment of Shri Justice A.D. Mane is clearly contrary to the provisions of the Rules governing the appointment of arbitrators by ICADR, which the parties had agreed to abide by in the matter of such appointment. The option given to the respondent Corporation to go beyond the panel submitted by ICADR and to appoint any person of its choice was clearly not in the contemplation of the parties. If

that be so, obviously, the appointment of Shri Justice A.D. Mane is non est in law. Such an appointment, therefore, will not inhibit the exercise of jurisdiction by this Court under Section 11(6) of the Arbitration Act. It cannot, therefore, be held that the present proceeding is not maintainable in law. The appointment of Shri Justice A.D. Mane made beyond 30 days of the receipt of notice by the petitioner, though may appear to be in conformity with the law laid down in *Datar Switchgears Ltd*, is clearly contrary to the agreed procedure which required the appointment made by the respondent Corporation to be from the panel submitted by ICADR. The said appointment, therefore, is clearly invalid in law."

27. It may be noted here that the aforesaid view of the Designated Judge in *Walter Bau AG* was pressed into service on behalf of the appellant in *TRF Limited* and the opinion expressed by the Designated Judge was found to be in consonance with the binding authorities of this Court. It was observed:-

"32. Mr Sundaram, learned Senior Counsel for the appellant has also drawn inspiration from the judgment passed by the Designated Judge of this Court in *Walter Bau AG*, where the learned Judge, after referring to *Antrix Corpn. Ltd.*, distinguished the same and also distinguished the authority in *Pricol Ltd. v. Johnson Controls Enterprise Ltd.* and came to hold that: (Walter Bau AG case, SCC p. 806, para 10)

"10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law. ..."

33. We may immediately state that the opinion expressed in the aforesaid case is in consonance with the binding authorities we have referred to hereinbefore."

28. In *TRF Limited*, the Managing Director of the respondent had nominated a former Judge of this Court as sole arbitrator in terms of aforesaid Clause 33(d), after which the appellant had preferred an application under Section 11(5) read with Section 11(6) of the Act. The plea was rejected by the High Court and the appeal therefrom on

the issue whether the Managing Director could nominate an arbitrator was decided in favour of the appellant as stated hereinabove. As regards the issue about fresh appointment, this Court remanded the matter to the High Court for fresh consideration as is discernible from para 55 of the Judgment. In the light of these authorities there is no hindrance in entertaining the instant application preferred by the applicants."

28. In addition to the proposition set forth hereinabove, the Constitution Bench of the Hon'ble Supreme Court while replying the reference in case of **C.O.R.E. (supra)** has also opined that:-

"169. In view of the above discussion, we conclude that:

a. The principle of equal treatment of parties applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators;

b. ....

c. A clause that allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, such a unilateral clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrators;

d. ....

e. Unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution;

f. ....

g. ...."

29. It is noteworthy that no special qualification of the Arbitrator is prescribed in the Arbitration Clause. This Court is not recording any opinion about the competence and standing of the members of the Resolution Committee, constituted by the non-applicant but as far as adjudication/ resolution of the present dispute by such Committee, which has been constituted by the non-applicant, who itself is one of the contesting and interesting party to the dispute,

it is difficult to hold that such an appointment of the Arbitration Committee at least to resolve the present dispute is *ex facie* valid. Rather, it can be held that for resolution of the present dispute, the appointed Resolution Committee of five members cannot be accepted as a *fait accompli*, to declare the present arbitration application as not maintainable and the High Court may exercise its jurisdiction under Section 11(6) of the A&C Act to appoint an independent, impartial and neutral Arbitration Tribunal.

30. It is true that the Arbitration Act allows parties to agree on a procedure for appointment of Arbitrators and provides an autonomy to parties, to settle their disputes through arbitrators of their choice, however, in order to maintain a balance and equities between the parties as also the independence and impartiality of the Arbitration Tribunal and fairness of the arbitrary procedure, the intervention by the Judicial Court is permissible in law. It is trite law that the arbitration proceedings being an alternative resolution mechanism, must ensure the expeditious disposal of the dispute, simultaneously, the cost and expenses of arbitration proceedings must also be tried to be kept less expensive and minimum so as to avoid huge financial burden on the parties, since the cost of arbitration is usually borne by both parties equally. Keeping such aim and object and scheme of the Arbitration and Conciliation Act, this Court finds that there is no embargo for consideration of an arbitration Tribunal of sole arbitrator, *de hors* to the procedure agreed upon by the parties to appoint a panel of five arbitrators here by virtue of Section 10(2) of the A&C Act, this Court may deviate from the appointment of

number of Arbitrators, unilaterally decided by the non-applicants and in the opinion of this Court, looking to the nature of subject matter of dispute, the constitution of Arbitration Tribunal of sole Arbitrator would be suffice. Therefore, in such fact and situation, in order to adjudicate/ resolve the present dispute, in the opinion of this Court, the appointment of independent and impartial Arbitral Tribunal of sole Arbitrator, would meet the ends of justice.

31. As far as the order passed by the Coordinate Bench in case of **Doshion Private Limited (supra)** referred by the counsel for non-applicants, in that case, the prayer was to terminate the mandate of appointed Arbitration Tribunal in terms of Section 14 and then to appoint a fresh Arbitration Tribunal under Section 11 of the A&C Act. The facts and issue under consideration was entirely different than the facts of the present case, hence, the *ratio decidendi* of that order does not render any support to the plea raised by the counsel for the non-applicants.

32. This Court records its observation about annulled effect of the Dispute Resolution Committee comprising five members appointed by the non-applicants, as far as in respect of adjudication/ resolution of the present dispute is concerned, the present arbitration application is accepted.

33. As a final result, the instant arbitration application is allowed and this Court appoints, *Hon'ble Mr. Justice Mahesh Bhagwati (Former Judge of High Court), Mob. No 9414160666, Address:- L-44 Sukhshanti, Income-Tax Colony, Durgapura, Jaipur E-mail:- justicebhagwati@gmail.com*, as a sole Arbitrator to adjudicate the

dispute between parties in accordance with provisions of the Arbitration and Conciliation Act, 1996.

34. The appointment of the Sole Arbitrator is subject to the declarations being made under Section 12 of the Arbitration & Conciliation Act, 1996 with respect to independence and impartiality, and the ability to devote sufficient time to complete the arbitration within the prescribed period as per Section 29A of the A&C Act.

35. The arbitration fee of the Sole Arbitrator shall be payable in accordance with the provisions contained in the Manual of Procedure for Alternative Dispute Resolution, 2009 as amended by the Manual of Procedure for Alternative Dispute Resolution (Amendment), 2017 vide notification dated 23.03.2017 read with 4<sup>th</sup> Schedule appended to the Act of 1996 or as determined by the Arbitrator with consensus of parties.

36. The Registry is directed to intimate Arbitrator *Mr. Justice Mahesh Bhagwati (Former Judge of High Court)* for his approval and consent to act as Arbitrator.

37. All other issues may be raised by the parties before the Arbitrator, which shall be considered in accordance with law.

38. Since as per Section 29A of the Arbitration and Conciliation Act, 1996, the arbitration proceedings are required to be concluded within scheduled time as stipulated therein, it is expected from the parties to appear before the Arbitrator on 09.12.2024 or any other date as informed by the Arbitrator to parties or agreed between parties with the consent of Arbitrator, and further parties shall provide their respective E-mail/ Contact

Number/ Mobile Number as also of their authorized representatives/lawyers, appearing on their behalf before the Arbitration Tribunal, in order to facilitate the Arbitrator to send information to the parties, whenever required. The information send by the Arbitrator, on such address/ E-mail/ cellphone of the parties/ their authorized representatives/lawyers, shall be treated as sufficient unless same is not changed.

39. The Arbitration Application stands disposed of accordingly.

**(SUDESH BANSAL),J**

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