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

268

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Date of decision: 25.02.2025

M/S INSTRUMENTATION LTD.

...APPLICANT

Vs.

UTTAR HARYANA BIJLI NIGAM LTD.

...RESPONDENT

**CORAM: HON'BLE MR. JUSTICE JAGMOHAN BANSAL**

Present: Ms. Dilmrig Nayani, Advocate  
for the applicant.

Mr. Raman Sharma, Addl. A.G., Haryana.

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**JAGMOHAN BANSAL, J (ORAL)**

1. The applicant through instant application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short "1996 Act") is seeking appointment of an Arbitrator to adjudicate the dispute between the parties.
2. The applicant-M/s Instrumentation Limited is a Government of India Undertaking. It is engaged in the business of manufacturing and supplying equipment on turnkey basis. The respondent is Government of Haryana Undertaking means applicant as well as respondent are Government Undertakings. The respondent floated a Tender in 2009 for supply of material for conversion of existing LT Lines to new 11 kV Lines. The applicant submitted its bid and respondent awarded the work. The applicant requested for grant of exemptions, however, respondent rejected its request on the ground that terms and conditions of the contract are sacrosanct. The respondent issued works order on 10.07.2009. A dispute erupted between the parties which led to termination of contract by respondent vide communication dated 22.07.2010 imposing liquidation damages to the tune of 5% of bid value. The applicant invoking

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arbitration clause, requested respondent to appoint an independent Arbitrator to resolve the dispute. The respondent appointed a Sole Arbitrator who vide notice dated 11.12.2013 informed the applicant about his appointment. The applicant submitted its claim and respondent submitted its defence. The process of filing claim and defence concluded by 22.05.2014. The proceedings continued before Arbitrator, however, could not be concluded due to change of Arbitrators. The applicant on 25.08.2020 filed an application under Section 13(2) of 1996 Act assailing appointment of the Arbitrator. The applicant contended before the Arbitrator that his appointment is in violation of law. It is an incurable defect. In view of amended Section 12(5) read with Seventh Schedule, the appointment has become *de jure* illegal, thus, Arbitrator is ineligible to proceed. The Arbitrator vide order dated 18.02.2021 rejected applicant's application. The operative part of the order dated 18.02.2021 is reproduced as below:-

*“ORDER*

*Both the parties have been heard at length on the application of the Claimant dated 25.08.2020. I have gone through the provisions of the Act and the judgements relied upon by both the parties. I conclude that the judgments relied upon by the Claimant are not applicable in the present case, for the reason that the Arbitrator in the cited judgements was appointed after the Amended Act of 2015 had come into operation. Whereas in this case, the Arbitrator was appointed by designation in the year 2013 as per the Contract. The undersigned has only been substituted as Arbitrator by virtue of the designation.*

*Section 26 of the Amended Act of 2015 clearly excludes the applicability of provisions of said Act on appointments made prior to October, 2015. This position of law has also been stated in the judgments cited by the Respondent, i.e. Union of India v Parmar Construction 29 March 2019 SC and Galore Infratech Pvt. Ltd.*



*Mumbai V. Sew Krishnagar Bahrampore, hyd. (Arb. No. 110 of 2016). In my view, the provisions of Section 12 (5) and the Seventh Schedule of the Amended Act of 2015 is not applicable to the present case.*

*Hence, the application has no merit and is hereby dismissed.”*

3. The applicant after rejection of its application assailing appointment of the Arbitrator, appeared before the Arbitrator and proceedings continued. The applicant through instant application is seeking substitution of the Arbitrator.

4. Counsel for the applicant submits that Arbitrator appointed by the respondent, in view of the amendment made in Section 12 by Arbitration and Conciliation (Amendment) Act 2015 (for short ‘2015 Act’) has become *de jure* ineligible to continue. The Arbitrator appointed by respondent falls in Seventh Schedule of 1996 Act, thus, he cannot continue without express consent of the applicant. Independence of Arbitrator is of paramount consideration in arbitration proceedings. Supreme Court in ‘*Ellora Paper Mills Ltd. Vs. State of M.P.,*’ (2022) 3 SCC 1, after noticing plethora of judgments has clearly held that appointment of Arbitrator made by any party which is contrary to Section 12(5) of 1996 Act is invalid and such Arbitrator cannot be allowed to continue. In view of mandate of Section 15 of 1996 Act, this Court is Competent to substitute the Arbitrator appointed by respondent. Application is maintainable before this Court in terms of Section 11(6) read with Section 15(2) of 1996 Act. The amendment of Section 12(5) is prospective still in view of judgments of Supreme Court, an Arbitrator who falls within Seventh Schedule cannot continue.

5. *Per contra*, Mr. Raman Sharma, Addl. A.G., Haryana submits that in view of judgment of Supreme Court in ‘*Hindustan Construction Company*



**Limited Vs. Union of India and others’, (2020) 17 SCC 324**, the amendment of Section 12(5) is prospective in nature. The Arbitrator was appointed much prior to amendment of Section 12 of 1996 Act. The applicant on 25.08.2020, in terms of amended Section 12 of 1996 Act, moved an application before Arbitrator assailing his jurisdiction. The said application came to be rejected vide order dated 18.02.2021 on the ground that as per Section 26 of 2015 Act, the proceedings already initiated would not be affected by 2015 Act. Order passed by Arbitrator is not under challenge. The applicant could approach District Judge against the order of Arbitrator. The Arbitrator passed order rejecting applicant’s application on 18.02.2021 whereas applicant approached this Court in 2024.

6. In view of Section 26 of 2015 Act read with judgment of Supreme Court in **Hindustan Construction Company Limited (Supra)**, it is undisputed that amendment made in Section 12 by 2015 Act is prospective in nature. The applicant is claiming that in view of Section 15(2) read with Section 11(6) of 1996 Act, this Court has power to substitute the Arbitrator. The applicant filed application under Sections 13(2) read with Section 12(5) before the Arbitrator who wrongly rejected the application. The applicant has only remedy to approach this Court under Section 11(6) in view of rejection order passed by Arbitrator.

7. The applicant relying upon judgment of Supreme Court in **Ellora Paper Mills Ltd. (Supra)** is claiming that despite joining proceedings, the Arbitrator should be substituted by this Court. The Supreme Court in the said case has held that an Arbitrator whose appointment is bad as per Section 12(5) read with Seventh Schedule of 1996 Act cannot continue and he should be substituted by another Arbitrator. The applicant has ignored the fact that in the



said case there was stay granted by High Court from May' 2001 to January' 2017 and thereafter an application was preferred before High Court under Section 14 read with Sections 11 and 15 of 1996 Act seeking termination of the mandate of the originally constituted Arbitral Tribunal. There was stay which remained operative virtually from 2001 to 2021. Facts of the instant case are different, thus, ratio of said case is inapplicable.

8. In view of following reasons, the instant application deserves to be dismissed:-

- (i) The applicant preferred an application dated 25.08.2020 before Arbitrator assailing its appointment in view of Section 12(5) read with Seventh Schedule of 1996 Act. The said application was dismissed on 18.02.2021 and there is no challenge to said order. Substitution of the Arbitrator by this Court would amount to setting aside of an order which is not under challenge.
- (ii) The applicant is claiming appointment of Arbitrator by respondent, in terms of Section 12(5), has become *de jure* bad in the eye of law. Thus, a new Arbitrator should be appointed by this Court. The applicant filed application before Arbitrator under Section 13 of 1996 Act. Section 14 of 1996 Act provides that mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if he becomes *de jure or de facto* unable to perform his functions. As per applicant, the Arbitrator appointed by respondent is *de jure* unable to perform. Section 14(2) provides that if a controversy remains concerning under any



of the grounds referred to in clause (a) of sub-section (1), a party may apply to the Court to decide on the termination of the mandate. Section 14 of 1996 Act is reproduced as below:-

**“Section 14. Failure or impossibility to act.**

*(1) [The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if]—*

*(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and*

*(b) he withdraws from his office or the parties agree to the termination of his mandate.*

*(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.*

*(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.”*

In the case in hand, the applicant is claiming that Arbitrator appointed by respondent is *de jure* unable to perform his functions. The Arbitrator has rejected applicant’s application. As per sub-section (2), the applicant is required to apply to Court to decide on the termination of the mandate. The expression ‘Court’ has been defined under Section 2(1)(e) of Arbitration Act. This Court does not fall within the definition of ‘Court’ in terms of Section 2(1)(e) of 1996 Act. Thus, this Court has no power to entertain instant application. The applicant was supposed to approach District Court.



- (iii) The Arbitrator was appointed on the request of applicant. The appointment was made in 2013. Both the parties filed their claim and defence by 2014. The amendment was made in 2015 and applicant without any demur joined proceedings till 2020 means for a period of 5 years from the date of amendment of Section 12 of 1996 Act. There was no express consent on the part of applicant as required under Section 12(5) but there was implied consent on the part of applicant. This Court is not oblivious of the fact that consent should be expressed. In view of peculiar facts of the instant case, this Court finds that there was consent on the part of the applicant. This fact is further corroborated by applicant's subsequent conduct. The Arbitrator rejected its application on 18.02.2021 whereas applicant approached this Court in September' 2024 means more than 3 years after the date of order passed by Arbitrator.
- (iv) The applicant is a Government of India Undertaking and respondent is also a State Government Undertaking. Except to claim that appointment of Arbitrator by respondent is contrary to Section 12(5), there is no evidence disclosing reasonable apprehension that Arbitrator appointed by respondent is not an independent or impartial Arbitrator. Section 12(5) as conceded by applicant is not applicable to instant case because Arbitrator was appointed much prior to amendment of 2015 and amendment of 2015 is prospective in nature.

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- (v) The Arbitrator was appointed in 2013 and proceedings are still pending. Substitution of Arbitrator after such a long time would not be in the interest of justice. The object of 1996 Act is to adjudicate disputes as expeditiously as possible. Substitution of Arbitrator at this belated stage would be contrary to intent and purport of 1996 Act.

9. In the wake of above discussion and findings, this Court is of the considered opinion that the present application deserves to be dismissed and accordingly dismissed.

25.02.2025  
manoj

**[JAGMOHAN BANSAL]**  
**JUDGE**

Whether speaking/reasoned  
Whether reportable

Yes/No  
Yes/No