

ARB-99-2016 (O&M)

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**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

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ARB-99-2016 (O&M)
Reserved on 18.12.2024.
Date of decision :07.01.2025

S.P.Singla Constructions Pvt. Ltd.

... Petitioner

Vs.

State of Punjab and another

... Respondents

CORAM: HON'BLE MR. JUSTICE SUVIR SEHGAL

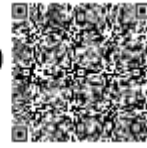
Present:- Mr. Anirudh Wadhwa, Advocate (through V.C.)
Mr. Gurmohan Singh Bedi, Advocate
Mr. Pawandeep Singh, Advocate
Mr. Anand Vardhan Khanna, Advocate
Mr. Kartik Gupta, Advocate for the petitioner.

Mr. Brijesh, AAG, Punjab.

SUVIR SEHGAL J.

1. By way of present petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short 'the Arbitration Act') petitioner has approached this Court for declaration of the appointment of Er. G.S. Mann, a nominee of the respondents, as void and for appointment of an impartial arbitrator in his place.

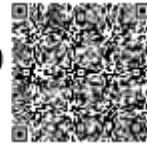
2. Facts leading to the filing of the petition are that the petitioner was awarded a contract for construction of a railway overbridge vide letter of acceptance dated 31.5.2007 Annexure P-2.



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The terms and conditions of the contract entered into between the parties contained a provision for resolution of disputes or differences by arbitration under Clause 25.3, Annexure P-3. Disputes arose between the parties and by letter dated 28.04.2010 Annexure P-4, petitioner invoked the arbitration clause while proposing names for appointment as a sole Arbitrator. Respondents rejected the names proposed by the petitioner and nominated Er. S.P. Banwait as their Arbitrator by letter dated 10.05.2010, Annexure P-5 and the petitioner nominated Mr. Inder J. Mamtani as its nominee arbitrator by letter dated 26.05.2010, Annexure P-6. Both the Arbitrators appointed Mr. A.K. Sarin as the Presiding Arbitrator, who accepted his appointment. The Arbitral Tribunal entered upon reference at Chandigarh on 16.08.2010 Annexure P-9, but Mr. S.P. Banwait resigned on 19.01.2015, Annexure P-10 and Er. Kuldip Singh was appointed as an Arbitrator by the respondents on 04.02.2015, Annexure P-11. The Arbitration and Conciliation (Amendment) Ordinance, 2015 was promulgated on 23.10.2015, which was brought to the notice of the Tribunal by the petitioner during the proceedings held on 30.11.2015 Annexure P-12. On 22.12.2015, Annexure P-13, Er. Kuldip Singh, recused from the Tribunal and by communication dated 30.12.2015, Annexure P-14, the respondents purported to appoint Er. G.S. Mann as their nominee Arbitrator. By protest letter dated 07.01.2016, Annexure P-15, petitioner objected to his appointment, but Er. G.S. Mann accepted his appointment on 07.01.2016, Annexure P-16. By his



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communication dated 10.01.2016 Annexure P-17, the nominee Er. G.S. Mann intimated that he will not proceed with the matter till the controversy over his appointment is settled. Some communications were exchanged between the parties and on 31.03.2016, Annexure P-26, arbitral proceedings were postponed and the petitioner was granted time to get orders from the Court.

3. Counsel for the petitioner has contended that Er. G.S.Mann, retired as Superintending Engineer from the Punjab PWD (B & R) and being an ex-employee of the respondents, his appointment is hit by Section 12(5) of the Arbitration Act, which has been incorporated w.e.f. 23.10.2015. He submits that Er. G.S. Mann is ineligible to be appointed as an Arbitrator by the respondents. He has placed reliance upon:-

(i) **Ellora Paper Mills Ltd. Versus State of Madhya Pradesh, (2022) 3 SCC 1;**

(ii) **KRR Infra Projets Limited versus Union of India, 2018 SCC Online Delhi 12418;**

(ii) **Perkins Eastmen Architets DPC and anoher Versus HSCC (India) Limited (2020)20 SCC 760;** and

(iv) **Oyo Hotels and Homes Pvt. Ltd. Versus Rajan Tiwari and another, 2021 SCC OnLine Delhi 446.**

4. Petition has been contested by the respondents by filing a reply wherein the factual position has not been disputed. It has been submitted that Er. S.P Banwait recused from the Arbitral Tribunal as the petitioner had objected to his continuing after he had delivered



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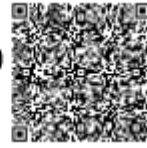
an award against the petitioner in another arbitral proceedings. Defending the appointment of Er. G.S. Mann, it has been submitted that the present petition for appointment under Section 11 of the Arbitration Act is not maintainable. State counsel has argued that the remedy available with the petitioner is to invoke Sections 13 and 14 of the Arbitration Act. It is his argument that as the arbitral proceeding had commenced prior to 23.10.2015, the provisions of the amended Act will not apply. He has placed reliance upon :-

i) *Union of India Versus Pardeep Vinod Construction Company (2020)2 SCC 464* and

(ii) *Chaudhary Charan Singh Versus M/s Astron Solpower Pvt. Ltd. and another Law Finder DocId #2248421*

5. I have considered the arguments addressed by counsel for the parties and analyzed the documents placed on the record by them with their respective pleadings.

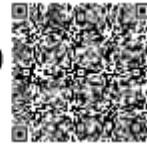
6. Petitioner invoked the arbitration clause by serving a notice dated 28.04.2010, Annexure P-4 and after its constitution, an Arbitral Tribunal comprising of three members entered upon reference on 16.08.2010 Annexure P-9. Arbitrator nominated by the respondents, Er. Kuldip Singh, resigned from the Tribunal in Janauray, 2015 and by communication dated 30.12.2015 Annexure P-14, respondents proposed to appoint Er. G.S. Mann as their nominee Arbitrator. The Arbitration and Conciliation (Amendment) Act, 2015 came into force retrospectively with effect from 23.10.2015.



The name proposed by the respondents was therefore, required to be in terms of the Amending Act. It cannot be disputed that Er. G.S Mann is a former employee of the respondents and drawing pension from the respondents. He will have an interest in the outcome of the dispute and he is not an impartial person. His appointment is hit by Section 12(5) of the Arbitration Act. Er. G.S. Maan is ineligible to be appointed as an Arbitrator. Merely because the arbitral proceedings had commenced prior to coming into force of the Amending Act, would not mean that any appointment could be made to the Tribunal ignoring the provisions of the Amending Act. Any change in the composition of the Tribunal has to meet the mandate of the provision, which came into force during the pendency of the arbitral proceedings. In ***Ellora Paper Mill's*** case (supra) Supreme Court held that members of the Arbitral Tribunal, who were the officers of the respondents-State, became ineligible to continue as Arbitrators in view of the mandate of Section 12(5) read with the VIIth Schedule. It was observed that by operation of law, the Tribunal had lost its mandate and cannot be permitted to be continue and a fresh appointment has to be made in terms of the Amending Act. This judgment is fully applicable to the facts of the present case.

7. Rejecting a similar argument, High Court of Delhi in ***KRR Infra Projects Limited's*** case (supra), held as under:-

"8. In view of the above, merely because the Arbitration Agreement had been invoked prior to the coming into force of the Amending Act and

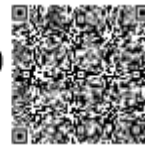


the arbitration proceedings had commenced before the earlier Arbitrator prior to coming into force of Amending Act, the respondent could not have proceeded to appoint an ineligible Arbitrator under Section 12(5) read with the Seventh Schedule of the Act after coming into force of the Amending Act. At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

8. In view of the above reproduced settled legal position, this Court is of the view that the appointment of Er. G.S. Mann does not meet the mandate of the amended Act. As he is ineligible, he cannot be appointed as a member of the Arbitral Tribunal.

9. Insofar as the question of the maintainability of the petition is concerned the answer to this issue can be found in the observation of the Supreme Court in **Perkins Eastmen's Architects DPC's** case (supra) wherein while relying upon the legal position settled in **Walter Bau AG versus Municipal Corporation of Greater Mumbai (2015)3 SCC 800**, it was held as under:-

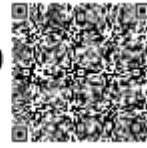
"26. *The further question that arises is whether the power can be exercised by this Court under Section 11 of the Act when the appointment of an arbitrator has already been made by the respondent and whether the appellant should be left to raise challenge at an appropriate stage in terms of remedies*



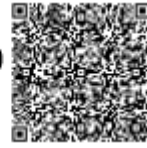
available in law. Similar controversy was gone into by a Designated Judge of this Court in Walter Bau AG¹ and the discussion on the point was as under: (SCC pp. 805-06, paras 9-10)

"9. While it is correct that in Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd., (2014) 11 SCC 560: (2014) 4 SCC (Civ) 147 and Pricol Ltd. v. Johnson Controls Enterprise Ltd. and others, (2015) 4 SCC 177, 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 Corpn. Ltd.'s case (supra), appointment of the arbitrator, as per the ICC Rules, was as per the alternative procedure agreed upon, whereas in Pricol Ltd.'s case (supra), 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



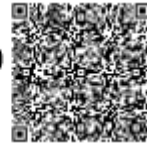
*of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law. In the present case, the agreed upon procedure between the parties contemplated the appointment of the arbitrator by the second party within 30 days of receipt of a notice from the first party. While the decision in **Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151** 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.'s** case (supra) , 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."*

10. After noticing the view in **Pardeep Vinod Construction Company's** case (supra), relied upon by the State counsel, a Division Bench of the High Court of Delhi in **M/s Dharamvir and Company Versus Delhi Development Authority and another Law Finder Doc Id # 2677123** decided on 24.12.2024 came to the conclusion that the observations in **Ellora Paper Mill's** case (supra) would apply. It was held as under:-

"42. The principle of law laid down in the said judgment clearly applies to the facts of the present case as well. Thus, after coming into force of the provisions of the Amendment Act in the event of any reconstitution of the Arbitral Tribunal, it is impermissible to disregard the provisions of Section 12(5) read with the VIIth Schedule of the A & C Act as interpreted by the Supreme Court in **Perkins Eastmen Architecits DPC Versus HSCC (India) Limited** (supra), **TRF Limited versus Energo**



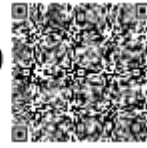
Engineering Projects Limited (supra), *Bharat Broadband Network Limited Versus United Telecoms Limited* (supra).

11. The judgment in *Chaudhary Charan Singh's* case (supra) would not help the respondents.

12. It is therefore, evident from the above that the appointment made by the respondents is *de hors*, the provisions of the statute. Such an appointment has to be treated as nonest and deserves to be ignored. As the appointment is not in accordance with the statutory provisions, petitioner is within its right to approach this Court for appointment of another arbitrator under Section 11 of the Arbitration Act. For the foregoing reasons, the prayer made in the petition deserves to be accepted.

13. Accordingly, the appointment of Er. G.S. Mann, who is nominee of the respondents, is set aside. This Court has been informed that Mr. Inderjit J. Mamtani, nominee of the petitioner has unfortunately expired during the pendency of the present petition. The Arbitral Tribunal is practically non-functional. Therefore, in exercise of the power conferred upon it under Section 11 of the Arbitration Act, this Court proceeds to appoint Mr. Justice M.M. Kumar, former Chief Justice of J & K High Court, House No. 79, Sector 16-A, Chandigarh, Mobile No. 9888824752 as a sole Arbitrator to adjudicate the dispute between the parties, subject to compliance of statutory requirements.

14. Parties are directed to appear before the Arbitrator on the



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date, time and place to be fixed and communicated by the Arbitrator at his convenience.

15. Needless to mention, parties will be at liberty to raise all the claims/counter claims/pleas/defence before the Arbitrator. Any observation made hereinabove will not be binding on the learned Arbitrator.

16. A request letter along with a copy of this order be sent to Mr. Justice M.M. Kumar (Retd.).

07.01.2025
pooja saini

(SUVIR SEHGAL)
JUDGE

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No