PRACHI PRANESH NANDIWADEKAR
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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL JURISDICTION

INTERIM APPLICATION NO.2007 OF 2026
IN
COMMERCIAL EXECUTION APPLICATION NO.59 OF 2016

M/s. S. E. Investments Ltd.
(now known as Paisalo Digital Limited) ...Applicant

Versus

Star Bazaar Private Limited,
(Through its Director/Manager/Secretary) & Ors. ...Respondents

WITH

INTERIM APPLICATION NO.2011 OF 2026
IN
EXECUTION APPLICATION NO.2073 OF 2016

M/s. S. E. Investments Ltd.
(now known as Paisalo Digital Limited) ...Applicant

Versus

Hareram Cotton Industries (Through
Its Proprietor Ramdas Mahadev Hirode) & Ors. ...Respondents

WITH

INTERIM APPLICATION NO.2009 OF 2026
IN
EXECUTION APPLICATION NO.2028 OF 2015

M/s. S. E. Investments Ltd.
(now known as Paisalo Digital Limited) ...Applicant

Versus

M/s. Maple Composite Containers Limited
(Through its Directors) & Ors. ...Respondents

WITH

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INTERIM APPLICATION NO.2015 OF 2026
IN
EXECUTION APPLICATION NO.1783 OF 2015

M/s. S. E. Investments Ltd
(now known as Paisalo Digital Limited) ...Applicant

Versus

M/s. Sezal Glass Limited (formerly known as Sejal Architectural Glass Limited) (Through Its Directors) & Ors. ...Respondents

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Mr. Devesh Khara a/w. Mr. Abhinav Kalia, Mr. Devesh Dubey, Ms. Shoumya Sahu, Mr. Akhilesh Nair, Mr. Bismit Nayak, Mr. Lakshya Bhatia, & Mr. Devendra Kumar Singh i/by DKL Advocates for the Applicant in all applications.

Mr. Mehul Rathod for Respondent Nos. 2 & 3 in IA/2009/2026.

Mr. Ashish Kamat, Senior Advoate a/w. Ms. Shivanee Srivastava, Mr. Varun V. Dhonde, Ms. Henna Daulay & Mr. Gunjan Shah i/by M/s. G.S. Legal for the Respondent-Judgment Debtor in IA/2015/2026.

Mr. Jay Sanklecha, Amicus Curiae.

CORAM : JITENDRA JAIN, J.

DATED : 4 AUGUST 2026

JUDGMENT :

ISSUES :

1. On 1 July 2026, the Execution Court had framed following questions for its consideration :-

> *(i) Whether unilateral appointment of arbitrator prior to 23 October 2015 is without jurisdiction, and consequently all proceedings arising therefrom would be void ab-initio ?*
>
> *(ii) If answer to question (i) is in affirmative, then whether Executing Court can consider the effect of such unilateral appointment of arbitrator, when there is no challenge to the award passed by the arbitrator ?*

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BACKGROUND OF HOW ISSUE AROSE :

2. Resolution of civil disputes between the parties has traditionally been undertaken by the Civil Courts. However, with the passage of time and changing scenario, an alternative dispute resolution mechanism was put in place by way of arbitration, whereby the disputes between the parties were to be resolved by an arbitrator to be appointed in accordance with the arbitration agreement between the parties.

3. The process of arbitration was codified by enactment of the Arbitration Act, 1940 and thereafter by the Arbitration and Conciliation Act, 1996 ("**the Act, 1996**"). Based on the experience and the issues that arose before the Court and the stakeholders in the implementation of the said Acts, amendments were carried out from time to time and will continue to be carried out in future to meet the changing times and situations.

4. Prior to 23 October 2015, judicial recognition was given to the unilateral appointment of an arbitrator as per the agreement, whereby one of the party was to appoint an arbitrator or the process of appointment of an arbitrator by one of the party was agreed upon or named arbitrator by person or designation was provided in the arbitration agreement. In Government/PSU contracts, an officer or head of a particular department was named as an arbitrator or a higher authority of one of the parties to the arbitration agreement was empowered to appoint another person. These appointments were challenged on the ground of bias, impartiality, etc. but said challenges were negatived by the Hon'ble Supreme Court. On realising that this would be against the basic tenets of arbitration, which regards equality, unbiased and impartiality as essential ingredients, the legislature on recommendation of Law Commission inserted Section 12(5) by Act 3 of 2016 with retrospective effect from 23 October 2015. A similar amendment was made by substituting Section 12 (1) with effect

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from same day. Section 12 as it stood **post** 23 October 2015 reads as under :-

> *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."*

5. The Seventh Schedule as it stands **post** 2015 amendment reads as under :-

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THE SEVENTH SCHEDULE
[See section 12(5)]

ARBITRATOR'S RELATIONSHIP WITH THE PARTIES OR COUNSEL.

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

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RELATIONSHIP OF THE ARBITRATOR TO THE DISPUTE

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

ARBITRATOR'S DIRECT OR INDIRECT INTEREST IN THE DISPUTE

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.—The term "close family member" refers to a spouse, sibling, child, parent or life partner.

Explanation 2.—The term "affiliate" encompasses all companies in one group of companies including the parent company.

Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.]

6. Fifth Schedule, referred to in Section 12 (1) inserted with effect from 23 October 2015 lists down various grounds which gives rise to justifiable doubts as to the independence or impartiality of arbitrators. Seventh Schedule referred to in Section 12(5) inserted with effect from 23 October 2025 provides for disqualification of a person from being an arbitrator. Prior to 23 October 2015, Section 12(5), Seventh Schedule and Fifth Schedule were not on the statute book.

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7. Section 12 as it stood **prior to 2015 amendment** reads as under :-

> *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.*

8. On 5 January 2026, the Hon'ble Supreme Court in the case of ***Bhadra International (India) Pvt. Ltd. vs. Airport Authority of India***[1] was posed with the question whether invocation of arbitration after 23 October 2015 in violation of Section 12(5) would vitiate all the proceedings arising therefrom. The Hon'ble Supreme Court held that invocation of arbitration post 23 October 2015 contrary to the provisions of Section 12(5) would be void and bad in law and an award passed pursuant to such void appointment cannot be executed. While coming to the said conclusion, the Hon'ble Supreme Court referred to its decision in the case of ***Dharma Prathishthanam vs. Madhok Construction (P) Ltd.***[2], wherein it was held that unilateral appointment without the consent of the other party is illegal. Prior to referring to the said decision, the Hon'ble Supreme Court

1 2026 SCC OnLine SC 7
2 (2005) 9 SCC 686

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also discussed provisions of Section 18 of the Act and in paragraph 37 of ***Bhadra International (India) Pvt. Ltd. (supra)*** observed that what was implicit prior to 23 October 2015 has now been made explicit and that a statutory guarantee is given of equal treatment in the process of appointment of the arbitrator.

9. Based on the above observations, judgment debtor against whom awards are passed by invoking arbitration prior to 23 October 2015 would contend in execution proceedings that the decision in the case of ***Bhadra International (India) Pvt. Ltd. (supra)*** would apply even to invocation of arbitration prior to 23 October 2015 and, therefore, unilateral appointment is illegal and consequently awards passed pursuant to such illegal appointment cannot be executed. The decree holder would contend otherwise by submitting that the decision in the case of ***Bhadra International (India) Pvt. Ltd. (supra)*** would be applicable only to those arbitrations which have been invoked after 23 October 2015 and therefore, would not be applicable to the awards passed pursuant to invocation of arbitration prior to 23 October 2015. The date of invocation of arbitration which confers jurisdiction on the tribunal is crucial point in the present case for adjudicating whether the decision in ***Bhadra International (India) Pvt. Ltd. (supra)*** would be applicable to the facts of a particular case or not.

10. It is on the above backdrop that, this Court was faced with a situation where execution applications have been filed to enforce arbitral awards in respect of which arbitration was invoked prior to 23 October 2015. The applicants in the execution applications were seeking enforcement on the ground that provisions of Section 12(5) of the Act, 1996 would not be applicable to the arbitral proceedings initiated prior to 23 October 2015, being the date of enactment of amendment of Section 12(5). The respondents were arguing relying on certain paragraphs of the decision of the Hon'ble Supreme Court in the case of ***Bhadra International***

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(India) Pvt. Ltd. (supra) and submitting that the ratio/obiter laid down by the said decision would equally apply to invocation of arbitration prior to 23 October 2015 and since unilateral arbitration is held to be void, execution applications should be dismissed.

11. Looking at the importance of the questions raised, this Court appointed Mr. Jay Sanklecha, advocate of this Court as *amicus curiae* for assisting the Court in resolving the controversy. This Court appreciates the assistance rendered by Mr. Sanklecha with his lucid and detailed arguments, followed by detailed written submissions and research analysing the whole law on the above controversy. The Court appreciates the efforts put in by the *amicus curiae,* which would also act as a guide to young lawyers and counsel on how to prepare for a matter. The amicus brought clarity to this whole subject, which assisted the Court in deciding the issue.

Submissions of learned senior counsel Mr. Kamat on Bhadra International (India) Pvt. Ltd.

12. Mr. Kamat, learned senior counsel appearing for judgment debtor in one of the connected matters has made following submissions :-

(i) Mr. Kamat referring to Sections 7, 11(2), 11(6), 12(1), 12(2), 12(3) and 18 of the Arbitration and Conciliation Act, 1996 ("the Act") submitted that these sections existed prior to insertion of Section 12(5) and continued to exist even post insertion of Section 12(5). He submitted that these provisions indicates the foundation of mutuality in referring disputes, party autonomy, guidance with respect to independence, lack of bias, impartiality, consensus etc. which forms the bedrock or the foundation of the alternate dispute resolution mechanism enshrined under the Act, 1996. The reason why

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he refers to these provisions is that based on these provisions, it is his reading that the Hon'ble Supreme Court in the case of ***Bhadra International (India) Pvt. Ltd. (supra)*** has come to a conclusion that if the appointment of an arbitrator is hit by implicit disqualification relating to the appointment of an arbitrator prior to 2015 amendment, then the proceedings are void.

(ii) Referring to Section 12(5), Seventh Schedule and Fifth Schedule of the Act inserted with effect from 23 October 2015, he submitted that what were implicit ingredients of Sections 7, 11, 12, 18 referred to above, were explicitly expressed in the Schedules and nothing new has been inserted by the 2015 amendment.

(iii) Mr. Kamat, thereafter, referred to paragraphs 53 to 60 of the Law Commission Report No.246 dated 5 August 2014 and emphasised that the neutrality of an arbitrator is universally accepted and is critical to the entire process of dispute resolution and it also forms the basis for challenging the appointment of an arbitrator under Section 12(3). He submitted that the Law Commission Report expressed that there may not be actual bias, but the bar is too high as to whether the circumstances in question give rise to any apprehension of bias. He submitted that the Law Commission has observed that the decisions of the Hon'ble Supreme Court have not been in consonance with the neutrality principle. He further referred to paragraph 57 wherein the Law Commission observes that the balance between procedural fairness and binding nature of contracts appears to have been

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tilted in favour of the contracts by the Hon'ble Supreme Court and same is not far from satisfactory. The Law Commission further observes that principles of impartiality and independence cannot be discarded at any stage including the stage of constitution of the tribunal and same would be incongruous even if the same has been agreed prior to the dispute having arisen between the parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of impartial and independent adjudicators for resolution of disputes. He referred to the fact that Fifth Schedule of the 1996 Act is borrowed from Red and Orange List of the IBA guidelines on conflicts of interest in international arbitration. The Law Commission further observes that the disqualification can be waived by an express agreement in writing.

(iv) Reliance has been placed by the learned senior counsel on the Law Commission Report to contend that neutrality and impartiality have always been the foundation of the Arbitration Act, not only in the Arbitration Act, 1940 but even under the Act of 1996.

(v) The learned senior counsel, thereafter, relied upon the decision of the Hon'ble Supreme Court in the case of ***Dharma Prathishthanam (supra)*** and contended that though the facts of ***Dharma Prathishthanam (supra)*** are different, where one of the parties without the consent of the other appointed an arbitrator and this was held to be void, the observations made therein by the Hon'ble Supreme Court with regard to independence of an arbitrator are very crucial. In paragraph

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7, the Hon'ble Supreme Court observes that the appointment and the reference both should be based on consent given by the parties to the contract. In paragraph 12, the Hon'ble Supreme Court observes that if the arbitration clause names an arbitrator as the one already agreed upon, then the appointment does not pose any difficulty or if the arbitration clause provides for the manner in which the arbitrator is to be chosen and appointed, then the parties are bound to act accordingly. However, if the parties do not agree, then a party cannot without approaching the Court appoint an arbitrator unilaterally. The learned senior counsel further emphasised on paragraph 15 and submitted that even if a party participates in the proceedings, but if it is found that the appointment itself is void, then the proceedings are void and such participation cannot confer jurisdiction and same cannot be cured even by acquiescence.

(vi) The learned senior counsel thereafter relied upon the decision of the Hon'ble Supreme Court in the case of ***Bhadra International (India) Pvt. Ltd. (supra)***. He submitted that in that case the invocation of arbitration was post insertion of Section 12(5) of the Act, 1996. However, the Court in paragraphs 32 to 37 relied upon provisions of Section 18 of the Act alongwith the decision in the case of ***Central Organisation for Railway Electrification (CORE) vs. M/s. ECI SPIC SMO MCML (JV) A Joint Venture Company***[3] and emphasised the importance of impartiality and fairness in the arbitral process. The Hon'ble Supreme Court in these paragraphs further emphasised the importance of equal

3 (2025) 4 SCC 641

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participation of the parties in the process of appointment of an arbitrator and an equal say in its constitution. The Hon'ble Supreme Court after relying upon the decision in the case of ***Dharma Prathishthanam (supra)*** and interpreting Section 18 of the Act, which existed even prior to 2015 amendment observes that the principle of equal treatment of parties which has always formed part of the Act has been articulated with greater clarity and precision by the legislature through the Amendment Act, 2015. The Amendment Act crystalises what was previously implicit.

(vii) Thereafter, the learned senior counsel emphasised the interpretation given by the Hon'ble Supreme Court to Section 12(5) of the Act. While interpreting Section 12(5), the Hon'ble Supreme Court relied upon Sections 12(1), 12(2) and 12(3) of the Act which existed even prior to 2015 amendment. Section 12(5) completely debars a person from acting as an arbitrator, if any of the disqualifications are attached. However, if parties agree to waive the same, then the disqualification gets obliterated.

(viii) The learned senior counsel heavily relied on paragraph 58 of ***Bhadra International (India) Pvt. Ltd. (supra)*** and submitted that unilateral appointments are not consistent with the basic tenets of arbitration. He further submitted that an arbitrator is legally incapable of performing his function and is barred by law from continuing in office on account of ineligibility under Section 12(5).

(ix) Mr. Kamat, learned senior counsel referring to the decision of this Court in the case of ***Chhabriya Cloth Stores vs. Kamal***

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Synthetics[4] and the decision of the Hon'ble Supreme Court in the case of ***K. K. Modi vs. K. N. Modi and Ors.***[5] submitted that ratio of ***Dharma Prathishthanam (supra)*** has been applied even to matters under the Arbitration Act, 1940. He further submitted that the Supreme Court in paragraph 17 of the said decision has observed that jurisdiction of the tribunal is conferred by consent or by the Court or by the Statute and the agreement must contemplate that substantive rights of the parties will be determined by the tribunal which is impartial, judicious and exercises equal fairness towards both sides. He, therefore, submitted that the implicit ingredients of fairness, unbiased, equality, etc., were the bedrock of even Arbitration Act, 1940 and the Courts have struck down the awards passed contrary there to.

(x) Learned Senior Counsel, thereafter, referred to the decision in the case of ***Indian Oil Corporation Ltd. & Ors. vs. Raja Transport Pvt. Ltd.***[6]***,*** and more particularly paragraphs 13 to 15 and 27 to 39 and contended that the view of the Hon'ble Supreme Court has been that an interested person cannot be appointed as an arbitrator. He also refers to paragraph 38 where the Court observes that the parties after having agreed to an arbitration clause providing for employee arbitrator before entering into the contract, subsequently litigate to secure an independent arbitrator. He emphasised that the Hon'ble Supreme Court in the said decision has stressed upon the independence and impartiality of the arbitrator.

4 2025 SCC OnLine Bom 1950
5 (1998) 3 SCC 573
6 (2009) 8 SCC 520

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(xi) The learned senior counsel refers to the decision of the Hon'ble Supreme Court in the case of ***Board of Control for Cricket in India vs. Kochi Cricket Private Limited and Others***[7]***,*** wherein in paragraph 75 the Hon'ble Supreme Court while dealing with 2015 amendment clarifies that though Section 26 of the Amendment Act makes whole of the Act prospective in nature but they would be considering the effect of amendment only *qua* Section 36 and not with respect to other sections. He, therefore, submitted that this decision cannot be relied upon by judgment creditor to contend that the Supreme Court has laid down that the Amendment Act of 2015 is prospective in nature with regard to provisions other than section 36 of the Amendment Act as well.

(xii) The learned senior counsel, thereafter, relied upon decisions of the Delhi High Court in the case of ***Vineet Dujodwala & Ors. vs. Phonenix Arc Pvt. Ltd., & Anr.***[8] ***ABL Biotechnologies Ltd. & Ors. vs. Technology Development Board & Anr.,***[9] ***Supreme Infrastructure India Limited vs. Freyssinet Memard India Pvt. Ltd.,***[10] ***and Bharat Forge Limited vs. Tarsem Jain and Anr.,***[11] and submitted that even prior to ***Bhadra International (India) Pvt. Ltd. (supra),*** the Delhi High Court has quashed the awards challenged under Section 34 of the Act on the ground of the arbitrator being unilaterally appointed being unfair. Relying upon the said decisions he submitted that even prior to 2015 amendment the law has

7 (2018) 6 SCC 287
8 2024 SCC OnLine Del 5490
9 2024 SCC OnLine Del 10320
10 2025 SCC OnLine Del 3305
11 2025 SCC OnLine Del 4090

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always been that a unilateral appointment without the consent of one of the party at the time of the appointment though agreeing to the arbitration at the time of signing agreement has been found to be illegal and bad in law.

(xiii) Learned senior counsel, thereafter, relied upon decision of this Court in the case of ***D. S. Textile vs. IIFL Limited,***[12] ***and Ingram Micro India Pvt. Ltd.vs. Duckback Information Systems Pvt. Ltd. and Anr.,***[13] to contend that even Learned Single Judge in these decisions has expressed his displeasure/reservations on the increasing trend of NBFC and other banks to appoint arbitrator unilaterally even post 2015. The reason why he relied upon these two decisions is to submit that even the Learned Single Judge was of the *prima facie* view that such appointments are bad in law though these matters were under Section 9 and 11 of the Act, 1996.

(xiv) Learned senior counsel, thereafter, relied upon various paragraphs of the decision of the Hon'ble Supreme Court in the case of ***CORE (supra)*** which dealt with an appointment post insertion of Section 12 (5) but while dealing with the same has emphasised the basic foundational ingredients of appointment of an arbitrator namely unbiased, impartiality, equal treatment etc. He relied upon paragraphs 1, 14, 63, 64, 66 to 68, 70 to 75, 81, 88, 103, 112, 113, 124 to 137, 149, 163, 164 and 167 to 169 to emphasis that above attributes are absent in unilateral appointment and, therefore, such appointments have been held by ***Bhadra International (India) Pvt. Ltd. (supra)*** to be void even prior to 2015.

12 Arbitration Petition (L) No.12097 of 2026

13 Commercial Arbitration Petition No.202 of 2023

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(xv) Lastly, learned senior counsel submits that even ***Bhadra International (India) Pvt. Ltd. (supra)*** clearly indicates that the basic ingredients of impartiality, unbiased, equal treatment which have now been incorporated in the statute, were always enshrined in the Arbitration Act, 1940 and the Arbitration and Conciliation Act, 1996 prior to 2015 amendment and therefore, if these fundamental aspects are not complied with then applying the ratio of ***Bhadra International (India) Pvt. Ltd. (supra)*** the awards wherein there is unilateral appointment have to be quashed as void.

Submissions of Mr. Jay Sanklecha, Amicus Curiae :

13. Mr. Sanklecha, learned amicus curiae opposed submissions made by Mr. Kamat, learned senior counsel on following grounds :-

(i) Mr. Sanklecha submitted that unilateral appointment can be made in three ways viz. naming arbitrator by person/designation in arbitration agreement, giving authority to a person to appoint an arbitrator and without there being any such clause a person appointing an arbitrator without consent of other and it is the last one which is void.

(ii) Mr. Jay Sanklecha, learned amicus curiae submitted that jurisdiction for arbitration is conferred by consent of the parties. The consent could be by naming a person or by designation as an arbitrator or by agreeing to the appointment of an arbitrator by another party to the contract. In all these cases there is consent given by one party to another and therefore, it cannot be said that there is no consensus in such cases. This view has been accepted by the Hon'ble Supreme Court in a series of decisions dealing with appointment prior to 2015 Amendment.

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(iii) Mr. Sanklecha, refers to the Arbitration Act of 1996 as it existed prior to 2015 Amendment and after referring to Sections 7, 10, 11, 12 and 13 submits that the parties by agreement agree to refer the dispute between them for arbitration, the number of arbitrators is also agreed upon by the parties, the procedure for appointment of the arbitrator is also agreed upon by the parties. Section 11(6) provides that where the parties to the agreement fail to act as per the procedure agreed upon then the Court appoints an arbitrator and in such appointment by the Court independence and impartiality are given due regard. Section 12 provides for disclosure by an arbitrator in writing, which may give rise to doubts as to his independence or impartiality not only at the time of his appointment but even during the arbitral proceedings and an arbitrator may be challenged if circumstances exists that gives rise to justifiable doubts as to his independence or impartiality. The parties agree upon the procedure for challenge to appointment of an arbitrator not only at the time of his appointment but also during the course of the arbitration.

(iv) Mr. Sanklecha submits that out of three types of unilateral appointment it is only the type where there is no named arbitrator or no provision whereby one party is given authority to appoint an arbitrator, that in those cases unilateral appointment has been held to be bad in law. If there is named arbitrator or a party is authorised to appoint an arbitrator, then as per the decisions of the Hon'ble Supreme Court in the case of ***Datar Switchgears Ltd. vs. Tata Finance***[14] and ***Indian Oil Corporation Ltd. & Ors. (supra)*** it cannot be said that unilateral appointment is bad in law. He further submitted that party autonomy has been done away with after 23 October 2015 by virtue of Section 12(5) of the Act.

(v) Mr. Sanklecha submitted that consistent stand of the Hon'ble Supreme Court post 2015 Amendment is that the provisions of the Amendment Act

14 (2000) 8 SCC 151

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are prospective and, therefore, it would not be correct to say that decision in the case of ***Kochi Cricket Private Limited (supra)*** was restricted insofar as prospectivity is concerned only *qua* Section 36. Mr Sanklecha refers to the decisions in cases of ***Bhadra International (India) Pvt. Ltd. (supra)***, ***Aravali Power Company Limited vs. Era Infra Engineering Ltd.***[15]***, Rajasthan Small Industries Corporation Limited vs. Ganesh Containers Movers Syndicate***[16]***, S. P. Singla Construction Private Limited vs. State of Himachal Pradesh & Anr.***[17] and ***Union of India vs. Parmar Constructions Company***[18] ***(supra)*** and decisions of this Court and other High Courts which have consistently taken the view that 2015 Amendments and more particularly Section 12(5) are prospective.

(vi) Mr. Sanklecha, referring to the decision of this Court, prior to ***Bhadra International (India) Pvt. Ltd. (supra)*** in the case of ***Integro Finserve Pvt. Ltd. vs. Vineet Singh Construction Pvt. Ltd.***[19] submitted that even this Court after considering ***Kochi Cricket Private Limited (supra)*** and various other decisions referred to above has come to a conclusion that the Amendment Act of 2015 is prospective and, therefore, provisions of Section 12(5) cannot be invoked for substituting an arbitrator appointed prior to 2015. Mr. Sanklecha further submitted that Division Bench of this Court in the case of ***State of Maharashtra vs. Morya Infrastructure Pvt. Ltd.***[20] after considering ***Bhadra International (India) Pvt. Ltd. (supra)*** and ***Kochi Cricket Private Limited (supra)*** held that the provisions of Section 12(5) are prospective and would not be applicable to appointments made prior to 2015.

(vii) Mr. Sanklecha, referring to the decision in the case of ***Dharma Prathishthanam (supra)*** read out various paragraphs and submitted that in

15 (2017) 15 SCC 32
16 (2019) 3 SCC 282
17 (2019) 2 SCC 488
18 (2019) 15 SCC 682
19 (2024) SCC OnLine Bom 511
20 (2026) SCC OnLine Bom 1374

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paragraphs 7 and 31, the Hon'ble Supreme Court specifically notes that in the case of ***Dharma Prathishthanam (supra)*** there was no named arbitrator nor anyone of the party was given authority to appoint an arbitrator. He submitted that Hon'ble Supreme Court recognises that in these two cases unilateral appointment would not be bad in law and it is only in a case where the arbitration clause provides for appointment by mutual consent and one of the party proceeds to appoint an arbitrator without the consent of the other that such an appointment is held to be illegal. He submitted that the decision of the Delhi High Court in the case of ***Bharat Forge Ltd. (supra)*** is similar to the case of ***Dharma Prathishthanam (supra)*** since the arbitration clause in the case of ***Bharat Forge Ltd. (supra)*** was not reproduced in judgment but on a reading of various paragraphs one can infer that it was a case similar to ***Dharma Prathishthanam (supra)***.

(viii) Mr. Sanklecha referred to decision in the case of ***Indian Oil Corporation Ltd. & Ors. (supra)*** and its various paragraphs and submitted that if the arbitration clause names a person by designation or name or an authority is given to one of the party to appoint an arbitrator, then such appointments prior to 2015 have been held to be valid. He submitted that this decision of ***Indian Oil Corporation Ltd. & Ors. (supra)*** and other decisions rendered with regard to such type of appointment of an arbitrator have been judicially recognised by the Hon'ble Supreme Court in the case of ***CORE (supra)***.

(ix) Mr. Sanklecha further relied upon the decision in the case of ***Avneet Soni vs. Kavita Agarwal***[21] and ***Punjab State Civil Supplies Corporation vs. Ganesh Rice Mills***[22] and submitted that these decisions supports the submissions made that appointments made prior to 2015 in accordance with an arbitration agreement which contains a named arbitrator or

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authorises one of the party to appoint an arbitrator cannot be held to be bad in law. Both these decisions have considered the amendment and held it to be prospective.

(x) Mr. Sanklecha sought to distinguish the decision in the case of ***ABL Biotechnologies Ltd. & Ors. (supra)*** and submitted that was the case of unilateral appointment similar to the facts of ***Dharma Prathishthanam (supra)*** and was with regard to an appointment post 2015 which can be culled out from the decision in the case of SK Builders which is referred to in paragraph 3 of the said decision.

(xi) Mr. Sanklecha sought to distinguish the decision of the Delhi High Court in the case of ***Vineet Dujodwala & Ors. (supra)*** and submitted that on a perusal of the said decision it is not clear as to what was the arbitration agreement but on a perusal of the decision it appears that it too was a case very similar to the case of ***Dharma Prathishthanam (supra)*** and further whether Section 12(5) is retrospective or prospective was not the issue before the Delhi High Court.

(xii) Mr. Sanklecha, thereafter, relied upon the decision of the Calcutta High Court in the case of ***West Bengal Housing Board vs. Abhishek Construction***[23] and submitted that this very issue had come up for consideration before the Calcutta High Court and the High Court after considering the amendment and referring to the decision in the case of ***Kochi Cricket Private Limited (supra),*** observed that the amendments made in 2015 are substantive amendments which cannot be made applicable retrospectively.

(xiii) Mr. Sanklecha, thereafter, referred to the decision in the case of ***Bhadra International (India) Pvt. Ltd. (supra)*** and submitted that the

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reference to ***Dharma Prathishthanam (supra)*** was made only in a background for deciding the issue and the issue which was raised for consideration before the Hon'ble Supreme Court was whether an arbitrator appointed contrary to provisions of Section 12(5) can be said to have become ineligible and whether the parties had waived the applicability of Section 12(5) and whether such an argument can be raised for the first time in an application under Section 34 of the Act. Mr. Sanklecha submitted that ***Bhadra International (India) Pvt. Ltd. (supra)*** was a case of *de jure* ineligibility which goes to the root of the matter and was dealing with a case post 2015 amendment and, therefore, one cannot pick up certain observations of the decision *dehors* the core issue and contend by relying upon the said decision that unilateral appointments in all cases prior to 2015 are illegal and bad in law.

(xiv) He submitted that prior to 2015, there were enough safeguards under the Act, which provided for challenge to the appointment of an arbitrator in accordance with law even if the parties have agreed to a named arbitrator or parties have agreed to give authority to one party to appoint the arbitrator. He, therefore, submitted that prior to 2015 it was not a case of ***de jure*** **ineligibility** of the arbitrator to perform his function in all cases. He submitted that the provision of Section 14(1)(a) was substituted with effect from 23 October 2015, whereby the arbitrator becomes *de jure* or de facto unable to perform his function.

(xv) Mr. Sanklecha submitted relying on paragraph 113 of ***Bhadra International (India) Pvt. Ltd. (supra)*** that insofar as challenge to the ineligibility of the arbitrator is concerned, it can be raised at any stage and even in execution proceedings, if the arbitrator who passed the award lacked jurisdiction. He submitted that pre 2015 unilateral appointment in all the cases did not lead to an award being passed without jurisdiction and

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it was only in third category where there is no named arbitrator or an authority is not given to one of the party to appoint an arbitrator, that unilateral appointment were held to be illegal. He further submitted that prior to 2015 even if the parties have agreed to a named arbitrator or has given authority to one of the party to appoint an arbitrator, but at the time of the appointment had any reservation, it could always be challenged before the arbitrator and also in a petition under Section 34 of the 1996 Act.

(xvi) Mr. Sanklecha, thereafter, sought to distinguish the decisions relied upon by the learned senior counsel. He submitted that insofar as the decision in the case of ***Chhabriya Cloth Stores (supra)*** is concerned, the arbitration clause is not culled out in the judgment but on a reading of the judgment as a whole, emphasis is made by the learned Judge that there was no named arbitrator. He, therefore, submitted that this is a case very similar to the case of ***Dharma Prathishthanam (supra)***. He further sought to distinguish the decision in the case of ***K. K. Modi (supra)*** where the issue was whether the agreement between the family members could at all be considered as an arbitration agreement or a reference of an issue to an expert for decision. He submitted that reliance placed on paragraph 17 of that judgment cannot be of any assistance in answering the question raised today. Similarly, he submitted that decision in the case of ***Bharat Forge Ltd. (supra)*** was similar to that of ***Dharma Prathishthanam (supra)*** and further the appointment was objected to at the first available instance and it is on these facts that the appointment of arbitrator was held to be bad in law.

(xvii) Lastly, Mr. Sanklecha referring to the decision of this Court in the case of ***Ajazul Haque Khan vs. ICICI Bank Limited*** [24] submitted that it was a decision post 2015 and same would not be applicable to the facts of the present case.

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(xviii) Mr. Sanklecha concluded by submitting that the unilateral appointments made prior to 23 October 2015 except in cases similar to ***Dharma Prathishthanam (supra)*** cannot be without jurisdiction and that the proceedings arising therefrom cannot be held to be *void ab initio*. He, therefore, submitted that in the light of this submission answer to question (ii) would not arise.

14. Submissions of Mr. Devesh Khara, learned counsel for the Judgment Creditor :-

(i) Learned counsel for the judgment creditor relied upon the decision in the case of ***Voestalpine Schienen GmbH vs. Delhi Metro Rail Corporation Limited***[25] and more particularly paragraph 14, wherein four pillars of the commercial arbitration are described namely :-

(a) The first pillar - general principles being speedy, inexpensive and fair trial by an impartial tribunal, party autonomy and minimum court intervention.

(b) The second pillar - general duty of the tribunal which is enshrined in Section 18 of the Arbitration and Conciliation Act, 1996 and which is applicable during the conduct of the arbitral proceedings and not at the time of the appointment.

(c) The third pillar - general duty of the parties which means participating in the arbitration proceedings and

(d) The fourth pillar - mandatory and semi-mandatory provisions.

It is his submission that if a party does not carry out the duty enshrined in the third pillar, then it cannot be absolved of its liability under an award.

25 (2017) 4 SCC 665

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(ii) Mr. Khara, learned counsel submits that if a party does not challenge the appointment of the arbitrator at any stage nor the award passed by such an arbitrator though the Act provides remedy for such a challenge under Sections 13, 34, 37 etc., then it would amount to waiver under Section 4 of the Act and the judgment debtor should not be permitted to challenge the appointment at the stage of execution.

(iii) Mr. Khara, learned counsel submits that these are commercial contracts and unless it falls foul of commercial bargain, same should be interpreted in terms of the agreement between the parties who have signed the document with wide eyes open.

(iv) Mr. Khara, learned counsel relied upon the decision in the case of ***Central Inland Water Transport Corporation Limited & Anr. vs. Brojo Nath Ganguly***[26] and more particularly paragraph 89 of that judgment and submitted this is not a case of disproportionate and unequal bargaining power because the agreement is commercial in nature and the transaction is of money lending. He submitted that the plea is now being made by the judgment debtor after almost more than a decade of passing of the award. He submits that the borrower in a money lending transaction, after the money is received is in a stronger position than a lender who has to wait for decades to recover the amount. He submits that an arbitration which is adopted for speedy disposal of the dispute is being misused by the judgment debtor for avoiding payment.

(v) Mr. Khara, learned counsel relied upon the decision in the case of ***Narayan Prasad Lohia vs. Nikunj Kumar Lohia & Ors.***[27] in support of his submission that the Act provides sufficient remedy for challenge to the

26 (1986) 3 SCC 156
27 (2002) 3 SCC 572.

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appointment of an arbitrator and its jurisdiction and if such an objection is not raised, then it must be deemed to have been waived.

(vi) Mr. Khara, learned counsel referred to the decision in the case of ***Bhadra International (India) Pvt. Ltd. (supra)*** and more particularly the arbitration clause and submitted that if ***Bhadra International (India) Pvt. Ltd. (supra)*** would have been a case pre-2015, then relying upon various decisions of the Hon'ble Supreme Court, the appointment as per the agreement would have been upheld. He submitted that presumption of independence fails if one reads the arbitration clause in the case of ***Bhadra International (India) Pvt. Ltd. (supra)*** but still the appointment would have been upheld relying upon the decision in the case of ***Datar Switchgears Ltd. (supra).***

(vii) Mr. Khara, learned counsel relied upon the decision of the Delhi High Court in the case of ***Kamal Kumar vs. Municipal Corporation of Delhi***[28] and submitted that if a challenge under section 12(5) cannot be raised in Section 37 appeal, then certainly such an objection cannot be raised before the Executing Court. He submits that the Special Leave Petition against the said decision has been dismissed by the Supreme Court.

(viii) He, concluded by praying that the objections raised by the judgment debtor should be rejected by holding that the decision of ***Bhadra International (India) Pvt. Ltd. (supra)*** would not be applicable to appointments made prior to 2015.

ANALYSIS & CONCLUSIONS :-

15. The submissions made by Mr. Kamat, learned senior counsel for the judgment debtor that the decision in the case of ***Bhadra International***

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(India) Pvt. Ltd. (supra) would be applicable in all cases of unilateral appointments even with regard to arbitration proceedings initiated by issuing a notice prior to 23 October 2015 cannot be accepted for more than one reason.

16. The issue which requires consideration is whether unilateral appointment of an arbitrator prior to 23 October 2015 vitiates all proceedings arising therefrom.

17. It is important to understand various facets of unilateral appointment. Unless this aspect is clarified, there is bound to be confusion regarding the applicability of various decisions.

18. Unilateral appointment can be of three types :-

a) Appointment by a party that is evidently not accepted to be impartial/independent, for example an office-bearer of one of the parties to the arbitration agreement is appointed as an arbitrator.

b) The second case would be where one of the parties to the arbitration agreement as per the said agreement is entitled to appoint an arbitrator and such an arbitrator is not connected with the party to the arbitration.

c) The third case would be a case where there is no contractual clause in the agreement naming a particular arbitrator or conferring on one of the parties, the right to unilateral appointment of an arbitrator, but the appointment is made by one of the party in the absence of consent of the other party.

19. Section 7 defines arbitration agreement to mean an agreement by the parties to submit disputes to arbitration. Section 11 provides for appointment of arbitrators according to procedure agreed by the parties and failing which by the Court. Section 12 provides for grounds for challenging appointment of an arbitrator and procedure to be agreed upon

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by the parties. Section 18 provides for equality and each party to be given full opportunity.

20. Prior to 23 October 2015, inspite of above Sections 7, 11(2), 11(6), 12(1), 12(2), 12(3) and 18 of the Act, 1996 being in force, the Hon'ble Supreme Court time and again upheld unilateral appointment of an arbitrator as per the arbitration agreement between the parties, wherein under the said agreement, one of the party was entitled to appoint an arbitrator either by person-designate or named person or where the name of the person was specified who would in turn appoint the arbitrators. Some of these decisions under the 1996 Act prior to 23 October 2015 are as under :-

(i) Datar Switchgears Ltd. vs. Tata Finance Ltd & Anr. (supra).
(ii) ACE Pipeline Contracts (P) Ltd. vs. Bharat Petroleum Corporation Ltd. (supra).

21. The Hon'ble Supreme Court in the case of ***Indian Oil Corporation Limited & Ors. (supra)*** exhaustively dealt with the above issue by referring to various decisions including above decisions and also by considering provisions of Sections 11, 12 and 18 of the Act, 1996 and upheld unilateral appointments made as per agreement but only exception carved out by the said decision was in the case of a person named as an arbitrator who is an employee of a company or body or individual other than the State and its instrumentalities. The relevant discussion on this issue can be found from paragraphs 13 to 36 of the said decision which reads as under :-

> *13. Arbitration is a binding voluntary alternative dispute resolution process by a private forum chosen by the parties. It is quite common for Governments, statutory corporations and public sector undertakings while entering into contracts, to provide for settlement of disputes by arbitration, and further provide that the arbitrator will be one of its senior officers. If a party, with open eyes and full knowledge and comprehension of the said provision enters into a contract with a Government/statutory corporation/public sector undertaking containing an arbitration agreement providing that one of its Secretaries/Directors shall be the arbitrator, he cannot subsequently turn around and contend*

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that he is agreeable for settlement of the disputes by a arbitration, but not by the named arbitrator who is an employee of the other party.

14. No party can say he will be bound by only one part of the agreement and not the other part, unless such other part is impossible of performance or is void being contrary to the provisions of the Act, and such part is severable from the remaining part of the agreement. The arbitration clause is a package which may provide for what disputes are arbitrable, at what stage the disputes are arbitrable, who should be the arbitrator, what should be the venue, what law would govern the parties, etc. A party to the contract cannot claim the benefit of arbitration under the arbitration clause, but ignore the appointment procedure relating to the named arbitrator contained in the arbitration clause.

15. It is now well settled by a series of decisions of this Court that arbitration agreements in government contracts providing that an employee of the Department (usually a high official unconnected with the work or the contract) will be the arbitrator, are neither void nor unenforceable. We may refer to a few decisions on this aspect.

16. In Executive Engineer v. Gangaram Chhapolia this Court was considering the validity of the appointment of the arbitrator where the arbitration required that the disputes shall be referred to the sole arbitration of a Superintending Engineer of the Public Works Department unconnected with the work at any stage nominated by the Chief Engineer concerned.

17. This Court in Gangaram case held: (SCC pp. 631-32, para 9) "

> *9. The use of the expression 'Superintending Engineer, State Public Works Department in Clause 23 qualified by the restrictive words 'unconnected with the work' clearly manifests an intention of the parties that all questions and disputes arising out of a works contract shall be referred to the sole arbitration of a Superintending Engineer of the department concerned. From the very nature of things, a dispute arising out of a works contract relating to the Department of Irrigation has to be referred to a Superintending Engineer, Irrigation as he is an expert on the subject and it cannot obviously be referred to a Superintending Engineer, Building & Roads. The only limitation on the power of the Chief Engineer under Clause 23 was that he had to appoint a 'Superintending Engineer unconnected with the work' i.e. unconnected with the works contract in relation to which the dispute has arisen. The learned Subordinate Judge was obviously wrong in assuming that since D. Sahu, Superintending Engineer, Irrigation was subordinate to the Chief Engineer, he was not competent to act as an arbitrator or since he was a Superintending Engineer, Irrigation, he could not adjudicate upon the dispute between the parties. The impugned order passed by the learned Subordinate Judge is accordingly set aside."*

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18. In Eckersley v. Mersey Docks and Harbour Board it was held: (QB p. 667)

> *"The rule which applies to a Judge or other person holding judicial office-namely, that he ought not to hear cases in which he might be suspected of a bias in favour of one of the parties does not apply to an arbitrator, named in a contract, to whom both the parties have agreed to refer disputes which may arise between them under it. In order to justify the court in saying that such an arbitrator is disqualified from acting, circumstances must be shewn to exist which establish, at least, a probability that he will in fact be biassed in favour of one of the parties in giving his decision Where, however, in a contract for the execution of works, the arbitrator selected by the parties is the servant of one of them, he is not disqualified by the mere fact that under the terms of the submission he may have to decide disputes involving the question whether he has himself acted with due skill and competence in advising his employers in respect of the carrying out of the contract."*

19. In Secy. to Govt., Transport Deptt. v. Munuswamy Mudaliar the contract between the respondent and the State Government contained an arbitration clause providing that the Superintending Engineer will be the arbitrator. Disputes arising in respect of cancellation of the contract by the Department were referred to the said arbitrator. An application under Section 5 of the Arbitration Act. 1940 was filed by the contractor for removal of the arbitrator on the ground of apprehended bias on the part of the arbitrator as he was an employee of the State Government and was subordinate of the Chief Engineer who took the decision to cancel the contract.

20. This Court negatived the said contention and held in Munuswamy case: (SCC pp. 654-55, paras 11 & 13)

> *"11. ... When the parties entered into the contract, the parties knew the terms of the contract including arbitration clause. The parties knew the scheme and the fact that the Chief Engineer is superior and the Superintending Engineer is subordinate to the Chief Engineer of the particular circle. In spite of that the parties agreed and entered into arbitration Unless there is allegation against the named arbitrator either against his honesty or capacity or mala fides or interest in the subject-matter or reasonable apprehension of the bias, a named and agreed arbitrator cannot and should not be removed in exercise of a discretion vested in the Court under Section 5 of the Act.*
>
> *13. This Court in International Airports Authority of India v. K.D. Bali held that there must be reasonable evidence to satisfy that there was a real likelihood of bias. Vague suspicions of whimsical, capricious and unreasonable people should not be made the standard to regulate normal human conduct. In this country in numerous contracts with the Government, clauses requiring the Superintending Engineer or some official of the Government to be the arbitrator are there. It cannot be said that the Superintending Engineer, as such, cannot be entrusted with*

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the work of arbitration and that an apprehension, simpliciter in the mind of the contractor without any tangible ground, would be a justification for removal."

21. In S. Rajan v. State of Keralas this Court held: (SCC pp. 614-15, b para 12)

12. .....Clause (3) of the agreement fulfilling the duties set forth in the arbitration clause of the Standard Preliminary Specification shall be the Superintending Engineer, Buildings and Roads Circle, Trivandrum'. Thus, this is a case where the agreement itself specifies and names the arbitrator. In such a situation, c it was obligatory upon the learned Subordinate Judge, in case he was satisfied that the dispute ought to be referred to the arbitrator, to refer the dispute to the arbitrator specified in the agreement. It was not open 10 him to ignore the said clause of the agreement and to appoint another person as an arbitrator. (emphasis supplied) Only if the arbitrator specified and named in the agreement refuses or fails to act does the court get the jurisdiction to appoint another person or persons as the arbitrator. This is the clear purport of sub-section (4). It says that the reference shall (emphasis in original) be to the arbitrator appointed by the parties. Such agreed appointment may be contained in the agreement itself or may be expressed separately. To repeat, only in cases where the agreement does not specify the arbitrator and the parties cannot also agree upon an arbitrator, does the court get the jurisdiction to appoint an arbitrator"

22. In Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd. this Court held: (SCC p. 60, para 17)

"17. Shri Desai submits that Respondent 3 may not be required to arbitrate inasmüch as he being an appointee of the Chairman and Managing Director of the appellant himself, the respondents' case may not be fairly examined. He prays that any retired High Court Judge may be appointed as an arbitrator by us. We have not felt inclined to accept this submission, because arbitration clause states categorically that the difference/dispute shall be referred 'to an arbitrator appointed by the Chairman and Managing Director of IPDL' (Indian Drugs and Pharmaceuticals Limited) who is the appellant. This provision in the arbitration clause cannot be given a go-by merely at the askance of the respondent unless he challenged its binding nature in an appropriate proceeding which he did not do."

23. In Union of India v. M.P. Gupta this Court was considering an arbitration agreement which provided for the appointment of two gazetted railway officers as arbitrators. But a learned Single Judge of the High Court while allowing an application under Section 20 of the Arbitration Act, 1940, appointed a retired Judge as the sole arbitrator and a Division Bench affirmed the same. Reversing the said decision, this Court held that having regard to the express provision in the arbitration agreement that two gazetted railways officers shall be the arbitrators, a retired Judge could not be appointed as the sole arbitrator.

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24. In Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Lid. this Court considered a somewhat similar clause of another petroleum corporation which also provided that the arbitration will be by its Director (Marketing) or some other officer nominated by the Director (Marketing). The contractor expressed an apprehension about the independence and impartiality of the named arbitrator and prayed for appointment of a retired Judge as the arbitrator in his application under Section 11(6) of the Act.

25. This Court in Ace Pipeline cases held: (SCC p. 316, para 21)

> *"21. In the present case, in fact the appellant's demand was to get some retired Judge of the Supreme Court to be appointed as arbitrator on the ground that if any person nominated in the arbitration clause is appointed, then it may suffer from bias or the arbitrator may not be impartial or independent in taking decision. Once a party has entered into an agreement with eyes wide open it cannot wriggle out of the situation [by contending] that if any person of the respondent BPCL is appointed as arbitrator he will not be impartial or objective. However, if the appellant feels that the arbitrator has not acted independently or impartially, or he has suffered from any bias, it will always be open to the party to make an application under Section 34 of the Act to set aside the award on the ground that the arbitrator acted with bias or malice in law or fact."*

26. The learned counsel for the respondent attempted to distinguish the said decisions. He submitted that except the last two decisions, all others were rendered with reference to the provisions of the Arbitration Act, 1940, whose provisions were different from the provisions of the Arbitration and Conciliation Act, 1996. It was also submitted that the last two decisions merely followed the legal position enunciated with reference to the old Act, without considering the provisions under the new Act.

27. The learned counsel contended that the provisions of the Arbitration and Conciliation Act, 1996, in regard to the appointment of arbitrators, are materially different from the provisions of the old Act. It was submitted that several provisions of the new Act lay stress upon the independence and impartiality of the arbitrator. Reference was invited to sub-section (8) of Section 11, sub-sections (1) and (3) of Section 12 and Section 18 of the Act.

28. It is contended by the respondent that in view of the emphasis on the independence and impartiality of an arbitrator in the new Act and having regard to the basic principle of natural justice that no man should be judge in his own cause, any arbitration agreement to the extent it nominates an officer of one of the parties as the arbitrator, would be invalid and unenforceable.

29. While the provisions relating to independence and impartiality are more explicit in the new Act, it does not mean that the old Act (the Arbitration Act, 1940) enabled persons with bias to act as arbitrators.

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What was implicit under the old Act is made explicit in the new Act in regard to impartiality, independence and freedom from bias. The decisions under the old Act on this issue are therefore not irrelevant when considering the provisions of the new Act. At all events, M.P. Gupta and Ace Pipelines are cases under the new Act. All the decisions proceed on the basis that when senior officers of Government/statutory corporations/public undertakings are appointed as arbitrators, they will function independently and impartially, even though they are employees of such institutions/organisations.

30. We find no bar under the new Act, for an arbitration agreement providing for an employee of a Government/statutory corporation/public sector undertaking (which is a party to the contract), acting as an arbitrator. Section 11(8) of the Act requires the Chief Justice or his designate, in appointing an arbitrator, to have due regard to:

> *"11. (8)(a) any qualifications required of the arbitrator by the agreement of the parties; and*
> *(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator."*

31. Section 12(1) requires an arbitrator, when approached in connection with his possible appointment, to disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Section 12(3) enables the arbitrator being challenged if (i) the circumstances give rise to justifiable doubts as to his independence or impartiality, or
(ii) he does not possess the qualifications agreed to by the parties.

32. Section 18 requires the arbitrator to treat the parties with equality (that is to say without bias) and give each party full opportunity to present his case. Nothing in Sections 11, 12, 18 or other provisions of the Act suggests that any provision in an arbitration agreement, naming the arbitrator will be invalid if such named arbitrator is an employee of one of the parties to the arbitration agreement.

33. Sub-section (2) of Section 11 provides that parties are free to agree upon a procedure for appointment of arbitrator(s). Sub-section (6) provides that where a party fails to act, as required under the procedure prescribed, the Chief Justice or his designate can take necessary measures. Sub-section (8) gives the discretion to the Chief Justice/his designate to choose an arbitrator suited to meet the requirements of a particular case. The said power is in no way intended to nullify a specific term of arbitration agreement naming a particular person as arbitrator. The power under sub-section (8) is intended to be used keeping in view the terms of the arbitration agreement.

34. The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other

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Department) to the officer whose decision is the subject-matter of the dispute.

35. Where however the named arbitrator though a senior officer of the Government/statutory body/government company, had nothing to do with the execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer(s) (usually Heads of Department or equivalent) of a Government/statutory corporation/public sector undertaking, not associated with the contract, are considered to be independent and impartial and are not barred from functioning as arbitrators merely because their employer is a party to the contract.

36. The position may be different where the person named as the arbitrator is an employee of a company or body or individual other than the State and its instrumentalities. For example, if the Director of a private company (which is a party to the arbitration agreement), is named as the arbitrator, there may be a valid and reasonable apprehension of bias in view of his position and interest, and he may be unsuitable to act as an arbitrator in an arbitration involving his company. If any circumstance exists to create a reasonable apprehension about the impartiality or independence of the agreed or named arbitrator, then the court has the discretion not to appoint such a person."

22. It is important to note that none of the decisions referred to above, have been expressly overruled by the decision in the case of ***Bhadra International (India) Pvt. Ltd. (supra)***. All the above decisions and the decision in the case of ***Bhadra International (India) Pvt. Ltd. (supra)*** are by Benches of same strength. Therefore, accepting the submissions of judgment debtor would amount to coming to a conclusion that these decisions have been overruled by ***Bhadra International (India) Pvt. Ltd. (supra)*** which cannot be accepted by this Court.

23. The above decisions viz. ***Datar Switchgears Ltd. (supra), ACE Pipeline Contracts (P) Ltd. (supra) and Indian Oil Corporation Limited & Ors. (supra)*** were analysed by the Constitution Bench of five Judges of Hon'ble Supreme Court in the case of ***CORE (supra)*** and the Hon'ble Supreme Court observed that prior to 2015 amendment, the Supreme Court has upheld unilateral appointment of an arbitrator which gave unfettered discretion to appoint a sole arbitrator to one of the party to the

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agreement. ***CORE (supra)*** was concerned with post 2015 amendment and the Constitution Bench has considered all the aspects of the ingredients of arbitration proceedings viz., party autonomy, independence, impartiality, equality, public private arbitration, *quasi judicial function*, *nemo judex rule*, natural justice, bias, unilateral appointment, Indian Contract Act, etc. This decision also analysed all the provisions of the Act existing prior to 2015 amendment and post 2015 amendment viz., Sections 11, 12, 18 etc. However. after analysing the whole law on the subject including automatic disqualification, likelihood of bias etc., the Hon'ble Supreme Court approved the decision in the case of ***TRF Ltd vs. Energo Engineering Projects Ltd.***[29] and ***Perkins Eastman DPC vs. HSCC (India) Ltd.***[30] which were decisions dealing with post 2015 amendment but disagreed with the decision in the case of ***Voestalpine Schienen GmbH (supra)*** which too was post 2015 amendment dealing with appointment of three member Arbitral tribunal from panel and in paragraph 169, the Hon'ble Supreme Court made its decision in the case of ***CORE (supra)*** applicable prospectively to appointment of arbitrator from panel after the date of the judgment and that too only to three member tribunal. In my view, the submissions made by the learned senior counsel Mr. Kamat on neutrality, independence, bias, equality, etc. have all been considered by this decision and also the decision rendered prior to 2015 on unilateral appointment were also considered but the Constitution Bench of the Hon'ble Supreme Court did not overrule the decisions rendered prior to 2015, rather it expressly disagreed with decision rendered qua panel appointment post 2015 amendment. This clearly indicates that the Constitutional Bench did not disapprove or impliedly overrule the decisions rendered on unilateral appointment prior to 2015 though all the aspects of the qualification of an arbitrator were examined in great detail. Therefore, to say that earlier decisions of the

29 (2017) 8 SCC 377
30 (2020) 20 SCC 760

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Hon'ble Supreme Court dealing with unilateral appointment are no longer good law even in case of invocation prior to 23 October 2015 and awards passed pursuant thereto are void, cannot be accepted.

24. The decision in the case of ***Bhadra International (India) Pvt. Ltd. (supra)*** was concerned with the invocation of arbitration post 2015 amendment. The issue before the Hon'ble Supreme Court was not of pre-2015 amendment. The decision has to be read holistically and not by reading few observations *dehors* the context. The Court did refer to Section 18 dealing with equal treatment of parties and did emphasised upon ensuring impartiality and preserving fairness of the arbitral process but that would not mean that prior to 2015 this decision can be made applicable. When in paragraph 37 of ***Bhadra International (India) Pvt. Ltd. (supra)***, the Hon'ble Supreme Court says what was implicit prior to 2015 has been made explicit by the Amendment Act of 2015, it does not flow therefrom that the unilateral appointments made prior to 2015 are void. This reading would be contrary to the decision of the 5 Judge Constitution Bench decision in the case of ***CORE (supra)*** and also would amount to saying something which the Hon'ble Supreme Court has not said.

25. Section 12(5) of the Act, 1996 expressly provides for ineligibility of a person who is appointed as an arbitrator if he falls under any of the categories specified in the Seventh Schedule of the Act. Post 23 October 2015, there is an express provision making a person ineligible to be appointed as an arbitrator and, therefore, any proceedings pursuant to such an appointment are bad in law. Prior to 23 October 2015, there was no such express provision making a person ineligible. The basic tenets of the arbitral proceedings enshrined in Sections 7, 11, 12 and 18 of the Act, 1996 which existed even prior to 23 October 2015 may indicate that categories specified in Seventh Schedule of the Act were implicit or enshrined in these provisions but merely because they were implicit providing for impartiality,

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unbiased, equal treatment etc., that would not lead to appointment of an arbitrator being illegal and consequently, the proceedings arising therefrom being illegal. If a party had any apprehension that any provision of the Act or basic tenets of arbitral proceedings were not followed or were being violated then such a party always had a remedy to challenge the same in accordance with law and if such a challenge is upheld, then certainly the proceedings would be bad in law but if such a challenge is unsuccessful then the party is estopped from making such a grievance during execution proceedings. Accepting submissions of the judgment debtor would amount to attributing disqualification to arbitrator appointed prior to 23 October 2015 and such an attribution cannot be interpreted retrospectively.

26. A party who does not challenge the eligibility of an arbitrator appointed prior to 23 October 2015 in any proceedings then he is deemed to have waived such a right under Section 4 of the Act, 1996. Such a party who has not challenged the appointment of an arbitrator and invites an award against him and who does not challenge the award on that ground or any other ground cannot obstruct the execution proceedings to deprive successful party of the fruits of the decree. Any other interpretation would be giving premium to a person who has lost the challenge or who has not challenged the adjudication proceedings but in recovery proceedings seeks to demolish the decree. In my view, such an approach and interpretation would run contrary to the object of resolving the dispute either through Civil Court or through any other alternate dispute resolution mechanism and such an attempt should not be encouraged by interpretative process, which too is not correct.

27. Mr. Kamat, learned senior counsel has also placed reliance upon the Law Commission Report No.246 before enactment of the 2015 amendment. The learned senior counsel has relied upon paragraphs 53 to 60 of the said

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Law Commission Report and also note to amendment of Section 12 and contended that the Law Commission also accepts that the intention of arbitration process universally and for all times was to be in accordance with the principles of natural justice, neutrality of arbitrator etc. The Law Commission also recognises that the decisions of the Hon'ble Supreme Court on unilateral appointment has tilted against procedural fairness and, therefore, there was a need to bring in Fifth Schedule and Seventh Schedule and Section 12(5) by way of amendment.

28. In my view, the report of Law Commission only constitutes the reasoning and the basis for bringing an amendment to the Act, 1996. When the Law Commission realised that the decisions of the Hon'ble Supreme Court has not been in accordance with the principles of natural justice, neutrality, equality etc., a need was felt to statutorily bring an amendment which would ensure fair and equal process to be followed in the conduct of arbitration. On the basis of the report of the Law Commission, it cannot be submitted that decision of ***Bhadra International (India) Pvt. Ltd. (supra)*** should be made applicable to appointment of an arbitrator prior to 23 October 2015. If the intention of the legislature was to disqualify a person on the basis of Fifth Schedule or Seventh Schedule read with Section 12(5) on an implicit basis, then nothing stopped them from making the law retrospectively applicable from the date when 1996 Act came into force or from providing that an arbitrator would be ineligible even if appointed prior to 23 October 2015. The fact that Section 12(5) has been inserted by Act 3 of 2016 with retrospective effect from 23 October 2015 and not prior thereto clearly demonstrates that the legislature did not intend to disqualify a person from being an arbitrator whose appointment was made even prior to 23 October 2015 on the basis of the Schedule which never existed though impliedly existed in various provisions of the Act viz., Sections 10, 11, 12, 18 etc. There can be no doubt that what has been made explicit by

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virtue of Fifth Schedule and Seventh Schedule were implicit prior to 23 October 2015, but by virtue of these implicit provisions, the appointments are not treated statutorily as illegal unless a party aggrieved successfully challenges the same in accordance with the provisions of the Act based on provisions existing prior to 23 October 2015.

29. In ***Aravali Power Company Limited (supra),*** the issue arose before the Hon'ble Supreme Court on the objections raised to the appointment of an arbitrator relying on the provisions post 23 October 2015. In that case, the arbitrator was appointed prior to 23 October 2015. The Hon'ble Supreme Court after considering the provisions of Sections 11, 12, 13 and 14 of the Act, 1996 and the decisions rendered with respect to unilateral appointment and more particularly the decision in the case of ***Indian Oil Corporation Ltd. & Ors. (supra)*** upheld the arbitration agreement providing for appointment of an arbitrator by the Chairman or Project In-charge by observing that the amendment is not applicable. The Hon'ble Supreme Court also considered the aspects of neutrality, bias etc. in the said decision.

30. In my view, above decision upholds appointment of an arbitrator as per the arbitration agreement between the parties with regard to the unilateral appointment if the appointment is prior to 23 October 2015. The Hon'ble Supreme Court followed the law laid down in ***Northern Railway Administration, Ministry of Railway, New Delhi vs. Patel Engineering Company Ltd.***[31] and all other cases and observed that the terms of the agreement ought to be adhered to and/or given effect to as closely as possible. The Hon'ble Supreme Court further held that in cases governed by the period prior to 23 October 2015, the fact that the named arbitrator is an employee of one of the parties is not *ipso facto* a ground to raise a presumption of bias or partiality or lack of independence on his part. The

31 (2008) 10 SCC 240

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Hon'ble Supreme Court further observed that unless a cause of action for invoking jurisdiction under Clauses (a), (b) or (c) of Section 11(6) of the Act, 1996 arises, there is no question of exercising power under Section 11(6) and an endeavour shall be made to give effect to the appointment procedure prescribed in the arbitration clauses. The Hon'ble Supreme Court further observed that in cases post 23 October 2015, if the arbitration clause is found to be foul with the amended provision, appointment of an arbitrator would be illegal even if it is in conformity with the agreement. In my view, this decision again reiterates that if the appointment is prior to 23 October 2015, disqualification which is explicit in Section 12(5) could not be made applicable impliedly to the appointment made prior to 23 October 2015 for vitiating the arbitration proceedings arising therefrom. This decision squarely answers the submissions made by the learned senior counsel for judgment debtor.

31. Similar view has been reiterated by the Hon'ble Supreme Court in the case of ***Rajasthan Small Industries Corporation Limited (supra)*** and more particularly in paragraphs 23 to 27 and the Hon'ble Supreme Court after referring to the decision of ***Aravali Power Company Limited (supra) and Kochi Cricket Private Limited (supra)*** held that by virtue of Section 12 as amended by Amendment Act, the Managing Director does not become ineligible to act if the appointment was prior to 23 October 2015. This view was once again reiterated by another decision of the Hon'ble Supreme Court in the case of ***S. P. Singla Construction Private Limited (supra)***. This issue again came up for consideration before the Hon'ble Supreme Court in the case of ***Parmar Constructions Company (supra)***, and the Hon'ble Supreme Court after considering the decisions in the case of ***Aravali Power Company Limited (Supra) and S. P. Singla Construction Private Limited (supra)*** reiterated and upheld unilateral appointment of an arbitrator prior to 2015 and after considering the provisions of Section 12(5) and Section

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21 of the Act, 1996.

32. The submission of learned senior counsel for judgment debtor is that as per the decision of the Hon'ble Supreme Court in the case of ***Bhadra International (India) Pvt. Ltd. (supra),*** what is explicit now post 23 October 2015 was implicit pre 23 October 2015 and is also based on provisions of Sections 11, 12, 18 etc., which were on the statute book prior to 23 October 2015. In my view, post 23 October 2015 by express provision contained in Section 12(5), a person is disqualified from acting as an arbitrator, if any of the disqualifications referred to in the Seventh Schedule is attracted. If these were implicit in various provisions referred to by the learned senior counsel, viz., Sections 7, 11, 12, 18 etc., then the Act as it existed prior to 23 October 2015 also gave a remedy to a person who was aggrieved by the appointment of an arbitrator with such an implicit disqualification. Section 12(3) provided that an arbitrator may be challenged, if circumstances exist that give rise to justifiable doubts as to his independence or impartiality or he does not possess the qualifications agreed to by the parties. It is settled that disqualification cannot be ascribed impliedly and retrospectively which would be the case if submission made by the judgment debtor is to be accepted. Prior to 2015 Amendment, there was no express provision disqualifying a person to be an arbitrator on such implied criteria.

33. Section 13 of the Act provides for agreement between the parties on a procedure for challenging constitution of the tribunal. Section 16 provides for Arbitral tribunal to rule on its own jurisdiction, which would include the implicit disqualification as contended by the learned senior counsel. Therefore, to say that ***Bhadra International (India) Pvt. Ltd. (supra)*** has laid down that the appointments contrary to implicit disqualification are bad in law cannot be accepted. The Act, even prior to

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2015, had safeguard to challenge an arbitrator on the ground of neutrality, bias, impartiality, etc., which according to the learned senior counsel goes to the root of the matter in case of unilateral appointment. Therefore, even if parties agreed for appointment of a particular person, they can always challenge the appointment on the grounds mentioned in the Act.

34. On one hand, the judgment debtor agrees that there is an arbitration agreement between the parties, but the procedure for appointment of an arbitrator under that very agreement is being contended to be illegal. An agreement for arbitration cannot be bifurcated in this manner. Once the parties have signed the agreement and agreed upon the procedure for appointment of an arbitrator and the arbitrator is appointed prior to 2015, they cannot in execution proceedings contend that on account of ***Bhadra International (India) Pvt. Ltd. (supra)***, the appointment of the arbitrator itself is illegal. The submission on hardship suffered because of such awards also cannot be accepted. These are commercial contracts which parties have signed by keeping eyes wide open. Benefits under the contract has been availed but when dispute arose, parties without challenging the process invited orders and when it comes to execution such objections are raised to get away with their obligations. Therefore, even on this count, submissions of judgment debtor cannot be accepted. The Act gave full protection but without availing the shield, parties now are using sword to avoid the execution proceedings.

35. It is well settled that the decision is an authority for what it decides and not for what flows logically therefrom. The decision has to be understood based on the facts before the Court and the issue raised therein. If based on those facts and while rendering its reasoning for deciding the issue raised, the Court makes any observation, it would not mean that those observations should be read *dehors* the context, facts and issue

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before the Court. In the instant case, in the case of ***Bhadra International (India) Pvt. Ltd. (supra)***, the arbitration was invoked post 23 October 2015. The issue before the Court as per paragraph 29 was with regard to the appointment of an arbitrator being ineligible by virtue of Section 12(5) of the Act and whether by conduct, there can be a waiver of such appointment and whether such a point can be raised for the first time in an application under Section 34 of the Act. On these facts, the Hon'ble Supreme Court relied upon Section 18 and its own decision in the case of ***Dharma Prathishthanam (supra)*** while observing that what was implicit earlier has now been made explicit by way of statutory amendment. It stops there. The Hon'ble Supreme Court nowhere in the said decision has observed that appointments made prior to 23 October 2015, even if hit by implicit disqualifications would render the appointment bad in law. Reading such a conclusion, as sought by the judgment debtor cannot, in my view, be correct reading of judgment of the Hon'ble Supreme Court. The observations made in paragraphs 32 to 37 were for deciding whether the appointments made contrary to the provisions of Section 12(5) were illegal. It is settled position that a judgment of the Hon'ble Supreme Court cannot be read as a statute *dehors* the context and the issue.

36. In this connection, the decision of the Hon'ble Supreme Court in the case of ***Ashwani Kumar Singh vs. UP Public Service Commission & Ors***[32] is relevant and, more particularly, paragraphs 10 to 13 which reads as under :-

> *10. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark upon lengthy discussions, but the discussion is meant to explain and not to define.*

32 (2003) 11 SCC 584

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Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton2 (AC at p. 761) Lord McDermott observed: (All ER p. 14 C-D)

> *"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto.*
>
> *This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge...."*

11. In Home Office v. Dorset Yacht Co.3 Lord Reid said, "Lord Atkin's speech ... is not to be treated as if it were a statutory definition. It will require qualification in new circumstances" (All ER p. 297g-h). Megarry, j. in Shepherd Homes Ltd. v. Sandham (No. 2)4 observed: (All ER p. 1274d-e) "One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament;" In Herrington v. British Rlys. Boards Lord Morris said: (All ER p. 761c)

> *"There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in in the the setting of the facts of a particular case."*

12. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

13. The following words of Hidayatullah, J. in the matter of applying precedents have become locus classicus: (Abdul Kayoom v. CITSa, AIR p. 688, para 19)

> *"19.... Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."*
>
> *(emphasis supplied)*

37. The above view on how to read a judgment has been echoed by the Hon'ble Supreme Court in the case of ***Commissioner of Income Tax vs. Sun Engineering Works (P) Ltd.***[33] and relevant paragraph 39 of said decision reads as under :-

33 (1992) 4 SCC 363

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39 ..... It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. In Madhav Rao Scindia v. Union of India [(1971) 1 SCC 85: (1971) 3 SCR 9] this Court cautioned:

> *"It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment."*

(emphasis supplied)

38. Similar enunciation on how to read a judgment was provided by the Hon'ble Supreme Court in paragraph 7 of its decision in the case of ***Deepak Bajaj vs. State of Maharashtra***[34] which reads as under :-

7. It is well settled that the judgment of a court is not to be read mechanically as a Euclid's theorem nor as if it were a statute.

> *"14. On the subject of precedents Lord Halsbury, L.C., said in Quinn v. Leathem [1901 AC 495 : (1900-03) All ER Rep 1 (HL)] : (All ER p. 7 G-I)*
>
> > *'[Now before] discussing Allen v. Flood [1898 AC 1 : (1895-99) All ER Rep 52 (HL)] and what was decided therein, there are two observations of a general character which I wish to make; and one is to repeat what I have very often said before —that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.*

34 (2008) 16 SCC 14

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(emphasis in original)

We entirely agree with the above observations.

15. In Ambica Quarry Works v. State of Gujarat [(1987) 1 SCC 213] (vide SCC p. 221, para 18) this Court observed:

'18. … The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.'

16. In Bhavnagar University v. Palitana Sugar Mill (P) Ltd. [(2003) 2 SCC 111] (vide SCC p. 130, para 59) this Court observed:

'59. … It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.'

(emphasis in original)

17. As held in Bharat Petroleum Corpn. Ltd. v. N.R. Vairamani [(2004) 8 SCC 579 : AIR 2004 SC 4778] a decision cannot be relied on without disclosing the factual situation. In the same judgment this Court also observed: (SCC pp. 584-85, paras 9-12)

'9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. (emphasis in original) These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. (emphasis supplied) In London Graving Dock Co. Ltd. v. Horton [1951 AC 737 : (1951) 2 All ER 1 (HL)] (AC at p. 761), Lord MacDermott observed: (All ER p. 14 C-D)

"… The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge, …"

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10. In Home Office v. Dorset Yacht Co. Ltd. [1970 AC 1004 : (1970) 2 WLR 1140 : (1970) 2 All ER 294 (HL)] Lord Reid said:

> *"... Lord Atkin's speech ... is not to be treated as if it were a statutory definition. It will require qualification in new circumstances."*

Megarry, J. in Shepherd Homes Ltd. v. Sandham (No. 2) [(1971) 1 WLR 1062 : (1971) 2 All ER 1267] observed: (All ER p. 1274 d)

> *"... One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament;"*

And, in British Railways Board v. Herrington [1972 AC 877 : (1972) 2 WLR 537 : (1972) 1 All ER 749 (HL)] Lord Morris said: (All ER p. 761 c)

> *"... There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."*

11. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

12. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

> *"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo [, J.]) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.*
>
> * * *
>
> *Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. (emphasis in original) My plea is to keep the path of justice clear of obstructions which could impede it*
>
> *(emphasis supplied)*

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39. In my view, the facts of ***Bhadra International (India) Pvt. Ltd. (supra)*** and ***Dharma Prathishthanam (supra)*** were similar and, therefore, the Hon'ble Supreme Court in the case of ***Bhadra International (India) Pvt. Ltd. (supra)*** referred to the decision in the case of ***Dharma Prathishthanam (supra)*** and observed that what was implicit earlier has now been made explicit post 2015 amendment. In ***Dharma Prathishthanam (supra),*** the arbitration clause read *"Settlement of disputes shall be through arbitration as per the Indian Arbitration Act".* The Indian Arbitration Act provided for fairness, equality, impartiality, consensus, etc., in the appointment of an arbitrator and in the conduct of the arbitration proceedings.

40. It is important to note that the arbitration clause in the case of ***Dharma Prathishthanam (supra)*** did not name a person as an arbitrator nor was any one of the party given the authority to appoint an arbitrator but it merely provided that dispute shall be resolved through arbitration as per the Indian Arbitration Act. Despite that, the party unilaterally appointed an arbitrator without the consent of the other party and the issue before the Hon'ble Supreme Court was whether such an appointment without consent is bad-in-law. The Hon'ble Supreme Court upheld the challenge to the appointment of an arbitrator unilaterally without the consent of the other party.

41. In the case of ***Bhadra International (India) Pvt. Ltd. (supra),*** the arbitration was invoked post 2015 but the license agreement was prior to 2015 and the arbitration clause provided for referring the dispute to the sole arbitrator, being a person to be appointed by the Chairman of the Authority and in case the designation of Chairman is changed or office is abolished, then to a person with similar functions. The notice invoking the arbitration was issued post 23 October 2015. The party relied upon the arbitration clause whereby the arbitrator was to be appointed by the

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Chairman of the authority and appointed the arbitrator in accordance with the said arbitration clause. For the first time in a petition under Section 34, the appointment of an arbitrator was challenged on the ground that since the invocation is post 23 October 2015, such a clause is contrary to provisions of Section 12(5) read with the Seventh Schedule unless the parties subsequent to disputes having arisen waived such disqualification by an express agreement in writing. The Hon'ble Supreme Court observed that such a plea could be raised for the first time in a petition under Section 34. The Hon'ble Supreme Court further observed that the appointment made as per arbitration clause was contrary to provisions of Section 12(5) and there being no waiver in writing, it would amount to a case of unilateral appointment without the consent of both the parties. Therefore, the Hon'ble Supreme Court held that such an appointment contrary to provisions of Section 12(5) is *void ab initio* without there being mutual consent as provided in proviso to Section 12(5).

42. Therefore, in my view, in both the cases, i.e. ***Bhadra International (India) Pvt. Ltd. (supra)*** and ***Dharma Prathishthanam (supra),*** the facts were similar inasmuch as in both the cases, there was no consensus between the parties with regard to appointment and the appointment was unilateral. Therefore, the Hon'ble Supreme Court referred to the decision in the case of ***Dharma Prathishthanam (supra)*** and observed that non-consensual appointment was bad-in-law prior to 2015 and relying upon the said decision held that post 2015 also, such an appointment is bad because there was no express agreement in writing between the parties waiving such non-consensual appointment. Therefore, in my view, stretching decision in the case of ***Bhadra International (India) Pvt. Ltd. (supra)*** to contend that even in case of a named arbitrator or appointment prior to 2015 of an arbitrator by one of the party as per the arbitration agreement should be held to be void would be reading too much in the case of ***Bhadra***

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International (India) Pvt. Ltd. (supra) and hence, it cannot be made applicable to such cases. Therefore, the contention raised by learned senior counsel, Mr. Kamat for the judgment debtor cannot be accepted.

43. Analysis of paragraph nos. 32 to 39 of Bhadra International (India) Pvt. Ltd. (supra)

(i) The learned senior counsel, Mr. Kamat has placed heavy reliance on above paragraphs to contend that by virtue of these paragraphs all types of unilateral appointment made prior to 23 October 2015 is without jurisdiction. In my view, the said submission cannot be accepted for more than one reason.

(ii) The first issue, as per paragraph 29 of the said decision, which was framed by the Hon'ble Supreme Court, was whether the sole arbitrator could be said to have become ineligible to be appointed as an arbitrator by virtue of Section 12(5) of the Act, 1996. The contention of the appellant was that the sole arbitrator appointed by the chairman of the respondent was ineligible to act as an arbitrator as he was appointed unilaterally post 23 October 2015 and such an appointment was *void ab initio* by virtue of Section 12 (5) of the Act, 1996.

(iii) While adjudicating the provisions of Section 12(5) of the Act, 1996 as applicable to the facts before the Court, Hon'ble Supreme Court analysed the provisions of Section 18 under the caption "Interplay Between Equal Treatment of Parties and Autonomy".

(iv) In paragraphs 32 to 35, the Hon'ble Supreme Court analyses Section 18 in the context of Section 12 (5) of the Act, 1996 and relies upon the decision in ***CORE (supra)*** which was again a decision concerning the provisions of Section 12(5) of the Act, 1996. After interpreting Section 18 in the context of Section 12(5) of the 1996, Act, the Hon'ble Supreme Court states that equal treatment has long been recognised in the

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constitution of the Arbitral Tribunal for ensuring impartiality and preserving fairness of the arbitral process.

(v) The Hon'ble Supreme Court, thereafter, in paragraph 36 observes that even prior to Amendment Act 2015, the Hon'ble Supreme Court in ***Dharma Prathishthanam (supra)*** held that unilateral appointment without the consent of the other party is illegal and alien to law. When ***Bhadra International (India) Pvt. Ltd (supra),*** refers to unilateral appointment by referring to the decision in the case of ***Dharma Prathishthanam (supra)*** one has to go to the facts of ***Dharma Prathishthanam (supra)*** wherein the arbitration clause did not provide for a named arbitrator or an arbitrator appointed by designation or authorised a person to appoint an arbitrator but it simply said disputes will be resolved as per the Arbitration Act. It is in that context that paragraph 37 has to be read alongwith other previous paragraphs, to mean that unilateral appointments of the nature referred to in ***Dharma Prathishthanam (supra)*** have now been articulated with greater clarity through the amendment Act, 2015.

(vi) Therefore, from a reading of paragraphs 30 to 37 one cannot come to a conclusion that ratio of ***Bhadra International (India) Pvt. Ltd (supra)*** is that even prior to 2015, unilateral appointments made in scenarios other than those which was in the nature of ***Dharma Prathishthanam (supra)*** are *void ab initio*. It is neither a ratio nor an obiter of the Hon'ble Supreme Court but is a misreading of the said decision to contend that ***Bhadra International (India) Pvt. Ltd (supra)*** lays down, through ratio or through obiter that all types of unilateral appointments made prior to 2015 of the nature not that of ***Dharma Prathishthanam (supra)*** are also *void ab initio .*

(vii) Paragraphs 32 to 37 have to be read with paragraph 38 and paragraph 38 states that even though the parties may have unbridled freedom regarding the procedure for appointing an arbitrator, the exercise of such freedom must not be in conflict with mandatory provisions of the Act.

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When the Hon'ble Supreme Court refers to mandatory provisions of the Act, it refers to the provisions of Section 12 (5) of the Act 1996 because these observations are made while dealing with first issue with regard to the provision of Section 12 (5) of the Act, 1996.

(viii) Therefore, in my view, the submission made that by virtue of ***Bhadra International (India) Pvt. Ltd (supra)*** all types of unilateral appointments which are not even of the nature of unilateral appointments referred to in ***Dharma Prathishthanam (supra)*** are *void ab initio* is incorrect.

(ix) When ***Bhadra International (India) Pvt. Ltd (supra)*** refers to implicit provisions prior to 2015 having been made explicit, it cannot be treated as obiter in the sense that in all cases of unilateral appointments contrary to the implicit provisions prior to 2015, are bad in law.

44. The submission of judgment debtor that jurisdiction cannot be conferred by consent also cannot be accepted in cases where the parties agree to resolve their disputes as per the Arbitration and Conciliation Act, 1996 because the scheme of the Act as evident from Sections 7, 10, 11, 12, 13 etc. goes on to show that general rule of not conferring jurisdiction by consent would not be applicable in cases governed by the Arbitration and Conciliation Act. Parties agree by consent to refer the disputes between them to arbitration. Number of arbitrators are agreed by the parties themselves. Appointment and its procedure is agreed by the parties. Procedure for challenging an arbitrator is also agreed by the parties themselves. Parties can mutually agree to terminate the mandate of arbitration or for substitution. Place of arbitration is agreed by the parties. Language to be used in the proceedings is also left to be decided by the parties. Extension of time to make an award is also by the consent of the parties. Under Section 12(5) of the Act, even if a person is disqualified still he can be appointed as an arbitrator by mutual consent in writing. All these provisions and scheme of the Act shows that the arbitration is an exception

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to general rule that parties by consent cannot confer jurisdiction except in those cases where expressly or impliedly certain disputes cannot be referred to arbitration at all.

45. I have heard all the counsel at length for all the parties including the *amicus curiae* and have independently analysed the issue raised for my consideration though the view, which I have taken is supported by following decisions of the High Courts :-

(i) ***State of Maharashtra vs. Morya Infrastructure Pvt. Ltd. (supra)***
(ii) ***Punjab State Civil Supplies Corporation vs. Ganesh Rice Mills (supra)***
(iii) ***Avneet Soni vs. Kavita Agarwal (supra)***
(iv) ***West Bengal Housing Board (supra)***

46. If the contention of the learned senior counsel for the judgment-debtor is to be accepted, then it would mean giving retrospective effect to the provisions of Section 12(5) of the Act, 1996 indirectly, though such provisions are directly applicable only from 23 October 2015. What cannot be done directly cannot be achieved by interpretative process indirectly.

47. The decisions of the Delhi High Court relied upon by the learned senior counsel in the case of ***Vineet Dujodwala & Ors. (supra)***, ***ABL Biotechnologies Ltd. & Ors. (supra)***, ***Supreme Infrastructure India Limited (supra)*** and ***Bharat Forge Ltd. (supra)*** are the decisions dealing with petition under Section 34, wherein one of the grounds for challenge to the award was the unilateral appointment of the arbitrator and the Court quashed the award on the ground that the appointments made in the facts of those cases did not satisfy the ingredients of impartiality, unbiased, etc. These decisions would not apply to the issue raised for my consideration, since I am not concerned with a petition under Section 34. If a party adopts

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the procedure provided under Section 34 and succeeds in quashing the award on the ground of arbitrator not being unbiased, impartial, etc., then such an award will never come to the Executing Court. Merely because under Section 34, the Courts in other cases have quashed the award passed by accepting the challenge to the appointment of an arbitrator, it would not mean that in all other cases even where there is no challenge, the Executing Court can hold the arbitrator unilaterally appointed as *void ab-initio*. Also, these decisions do not cull out the arbitration agreement to ascertain what was the type of unilateral appointment which the Court was concerned with. Therefore, these decisions would not come to the assistance of the judgment debtor.

48. The decision relied upon by the learned senior counsel Mr. Kamat in the case of ***Chhabriya Cloth Stores (supra)*** was also a case where the award passed was challenged before the Court on the ground of unilateral appointment. The party in that case did not concur with the appointment of arbitrator but challenged the same in accordance with the procedure provided under the Arbitration Act, 1940. The arbitration clause is not reproduced in the said decision but the learned Judge has laid emphasis on no named arbitrator. Similar is the case with respect to decision in the case of ***K. K. Modi (supra)*** since the issue before the Hon'ble Supreme Court was as to what constitutes an arbitration agreement. It is important to note that Section 4 of the Arbitration Act, 1940, recognised appointment by a person designated in the agreement either by name or as the holder of any office or appointment.

49. I have already observed above that if a party challenges an award on the ground of appointment of arbitrator being invalid or appointment of arbitrator itself and said ground is accepted, then certainly that award can be quashed and set aside but from that it does not flow that in all the cases

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where a party has not challenged the appointment of an arbitrator in accordance with law, even in those cases, the award becomes *void ab initio* on the ground of unfairness, partiality or conduct being non-judicial insofar as pre 2015 appointment is concerned. Therefore, these decisions cannot support the submission made by the judgment debtor to contend that in all cases of unilateral appointment, the awards are bad in law. Same would also be contrary to various decisions of the Hon'ble Supreme Court referred to hereinabove where challenge to named arbitrator or in accordance with the procedure agreed upon has been upheld prior to 2015 amendment without there being successful challenge.

50. The decision relied upon by the learned senior counsel in the case of **Indian Oil Corporation Ltd & Ors.** ***(supra)*** also cannot be of any assistance. In the said decision, the unilateral appointment by a named person or by a procedure agreed upon was upheld except to the extent that where the person named as an arbitrator is an employee of a company or body or individual, other than the State and its instrumentalities. However, this decision and the paragraphs relied upon cannot be construed to mean that the appointments made in accordance with the agreed procedure and not challenged can still be held to be *void ab initio* by relying upon the decision in the case of ***Bhadra International*** *(India) Pvt. Ltd.* ***(supra)***.

51. The learned senior counsel is justified and fairly stated that the decision of this Court in the case of ***DS Textiles (supra)*** and ***Ingram Micro India Pvt. Ltd. (supra)*** do not directly deal with the issue under consideration, but the learned Single Judge has merely expressed his displeasure and views on unilateral appointment and, therefore, to that extent, it only throws light on the situation prevailing and faced by the litigants where unilateral appointment is made but that, however, does not take the case of the judgment debtor any further. Also these cases were

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concerning unilateral appointments post 2015 Amendment and, therefore, the Court expressed its displeasure.

52. I may now deal with observations made by various decisions of the Hon'ble Supreme Court and High Court which are relevant in support of my above analysis.

(i) ***Aravali Power Company Private Limited (supra) -***

In this case, the arbitration clause provided that the dispute will be referred to the sole arbitration of the project in-charge or to some other person appointed by the Chairman and Managing Director of NTPC. The agreement was prior to 2015 and the invocation of arbitration was also prior to 23 October 2015 but a contention was raised in Section 11 proceedings that on account of Section 12(5) inserted with effect from 23 October 2015, the appointment made in accordance with the arbitration clause is bad-in-law which was rejected. The relevant paragraphs of the said decision are reproduced herein :-

> *"14. At the outset, it must be stated that the invocation of arbitration in the present case was on 29-7-2015, the arbitrator was appointed on 19-8-2015 and the parties appeared before the arbitrator on 7-10-2015, well before 23-10-2015 i.e. the date on which the Amendment Act was deemed to have come into force. The statutory provisions that would therefore govern the present controversy are those that were in force before the Amendment Act came into effect. We must mention here that both the parties have addressed their submissions on this premise.*
>
> *15. Before we consider the present controversy, we may quote, for facility, Sections 12, 13 and 14 of the 1996 Act as they stood before the Amendment Act came into force :*
>
> > *"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*

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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.

13. Challenge procedure.—(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the Arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the Arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the Arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the Arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the court may decide as to whether the arbitrator who is challenged is entitled to any fees.

14. Failure or impossibility to act.—(1) The mandate of an arbitrator shall terminate 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."

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16. In the present case Clause 56 of the GCC provides for arbitration by the Project In-charge of the Project concerned, and in case such Project In-charge were unable or unwilling to act, arbitration by any person appointed by the Chairman and Managing Director. It further provides inter alia that there would be no objection even if the arbitrator had dealt with the matters to which the contract related in the course of his duties or had expressed views on all or any of the matters in dispute or difference.

22.The principles which emerge from the decisions referred to above are:

22.1. In cases governed by 1996 Act as it stood before the Amendment Act came into force:

22.1.1. The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate to the officer whose decision is the subject-matter of the dispute.

22.1.2. Unless the cause of action for invoking jurisdiction under Clauses (a), (b) or (c) of sub-section (6) of Section 11 of the 1996 Act arises, there is no question of the Chief Justice or his designate exercising power under sub-section (6) of Section 11.

22.1.3. The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

22.1.4. While exercising such power under sub-section (6) of Section 11, if circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.

22.2. In cases governed by 1996 Act after the Amendment Act has come into force: If the arbitration clause finds foul with the amended provisions, the appointment of the arbitrator even if apparently in conformity with the arbitration clause in the agreement, would be illegal and thus the court would be within its powers to appoint such arbitrator(s) as may be permissible.

23. The observations of the High Court in paras 41-42 as quoted above show that the exercise was undertaken by the High Court, "in order to make neutrality or to avoid doubt in the mind of the petitioner" and ensure that justice must not only be done and must also be seen to be done. In effect, the High Court applied principles of neutrality and impartiality which have been expanded by way of Amendment Act, even when no cause of action for exercise of power under Section 11(6) had arisen. The procedure as laid down in unamended Section 12 mandated disclosure of circumstances likely to give rise to justifiable doubts as to independence and impartiality of the arbitrator. It is not the case of the respondent that

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the provisions of Section 12 in unamended form stood violated on any count. In any case the provision contemplated clear and precise procedure under which the arbitrator could be challenged and the objections in that behalf under Section 13 could be raised within prescribed time and in accordance with the procedure detailed therein. The record shows that no such challenge was raised within the time and in terms of the procedure prescribed. As a matter of fact, the respondent had participated in the arbitration and by its communication dated 4-12-2015, had sought extension of time to file its statement of claim."

(emphasis supplied)

(ii) *Rajasthan Small Industries Corporation Limited (supra) -*

This was also a case of challenge to the appointment of an arbitrator in Section 11 proceedings. In this case also, the agreement was prior to 2015 and the arbitrator as per the agreement was Managing Director himself or his nominee. The invocation was prior to 23 October 2015 but in the proceedings under Section 11, reliance was placed on Section 12(5) inserted with effect from 23 October 2015 to challenge the appointment of the arbitrator, which was negated.

"10. We have carefully considered the contentions of both the parties and perused the impugned judgment and materials on record. The following points arise for consideration:

10.1. In the light of the proceedings before the sole arbitrator on various dates and when the proceedings before the arbitrator were pending, whether the respondent was right in filing arbitration petition approaching the High Court under Section 11 and Section 15 of the Arbitration Act, 1996 for appointment of a substitute arbitrator?

10.2. When by virtue of arbitration agreement, Clause 4.20.1 of Schedule 4 (general conditions), parties have agreed that the dispute, differences between the parties to be resolved by the Managing Director or his nominee, whether the High Court was right in deviating from the terms of the agreement between the parties and appointing an independent arbitrator?

10.3. Whether by virtue of Section 12 of (sic the 1996 Act as amended by) the Arbitration and Conciliation (Amendment) Act, 2015, the Chairman-cum-Managing Director has become ineligible to act as the arbitrator?

10.4. Whether the High Court was right in terminating the mandate of the arbitrator whom the parties have agreed and appointing substitute arbitrator on the ground that there was delay in passing the award?

20. It is in this backdrop, the respondent has filed the arbitration petition before the High Court under Section 11 and Section 15 of the Arbitration and Conciliation Act, 1996 on 13-5-2015 seeking appointment of an independent arbitrator. As noted earlier, as per Clause 4.20.1 of Schedule 4

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(general conditions), the parties have agreed that all disputes and differences arising out of or in any way concerning the contract, shall be referred to the Managing Director himself or his nominees for the sole arbitration and that there will be no objection to any such appointment on the ground that the person so appointed is an employee of the Corporation and that he has dealt with the matter to which the contract relates. When the parties have consciously agreed that the disputes or differences shall be referred to the Managing Director himself or his nominee for sole arbitration and having participated in the arbitral proceedings before arbitrator for quite some time, the respondent cannot turn round and seek for appointment of an independent arbitrator.

22. The respondent has not placed any material to show that it has reason to believe that the arbitrator had not acted independently or impartially. The respondent has not brought on record any material to entertain an apprehension that the Managing Director of the appellant Corporation is not likely to act independently or impartially. On the other hand, as noted earlier, as per the proceeding of the Arbitral tribunal dated 21-10-2010, the respondent had expressed its full faith in the sole arbitrator and had also given a letter dated 21-10-2010 to that effect. The fact that the sole arbitrator is the Managing Director of the appellant Corporation is not a ground to raise a presumption of bias or lack of independence on his part. Arbitration Clause 4.20.1 of Schedule 4 (general conditions) stipulates a high official i.e. Managing Director of the Corporation not connected with the contract or the work executed by the respondent. Having participated in the entire arbitration proceedings and acquiesced in the proceedings, the respondent is estopped from challenging the competence of the arbitrator. The respondent was not justified in filing the arbitration petition seeking appointment of an independent arbitrator.

Whether by virtue of Section 12 as amended by the Amendment Act, the Managing Director has become ineligible to act?

23. After the amendment to the Arbitration and Conciliation Act, 1996 in 2015, Section 12(5) prohibits the employee of one of the parties from being an arbitrator. In the present case, the agreement between the parties was entered into on 28-1-2000 and the arbitration proceedings commenced way back in 2009 and thus, the respondent cannot invoke Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015. As per Section 26 of the Amendment Act, the provisions of the Amendment Act, 2015 shall not apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree.

24. In BCCI v. Kochi Cricket (P) Ltd. [BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287 : (2018) 3 SCC (Civ) 534] , this Court held that the provisions of the Amendment Act, 2015 (with effect from 23-10-2015) cannot have retrospective operation in the arbitral proceedings already commenced unless the parties otherwise agree. In the present case, there is nothing to suggest that the parties have agreed that the provisions of the new Act shall apply in relation to the arbitral proceedings.

25. Contending that the sole arbitrator/Chairman-cum-Managing Director, by virtue of the 2015 Amendment, has become ineligible to act as the

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arbitrator, the learned counsel for the respondent placed reliance upon TRF Ltd. v. Energo Engg. Projects Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] In the said case, though the agreement/purchase order was dated 10-5-2014 (prior to the amendment), notice invoking arbitration was issued on 28-12-2015 (after the Amendment Act, 2015) and the letter of the Managing Director nominating the arbitrator is dated 27-1-2016. In such factual matrix of the case, this Court has held that the named arbitrator Managing Director of the respondent therein had become ineligible by operation of law and therefore, he cannot nominate another person as an arbitrator. In para 54, it was held as under: (SCC pp. 404-05)

> *"54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. 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. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."*
>
> *(emphasis supplied)*

26. The facts of the said case are entirely different from the case in hand. In the said case, when notice invoking arbitration was issued on 28-12-2015, after the Amendment Act, 2015 came into force with effect from 23-10-2015, by virtue of which the person named in the agreement became ineligible to act as the arbitrator. In the case in hand, the arbitration proceedings started way back in 2009, long before the 2015 Amendment Act came into force and therefore, the 2015 Amendment Act is not applicable to the case in hand. The statutory provisions that would govern the matter are those which were then in force before the Amendment Act.

27. To fortify our view, we can usefully refer to the decision of this Court in Aravali Power Co. (P) Ltd. v. Era Infra Engg. Ltd. [Aravali Power Co. (P) Ltd. v. Era Infra Engg. Ltd., (2017) 15 SCC 32 : (2018) 2 SCC (Civ) 642] In this case, the invocation of arbitration was on 29-7-2015 and the arbitrator was appointed on 19-8-2015 and the parties appeared before the arbitrator on 7-10-2015 well before 23-10-2015 i.e. date on which the Amendment Act was deemed to have come into force. It was held that the statutory provisions that would therefore govern the controversy are those that were in force before the Amendment Act came into effect. This Court has

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therefore directed that the arbitration, in pursuance of the appointment of the arbitrator on 19-8-2015, shall proceed in accordance with law."

(emphasis supplied)

(iii) I do not wish to reproduce relevant paragraphs of the judgment of the Hon'ble Supreme Court in the case of ***S.P. Singla Constructions Private Limited (supra)*** and ***Parmar Construction Company (supra)***. However, suffice to say that these two decisions also negated the contention that Section 12(5) was applicable to the appointment of an arbitrator pursuant to invocation prior to 23 October 2015. In both these decisions, the arbitrator was a named arbitrator or was to be appointed by an authority. The decision in the case of ***Aravali Power Company Private Limited (supra)*** and ***S.P. Singla Constructions Private Limited (supra)*** have been referred to and considered in the case of ***Parmar Construction Company (supra)***.

(iv) ***Integro Finserv Private Limited (supra) -***

In this case, the application was filed for substitution of an arbitrator who was appointed prior to 23 October 2015. The plea for substitution was based on the amendment by which Section 12(5) was brought into the statute book. The plea based on Section 12(5) was rejected by this Court. The decision was rendered by this Court before the decision in the case of ***Bhadra International (India) Pvt. Ltd. (supra)*** The relevant paragraphs are reproduced hereinunder :-

"20. In Board of Control for Cricket in India v. Kochi Cricket (P) Ltd.2, a Two-Judge Bench had an opportunity to consider Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 with reference to Sections 34 and 36, which was amended by the Amending Act, and as regards, Section 34, it is held that Applications u/s. 34 even in cases where arbitration has commenced prior to 23/10/2015 i.e. date of coming into force, the Amendment Act, 2015, would apply, since the execution of a decree pertain to realm of procedure and it was held that no substantive vested right in the judgment debtor to resist the execution. Section 36, relating to execution of an Award, attracting the provisions of Order 21 and Order 41 Rule 5 of CPC, was held to have a retrospective effect.

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25. In the case of Rajasthan Small Industries Corporation Limited v. Ganesh Containers Movers Syndicate3, the question of the Amendment Act of 2015 once again surfaced with reference to Sections 11(6), 14 and 15(2).

26. Following the law laid down in the case of Kochi Cricket (P) Ltd. (supra), in the backdrop facts, that the agreement between the parties was entered into on 28/01/2000 and the arbitration proceedings commenced way back in 2009, and in absence of anything to suggest that the parties had agreed that the provisions of the new Act shall apply in relation to the arbitral proceedings, it was held that the Respondent could not invoke Section 12(5).

31. Another decision relied upon by Mr. Kelkar is in the case of Aravali Power Company Private Limited v. Era Infra Engineering Limited4 and even in this decision, the arbitration clause, according to Mr. Kelkar, is not similar to the one, with which I am concerned, but still a conclusion is drawn that in the cases governed by the Act of 1996, after the Amendment Act coming into force, if the arbitration clause falls foul of the amended provisions, the appointment of the arbitrator, even if apparently in conformity with the arbitration clause in the agreement, would be illegal and thus the Court would be within its powers to appoint such arbitrator(s) as may be permissible.

32. Subsequent to the decision, in the case of Rajasthan Small Industries Corporation Limited (supra), another decision involving Section 12(5) and its effect in the backdrop of Section 11(6) is in the case of S.P. Singla Constructions Private Limited v. State of Himachal Pradesh5, which arose in the background fact, where a Construction Work Contract, was entered between the parties on 19/12/2006 and upon completion of the work, with the extension granted, disputes arose between the parties, as regards the payment.

50. The only question, which is posed for consideration before me is, whether an Arbitrator, who is appointed prior to the Amendment Act, 2015, coming into force where the arbitration proceedings have already commenced, whether such an Arbitrator would incur ineligibility only in the wake of provisions introduced and such a person who may be either unilaterally appointed or who would fall within the ambit of Schedule VII, is forbidden from continuing as an Arbitrator and deserve to be substituted.

54. In light of the above and the series of decisions, to which a reference is made, I see no difficulty in arriving at a conclusion that the Application preferred by Integro Finserv Private Limited, under Section 11 of the Arbitration and Conciliation Act, seeking appointment of an Arbitrator/substituted Arbitrator, by relying upon Section 12(5) do not deserve any consideration, as the facts of the case clearly reveal that the Loan-cum-Hypothecation Agreement was entered by the Defendants/Respondents in favour of L & T Finance on 29/05/2012 and even the Respondent No. 2, executed a Deed of Guarantee. L & T Finance Co. was compelled to terminate the Loan Agreement by recalling the loan balance, with accrued charges and enforce the security created under the said Agreement on 05/10/2013 and in the wake of the arbitration clause in the Loan-Cum-Hypothecated Agreement and Deed of Guarantee, appointed an Advocate as a sole Arbitrator to adjudicate the disputes.

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58. However, for the reasons recorded above, since the appointment of an Arbitrator or his substitution on the ground, of his ineligibility, by applying Section 12(5) retrospectively, as the Arbitrator has entered reference prior to the Amendment Act and the proceedings are ongoing before him, I am not inclined to grant the relief of substituting him on the ground of his de jure ineligiblity, in the light of the amended provison."

(emphasis supplied)

(v) ***State Maharashtra vs. Morya Infrastructure Pvt. Ltd.(supra) -***

The decision in the case of ***Morya Infrastructure Pvt. Ltd. (supra)*** has considered ***Bhadra International (India) Pvt. Ltd. (supra)*** decision and rejected the contention of making Section 12(5) applicable for the appointments made prior to 23 October 2015. Relevant paragraphs of the said decision are reproduced hereinunder :-

"6. Since the disputes were not referred to Arbitration, the respondent approached this Court by filing Arbitration Application No. 2 of 2015 under Section 11 of the Arbitration and Conciliation Act, 1996, seeking appointment of an Arbitrator. It is the case of the respondent that with the consent of both parties, a sole Arbitrator was appointed, and by order dated 02/03/2015, the said Arbitration Application was disposed of. As the fact of appointment of the Sole Arbitrator by the High Court is disputed, we will deal with this aspect little later in the Judgment.

17. Having considered the rival submissions, the following issues arise for consideration in the present appeal:

(a) Whether the Arbitrator, Mr. C.D. Fakir, was appointed by the High Court in exercise of powers under Section 11(6) of the Arbitration and Conciliation Act, 1996?

(b) Whether there is a deemed waiver of objection to the constitution of the Arbitral tribunal under Section 4 of the Arbitration and Conciliation Act, 1996, and alternatively, whether Section 10 is a non-derogable provision such that there can be no waiver regarding the constitution of the Arbitral tribunal?

(c) Whether the Arbitrator is disqualified to act in view of disqualification under Section 12 (1) read with Schedule V of the Arbitration Act?

(d) Whether the Sole Arbitrator lacked jurisdiction in the absence of a written consent, post-dispute, under Section 12(5) read with the Seventh Schedule to the Arbitration and Conciliation Act, 1996?

(e) Whether the amended provision of Section 12 (1) and Section 12(5) read with Schedule V and Schedule VII would apply to the instant case?

37. It is significant to note that for a period of nearly two years, the appellant did not take any steps either to seek recall of the order passed by the High

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Court or to raise any objection to the constitution of the tribunal in accordance with law.

47. The next issue that arises for consideration is whether the mandate of the arbitral tribunal stands vitiated in view of the alleged disqualification under Schedule V read with Section 12(1) of the Arbitration and Conciliation Act, 1996, and whether the arbitrator has become ineligible to act as an arbitrator unless there is express written consent after the dispute has arisen in view of the statutory bar contained in Schedule VII read with Section 12 (5) of the Act.

48. The learned Counsel appearing for the appellant submits that the learned Arbitrator appointed in the present matter is a former employee of the appellant and was allegedly responsible for sanctioning the project which was subsequently tendered to the sister concern of the respondent. It is contended that the Chief Engineer who had dealt with the sanctioning of the project was nominated as Arbitrator of the respondent/contractor under Clause 3.4.17 of the agreement, and thus the Arbitrator had live nexus with the respondent. According to the appellant, such relationship gives rise to justifiable doubts as to independence and impartiality, thereby attracting disqualification under the Fifth Schedule read with Section 12(1) of the Arbitration and Conciliation Act, 1996.

49. The learned Counsel submits that though the objection was raised in the fifth meeting of the arbitral tribunal, it was raised immediately upon the appellant becoming aware of the circumstances giving rise to such ineligibility. According to him, such an objection can be raised even after filing of the statement of claim or defence, particularly when the ground pertains to statutory ineligibility.

50. The learned Counsel further contends that by virtue of the Arbitrator being a nominee of the respondent, he suffered disqualification under the Seventh Schedule read with Section 12(5). It is urged that Section 12(5) is a substantive provision which relates to the de jure inability of an arbitrator to act. By virtue of the non obstante clause contained therein, any prior agreement between the parties stands overridden the moment it is found that the relationship of the arbitrator with the parties or the subject matter of the dispute falls within any of the categories specified in the Seventh Schedule. In such circumstances, the person becomes ineligible, as a matter of law, to be appointed as an arbitrator.

51. It is further submitted that such ineligibility can be cured only by an express agreement in writing entered into between the parties after the disputes have arisen, whereby they waive the applicability of Section 12(5). In the absence of such an express written waiver, the ineligibility operates automatically. In support of these submissions, reliance is placed upon the judgment of the Hon'ble Supreme Court in Bharat Broadband Network Limited v. United Telecoms Limited, (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1 : AIR 2019 SC 2434.

52. The learned Counsel for the appellant submits that the aforesaid objections raise serious and substantial issues concerning the impartiality and

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independence of the Arbitrator, and therefore prays that the arbitral award be set aside. The issues raised herein are prima facie serious and may require examination by this Court. However, before examining the question of disqualification of the Arbitrator under Schedule V read with Section 12(1) of the Arbitration and Conciliation Act, 1996, and the Seventh Schedule read with Section 12(5) of the Act, it becomes necessary to determine whether the said provisions are applicable to the arbitral proceedings in question, having regard to the date of commencement of the arbitration proceedings.

53. The Hon'ble Supreme Court in Bhadra International (India) Pvt. Ltd. v. Airports Authority of India, 2026 INSC 6, while considering the applicability of the Arbitration and Conciliation (Amendment) Act, 2015, has held that Section 26 of the Amendment Act, 2015 makes it clear that the amended provisions shall apply only to arbitral proceedings commenced on or after 23/10/2015, unless the parties otherwise agree. Section 26 of the Amendment Act, 2015 reads as under:

> *"Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."*

54. The Supreme Court reiterated that, in view of Section 21 of the Arbitration and Conciliation Act, 1996, arbitral proceedings commence on the date on which a notice invoking arbitration is received by the respondent, unless there is a contrary agreement between the parties.

55. Reliance was placed upon the judgment in Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd., (2018) 6 SCC 287 : (2018) 3 SCC (Civ) 534, wherein the Supreme Court has observed as under:

> *"37. What will be noticed, so far as the first part is concerned, which states,-*
>
> > *"26. Act not to apply to pending arbitral proceedings. - Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree…"*
> > *is that:*
> >
> > *(1) "the arbitral proceedings" and their commencement is mentioned in the context of Section 21 of the principal Act;*
> >
> > *(2) the expression used is "to" and not "in relation to"; and (3) parties may otherwise agree. So far as the second part of Section 26 is concerned, namely, the part which reads, "…but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act" makes it clear that the expression "in relation to" is used; and the expression "the"*

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arbitral proceedings and "in accordance with the provisions of Section 21 of the principal Act" is conspicuous by its absence."

"38. That the expression "the arbitral proceedings" refers to proceedings before an arbitral tribunal is clear from the heading of Chapter V of the 1996 Act, which reads as follows:

"Conduct of Arbitral Proceedings"

The entire chapter consists of Sections 18 to 27 dealing with the conduct of arbitral proceedings before an arbitral tribunal. What is also important to notice is that these proceedings alone are referred to, the expression "to" as contrasted with the expression "in relation to" making this clear. Also, the reference to Section 21 of the 1996 Act, which appears in Chapter V, and which speaks of the arbitral proceedings commencing on the date on which a request for a dispute to be referred to arbitration is received by the respondent, would also make it clear that it is these proceedings, and no others, that form the subject-matter of the first part of Section 26. Also, since the conduct of arbitral proceedings is largely procedural in nature, parties may "otherwise agree" and apply the Amendment Act to arbitral proceedings that have commenced before the Amendment Act came into force In stark contrast to the first part of Section 26 is the second part, where the Amendment Act is made applicable "in relation to" arbitral proceedings which commenced on or after the date of commencement of the Amendment Act. What is conspicuous by its absence in the second part is any reference to Section 21 of the 1996 Act. Whereas the first part refers only to arbitral proceedings before an arbitral tribunal, the second part refers to Court proceedings "in relation to" arbitral proceedings, and it is the commencement of these Court proceedings that is referred to in the second part of Section 26, as the words "in relation to the arbitral proceedings" in the second part are not controlled by the application of Section 21 of the 1996 Act."

39. Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings - arbitral proceedings themselves, and Court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, "arbitral proceedings" having been subsumed in the first part cannot re-appear in the second part, and the expression "in relation to arbitral proceedings" would, therefore, apply only to Court proceedings which relate to the arbitral proceedings. The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or

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after the Amendment Act, and to Court proceedings which have commenced on or after the Amendment Act came into force."

56. The Supreme Court in BCCI (Supra) clarified that the first part of Section 26 makes it explicit that the Amendment Act, 2015 is prospective in nature and would not apply to arbitral proceedings which commenced prior to 23/10/2015, unless the parties otherwise agree. The commencement of proceedings must be understood in the manner contemplated under Section 21 of the principal Act. Section 21 of the Arbitration Act provides:

"Unless otherwise agreed by the parties, 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."

57. Thus, the determining factor for applicability of the Amendment Act, 2015 is the date on which the notice invoking arbitration was received by the respondent. In the present case, it is found that the first notice invoking arbitration was issued in March 2014 and was received by the respondent. Thus the notice of arbitration was prior to the commencement of the Amendment Act, 2015. The respondent thereafter approached the High Court under Section 11(6) and the High Court disposed of the application by an order on 02/03/2015. Thus commencement of arbitral proceedings, in terms of Section 21, had already taken place upon receipt of the notice invoking arbitration, much prior to the commencement of the Amendment Act in 2015.

58. Since the arbitral proceedings in the present case commenced prior to 23/10/2015, and there is no material to show that the parties agreed to the applicability of the amended provisions, the Arbitration and Conciliation (Amendment) Act, 2015 would not apply to the present proceedings. Consequently, Section 12(1), and the Fifth Schedule of the Act and Section 12 (5) and the Seventh Schedule of the Act, which were introduced by the 2015 Amendment, are not applicable to the present arbitration proceedings. Thus the disqualification of Sole Arbitrator as provided in the above provisions [i.e. Schedule V read with Section 12 (1) and Schedule VII read with Section 12 (5)] cannot be invoked qua the present proceedings."

(emphasis supplied)

(vi) *Dharma Prathishthanam (supra) -*

Relevant paragraphs of the said decision are reproduced hereinunder :-

"2. ....."Settlement of disputes shall be through arbitration as per the Indian Arbitration Act."

7. An arbitrator or an Arbitral tribunal under the scheme of the 1940 Act is not statutory. It is a forum chosen by the consent of the parties as an alternate to resolution of disputes by the ordinary forum of law courts. The essence of arbitration without assistance or intervention of the court is settlement of the dispute by a tribunal of the own choosing of the parties. Further, this was not a case where the arbitration clause authorised one of the parties to appoint an arbitrator without the consent of the other. Two things are, therefore, of

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essence in cases like the present one: firstly, the choice of the tribunal or the arbitrator; and secondly, the reference of the dispute to the arbitrator. Both should be based on consent given either at the time of choosing the arbitrator and making reference or else at the time of entering into the contract between the parties in anticipation of an occasion for settlement of disputes arising in future. The law of arbitration does not make the arbitration an adjudication by a statutory body but it only aids in implementation of the arbitration contract between the parties which remains a private adjudication by a forum consensually chosen by the parties and made on a consensual reference.

31. ..... Secondly, there may be an arbitrator or arbitrators named, or the authority may be named who shall appoint an arbitrator, then the parties have already been ad idem on the real identity of the arbitrator as appointed by them beforehand; the consent is already spelled out and binds the parties and the court. All that may remain to be done in the event of an occasion arising for the purpose, is to have the agreement filed in the court and seek an order of reference to the arbitrator appointed by the parties. Thirdly, if the arbitrator is not named and the authority who would appoint the arbitrator is also not specified, the appointment and reference shall be to a sole arbitrator unless a different intention is expressly spelt out. The appointment and reference - both shall be by the consent of the parties. Where the parties do not agree, the court steps in and assumes jurisdiction to make an appointment, also to make a reference, subject to the jurisdiction of the court being invoked in that regard. We hasten to add that mere inaction by a party called upon by the other one to act does not lead to an inference as to implied consent or acquiescence being drawn. The appellant not responding to the respondent's proposal for joining in the appointment of a sole arbitrator named by him could not be construed as consent and the only option open to the respondent was to have invoked the jurisdiction of court for appointment of an arbitrator and an order of reference of disputes to him. It is the court which only could have compelled the appellant to join in the proceedings."

(emphasis supplied)

53. To summarize, the Hon'ble Supreme Court prior to 23 October 2015 amendment upheld unilateral appointment of an arbitrator in accordance with the arbitration agreement between the parties wherein arbitrator is named by person or designation or authority is given by one party to another to appoint an arbitrator. Post 23 October 2015, relying on the provisions of Section 12(5) appointments made prior to 23 October 2015 were challenged, but the Hon'ble Supreme Court rejected such a challenge. The Constitution Bench of Five Judges while dealing with provisions of Section 12(5) recognized unilateral appointments, upheld by the Hon'ble Supreme Court prior to 2015 but reversed such appointments post 2015 in

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case of three member tribunal to be selected from panel and made the decision applicable prospectively. Insofar as pre and post 2015 is concerned, where the appointment is not consensual then decision in the case of ***Dharma Prathishthanam (supra)*** would apply. Therefore, in my view, looked at from the entire conspectus, it cannot be said that the decision of ***Bhadra International (India) Pvt. Ltd. (supra)*** can be made applicable to the appointment of an arbitrator made prior to 23 October 2015 for holding award passed, in cases other than those similar to ***Dharma Prathishthanam (supra),*** as void.

Conclusion :-

54. Answers to the questions raised are as under :-

Issue No.(i) Whether unilateral appointment of an arbitrator prior to 23 October 2015 is without jurisdiction, and consequently, all proceedings arising therefrom would be *void ab initio* ?

Unilateral appointment of an arbitrator prior to 23 October 2015 wherein the arbitration clause provides for a named arbitrator or by designation or authorising appointment of an arbitrator by one of the party will not be without jurisdiction and consequently, the proceedings arising therefrom would not be *void ab initio* except in cases, where there is no contractual clause in the agreement naming a particular arbitrator or conferring on one of the party the right to unilateral appointment of an arbitrator but the appointment is made by one of the party in the absence of consent of other party. In the latter case, it will be void.

Issue No.(ii) Whether unilateral appointment of an arbitrator prior to 23 October 2015 is without jurisdiction, and consequently, all proceedings arising therefrom would be *void ab initio* ?

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In view of above, answer to question no.(ii) does not arise, except in case of non-consensual appointment i.e. 3rd category and in such a case, the Executing Court would be justified in treating the award as void. However, if challenge to such an appointment was made unsuccessfully, then the Executing Court cannot treat the award void.

55. List these matters on 15 September, 2026 for further consideration.

[JITENDRA JAIN, J.]

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