

Hindustan Construction Company Ltd. through its Authorised Signatory Yogesh Dalal Vs. Bihar Rajya Pul Nirman Nigam Ltd. and Ors.

Civil Appeal No. _____ of 2025 arising out of SLP (C) No. 4211 of 2025 · Supreme Court of India · 2025-11-28 · J.B. Pardiwala · R. Mahadevan · F2J-C-1397

Full judgment text

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[Civil Appeal No. _____ of 2025 arising out of SLP (C) No. 4211 of 2025]

R. Mahadevan, J.

1. Leave granted.

2. This Appeal is directed against the final judgment and order dated 09.12.2024 passed by the High Court of Judicature at Patna¹ in Request Case No. 53 of 2020, whereby the High Court dismissed the request case filed by the appellant, Hindustan Construction Company Limited, under Section 11 of the Arbitration and Conciliation Act, 1996².

PREFACE

3. Arbitration is often a friend in conferences but a foe in practice. Its *raison d'être* has always been to ease the burden on courts and to ensure the expeditious resolution of commercial disputes. Yet, this is not its only virtue. The true advantage of arbitration lies in its freedom and flexibility, with party autonomy as the cornerstone of the arbitral process.

3.1. Parties enjoy the liberty to determine the strength and composition of the tribunal, to appoint domain experts as arbitrators, and to design procedures suited to the nature and complexity of their disputes. This freedom allows them to bring to the table expertise and insight that even a judge may not be able to contribute.

3.2. However, parties often embrace arbitration in good times, only to resist or manipulate it when disputes actually arise - seeking either to wiggle out of arbitration altogether or to tilt the process unfairly in their favour. In such situations, judicial intervention becomes inevitable and rightly so to safeguard fairness and the integrity of the arbitral process.

3.3. The evolution of the judicial role from that of a helicopter parent to that of a guardian angel of arbitration has been neither smooth nor uniform. Successive legislative amendments, most notably those of 2015, 2019, and 2021, have sought to curtail judicial interference and recalibrate the delicate balance between autonomy and oversight. Yet, in practice, arbitration has at times become more cumbersome than civil litigation. Parties continue to exploit every procedural avenue to delay proceedings, i.e., filing a maze of applications before the arbitral tribunal, the High Court, and even this Court, often on technical or jurisdictional objections.

3.4. The present case is yet another instance where the fine boundary between judicial oversight and arbitral independence is tested. At its core, arbitration remains a creature of contract, founded on the twin pillars of party autonomy and impartiality. Every act of interpretation whether of the statute or of the contract must therefore be guided by these two foundational principles. With this preface, we proceed to the facts of the present case.

FACTUAL MATRIX

4. Respondent No. 1, Bihar Rajya Pul Nirman Nigam Limited³ awarded a contract to the appellant on 04.03.2014 for the construction of a bridge over River Sone in the Districts of Aurangabad and Rohtas, Bihar. The contract contained Clause 25 providing for settlement of disputes through arbitration.

4.1. During execution of the contract, the appellant, by letter dated 18.09.2018, raised a claim before the Deputy Chief Engineer, BRPNNL seeking compensation for additional costs and losses incurred

during the original contract period, in terms of Clause 25. Receiving no response, the appellant preferred an appeal on 20.10.2018 before the Managing Director, BRNPPL, and thereafter, issued a notice dated 14.12.2018 expressing its intention to commence arbitration. However, the Managing Director failed to appoint an arbitrator within the prescribed period.

4.2. Consequently, the appellant filed an application under Section 11 of the A&C Act for appointment of arbitrator. By order dated 02.08.2019 in Request Case No. 4 of 2019, the Patna High Court appointed Justice P.K. Sinha (Retd.) as the sole arbitrator. The arbitrator passed an award on 31.12.2021, which was accepted by the respondents, and the awarded sum was duly paid to the appellant.

4.3. Thereafter, the appellant once again approached the Deputy Chief Engineer, BRNPPL under Clause 25, raising fresh claims relating to extension of time for completion of works and compensation for the additional costs incurred during the extended period. However, no response was received, and the appeal to the Managing Director also remained undecided.

4.4. On 10.01.2020, the appellant issued a notice of intention to commence arbitration and sought appointment of an arbitrator for adjudication of the aforesaid disputes. As the Managing Director failed to act, the appellant filed another petition under Section 11 of the A&C Act before the Patna High Court, being Request Case No. 53 of 2020, for appointment of arbitrator.

4.5. By judgment dated 18.08.2021, the High Court appointed Justice Shivaji Pandey (Retd.) as the sole arbitrator to adjudicate all disputes arising out of the contract dated 04.03.2014.

4.6. Upon completion of pleadings, the parties jointly sought extension of the mandate under Section 29A of the A&C Act. The arbitrator, by order dated 11.03.2023, extended the mandate for six months. As the extended period was to expire on 27.08.2023, both parties sought liberty to approach the Court for further extension. The arbitrator, by order dated 17.06.2023, granted liberty to approach court under Section 29A (5).

4.7. The Patna High Court, by order dated 13.10.2023, extended the mandate for a further period of six months. On a subsequent joint request, the arbitrator again extended time by order dated 17.03.2024, and the High Court, by order dated 10.05.2024, granted a corresponding extension of six months.

4.8. Despite having consented to arbitration and actively participated in the proceedings for over three years, the respondents filed Civil Review Application No. 293 of 2024 before the High Court seeking review of the order dated 18.08.2021. By order dated 04.10.2024, the High Court reviewed its earlier order and directed the arbitrator not to proceed further with the ongoing arbitration. The Court further ordered that Request Case No. 53 of 2020 be listed on 25.10.2024 for appointment of a new arbitrator, pointing out that Justice Shivaji Pandey had, in the meantime, been appointed as President of the State Consumer Disputes Redressal Commission, Meghalaya.

4.9. In compliance with the High Court's direction, the arbitrator, by order dated 19.10.2024, suspended the arbitral proceedings sine die until further orders. The High Court thereafter heard arguments and reserved orders on 22.11.2024, and by judgment dated 09.12.2024, dismissed the appellant's Request Case No. 53 of 2020.

4.10. Aggrieved by the aforesaid judgment and order, the appellant has preferred the present Civil Appeal before this Court.

CONTENTIONS OF THE PARTIES

5. The learned senior counsel for the appellant submitted that the High Court exceeded its jurisdiction in passing the impugned judgment dated 09.12.2024 thereby reviewing its earlier order dated 18.08.2021 passed under Section 11(6) of the A&C Act, by which a sole arbitrator had been appointed. That order had attained finality, having never been challenged by the respondents through any appeal or other proceedings. Moreover, the A&C Act is a self-contained code and does not confer any power of review upon the High Court. Hence, the very act of entertaining a review petition was without jurisdiction.

5.1. It was further submitted that the order dated 04.10.2024 passed in the review petition had specifically directed that Request Case No. 53 of 2020 be listed on 25.10.2024 for appointment of a new arbitrator. However, the impugned judgment went beyond that limited extent and proceeded to

dismiss Section 11 petition itself, thereby nullifying its own subsisting order and acting in excess of jurisdiction.

5.2. Without prejudice to the above, it was submitted that the review petition was hopelessly barred by limitation, having been filed more than three years after the order of appointment had been passed and fully acted upon by both sides. Even assuming that a review was maintainable in law, it could not have been entertained after such an inordinate and unexplained delay.

5.3. The learned senior counsel submitted that Clause 25 of the agreement contains a valid arbitration clause in writing, clearly manifesting the parties' intention to refer all or certain disputes arising out of the contract to arbitration. The language of the clause leaves no ambiguity regarding the parties' intention to submit their disputes to an arbitral forum. Consequently, the High Court's finding that Clause 25 was not an arbitration clause is misconceived, untenable, and contrary to the settled position of law.

5.4. It was pointed out that the appellant had duly complied with the prearbitral procedure prescribed under Clause 25 by referring the dispute to the Deputy Chief Engineer on 15.10.2019, preferring an appeal to the Managing Director on 12.11.2019, and issuing a notice of arbitration on 10.01.2020. The High Court thereafter appointed a sole arbitrator by order dated 18.08.2021. The respondents neither filed an application under Section 16 objecting to jurisdiction nor raised such a plea in their statement of defence. The arbitration commenced on 13.09.2021 and proceeded through over seventy sittings and three joint applications under Section 29A, reaching the stage of final arguments, before the respondents belatedly filed the review petition.

5.5. According to the learned senior counsel, in the counter affidavit filed in the review petition, the respondents for the first time, referred to a Bihar Government Notification dated 14.08.2019, which substituted Clause 25 of the Standard Bidding Document to provide for reference to the Bihar Public Works Contract Disputes Arbitration Tribunal Act, 2008. It was submitted that such substitution could not operate retrospectively to alter the terms of the contract dated 04.03.2014.

5.6. It was submitted that an arbitration clause does not become null and void merely because the person or authority designated to appoint an arbitrator, has become ineligible under law. The High Court, therefore, erred in interpreting Clause 25 to mean that arbitration itself was rendered impossible merely because the Managing Director, BRNPPL could not act as the appointing authority.

5.7. It was further submitted that both parties had jointly moved applications under Section 29A of the A&C Act on multiple occasions seeking extension of the arbitrator's mandate. Such conduct clearly demonstrates their acknowledgment of the arbitral process and their submission to the jurisdiction of the arbitrator.

5.8. The learned senior counsel emphasized that the impugned judgment was passed, after more than three years of continuous arbitral proceedings during which, over seventy sittings were conducted. The appellant alone had incurred approximately Rs.50 lakhs towards arbitrator's fees, secretarial expenses, travel, accommodation, and legal costs. The proceedings had reached the stage of final arguments when the High Court rendered the impugned judgment, thereby defeating the very objective of the A&C Act - speedy and cost-effective resolution of disputes.

5.9. It was further submitted that in their reply to the Section 11 petition, the respondents had categorically admitted that Clause 25 of the agreement provided for arbitration. Such admission, coupled with its active participation in the proceedings, conclusively establishes the existence of a valid arbitration agreement. The plea of non-arbitrability was raised for the first time only in the review petition and was initially rejected. The review was allowed only to the limited extent of substituting the arbitrator since Justice Shivaji Pandey had been appointed as President, State Consumer Protection Commission, Meghalaya. Despite this, the High Court subsequently dismissed the Section 11 petition in its entirety.

5.10. It was further contended that unilateral appointment of an arbitrator has been held to be impermissible in law. Hence, the only option available to the appellant was to invoke the jurisdiction of the High Court under Section 11(6) of the A&C Act. The High Court, however, by enforcing a clause of unilateral appointment, acted contrary to the principles laid down by this Court in TRF Ltd v. Energo Engineering Projects Ltd⁴, and Perkins Eastman Architects DPC and another v. HSCC (India) Ltd⁵, which have been affirmed by the Constitutional Bench in Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)⁶.

5.11. The learned senior counsel submitted that the High Court's observation regarding the absence of an express waiver under Section 12(5) of the A&C Act is misconceived. The effect of Section 12(5) does not negate or curtail the jurisdiction of the High Court under Section 11 to appoint an independent arbitrator where the designated authority suffers a disqualification under the Seventh Schedule. The Court, acting as the appointing authority in place of the Managing Director named in the clause, does not destroy the arbitration clause; rather, it preserves it by substituting a neutral appointing mechanism. Otherwise, PSUs could compel private contractors to waive disqualification criteria, defeating the purpose of Section 12(5).

5.12. It was also submitted that the same Clause 25 had earlier been invoked between the very same parties, resulting in an arbitral award that was accepted and implemented by the respondents. The High Court's contrary interpretation, therefore, is inconsistent with the parties' own conduct and past understanding of the clause.

5.13. According to the learned counsel, having fully participated in the arbitral proceedings, filed statements of claim and defence, and sought extensions under Section 29A, the respondents are estopped under Section 4 of the A&C Act from subsequently challenging the existence or validity of the arbitration agreement. Reliance was placed on *Narayan Prasad Lohia v. Nikunj Kumar Lohia and others*⁷. Further reference was placed on *Gayatri Project Ltd. v. Madhya Pradesh Road Development Corporation Ltd.*⁸, to contend that once arbitration proceedings are underway, the parties cannot subsequently challenge the jurisdiction of the arbitral tribunal.

5.14. The High Court's reliance on *State of Bihar v. Kashish Developers*⁹ was said to be misplaced, as that decision preceded the Constitution Bench judgement in *Central Organisation for Railway Electrification v. ECI-SPICSMO- MCML (JV)*¹⁰, which overruled the earlier view taken in *CORE v. ECISPIC- SMO-MCML (JV)*¹¹, relied upon in *Kashish Developers*.

5.15. Accordingly, it was prayed that this Court may be pleased to set aside the impugned judgment dated 09.12.2024, restore the validity of the arbitration proceedings pursuant to the order dated 18.08.2021, and either appoint a substitute arbitrator itself or direct the High Court to do so within a time-bound period.

6. Per contra, the learned counsel for the respondents submitted that the present dispute does not merely raise questions on the enforceability of unilateral appointment but brings to light an uncommon yet valid manifestation of party autonomy, where the contract explicitly restricts arbitration to a single prescribed method and thereby excludes all alternate routes to arbitration.

6.1. According to the learned counsel, the specific question, as to whether an arbitration clause which stipulates the unilateral appointment of an arbitrator by one party and further provides that no arbitration shall be held if such appointment cannot be made, can still be said to constitute a valid and subsisting arbitration agreement, has not been directly adjudicated upon by this Court and thus requires authoritative determination.

6.2. It was further submitted that Clause 25 of the contract titled "Settlement of Disputes and Arbitration", comprises two distinct parts. The first part provides that upon the emergence of a dispute and compliance with prearbitration steps the Managing Director of the respondent company shall appoint the arbitrator. The second part, however, goes a step further and stipulates that if for any reason, such appointment cannot be made, there shall be no arbitration at all.

While it is undeniable that the Constitution Bench in *Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)* has held that unilateral appointment of an arbitrator by one party is unenforceable, the peculiar feature of the present clause is that it contains a negative covenant that expressly forecloses arbitration altogether in the event the prescribed mode of appointment cannot be followed. This makes the clause substantially different from the one considered in *CORE*.

6.3. Adding further, it was submitted that in *CORE*, Clause 64(3)(b) of the General Conditions of Contract provided that the arbitration panel would consist of three retired railway officers, one or more of whom were to be chosen by the Railways from a panel. There was no stipulation in that clause that arbitration would not take place if the procedure became invalid or could not be implemented. In contrast, the present clause clearly records the parties' intention that arbitration is contingent upon the appointment of an arbitrator by the Managing Director, and that failing such appointment, the disputes shall not be referred to arbitration. Accordingly, the reliance placed by the appellants on *CORE* is misplaced.

6.4. The learned counsel submitted that the impugned order rightly follows the judgment of the Patna High Court in Civil Review No. 181 of 2023, where an identical clause was considered. The High Court held that by reason of the substitution of Section 12 by Act 3 of 2016, an arbitration clause enabling appointment of an arbitrator by an ineligible officer such as the Engineer-in-Chief or Administrative Head becomes otiose. The Special Leave Petitions bearing Nos.25109 - 25110 of 2024 challenging that judgment came to be dismissed by this Court after notice and hearing, thereby affirming the view that such a clause does not survive in law.

6.5. It was submitted that Clause 25, on its true construction, operates as a contingent contract under Section 31 of the Indian Contract Act, 1872. The first part constitutes a positive covenant for arbitration by an arbitrator appointed by the Managing Director, while the second part provides that if such appointment cannot be made, there shall be no arbitration. Upon the unilateral appointment clause being rendered unenforceable by law, the contingency contemplated in the first part became impossible, triggering the operation of the second part under Section 33 of the Contract Act. Consequently, the clause itself dictates that no arbitration shall take place.

6.6. The learned counsel further submitted that the principle of party autonomy, as reaffirmed in CORE, remains the foundational norm of arbitration, subject to statutory limitations and the principle of equality. However, party autonomy cannot be invoked to rewrite the parties' agreement. In *Vidya Drolia and others v. Durga Trading Corporation*¹², this Court held that the scope and existence of arbitration depend on the subjective will of the parties as expressed in the arbitration agreement.

If the parties have agreed that arbitration shall not be held unless a specific mode of appointment is followed, the court cannot override that consensus. The subjective will of the parties here, clearly recorded in clause 25, is that arbitration shall be conducted only by an arbitrator appointed by the Managing Director, otherwise, disputes shall be resolved through the courts. To appoint an arbitrator under Section 11 in such a case would amount to rewriting the contract.

6.7. It was further contended that the two parts of Clause 25 are separable. The first part, now unenforceable due to the ruling in CORE, can be severed without affecting the remainder of the clause. The second part, which independently records the negative covenant against arbitration, remains valid and binding. The doctrine of severability and the "blue pencil test" as recognized in *Shin Satellite Public Co. Ltd v. Jain Studios Ltd*¹³, and *Beed District Central Cooperative Bank Ltd v. State of Maharashtra and others*¹⁴, allow the offending portion to be struck off while giving effect to the surviving portion that reflects the parties' intention. Upon such severance, the second part of Clause 25 stands independently and unambiguously expresses that disputes shall not be referred to arbitration.

6.8. It was submitted that it is a settled principle that courts cannot rewrite or modify the terms of a contract. In *Venkataraman Krishnamurthy and another v. Lodha Crown Buildmart Private Ltd*¹⁵, this Court held that courts must give effect to the contract as executed and cannot make a new one, however, reasonable, if the parties themselves have not agreed to it. Therefore, the relief sought by the appellants, which effectively seeks to introduce an arbitration clause contrary to the contract, is legally untenable.

6.9. The learned counsel further submitted that the State of Bihar has consciously shifted from ad hoc arbitration to institutional arbitration by amending Clause 25 of the Standard Bidding Document through Gazette Notification dated 14.08.2019, substituting it with a provision mandating reference of disputes to the Bihar Public Works Contract Disputes Arbitration Tribunal established under the 2008 Act. This policy reform shows that the respondents never intended for ad hoc arbitration to subsist under earlier contracts, and the contractual clause under consideration must be construed in this policy context.

6.10. In view of the foregoing, it was submitted that the arbitration agreement in the present case has been rendered inoperative and unenforceable by operation of law. The second part of Clause 25 constitutes a binding negative covenant reflecting the parties' express intention to exclude arbitration if the Managing Director is unable to appoint an arbitrator. Any attempt by the Court to appoint an arbitrator notwithstanding this stipulation would amount to rewriting the contract and negating party autonomy. The impugned order, therefore, correctly concludes that no arbitration agreement exists between the parties, and the appeal deserves to be dismissed.

7. We have considered the submissions advanced by learned counsel for both sides and have meticulously examined the materials placed on record.

8. Apparently, there was an express agreement dated 04.03.2014 between Respondent No.1 and the appellant for award of the contract for construction of a bridge over River Sone in the Districts of Aurangabad and Rohtas. Clause 25 thereof provided for settlement of disputes through arbitration. The appellant's claim for additional costs / losses incurred during the original contract period, raised under Clause 25, was adjudicated and settled by an arbitral award dated 31.12.2021, which the respondents did not challenge. However, the respondents seriously resisted the appellant's claim for the extended period of the contract.

8.1. The appellant's request before the Deputy Chief Engineer, as required under Clause 25, and the subsequent appeal before the Managing Director, were not considered. The appellant's notice of intention to commence arbitration and request for appointment of an arbitrator for adjudication of disputes relating to the extended period of the contract were also kept pending without any progress. Consequently, the appellant invoked Section 11 of the A&C Act by filing Request Case No. 53 of 2020 seeking appointment of an arbitrator.

8.2. By judgment dated 18.08.2021, the High Court of Patna appointed Justice Shivaji Pandey (Retd.) as the sole arbitrator to adjudicate all disputes arising out of the contract dated 04.03.2014. Arbitration proceedings commenced; evidence was adduced; and arguments on the side of the appellant were concluded by 30.07.2023. Meanwhile, both parties jointly sought an extension of time under Section 29A (3) of the A&C Act, which the arbitrator granted by extending the mandate for a further six months. Subsequently, the High Court extended the mandate of the arbitrator on two more occasions - vide order dated 13.10.2023 in Request Case No. 79 of 2023 and order dated 10.05.2024 in Request Case No. 59 of 2024.

8.3. Thereafter, the respondents filed Civil Review Application No. 293 of 2024 seeking review of the order dated 18.08.2021, stating inter alia that Justice Shivaji Pandey had been appointed as President of the Meghalaya State Consumer Protection Commission. By order dated 04.10.2024, the High Court directed the arbitrator not to proceed with the arbitration and posted the request case for appointment of a new arbitrator. However, the High Court dismissed the request case, by the impugned judgment dated 09.12.2024.

9. In the given backdrop, the issues that fall for consideration in the present appeal are as follows:

(i) Whether the High Court possessed the jurisdiction to review or recall its earlier order passed under Section 11(6) of the A&C Act, and whether the exercise of such power was valid in law.

(ii) Whether a valid and subsisting arbitration agreement existed between the parties within the meaning of Section 7 of the A&C Act, and whether clause 25 of the contract satisfies the statutory requirements of a binding arbitration clause.

(iii) whether the joint application filed by both parties, seeking extension of the arbitrator's mandate under Section 29A constitutes an express or implied waiver of the ineligibility under Section 12(5), and Section 4 of the Act.

10. Before proceeding further, it is apposite to look into the relevant provisions of the Arbitration and Conciliation Act, 1996, as follows:

"2. Definitions.- (1) In this Part, unless the context otherwise requires,-

(b) "arbitration agreement" means an agreement referred to in section 7;

4. Waiver of right to object.- A party who knows that-

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

5. Extent of judicial intervention.- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

7. Arbitration agreement.-

(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

11. Appointment of arbitrators.-

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(3A) The Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under section 43-I, for the purposes of this Act:

Provided that in respect of those High Court jurisdictions, where no graded arbitral institution are available, then, the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institution and any reference to the arbitrator shall be deemed to be an arbitral institution for the purposes of this section and the arbitrator appointed by a party shall be entitled to such fee at the rate as specified in the Fourth Schedule:

Provided further that the Chief Justice of the concerned High Court may, from time to time, review the panel of arbitrators.

(4) If the appointment procedure in sub-section (3) applies and-

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, [the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be].

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, on an application of the party in accordance with the provisions contained in sub-section (4).

(6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.

(8) The arbitral institution referred to in sub-sections (4), (5) and (6), before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to-

(a) any qualifications required for the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

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 subjectmatter 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.

Explanation1.-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.

14. Failure or impossibility to act.-

(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if-

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

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

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

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

15. Termination of mandate and substitution of arbitrator.-

(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate-

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

16. Competence of arbitral tribunal to rule on its jurisdiction.-

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

18. Equal treatment of parties.- The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

29A. Time limit for arbitral award.-

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

34. Application for setting aside arbitral award. (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)."

10.1. The above provisions make it clear that the Arbitration and Conciliation Act, 1996 embodies a legislative policy of party autonomy, limited judicial intervention, and procedural self-sufficiency. Section 5 expressly restricts judicial interference except as provided under the Act, reflecting the proarbitration intent of the legislature. Once the parties have agreed to resolve their disputes through arbitration, and such agreement satisfies the requirements of Section 7, the Court's role becomes largely facilitative - confined to enabling, not obstructing, the arbitral process.

10.2. Section 11 delineates the mechanism for the appointment of arbitrators and underscores the neutrality of the arbitral process by empowering the High Courts and this Court to intervene only where the parties or the designated authorities fail to act. Importantly, sub-section (6) confers a default power upon the Court to secure such appointment when the agreed procedure breaks down, while Section 11(8) reinforces independence and impartiality through mandatory disclosures under Section 12(1).

10.3. Section 12(5) renders persons having relationships enumerated in the Seventh Schedule ineligible for appointment as arbitrators, subject only to an express written waiver executed after the disputes have arisen. This provision marks a deliberate shift from presumed consent to conscious post-dispute waiver, thereby strengthening the integrity of arbitral appointments.

10.4. Similarly, Sections 14 and 15 contemplate situations where an arbitrator becomes de jure or de facto unable to act, or withdraws for any reason. In such cases, the statute ensures continuity through substitution under Section 15(2), thereby preserving the validity of prior proceedings. Section 18, often hailed as the Magna Carta of Arbitration, guarantees equal treatment of parties. Section 29A further reinforces expedition and procedural discipline by imposing time limits for completion of arbitral proceedings, while empowering the Court, within the contours of the Act, to extend or substitute the tribunal, set terms, and impose exemplary costs to prevent frustration of the process.

10.5. Section 34, read with Section 16, provides for challenges to the award on limited grounds, including the validity of the arbitration agreement, but not midstream, thus ensuring continuity of proceedings until an award is rendered.

11. Issue No. 1 Whether the High Court had jurisdiction to review its earlier order passed under Section 11(6) of the A&C Act, and whether such exercise of power was valid in law.

11.1. The issue goes to the very foundation of the legislative policy underlying the Arbitration and Conciliation Act, 1996, which was enacted to promote expedition, party autonomy, and finality in arbitral proceedings, while keeping judicial intervention to a minimum. The Statement of Objects and Reasons of both the 1996 Act and the 2015 Amendment clearly reflect the intention to facilitate a fair and efficient arbitral process and to "minimize the supervisory role of courts in the arbitral process".

11.2. In *Bharat Sanchar Nigam Limited and another v. Nortel Networks India Pvt. Ltd*¹⁶, this Court reiterated that "the legislative policy of the 1996 Act is to minimize the supervisory role of courts in the arbitral process and to ensure that arbitration proceedings are conducted expeditiously without unnecessary interference".

11.3. The insertion of Section 11(6-A) through the 2015 Amendment reaffirmed the limited nature of judicial scrutiny at the appointment stage, restoring the position that courts must confine themselves to a prima facie determination of the existence of an arbitration agreement, curtailing the wider inquiry recognized in *SBP & Co. v. Patel Engineering Ltd.* and another¹⁷.

11.4. Section 5 of the A&C Act begins with a non-obstante clause that expressly restricts judicial intervention only to situations enumerated under the Act. The statute identifies specific points for court involvement - principally under Sections 8, 9, 11, 29A, 34 and 37 - beyond which judicial interference is prohibited.

11.5. In the seven-Judge Bench decision in *Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899*, In re¹⁸, this Court reaffirmed that the role of the referral court under Section 11 is confined to a prima facie examination of the existence of an arbitration agreement. All other questions including validity, enforceability, and jurisdiction are matters for the arbitral tribunal under Section 16. The Court further emphasized that the Arbitration Act is a self-contained code governed by the principle that what is not expressly permitted under the Act is deemed prohibited. The following passages from *Interplay* highlight that minimal judicial intervention is the governing principle and that referral courts must avoid undertaking detailed fact-finding or adjudication at the Section 8 or Section 11 stage:

"88. One of the main objectives behind the enactment of the Arbitration Act was to minimise the supervisory role of Courts in the arbitral process by confining it only to the circumstances stipulated by the legislature. For instance, Section 16 of the Arbitration Act provides that the Arbitral Tribunal may rule on its own jurisdiction "including ruling on any objection with respect to the existence or validity of the arbitration agreement". The effect of Section 16, bearing in view the principle of minimum judicial interference, is that judicial authorities cannot intervene in matters dealing with the jurisdiction of the Arbitral Tribunal.

Although Sections 8 and 11 allow Courts to refer parties to arbitration or appoint arbitrators, Section 5 limits the Courts from dealing with substantive objections pertaining to the existence and validity of arbitration agreements at the referral or appointment stage. A Referral Court at Section 8 or Section 11 stage can only enter into a prima facie determination. The legislative mandate of prima facie determination ensures that the Referral Courts do not trammel the Arbitral Tribunal's authority to rule on its own jurisdiction.

89. Section 5 is of aid in interpreting the extent of judicial interference under Sections 8 and 11 of the Arbitration Act. Section 5 contains a general rule of judicial non-interference. Therefore, every provision of the Arbitration Act ought to be construed in view of Section 5 to give true effect to the legislative intention of minimal judicial intervention.

92. The Arbitration Act is a self-contained code inter alia with respect to matters dealing with appointment of arbitrators, commencement of arbitration, making of an award and challenges to the arbitral award, as well as execution of such awards. [*Pasl Wind Solutions (P) Ltd. v. GE Power Conversion (India) (P) Ltd.*, (2021) 7 SCC 1 : (2021) 3 SCC (Civ) 702; *Kandla Export Corpn. v. OCI Corpn.*, (2018) 14 SCC 715 : (2018) 4 SCC (Civ) 664] When a self-contained code sets out a procedure, the applicability of a general legal procedure would be impliedly excluded. [*Subal Paul v. Malina Paul*, (2003) 10 SCC 361] Being a self-contained and exhaustive code on arbitration law, the Arbitration Act carries the imperative that what is permissible under the law ought to be performed only in the manner indicated, and not otherwise.

Accordingly, matters governed by the Arbitration Act such as the arbitration agreement, appointment of arbitrators and competence of the Arbitral Tribunal to rule on its jurisdiction have to be assessed in the manner specified under the law. The corollary is that it is not permissible to do what is not mentioned under the Arbitration Act. Therefore, provisions of other statutes cannot interfere with the working of the Arbitration Act, unless specified otherwise.

94. The Arbitration Act represents the principles of modern arbitration, which seeks to give effect to the mutual intention of the parties to resolve their disputes by a neutral third-party Arbitral Tribunal, whose decision is final and binding on all the parties. Arbitration law allows the parties to design arbitral procedures, which ensures efficiency and expediency of the arbitration process. One of the reasons that business and commercial entities prefer arbitration is because it obviates cumbersome judicial processes, which can often prove expensive, complex and interminable. Most legal

jurisdictions have also recognised and adopted legal approaches that favour arbitration at both the domestic and international level.

In the process, national courts have given effect to principles such as the separability presumption and jurisdictional competence of the Arbitral Tribunal. Modern arbitration law does not completely restrict the role of national courts in the arbitration process, but gives priority to the Arbitral Tribunal to decide on disputes and issues pertaining to arbitration agreements as well as the substantive rights of the parties. The Arbitration Act reflects these aspects of modern arbitration law. It is the duty of this Court to interpret the Arbitration Act in a manner which gives life to the principles of modern arbitration in India."

11.6. This position was reaffirmed in *Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)*¹⁹, wherein, this Court reiterated that proceedings under Section 11 are strictly facilitative and not adjudicatory in nature, and that issues relating to validity or jurisdiction must be left to the arbitral tribunal. The following paragraphs are pertinent in this regard:

"H. Necessity of maintaining the principle of minimum judicial interference

165. In *Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899*, In re [Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899, In re, (2024) 6 SCC 1, para 92] a seven-Judge Bench of this Court emphasised the importance of minimal judicial interference by the courts at the Section 11 stage. This Court held that the scope of the proceedings under Section 11 must be confined to the existence of an arbitration agreement. The Court further observed : (SCC pp. 87-88, paras 165-67)

"165. The legislature confined the scope of reference under Section 11(6-A) to the examination of the existence of an arbitration agreement. The use of the term "examination" in itself connotes that the scope of the power is limited to a prima facie determination. Since the Arbitration Act is a self-contained code, the requirement of "existence" of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In *Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764]*, this Court held that the Referral Courts only need to consider one aspect to determine the existence of an arbitration agreement - whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

Therefore, the scope of examination under Section 11(6-A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by Arbitral Tribunal under Section 16.

166. The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. In jurisdictions such as India, which accept the doctrine of competence-competence, only prima facie proof of the existence of an arbitration agreement must be adduced before the Referral Court. The Referral Court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the Arbitral Tribunal. This position of law can also be gauged from the plain language of the statute.

167. Section 11(6-A) uses the expression "examination of the existence of an arbitration agreement". The purport of using the word "examination" connotes that the legislature intends that the Referral Court has to inspect or scrutinise the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression "examination" does not connote or imply a laborious or contested inquiry. On the other hand, Section 16 provides that the Arbitral Tribunal can "rule" on its jurisdiction, including the existence and validity of an arbitration agreement. A "ruling" connotes adjudication of disputes after admitting evidence from the parties.

Therefore, it is evident that the Referral Court is only required to examine the existence of arbitration agreements, whereas the Arbitral Tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement." The Constitution Bench held that the nature of objections to the jurisdiction of an Arbitral Tribunal on the basis that stamp duty has not

been paid or is inadequate cannot be decided on a prima facie basis. [Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899, In re, (2024) 6 SCC 1, para 207] Hence, it was observed that objections of such a kind will require a detailed consideration of evidence and submissions and a finding as to the law as well as the facts.

166. At the Section 11 stage, a referral court only has to determine the existence of arbitration agreement. The validity of the arbitration clause providing for the procedure for appointment of arbitrators will require the referral court to enter into a detailed consideration of evidence and render a finding as to law and facts. This issue should be left to be decided by the Arbitral Tribunal in view of the doctrine of competence-competence. The Arbitral Tribunal is competent to rule on its jurisdiction, including the issue of validity of the arbitration clause for violating the equality principle under the Arbitration Act.

(Emphasis Supplied)

Thus, the entire scheme of the Act strongly discourages any mid-way judicial intervention, especially by way of review, as it would run contrary to both the text and the spirit of the statute.

11.7. Although the power exercised by the High Court under Section 11 is judicial in nature post - SBP & Co. case, its scope remains narrow. Once an arbitrator is appointed, the arbitral process must proceed unhindered. There is no statutory provision for review or appeal from an order under Section 11, which reflects a conscious legislative choice.

11.8. While High Courts, as courts of record, do possess a limited power of review, such power is extremely circumscribed in matters governed by the Arbitration Act. It may be exercised only to correct an error apparent on the face of the record or to address a material fact that was overlooked. It cannot be used to revisit findings of law or reappreciate issues already decided.

11.9. In *Grindlays Bank Ltd v. Central Government Industrial Tribunal and others*²⁰, this Court drew a clear distinction between procedural review and review on merits, holding that the latter is impermissible unless expressly provided. Applied to the Arbitration Act, this means that review is available only to cure a patent or procedural error - not to reopen interpretation of the arbitration agreement.

11.10. Referring to the aforesaid decision in *Bharat Heavy Electricals Limited v. Jyothi Turbopower Services Private Limited*²¹, in which, one of us (R. Mahadevan, J.) was a member, the Madras High Court held that while a Tribunal has no inherent power to undertake a review on merits, it nonetheless possesses the inherent procedural power to recall an order terminating the proceedings. It cannot be that a constitutional court of record lacks such power, to presume otherwise would amount to a constitutional fallacy. The Court further observed that the A&C Act, 1996 is a complete code in itself and is premised on minimal judicial intervention in arbitral proceedings. The following paragraphs are apposite:

"18. The learned Arbitrator has also opined that an order under Section 25(a) of the said Act cannot be construed to be an award as there is no decision on merit and thus, it may not be possible to maintain an appeal under Section 34 of the said Act (reliance was placed on the decision of the Division Bench of the Delhi High Court in *ATV Projects India vs. IOC & another*, (2013) 200 DLT 553). The learned Arbitrator thus opined that since a party cannot be without a remedy, what should be the remedy in such a situation needed to be examined.

The Tribunal, while accepting that there cannot be any power of review inherent in character, that proposition would apply to decision on merits. However, with respect to procedural review, the implied power is available with the Tribunal to deal with petitions similar to the ones in the present case. The observations made by the Hon'ble Supreme Court in *Grindlays Bank Ltd. vs. the Central Govt. Industrial Tribunal*, reported in AIR 1981 SC 806, in latter part of para 13 were specifically referred to, which are once again extracted as under:

"13. Furthermore, different considerations arise on review. The expression 'review' is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a Court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the Court in *Patel Narshi Thakershi* case (AIR 1970 SC 1273) held that no review lies on merits unless a statute specifically provides for it. Obviously when a review is

sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected *ex debito justitiae* to prevent the abuse of its process, and such power inheres in every Court or Tribunal."

"27. We reject the plea of the learned counsel for the petitioner that on termination of proceedings under Section 25(a) of the said Act, the Arbitrator becomes *functus officio*, as he is a *persona designata*. Both the methods of appointment of Arbitrator are possible, i.e. by consent or through the process of Court. The position would not be different in the two situations. It is not as if there is a better sanctity to the appointment of an Arbitrator which enlarges the power if he is appointed by mutual consent, while there are abridged powers if he is not appointed by the Court."

"29. We are also in agreement with the views of both the Calcutta and Delhi High Courts and in view of the aforesaid finding, that the remedy under Article 226 of the Constitution of India is not really available as the aforesaid is the appropriate remedy. The invocation of jurisdiction of this Court by the petitioner is, in turn, predicated on a belief that either of the parties aggrieved have to approach this Court under its extraordinary writ jurisdiction.

However, we have already explained the remedy available and any further challenge to an order which may be passed in such application would, in turn, depend on the fate of it. The said Act is a complete code in itself and the basis is that there should not be periodic judicial intervention in arbitration proceedings. Were a favourable order to be passed commencing arbitration proceedings, the option would only be to challenge the award, if so advised, under Section 34 of the said Act. Similarly, if the application was to be dismissed, the position would really be no different."

11.11. The decisions such as *Municipal Corporation of Greater Mumbai and another v. Pratibha Industries Ltd. and others*²², and *Mohd. Anwar & others v. Pushpalata Jain & others*²³, illustrate this narrow window, where review was permitted only because the earlier orders had been passed in ignorance of fundamental facts. These cases are confined to procedural lapses, not to reexamining matters of law.

11.12. By contrast, in the present case, the High Court reopened the issue of interpretation of the arbitration clause based solely on a subsequent judgment. Such an exercise falls squarely outside the scope of review jurisdiction. Even assuming that a review was maintainable, it was filed after an unexplained delay of nearly three years and was not founded on any error apparent on the face of the record or any suppression of material fact.

11.13. Once the Section 11 order had attained finality, the only remedies available to the respondents were to approach this Court under Article 136 or to raise objections under Section 16 before the arbitral tribunal. Having chosen neither route, and having participated in the arbitral proceedings, including joint applications under Section 29A, they were estopped from reopening the matter through review. A later judgment cannot revive a concluded cause of action.

11.14. As emphasized in *BSNL v. Nortel Networks (India) (P) Ltd* (*supra*), courts must resist "attempts to re-enter through the back door what the statute has shut through the front door". Section 11 is intended to trigger arbitration, not to create multiple stages of judicial reconsideration.

11.15. For the reasons discussed above, this Court is of the considered view that the High Court did not have the jurisdiction to reopen or review its earlier order passed under Section 11(6) of the A&C Act. Once the appointment was made, the court became *functus officio* and could not sit in judgment over the very issue it had already settled. The review order cuts against the grain of the Act, undermines the principle of minimal judicial interference, and effectively converts the review into an appeal in disguise. Such an exercise cannot stand. Accordingly, this issue is answered in the negative.

12. Issue No.2 Whether a valid and subsisting arbitration agreement exists between the parties within the meaning of Section 7 of the A&C Act, and whether Clause 25 of the agreement satisfies the statutory requirements of an arbitration clause.

12.1. Section 7 of the A&C Act defines an "arbitration agreement" and stipulates the manner in which it may be proved. While sub-section (3) mandates that such an agreement must be in writing, Section 7(4)(c) significantly widens the evidentiary scope by recognizing a valid arbitration agreement even where it is evidenced through an exchange of statements of claim and defence, provided that one party asserts the existence of such an agreement and the other does not deny it.

12.2. This formulation derived from Article 7(2) of the UNCITRAL Model Law, reflects a liberal legislative design that places primacy on the parties' intention to arbitrate rather than on formalistic requirements. What matters is the meeting of minds, not the mode in which that understanding is recorded.

12.3. This Court has consistently adopted a purposive interpretation of Section 7(4)(c). In *S.N. Prasad, Hitek Industries (Bihar) Ltd. v. Monnet Finance Ltd. and others*²⁴, it was held that the expression "statement of claim and defence" is not confined to pleadings before an arbitral tribunal, but extends to judicial proceedings where the existence of an arbitration agreement is asserted, but not specifically disputed.

12.4. Likewise, in *State of West Bengal v. Sarkar & Sarkar*²⁵, this Court reiterated that active participation in arbitral proceedings without objection may itself constitute sufficient evidence of a valid and subsisting arbitration agreement. Similarly, in *Mahanagar Telephone Nigam Limited v. Canara Bank and others*²⁶, it was held that even without a formally executed arbitration clause, a valid arbitration agreement can be inferred from the conduct of parties, including participation in arbitration and exchange of pleadings without denial.

12.5. These authorities make it abundantly clear that the true test lies not in technical formality, but in intention. Where parties have acted on a shared understanding to arbitrate, they are estopped from subsequently denying the existence of such an agreement.

12.6. Applying these principles to the present case, the record unequivocally demonstrates the existence of an arbitration agreement between the parties. Pursuant to Clause 25 of the contract, arbitral proceedings were formally commenced on 13.09.2021. More than seventy hearings were conducted before the sole arbitrator, during which both parties actively participated, filed pleadings, paid fees, and incurred substantial costs.

12.7. It is also significant to note that in an earlier dispute between the same parties, arising from the same contractual framework, arbitration had been invoked under Section 11, and the respondents had accepted the resulting award without protest. Such consistent conduct fortifies the conclusion that both parties intended to, and indeed did, submit their disputes to arbitration.

12.8. These circumstances collectively establish a clear meeting of minds and constitute compelling evidence of a valid and subsisting arbitration agreement within the meaning of Section 7(4)(c). Having invoked and participated in the arbitral process, the respondents cannot now be permitted to resile from its earlier position.

12.9. Clause 25 of the agreement reads as follows: "Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in-before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim right matter or thing whatsoever in any way arising out of or relating to contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter.

(i) If the Agency considered any work demanded of him to be outside the requirements of the contract, or dispute any drawings, record or decision given in writing by the Engineer-in-charge on any matter in connection with or arising out of the contract or carrying out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 7 days request the Dy. Chief Engineer in writing for written instruction or decision. Thereupon, the Dy. Chief Engineer shall give his written instructions or decision within a period of fifteen days from the receipt of the Agency's letter.

If the Dy. Engineer fails to give his instructions or decision in writing within the aforesaid period or if the Agency is dissatisfied with the instructions or decision of the Dy. Chief Engineer, the Agency may, within 15 days of the receipt of Dy. Chief Engineer decision, appeal to the Managing Director who shall afford an opportunity to the Agency to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Managing Director shall give his decision within 30 days of receipt of Agency's appeal. If the Agency is dissatisfied with this decision the Agency shall within a period of 30 days from receipt of the decision, give notice to the Managing Director for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above disputes or difference shall be referred for adjudication through arbitrator appointed by Managing Director, the administrative head of the aid Bihar Rajya Pul Nigam Ltd. If the arbitrator so appointed is unable or unwilling to act or resign his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such persons shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Managing Director of the appeal. It is also a term of this contract that no person other than a person appointed by such Managing Director or administrative head of the Nigam as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitrator at all.

It is also a term of this contract that if the Agency does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 45 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the Agency shall be deemed to have been waived and absolutely barred and the B.R.P.N.N.L. TD shall be discharged and released of all liabilities under the contract in respect of these claims. The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause.

It is also a term of the contract that if any fees are payable to the arbitrator these shall be paid equally by both the parties. It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid. All arbitration shall be held at PATNA and at no other place."

A plain reading of Clause 25 reveals two components: (i) an unequivocal mandate that disputes "shall be referred to arbitration", and (ii) a procedural stipulation that vests exclusive power in the Managing Director to appoint the arbitrator and forecloses arbitration altogether if such appointment is not made. While the first component clearly evidences a binding intention to arbitration, the latter imposes an arbitrary and exclusionary condition, incompatible with the fundamental principles of neutrality and equality that underpin the arbitral process.

12.10. This Court has consistently distinguished between the existence of an arbitration agreement and the validity of the appointment procedure. In TRF Ltd (supra) and Perkins Eastman Architects DPC (supra), it was held that while a named authority may be ineligible to act as arbitrator, such ineligibility does not invalidate the arbitration agreement itself.

12.11. This principle was reaffirmed in Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)27, and conclusively settled by the Constitution Bench in CORE II v. ECI SPIC SMO MCML (JV)28, wherein, it was held that unilateral appointment clauses in public-private contracts violate Article 14 and offend the principle of nemo judex in causa sua. The Constitution Bench observed in paragraph 164 as follows:

"Unilateral appointment clauses in a public-private contract fail to provide the minimum level of integrity required in authorities performing quasi-judicial functions such as arbitral tribunals. Therefore, a unilateral appointment clause is against the principle of arbitration, that is, impartial resolution of disputes between parties. It also violates the nemo judex rule which constitutes the public policy of India in the context of arbitration. Therefore, unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution for being arbitrary, in addition to being contrary to the equality principle under the Arbitration Act."

12.12. Accordingly, the portion of Clause 25 that vests exclusive appointment power in one party and forecloses arbitration in default of such appointment must be severed as void and unenforceable.

However, the substantive agreement to arbitrate survives by virtue of the doctrine of severability.

12.13. The legal position is now settled. In *Offshore Infrastructures Ltd. v. Bharat Petroleum Corporation Ltd.*²⁹, this Court held that even where a clause contains an otherwise defective unilateral appointment mechanism, the Court may sever the offending portion and exercise its power under Section 11(6) to appoint an independent arbitrator, thereby giving effect to the parties' genuine intention to arbitrate. The following paragraphs are pertinent in this regard:

"19. The Respondent contends that once the arbitration clause referred to in the GCC has become obsolete and non-operative, it would render the entire arbitration mechanism non-existent therefore the Appellant cannot file an application for appointment of arbitrator.

20. We are not persuaded by this submission of the Counsel for Respondent. The very existence of the arbitration clause in the GCC referring to all disputes to arbitrator is the core part of contract. Merely because the procedure to appoint an arbitrator provided in the clause has become inoperative due to subsequent changes in statutory provisions, would not mean that the core of the contract referring the dispute for adjudication to arbitrator would be rendered nugatory. The amendment in the statute has been enacted with the legislative intent to enforce neutrality of the arbitrator and bring impartiality in arbitration proceedings by virtue of Section 12(5) of the 1996 Act.

It cannot be justified to literally interpret the clause in the contract in a manner or at the cost of the entire arbitration mechanism itself being abandoned. The arbitration agreement must be interpreted in a purposive manner, but not literally so as to enable the parties to pursue the intended dispute redressal mechanism of contract. Therefore, it cannot be said that non-operation of arbitration clause in GCC will result into forgoing of entire arbitration mechanism and rendering the Appellant disentitled for seeking appointment of arbitrator. The Appellant is, therefore, entitled to file application under section 11(6) of the 1996 Act for appointment of arbitrator and thereby the power is vested with the court to appoint an arbitrator upon filing of such application."

The Court further cautioned that refusing to sever such clauses would effectively confer on the dominant party a "nuclear veto" to defeat arbitration altogether- a result wholly inconsistent with the pro-arbitration policy of the Act and violative of Article 14.

12.14. The present contract, being a public -private contract, must withstand not only conventional contractual scrutiny but also constitutional scrutiny. As held in *CORE II*, arbitral appointments in public contracts must satisfy the requirements of fairness, equality, and non-arbitrariness under Article 14.

12.15. The sub-clause in Clause 25 which provides that "if for any reason the matter shall not be referred to arbitration" is vague, uncertain, and arbitrary. The expression "for any reason" confers an unguided and absolute veto, particularly objectionable in a public contract. Such a clause fails the test of manifest arbitrariness and violates Section 18 of the Act, which mandates equal treatment of parties.

12.16. In light of the above discussion, the following propositions emerge:

- (i) The parties' conduct clearly demonstrates their intention to arbitrate, satisfying the requirement of Section 7(4)(c);
- (ii) Clause 25, in its substantive form, constitutes a valid arbitration agreement;
- (iii) The unilateral and exclusionary appointment mechanism is void and severable; and
- (iv) This Court is empowered under Section 11(6) to cure the defect and appoint an independent arbitrator.

12.17. Accordingly, it is held that a valid and subsisting arbitration agreement exists between the parties. Clause 25, when read in its entirety and construed in accordance with the doctrine of severability, satisfies the statutory requirements of an arbitration clause under Section 7 of the Act. The contrary finding of the High Court is unsustainable in law and is liable to be set aside.

13. Issue No. 3 Whether the joint application filed by both parties, seeking extension of the arbitral mandate under Section 29A amounts to an express or implied waiver under Section 4 read with the proviso to Section 12(5) of the Act.

13.1. Waiver is a foundational principle of arbitration, rooted in party autonomy and fairness in conduct. Arbitration, being adversarial in nature, inevitably results in a winning and a losing side. The

legislative rationale in codifying waiver is to ensure that parties do not secure a second bite at the cherry after an unfavourable outcome. Parties are not permitted to sleep over their rights. This statutory policy is in harmony with the scheme of minimal judicial intervention, where the grounds for interference with an arbitral award are narrow, and waiver operates as a significant bar to belated objections.

13.2. Though waiver, acquiescence, and estoppel are often discussed together in arbitral jurisprudence, they occupy distinct conceptual spaces. Waiver is the intentional relinquishment of a known right; acquiescence arises from passive acceptance or delay; and estoppel precludes a party from resiling from a representation on which the other has relied. The Act, however, incorporates only the doctrine of waiver - presuming parties to be conscious of their conduct and its consequences. The Act elevates silence to waiver by importing an element of intent, thereby preventing parties from approbating and reprobating. A party who has actively participated or consented to continuation of the proceedings cannot later challenge the same process merely because the result is adverse. The legislative design thus discourages tactical objections and multiplicity of proceedings.

13.3. Section 12(5), read with the Seventh Schedule, introduces a mandatory disqualification for certain categories of persons from acting as arbitrators, such as employees, consultants, advisors, or those having financial or professional ties with a party. By the 2015 Amendment, the provision came to embody the twin pillars of independence and impartiality in arbitration. The proviso to Section 12(5) creates a narrow exception: such ineligibility may be waived only through an express agreement in writing, and only after disputes have arisen. The deliberate use of this phrase reflects a conscious legislative choice to exclude any notion of implied or inferred waiver.

13.4. In contrast, Section 4 embodies the broader principle of waiver by conduct - where a party, knowing of any non-compliance with the Act or the arbitration agreement, proceeds with the arbitration without timely objection. Rooted in party autonomy, Section 4 prevents parties from raising tactical or belated objections after having substantially participated. Thus, while Section 12(5) demands an express post-dispute written waiver, Section 4 covers all other situations involving informed inaction or acquiescence.

13.5. In *Bharat Broadband Network Ltd. v. United Telecoms Ltd*³⁰, this Court held that once a person falls within the disqualifications of the Seventh Schedule, he becomes de jure ineligible to act as an arbitrator. The appointment is void ab initio and the mandate terminates automatically under Section 14(1) (a). The Court emphasized that such disqualification is absolute and capable of being waived only through an express post-dispute written agreement.

13.6. This position was reiterated in *Ellora Paper Mills Ltd. v. State of Madhya Pradesh*³¹, where the Court held that mere participation in arbitration proceedings does not amount to waiver of statutory ineligibility. While these decisions do not directly address Section 29A, the legislative intent behind the phrase "express agreement in writing" remains unambiguous: implied waiver, acquiescence, or estoppel cannot cure Section 12(5) ineligibility.

13.7. Conversely, in *Quippo Construction Equipment Ltd. v. Janardan Nirman Private Limited*³², this Court held that failure to object or nonparticipation, resulting in an ex parte award, amounts to a deemed waiver under Section 4. The governing principle is that objections may be raised at any stage, but not after a party has, through conduct or delay, waived its right.

13.8. In the present case, the respondents had ample opportunity to object. Instead, both parties jointly moved for extension under Section 29A, not once but thrice. This leads directly to the interplay between Sections 4, 12(5) and 29A.

13.9. Section 29A empowers courts to extend the mandate of an arbitral tribunal, either on a party's application or upon sufficient cause. Its object is to prevent termination of proceedings by efflux of time and to ensure continuity. A joint application under Section 29A stands on a distinct footing from ordinary acts of participation such as filing pleadings. When both parties jointly seek an extension, they signify continued consent and confidence in the tribunal. Under Section 29A(5), even a single party may apply; the other is free to oppose. The Court may, in its discretion, extend the mandate with or without substituting the arbitrator.

13.10. Thus, when a party joins in seeking extension under Section 29A despite having the opportunity to object or seek termination, it signifies a higher degree of consent. However, such consent cannot be equated with an express written waiver under Section 12(5). The statutory language is categorical:

only an express written post-dispute waiver can cure Seventh Schedule ineligibility.

13.11. Reconciling Sections 4, 12(5) and 29A

Section 12(5) addresses inherent ineligibility - a structural defect affecting jurisdiction. Section 4 governs procedural waiver by conduct. Section 29A concerns extension of mandate, where joint invocation indicates consent but not an express written waiver.

The harmonious construction lies in recognizing that only Seventh Schedule disqualifications attract the stringent waiver regime of Section 12(5). In all other cases viz., procedural lapses, delays, or non-jurisdictional irregularities, Section 4 applies. Accordingly, a joint application under Section 29A amounts to a valid waiver under Section 4, save in cases of statutory ineligibility under Section 12(5). Any contrary view would render Section 4 redundant and distort the legislative design.

13.12. Where the disqualification under Section 12(5) is attracted, the language being plain and mandatory, a joint application merely seeking extension, without an informed written waiver, cannot cure ineligibility. Conversely, where no such disqualification exists, the conduct of the parties, especially in jointly invoking Section 29A, constitutes waiver under Section 4.

13.13. In conclusion, Section 12(5) protects impartiality; Section 4 regulates procedural conduct; and Section 29A ensures continuity of proceedings. In the present case, since no Seventh Schedule disqualification is attracted, the High Court's reliance on the rigours of Section 12(5) was misplaced. Viewed through the lens of Section 4, the respondents' conduct clearly amounts to waiver by participation and consent.

Application of Kashish Developers

14. In the present case, the respondents have placed considerable reliance on the fact that the decision in Kashish Developers, which was referred to by the High Court in the impugned judgment, stands "affirmed" on account of the dismissal of the Special Leave Petition. However, the circumstances in Kashish Developers involved an appointment made without affording the State an opportunity to oppose it. Whereas, the present matter arose after extensive pleadings, objections, and participation by both parties. The two cases are therefore factually distinct, and such reliance cannot justify revisiting or unsettling the earlier appointment order.

14.1. It is necessary to restate the well-settled legal position regarding the precedential value of orders dismissing Special Leave Petitions. A non-speaking dismissal of an SLP signifies only that this Court, in its discretion under Article 136, has declined to interfere. It does not amount to approval of the reasoning of the subordinate forum. The doctrine of merger does not apply to such dismissals. This position has been consistently affirmed by this Court, including in Kunhayammed and others v. State of Kerala and another³³; and P. Singaravelan and others v. District Collector, Tiruppur and others³⁴.

14.2. Similarly, in State of Uttar Pradesh and others v. Atul Kumar Dwivedi and others³⁵, after reviewing earlier authorities, this Court reiterated that dismissal of an SLP at the threshold without reasons does not elevate the underlying judgment to binding precedent unless accompanied by an express declaration of law under Article 141.

14.3. Accordingly, the respondents' reliance on the supposed "affirmation" of Kashish Developers is wholly misconceived. A non-speaking dismissal of an SLP neither endorses the reasoning of the judgment challenged nor transforms it into binding precedent. At best, such a decision has persuasive value; its only legal effect is to bring finality to the dispute between the parties in that particular case.

CONCLUSION

15. In the present case, the High Court had itself appointed the arbitrator in 2021 under Section 11(6) of the Act. Both parties participated fully, and more than seventy hearings took place. The High Court also extended the arbitrator's mandate twice under Section 29A. At that stage, the High Court could not, by invoking its jurisdiction under Articles 226 and 227, retrospectively invalidate its own appointment order on the strength of a subsequent interpretation of a similar clause in another matter. Such an approach undermines certainty, dilutes the sanctity of judicial orders, and erodes confidence in the arbitral process.

16. Once the High Court had accepted the existence of a valid arbitration agreement and appointed an arbitrator, its later interference on the same question of the validity of Clause 25 amounted, in substance, to an appeal disguised as supervisory review. If the arbitrator had become unable to act

owing to recusal or disqualification, the proper course was to invoke Section 15(2) and appoint a substitute arbitrator to continue from the existing stage of the proceedings.

17. Sections 15(1) and 15(2) clearly provide that an arbitrator's mandate terminates upon withdrawal or by agreement of the parties, and that a substitute arbitrator must be appointed following the same procedure as the original appointment. The judgments in *Yashwith Constructions (P) Ltd v. Simplex Concrete Piles (India) Ltd.* and another³⁶, *ACC Ltd v. Global Cements Ltd.*³⁷, and *Union of India v. Pradeep Vinod Construction Company*³⁸, reaffirm that such substitution preserves continuity, and prior proceedings remain valid unless either party objects. In light of the same, the High Court's decision to suspend the arbitration altogether, instead of ordering substitution, was contrary to settled law. The exercise of jurisdiction therefore calls for correction under Article 136 of the Constitution. Accordingly, the impugned judgment and order of the High Court is set aside.

18. On the facts of this case, restarting the arbitral process de novo would be both inequitable and inefficient. It is just and proper that the progress already made be preserved. Therefore, the High Court is directed to appoint a substitute arbitrator within two weeks from the date of receipt of this judgment. The newly appointed arbitrator shall continue the proceedings from the stage at which they were interrupted and endeavour to conclude them within one year, subject to any further extension under Section 29A by mutual consent.

19. At this juncture, we are also constrained to take note of the conduct of the respondent company, a public sector undertaking, which is far from satisfactory. Despite repeated notices in appeal and requests for the appointment of an independent arbitrator, the Managing Director chose to remain silent, thereby compelling the appellant to seek judicial intervention. Such indifference by a public authority, where contractual obligations demand prompt responsiveness, falls short of the standards of fairness required of a State entity under Articles 14 and 298 of the Constitution.

19.1. As held in *State of Bihar and others v. Kameshwar Prasad Singh and another*³⁹ and *Urban Improvement Trust, Bikaner v. Mohan Lal*⁴⁰, the State must act as a model litigant - fair, responsive, and transparent in its dealings. Silence or procedural evasion by senior officers is inconsistent with the constitutional trust reposed in public authorities. It is unfortunate that such apathy had to be defended before a constitutional court as an administrative prerogative.

19.2. Although this is a fit case for imposing costs, we refrain from doing so, but issue a stern warning to the then Managing Director of the respondent company, BRPNL. Public Officers are custodians of public faith, not mere administrators. Any repetition of such neglect may invite adverse remarks or even personal accountability. The officer is advised to reflect upon the responsibilities of public office and ensure that such indifference does not recur.

20. With the aforesaid directions and observations, this appeal is allowed. There shall be no order as to costs.

21. Pending application(s), if any, stand disposed of.

.....J. [J.B. Pardiwala]

.....J. [R. Mahadevan]

New Delhi;

November 28, 2025.

1 Hereinafter referred to as "the High Court"

2 For short, "the A&C Act"

3 For short, "BRPNL"

4 (2017) 8 SCC 377

5 (2019) SCC OnLine SC 1517

6 (2025) 4 SCC 641

7 (2002) 3 SCC 572

8 (2025) INSC 698

9 Order dated 04.10.2024 rendered by Patna High Court in C. Rev. No.181 and 182 of 2023

10 (2025) 4 SCC 641
11 (2020) 14 SCC 712
12 (2021) 2 SCC 1
13 (2006) 2 SCC 628
14 (2006) 8 SCC 514
15 (2024) 4 SCC 230
16 (2021) 5 SCC 738
17 (2005) 8 SCC 618
18 (2024) 6 SCC 1
19 (2025) 4 SCC 641
20 (1980) supp SCC 420
21 2016 SCC OnLine Mad 4029 : 2016-3-L.W. 683
22 (2019) 3 SCC 203
23 SLP (C) No. 4820 of 2021 dated 05.04.2021
24 (2011) 1 SCC 320
25 (2018) 12 SCC 736
26 (2020) 12 SCC 767
27 (2020) 14 SCC 712
28 (2025) 4 SCC 641
29 2025 SCC OnLine SC 2147
30 (2019) 5 SCC 755
31 (2022) 3 SCC 1
32 (2020) 18 SCC 277
33 (2000) 6 SCC 359
34 (2020) 3 SCC 133
35 (2022) 11 SCC 578
36 (2006) 6 SCC 204
37 (2012) 7 SCC 71
38 (2020) 2 SCC 464
39 (2000) 9 SCC 94
40 (2010) 1 SCC 512

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