THE
ALLAHABAD DAILY JUDGMENTS

ADJ] **ARTICLE** [2023(1)

[1] Arbitration is an alternative but whether it is equally efficacious or not

By

Nipun Singh

Advocate

High Court, Allahabad

Even before the law was codified there was an old tradition to settle the disputes amicably through arbitration and in order to make it easier and more systematic, the Arbitration Act, 1940 was enacted by Act No.10 of 1940 on 11.03.1940 to consolidate and amend the law relating to arbitration.

This tradition of adjudicators eventually evolved an Indian type of self rule that included arbitral techniques as part of a post colonial ideal of local governance and grass root democracy and therefore, first law on arbitration based on the English Arbitration Act, 1899 was framed as the Indian Arbitration Act, 1899 and later on, the same was substituted by the 1937 Act on Arbitration (Protocol and Convention) dealt with a Geneva Conventions Recognition and Enforcement of Foreign Awards and thereafter, the Arbitration Act 1940 being Act No.10 of 1940 was enacted on 11.03.1940 to consolidate and amend the law relating to arbitration which extended to the whole of India except the State of Jammu and Kashmir came into force with effect from 01.07.1940.

That as there were some deficiencies, therefore, the parliament deemed fit to make the Arbitration and Conciliation proceedings easier , convenient and more approachable to the normal litigant in order to get prompt justice by saving the litigants from long drawn process of conventional Courts of justice and therefore, on 16.08.1996, Arbitration Act, 1940 was substituted by the Arbitration and Conciliation Act, 1996 being Act No.26 of 1996, which was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and also to define the law relating to conciliation and for matter connected therewith or incidental thereto.

That in the said Act, the power to appoint an arbitrator is given u/s 11 either to the High Court or to the Supreme Court and even if there is an arbitration agreement and the same is brought to the knowledge of any judicial authority, it is incumbent upon the judicial authority to refer the parties to arbitration by further giving rights to the court to pass interim measures either before the commencement of arbitration proceedings or subsequent thereto as per section 9 of the Arbitration and Conciliation Act. The provision was also given to challenge the mandate of the arbitrator or to terminate its

mandate or to substitute the arbitrator, but the legislature further deemed proper to make the Act more convenient and easier and approachable to the common litigant by bringing a drastic amendment in the year 2015 w.e.f. 23.10.2015 vide Act No.3 of 2016, where, in order to get the appointment of an impartial arbitrator, clause-5 was added in section 12, where it is provided that 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 and therefore, seventh schedule r/w section 12(5) envisage that no person having fallen in any of the categories specified in the Seventh schedule can become an arbitrator.

That the Hon'ble Supreme Court in the case of Trf Ltd v Energo Engineering Projects Ltd, [(2017) 8 SCC 377] has held that if any person having fallen in any of the categories specified in Seventh schedule cannot act as an arbitrator, even that authority has no right to nominate or appoint somebody else as an arbitrator, so that to avoid any question being raised on the impartiality and integrity of transparent arbitrator.

In order to better appreciate the relevance of the aforesaid proposition laid down by the Hon'ble Supreme Court, it is imperative to first go through the arbitration clause which was up for interpretation before the Hon'ble Court.

The same is being reproduced herein below-

"33. Resolution of dispute/arbitration

(a) In case any disagreement or dispute arises between the buyer and the seller under or in connection with the PO, both shall make every effort to resolve it amicably by direct informal negotiation.

(b) If, even after 30 days from the commencement of such informal negotiation, seller and the buyer have not been able to resolve the dispute amicably, either party may require that the dispute be referred for resolution to the formal mechanism of arbitration.

(c) All disputes which cannot be settled by mutual negotiation shall be referred to and determined by arbitration as per the Arbitration and Conciliation Act, 1996 as amended.

(d) Unless otherwise provided, any dispute or difference between the parties in connection with this agreement shall be referred to sole arbitration of the Managing Director of buyer or his nominee. Venue of arbitration shall be Delhi, and the arbitration shall be conducted in English language.

(e) The award of the Tribunal shall be final and binding on both, buyer and seller."

The arbitration clause clearly stated that the Managing Director or his nominee would be the sole arbitrator. However, consequent to the amendment of 2015, the Managing Director became ineligible to act as an arbitrator. Thus, what was up for consideration before the Hon'ble Supreme Court was whether, by virtue of being ineligible, whether the Managing Director would also be ineligible to appoint his nominee, who may be a neutral person.

A very in depth analysis of the provision was done, which included analysis of Section 12 of the Arbitration and Conciliation Act, 1996, both pre as well post amendment.

Section 12, pre 2015 amendment is being reproduced herein below-

"12. Grounds for challenge.—(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(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."

After the amendment, Section 12 that deals with the grounds of challenge is as follows:

"12. Grounds for challenge.—(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 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

(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."

The Sixth Schedule stipulates, apart from others, the circumstances which are to be disclosed.

"Circumstances disclosing 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 your independence or impartiality (list out):

Circumstances which are likely to affect your ability to devote sufficient time to the arbitration and in particular your ability to finish the entire arbitration within twelve months (list out)."

While considering Section 12(5) of the Act, the Hon'ble Supreme Court has gone on to observe the following-

12. Sub-section (5) of Section 12, on which immense stress has been laid by the learned counsel for the appellant, as has been reproduced above, commences with a non obstante clause. It categorically lays down that if a person whose relationship with the parties or the counsel or the subject-matter of dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. There is a qualifier which indicates that parties may, subsequent to the disputes arisen between them, waive the applicability by express agreement in writing. The qualifier finds place in the proviso appended to sub-section (5) of Section 12. On a careful scrutiny of the proviso, it is discernible that there are fundamentally three components, namely, the parties can waive the applicability of the sub-section; the said waiver can only take place subsequent to dispute having arisen between the parties, and such waiver must be by an express agreement in writing.

The crux of the arguments of both sides has been encapsulated by the Hon'ble Supreme Court in the following manner-

"16. What is fundamentally urged, as is noticeable from the submissions of Mr Sundaram, learned Senior Counsel appearing for the appellants, is that the learned arbitrator could not have been nominated by the Managing Director as the said authority has been statutorily disqualified. The submission of the respondent, per contra, is that the Managing Director may be disqualified to act as an arbitrator, but he is not deprived of his right to nominate an arbitrator who has no relationship with the

respondent. Additionally, it is assiduously urged that if the appointment is hit by the Fifth Schedule or the Sixth Schedule or the Seventh Schedule, the same has to be raised before the Arbitral Tribunal during the arbitration proceeding but not in an application under Section 11(6) of the Act."

Before deciding the issue at hand, it was imperative for the Hon'ble Supreme Court to consider as to whether they can adjudicate the issue at the relevant stage. The Court held-

"17. First we shall address the issue whether the Court can enter into the arena of controversy at this stage. It is not in dispute that the Managing Director, by virtue of the amended provision that has introduced sub-section (5) to Section 12, had enumerated the disqualification in the Seventh Schedule. It has to be clarified here that the agreement had been entered into before the amendment came into force. The procedure for appointment was, thus, agreed upon. It has been observed by the Designated Judge that the amending provision does not take away the right of a party to nominate a sole arbitrator, otherwise the legislature could have amended other provisions. He has also observed that the grounds including the objections under the Fifth and the Seventh Schedules of the amended Act can be raised before the Arbitral Tribunal and further when the nominated arbitrator has made the disclosure as required under the Sixth Schedule to the Act, there was no justification for interference. That apart, he has also held in his conclusion that besides the stipulation of the agreement governing the parties, the Court has decided to appoint the arbitrator as the sole arbitrator to decide the dispute between the parties."

Reliance was placed on Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd. The Court observed-

"18. In Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd. [Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd., (2008) 10 SCC 240] , while dealing with sub-section (6) of Section 11 and sub-section (8) of Section 11 and appreciating the stipulations in sub-sections (3) and (5), a three-Judge Bench opined that : (SCC p. 246, para 13)

"13. The expression "due regard" means that proper attention to several circumstances has been focused. The expression "necessary" as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. Necessary measures can be stated to be the reasonable steps required to be taken."

19. Being of this view, the Court ruled that the High Court had not focused on the requirement of having due regard to the qualification required by the agreement or other considerations necessary to secure appointment of an independent and impartial arbitrator and further ruled that it needs no reiteration that appointment of an arbitrator or arbitrators named in the arbitration agreement is not a must because while making the appointment, the twin responsibilities of sub-section (8) of Section 11 have to be kept in view, considered and taken into account. The Court further observed that if the same is not done, the appointment becomes vulnerable. In the said case, the Court set aside the appointment made by the High Court and remitted the matter to make fresh appointment keeping in view the parameters indicated therein."

Reliance was also placed on Datar Switchgears Ltd. v. Tata Finance Ltd. [Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151]. The Court observed-

"20. In Datar Switchgears Ltd. v. Tata Finance Ltd. [Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151] , the appellant questioned the authority of the first respondent in appointing an arbitrator after a long lapse of notice period of 30 days on the foundation that the power of appointment should have been exercised within a reasonable time. It was further contended that unilateral appointment of arbitrator was not envisaged under the lease agreement and, therefore, the first respondent should have obtained the consent of the appellant and the name of the arbitrator should have been proposed to the appellant before the appointment. The Court took note of the fact that the arbitration clause in the lease agreement contemplated appointment of a sole arbitrator. The Court further took note of the fact that the appellant therein had not issued any notice to the first respondent seeking appointment of an arbitrator and it explicated that an application under Section 11(6) of the Act can be filed when there is a failure of the procedure for appointment of arbitrator. Elaborating the said concept, the Court held : (SCC p. 155, para 6)

"6. … This failure of procedure can arise under different circumstances. It can be a case where a party who is bound to appoint an arbitrator refuses to appoint the arbitrator or where two appointed arbitrators fail to appoint the third arbitrator. If the appointment of an arbitrator or any function connected with such appointment is entrusted to any person or institution and such person or institution fails to discharge such function, the aggrieved party can approach the Chief Justice for appointment of an arbitrator."

21. After so stating, the Court adverted to the issue whether there was any real failure of the mechanism provided under the lease agreement. The Court took note of the fact that the respondent had made the appointment before the appellant had filed the application under Section 11 of the Act though the said appointment was made beyond 30 days. It posed the question whether in a case falling under Section 11(6) of the Act, the opposite party cannot appoint an arbitrator after the expiry of 30 days from the date of appointment. Distinguishing the decisions of Naginbhai C. Patel v. Union of India [Naginbhai C. Patel v. Union of India, 1998 SCC OnLine Bom 668 : (1999) 2 Bom CR 189] , B.W.L. Ltd. v. MTNL [B.W.L. Ltd. v. MTNL, 2000 SCC OnLine Del 196 : (2000) 2 Arb LR 190] and Sharma & Sons v. Army Headquarters [Sharma & Sons v. Army Headquarters, 1999 SCC OnLine AP 846 : (2000) 2 Arb LR 31] , the Court held : (Datar Switchgears case [Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151] , SCC p. 158, paras 19-21)

"19. So far as cases falling under Section 11(6) are concerned — such as the one before us — no time-limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, [Ed. : The matter between two asterisks has been emphasised in original.] so far as Section 11(6) is concerned [Ed. : The matter between two asterisks has been emphasised in original.] , if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but [Ed. : The matter

between two asterisks has been emphasised in original.] before the first party has moved the court under Section 11 [Ed. : The matter between two asterisks has been emphasised in original.] , that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.

20. In the present case the respondent made the appointment before the appellant filed the application under Section 11(6) though it was beyond 30 days from the date of demand. In our view, the appointment of the arbitrator by the respondent is valid and it cannot be said that the right was forfeited after expiry of 30 days from the date of demand.

21. We need not decide whether for purposes of sub-sections (4) and (5) of Section 11, which expressly prescribe 30 days, the period of 30 days is mandatory or not." (emphasis supplied)

And again : (SCC pp. 158-59, para 23)

"23. When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. Even though rigour of the doctrine of "freedom of contract" has been whittled down by various labour and social welfare legislation, still the court has to respect the terms of the contract entered into by parties and endeavour to give importance and effect to it. When the party has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause."

22. On the aforesaid basis, the Court opined that the first respondent did not fail to follow the procedure contemplated under the agreement in appointing the arbitrator nor did it contravene the provisions of the arbitration clause. The said conclusion was arrived at as the appellant therein had really not sent a notice for appointment of arbitrator as contemplated under Clause 20.9 of the agreement which was the arbitration clause."

The judgment in the case of Newton Engg. and Chemicals Ltd. v. Indian Oil Corpn. Ltd. [Newton Engg. and Chemicals Ltd. v. Indian Oil Corpn. Ltd., (2013) 4 SCC 44 was also duly considered in the following manner-

23. In Newton Engg. and Chemicals Ltd. v. Indian Oil Corpn. Ltd. [Newton Engg. and Chemicals Ltd. v. Indian Oil Corpn. Ltd., (2013) 4 SCC 44 : (2013) 2 SCC (Civ) 457] , a two-Judge Bench was dealing with an arbitration clause in the agreement that provided that all disputes and differences between the parties shall be referred by any aggrieved party to the contract to the sole arbitration of ED (NR) of the respondent Corporation. The arbitration clause further stipulated that if such ED (NR) was unable or unwilling to act as the sole arbitrator, the matter shall be referred to the sole arbitration of some other person designated by ED (NR) in his place who was willing to act as sole arbitrator. It also provided that no person other than ED (NR) or the person designated by ED (NR) should act as an arbitrator. When the disputes arose between the parties, the appellant therein wrote

to the Corporation for appointment of ED (NR) as the sole arbitrator, as per the arbitration clause. The Corporation informed the contractor that due to internal reorganisation in the Corporation, the office of ED (NR) had ceased to exist and since the intention of the parties was to get the dispute settled through the arbitration, the Corporation offered to the contractor the arbitration of the substituted arbitrator, that is, the Director (Marketing). The Corporation further informed the contractor that if he agreed to the same, it may send a written confirmation giving its consent to the substitution of the named arbitrator. The contractor informed that he would like to have the arbitration as per the provisions of the Act whereby each of the parties would be appointing one arbitrator each. The Corporation did not agree to the suggestion given by the company and ultimately appointed Director (Marketing) as the arbitrator. The contractor, being aggrieved, moved the High Court of Delhi for appointment of arbitrator under Section 11(6)(c) of the Act and the learned Single Judge dismissed [Newton Engg. & Chemicals Ltd. v. Indian Oil Corpn. Ltd., 2006 SCC OnLine Del 1359 : (2007) 93 DRJ 127] the same and observed that the challenge to the appointment of the arbitrator may be raised by the contractor before the Arbitral Tribunal itself. Interpreting the agreement, this Court held : (Newton Engg. and Chemicals case [Newton Engg. and Chemicals Ltd. v. Indian Oil Corpn. Ltd., (2013) 4 SCC 44 : (2013) 2 SCC (Civ) 457] , SCC p. 46, paras 7-8)

"7. Having regard to the express, clear and unequivocal arbitration clause between the parties that the disputes between them shall be referred to the sole arbitration of ED (NR) of the Corporation and, if ED (NR) was unable or unwilling to act as the sole arbitrator, the matter shall be referred to the person designated by such ED (NR) in his place who was willing to act as sole arbitrator and, if none of them is able to act as an arbitrator, no other person should act as arbitrator, the appointment of Director (Marketing) or his nominee as a sole arbitrator by the Corporation cannot be sustained. If the office of ED (NR) ceased to exist in the Corporation and the parties were unable to reach to any agreed solution, the arbitration clause did not survive and has to be treated as having worked its course. According to the arbitration clause, sole arbitrator would be ED (NR) or his nominee and no one else. In the circumstances, it was not open to either of the parties to unilaterally appoint any arbitrator for resolution of the disputes. Sections 11(6)(c), 13 and 15 of the 1996 Act have no application in the light of the reasons indicated above.

8. In this view of the matter, the impugned order dated 8-11-2006 [Newton Engg. & Chemicals Ltd. v. Indian Oil Corpn. Ltd., 2006 SCC OnLine Del 1359 : (2007) 93 DRJ 127] has to be set aside and it is set aside. The appointment of Respondent 3 as sole arbitrator to adjudicate the disputes between the parties is also set aside. The proceedings, if any, carried out by the arbitrator are declared to be of no legal consequence. It will be open to the contractor, the appellant to pursue appropriate ordinary civil proceedings for redressal of its grievance in accordance with law."

The aforesaid decision clearly lays down that it is not open to either of the parties to unilaterally appoint an arbitrator for resolution of the disputes in a situation that had arisen in the said case."

An in-depth analysis of Deep Trading Co. v. Indian Oil Corpn. [Deep Trading Co. v. Indian Oil Corpn., (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449] was done in the following manner-

24. In Deep Trading Co. v. Indian Oil Corpn. [Deep Trading Co. v. Indian Oil Corpn., (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449] , the three-Judge Bench referred to Clause 29 of the agreement, analysed sub-sections (1), (2), (6) and (8) of Section 11 of the Act, referred to the authorities in Datar Switchgears [Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151] and Punj Lloyd Ltd. v. Petronet MHB Ltd. [Punj Lloyd Ltd. v. Petronet MHB Ltd., (2006) 2 SCC 638] and came to hold that : (Deep Trading case [Deep Trading Co. v. Indian Oil Corpn., (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449] , SCC p. 42, paras 19-20)

"19. If we apply the legal position exposited by this Court in Datar Switchgears [Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151] to the admitted facts, it will be seen that the Corporation has forfeited its right to appoint the arbitrator. It is so for the reason that on 9-8-2004, the dealer called upon the Corporation to appoint the arbitrator in accordance with the terms of Clause 29 of the agreement but that was not done till the dealer had made application under Section 11(6) to the Chief Justice of the Allahabad High Court for appointment of the arbitrator. The appointment was made by the Corporation only during the pendency of the proceedings under Section 11(6). Such appointment by the Corporation after forfeiture of its right is of no consequence and has not disentitled the dealer to seek appointment of the arbitrator by the Chief Justice under Section 11(6). We answer the above questions accordingly.

20. Section 11(8) does not help the Corporation at all in the fact situation. Firstly, there is no qualification for the arbitrator prescribed in the agreement. Secondly, to secure the appointment of an independent and impartial arbitrator, it is rather necessary that someone other than an officer of the Corporation is appointed as arbitrator once the Corporation has forfeited its right to appoint the arbitrator under Clause 29 of the agreement."

25. The Court accepted the legal position laid down in Newton Engg. [Newton Engg. and Chemicals Ltd. v. Indian Oil Corpn. Ltd., (2013) 4 SCC 44 : (2013) 2 SCC (Civ) 457] and referred to Deep Trading Co. [Deep Trading Co. v. Indian Oil Corpn., (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449] and opined that as the Corporation had failed to act as required under the procedure agreed upon and did not make the appointment until the application was made under Section 11(6) of the Act, it had forfeited its right of appointment of an arbitrator. In such a circumstance, the Chief Justice or his designate ought to have exercised his jurisdiction to appoint an arbitrator under Section 11(6) of the Act. Be it noted, the three-Judge Bench also expressly stated its full agreement with the legal position that has been laid down in Datar Switchgears Ltd. [Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151]

26. In Deep Trading Co. [Deep Trading Co. v. Indian Oil Corpn., (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449] , the three-Judge Bench noticed as the Corporation did not agree to any of the names proposed by the appellant, and accordingly, remitted the matter to the High Court for an appropriate order on the application made under Section 11(6) of the Act.

A distinction between the judgments of the Hon'ble Court in Newton Engg. and Deep Trading Co. was done in the following manner-

27. At this stage, it is necessary to understand the distinction between the two authorities, namely, Newton Engg. [Newton Engg. and Chemicals Ltd. v. Indian Oil Corpn. Ltd., (2013) 4 SCC 44 : (2013) 2 SCC (Civ) 457] and Deep Trading Co. [Deep Trading Co. v. Indian Oil Corpn., (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449] In Newton Engg. [Newton Engg. and Chemicals Ltd. v. Indian Oil Corpn. Ltd., (2013) 4 SCC 44 : (2013) 2 SCC (Civ) 457] the arbitration clause provided that no person other than ED (NR) or a person designated by ED (NR) should act as an arbitrator. Though the Corporation appointed its Director (Marketing) as the sole arbitrator yet the same was not accepted by the contractor. On the contrary, it was assailed before the Designated Judge. The Court held that since the parties were unable to arrive at any agreed solution, the arbitration clause did not survive and the dealer was left to pursue appropriate ordinary civil proceedings for redressal of its grievance in accordance with law. In Deep Trading Co. [Deep Trading Co. v. Indian Oil Corpn., (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449] arbitration clause, as is noticeable, laid down that the dispute or difference of any nature whatsoever or regarding any right, liability, act, omission on account of any of the parties thereto or in relation to the agreement shall be referred to the sole arbitration of the Director (Marketing) of the Corporation or of some officer the Corporation who may be nominated by the Director (Marketing).

28. As the factual matrix of the said case would show, the appointing authority had not appointed arbitrator till the dealer moved the Court and it did appoint during the pendency of the proceeding. Be it noted that dealer had called upon the Corporation to appoint arbitrator on 9-8-2004 and as no appointment was made by the Corporation, he had moved the application on 6-12-2004. The Corporation appointed the sole arbitrator on 28-12-2004 after the application under Section 11(6) was made. Taking note of the factual account, the Court opined that there was a forfeiture of the right of appointment of arbitrator under the agreement and, therefore, the appointment of the arbitrator by the Corporation during the pendency of the proceeding under Section 11(6) of the Act was of no consequence and remanded the matter to the High Court. The arbitration clause in Newton Engg. [Newton Engg. and Chemicals Ltd. v. Indian Oil Corpn. Ltd., (2013) 4 SCC 44 : (2013) 2 SCC (Civ) 457] clearly provided that if the authority concerned is not there and the office ceases to exist and parties are unable to reach any agreed solution, the arbitration clause shall cease to exist. Such a stipulation was not there in Deep Trading Co. [Deep Trading Co. v. Indian Oil Corpn., (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449] That is the major distinction and we shall delineate on the said aspect from a different spectrum at a later stage.

The judgment of the Hon'ble Supreme Court in the case of Municipal Corpn., Jabalpur v. Rajesh Construction Co. was also considered in the following manner-

29. At this juncture, we may also refer to a two-Judge Bench decision in Municipal Corpn., Jabalpur v. Rajesh Construction Co. [Municipal Corpn., Jabalpur v. Rajesh Construction Co., (2007) 5 SCC 344] In the said case the arbitration clause specifically provided that if the party invoking arbitration is the contractor, no reference order shall be maintainable unless the contractor furnishes a security deposit of a sum determined as per the table given therein. The said condition precedent was not satisfied by the contractor. Appreciating the obtaining factual score, the Court held that it has to be kept in mind that it is always the duty of the Court to construe the arbitration agreement in a

manner so as to uphold the same, and, therefore, the High Court was not correct in appointing an arbitrator in a manner, which was inconsistent with the arbitration agreement. Thus, emphasis was laid on the manner of appointment which is consistent with arbitration clause that prescribes for appointment.

The Hon'ble Supreme Court has encapsulated the consideration of all the judgments in the following manner-

30. The purpose of referring to the aforesaid judgments is that courts in certain circumstances have exercised the jurisdiction to nullify the appointments made by the authorities as there has been failure of procedure or ex facie contravention of the inherent facet of the arbitration clause. The submission of the learned counsel for the respondent is that the authority of the arbitrator can be raised before the learned arbitrator and for the said purpose, as stated hereinbefore, he has placed heavy reliance upon Antrix Corpn. Ltd. [Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd., (2014) 11 SCC 560 : (2014) 4 SCC (Civ) 147] In the said case, the two-Judge Bench referred to Article 20 of the agreement which specifically dealt with arbitration and provided that in the event any dispute or difference arises between the parties as to any clause or provision of the agreement, or as to the interpretation thereof, or as to any account or valuation, or as to rights and liabilities, acts, omissions of any party, such disputes would be referred to the senior management of both the parties to resolve the same within three weeks, failing which the matter would be referred to an Arbitral Tribunal comprising of three arbitrators and the seat of the arbitration would be New Delhi and further that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce (ICC) or Uncitral. As the agreement was terminated, the petitioner therein wrote to the respondent Company to nominate the senior management to discuss the matter and to try and resolve the dispute between the parties. However, without exhausting the mediation process, as contemplated under Article 20(a) of the agreement, the respondent unilaterally and without prior notice addressed a request for arbitration to the ICC International Court of Arbitration and one Mr V.V. Veedar was nominated as the arbitrator in accordance with the ICC Rules. The correspondence between the parties was not fruitful and the petitioner filed an application under Section 11(4) read with Section 11(10) of the Act for issuance of a direction to the respondent to nominate an arbitrator in accordance with an agreement dated 28-1-2005 and the Rules to adjudicate upon the disputes which had arisen between the parties and to constitute an Arbitral Tribunal and to proceed with the arbitration.

31. When the matter was listed before the designate of the Chief Justice of this Court, it was referred to a larger Bench and the Division Bench, analysing the various authorities, came to hold thus : (Antrix Corpn. case [Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd., (2014) 11 SCC 560 : (2014) 4 SCC (Civ) 147] , SCC p. 573, para 35)

"35. … Once the provisions of the ICC Rules of Arbitration had been invoked by Devas, the proceedings initiated thereunder could not be interfered with in a proceeding under Section 11 of the 1996 Act. The invocation of the ICC Rules would, of course, be subject to challenge in appropriate proceedings but not by way of an application under Section 11(6) of the 1996 Act. Where the parties

had agreed that the procedure for the arbitration would be governed by the ICC Rules, the same would necessarily include the appointment of an Arbitral Tribunal in terms of the arbitration agreement and the said Rules. Arbitration Petition No. 20 of 2011 under Section 11(6) of the 1996 Act for the appointment of an arbitrator must, therefore, fail and is rejected, but this will not prevent the petitioner from taking recourse to other provisions of the aforesaid Act for appropriate relief."

The said pronouncement, as we find, is factually distinguishable and it cannot be said in absolute terms that the proceeding once initiated could not be interfered with the proceeding under Section 11 of the Act. As we find, the said case pertained to the ICC Rules and, in any case, we are disposed to observe that the said case rests upon its own facts.

The Hon'ble Supreme Court went on to conclude the issue in the following manner:-

"By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth."

That as per section 21, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent and therefore, section 29A incorporated by the amended Act No.3 of 2016 prescribes a time limit in which the arbitral tribunal is supposed to pass an award within a period of 12 months from the date of completion of pleadings under sub section 4 of section 23 and if the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree by further allowing the parties to extend the period not exceeding six months by consent and if the award is not made within such period mentioned herein above, the mandate of the arbitrator shall terminate unless the court has either prior to or after the expiry of period so specified, extended the period.

The Arbitration Act further provides the forms and contents of arbitral award whereunder even what interest rate would be provided has also been mentioned in section 31 and therefore, the efforts of the parliament is to make the arbitration and conciliation proceedings more precise, convenient, approachable to the common man, but the question which goes to the root of the matter is that despite the best endeavour being made by the parliament, this Act is still an alternative forum to resolve the disputes, but can't be efficacious and the same is the subject matter of the article, particularly in view of the fees of arbitrator provided as per Schedule-IV of the Act, which is as follows :-

Sl.No	Sum in dispute	Model fee
1.	Up to Rs.5,00,000	Rs.45,000
2.	Above Rs.5,00,000 and up to Rs. 20,00,000	Rs. 45,000 plus 3.5 per cent. of the claim amount over and above Rs.5,00,000.

3.	Above Rs.20,00,000 and up to Rs. 1,00,00,000	Rs.97,500 plus 3 per cent. of the claim amount over and above Rs.20,00,000.
4.	Above Rs.1,00,00,000 and up to Rs. 10,00,00,000	Rs.3,37,500 plus 1 per cent. of the claim amount over and above Rs.1,00,00,000.
5.	Above Rs.10,00,00,000 and up to Rs. 20,00,00,000	Rs.12,37,500 plus 0.75 per cent. of the claim amount over and above Rs.10,00,00,000.
6.	Above Rs. 20,00,00,000	Rs.19,87,500 plus 0.5 per cent. of the claim amount over and above Rs.20,00,00,000 with a ceiling of Rs.30,00,000.

The Schedule-IV provided hereinabove shows that if any person seeks to get the matter resolved by the arbitrator, he has to pay handsome fees in lacs and sometime in crores as per the valuation, which normally he is not required to pay either before the civil court or before the commercial court in the conventional justice dispensation system.

That further if the award is passed, certainly the award is in favour of one party and against the other party and in case, the looser side wants to challenge the award as per section 34, the same has a very-very limited scope of interference even after the insertion of sub section 2-A in section 34 and if any party who has lost the arbitration case, fails to file the same within a period of three months extendable for a further period of 30 days, no application for condonation of delay is maintainable as held by the Hon'ble Supreme Court in various judgments, therefore, the law of arbitration sometimes is very convenient but on the other hand is also very harsh and contrary to the provisions of getting justice.

That the purpose of bringing the Arbitration and Conciliation Act is to give prompt justice but the same is not being fulfilled in view of the lengthy process of challenging the award u/s 34 on a very limited ground, then its appeal u/s 37 and the award having settled by the appellate forum u/s 37 of the Act, has to be executed as a decree of civil court as per section 36 of the Act, where all the provisions of Order 21 of The Code of Civil Procedure, 1908 are made applicable, which makes no difference between the decree and the award passed under the Arbitration and Conciliation Act.

That the first round of litigation begins when a party approaches the Hon'ble High Court or the Hon'ble Supreme Court for appointment of arbitrator, although, in the amended act, it has been provided that an application u/s 11 has to be decided within a period of 30 days from the date of service of notice to the opposite side but on account of our over burdened courts, the said period is not achievable and it takes months and sometimes years to get it decided and thereafter, the aggrieved party may approach the Hon'ble Supreme Court and only after the matter is settled from the Supreme Court, the arbitral proceedings commence u/s 21 of the Arbitration and Conciliation Act.

That as an illustration I am giving herewith the detail of one case where after having an arbitration clause in the agreement, writ petition was filed before the Hon'ble Allahabad High Court (author

is not intentionally giving the details of the writ petition), but the Hon'ble High Court was pleased to dismiss the petition on the ground of alternative remedy of having an arbitration clause by relegating the parties for arbitration and therefore, the party in order to invoke the arbitration clause, first exhausted the departmental remedy and after exhaustion of departmental remedy, the party approached the High Court u/s 11 for appointment of an independent sole arbitrator as per the terms of the agreement, upon which after running from pillar to post the Hon'ble Allahabad High Court was pleased to appoint an arbitrator particularly the same Hon'ble Judge who was the part of Division bench which dismissed the petition was appointed as sole arbitrator and thereafter, after running from pillar to post and going through a very lengthy process, finally the arbitration award has been passed in favour of that particular party who had approached the Hon'ble Allahabad High Court and still he is waiting for enforcement of arbitral award. The said party had paid almost Rs.10 lacs as a fees and expenses in getting the justice, which is not affordable to a common litigant. Secondly, if a common litigant approaches the Civil Court or the High Court, the availability of lawyers are much easier than the availability of lawyer for conducting the arbitration case and the lawyers charge heavy fees may be on per day basis to appear before the arbitral tribunal, which is making the arbitration more harsh and unapproachable for the common litigant.

I in order to sum up this article I hope that the parliament would make some more changes or amendments in the arbitration and conciliation act in order to make the same more approachable, convenient and to serve the purpose of "**सस्ता, सुलभ तथा त्वरित न्याय**"of our Constitution of India.

Date : 05 October, 2022

---

[2] Article on section 143-A of Negotiable Instrument Act, 1881

By

Nipun Singh

Advocate

High Court, Allahabad

The understanding of common man, "everybody is innocent unless proven guilty", but now a draconian law has been introduced by way of an amendment in the Negotiable Instrument Act vide Amendment Act 20 of 2018 with effect from 01.09.2018, incorporating section 143-A which provides the payment of interim compensation to the complainant even the accused pleads not guilty to the accusation made in the complaint.

That as per the section 143-A of The Negotiable Instrument Act, the court trying an offense