

parties that UOI had made full and final payment of all claims. Pradeep filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 (**Act**), before the High Court seeking court assistance to appoint an arbitrator. The Ld. Single Judge of the High Court *inter alia* held that since UOI failed to appoint an arbitrator despite the invocation of the Arbitration Clause by Pradeep, UOI forfeited its right under the Arbitration Clause. In the circumstances, the Ld. Single Judge appointed an independent sole arbitrator despite the Arbitration Clause providing for a named arbitrator.

Arbitration petition 2

- UOI and BM Construction Company (**BM Construction**) entered into a contract dated 17 January 2012 (**Contract 2**) for construction works. Disputes arose between the parties and BM Construction invoked the Arbitration Clause in the GCC, seeking determination of two claims. Resisting the appointment of an arbitrator, UOI submitted that the claims are not referable to arbitration as the same are covered under “*excepted matter*”² and BM Construction had issued a “*no claim*”³ letter stating that it had no claims towards UOI. BM Construction filed an application under Section 11 of the Act before the High Court seeking court assistance to appoint an arbitrator. The High Court observed that though the claims fall under ‘excepted matter’, the question of whether the disputes can be referred to arbitration ought to be determined by the arbitrator. The High Court appointed an independent sole arbitrator under the aegis of the Delhi International Arbitration Centre.

Observations and findings

- In the appeal before the SC, UOI submitted that since the request for appointment of an arbitrator was made prior to the 2015 Amendment Act, the proceedings shall be in accordance with the pre-amended Act, and therefore the High Court erred in appointing an independent arbitrator. Pradeep and BM Construction contended that UOI forfeited its right to appoint an arbitrator in terms of the Arbitration Clause, in view of its failure to respond to the notice of arbitration.

The arbitrator shall be appointed in terms of the contract

- Relying upon *Parmar Construction*,⁴ the SC observed that the request for appointment of an arbitrator shall be examined in accordance with the principal Act without taking recourse to the 2015 Amendment Act. The SC also observed that in the said case it had set aside the appointment of an independent arbitrator and directed the ‘General Manager’ of the railways to appoint an arbitrator in terms of clause 64 of the contract therein.
- Relying upon *V.S. Engineering*,⁵ the SC observed that when public institutions are slow in responding to request of the contractor for appointment of an arbitrator, the power of the high court to appoint an arbitrator is not taken away. Further, when the authorities fail to appoint an arbitrator and the contractor seeks court assistance in constitution of the tribunal, the Chief Justice / Designated Judge shall have the discretion to appoint a railway officer as per the contract or a High Court judge.
- The SC examined clause 64 of the GCC and observed that in the event of any dispute between the parties, except in any of the “*excepted matters*”, the ‘General Manager’ shall nominate a railway officer as per clause 64 as the sole arbitrator.
- Testing the judicial precedents in the present facts, the SC held that *V.S. Engineering* squarely applies to the present case and when the agreement specifically stipulates for the appointment of a named arbitrator, the appointment should be in terms of the agreement.

² Clause 64 of the GCC *inter alia* provides as follows:

64. (1) (i) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, **but except in any of the “excepted matters”** referred to in Clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration. ...”

³ UOI submitted that the claims of BM Construction were not arbitrable as Clause 43(2) of the GCC provides that the contractor signs a “No Claim” certificate in favour of the railway in the prescribed format after the work is finally measured up and that the contractor shall be debarred from disputing the correctness of the items covered under the “No Claim” certificate or demanding a clearance to arbitration in respect thereof. On the other hand, BM Construction disputed the “No Claim” certificate and submitted that it was issued under compulsion and due to undue influence by the railway authorities.

⁴ *Union of India v. Parmar Construction company*, 2019 (5) SCALE 453

⁵ *Union of India v. V.S. Engineering (P) Ltd.*, (2006) 13 SCC 240

- The SC concluded that the High Court erred in deviating from the Arbitration Clause and appointing an independent arbitrator.

The issue of arbitrability of disputes shall be left open for determination by the arbitrator

- UOI submitted that the High Court erred in referring a matter to arbitration which falls within the ambit of “excepted matters” under the contract. However, the Respondents contended that the matter cannot be regarded as an “excepted matter” since the “No Claim” letter was issued under undue influence and therefore, the arbitrator ought to examine the evidence to determine the same. With reference to the said plea of the respondent, the SC held that that the issue ought to be left open to be decided by the arbitrator. The Respondents argued that there was no merit in the Petitioners’ contention that the introduction of section 87 in the Act and the repeal of section 26 of the 2015 Amendment Act was unconstitutional.

Conclusion

Based on the above findings, the SC set aside the judgments passed by the High Court in Arbitration Petition No.1 and Arbitration Petition No.2. The SC directed UOI to appoint an arbitrator in terms of clause 64 of the GCC within a period of one month. In the interest of time, the SC set the timelines for the pleadings to be filed by both parties. The SC further directed the arbitrator to hear both parties and preferably decide the claims within a period of four months.

Pursuant to section 12 (5) of the Act, as amended by the 2015 Amendment Act, an employee of a company is precluded from being an arbitrator in disputes between the company and another party. Interestingly, in *Rajasthan Small Industries*,⁶ amongst other issues, the SC determined whether the named ‘Managing Director’ was ineligible to act as an arbitrator in view of section 12 of the amended Act. The SC held that the Managing Director was eligible to act as an arbitrator as section 12 of the amended Act was not applicable to the arbitration proceedings.

In the present case, the SC respecting principles of party autonomy in an arbitral process, reiterated that the courts shall make efforts to adhere to the agreed procedure for appointment of an arbitrator.

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⁶ *Rajasthan Small Industries Corporation Limited v. Ganesh Containers Movers Syndicate*, 2019 SCC OnLine SC