REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3461 OF 2023
(@ SLP (C) NO. 5306 OF 2022)

M/s. Shree Vishnu Constructions …Appellant(s)

Versus

The Engineer in Chief
Military Engineering Service & Ors. …Respondent(s)

J U D G M E N T

M.R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court for the State of Telangana at Hyderabad in ARBA No. 151 of 2016 by which the High Court has dismissed the said application filed under Section 11 of the Arbitration Act, 1996 (hereinafter referred to as “Act, 1996”) and has

refused to appoint an arbitrator on the ground that earlier the appellant had accepted the amount as per the final bill in full and final settlement and without raising any dispute and also signed and issued “no further claim certificate”, the original applicant has preferred the present appeal.

2. The facts leading to the present appeal in nutshell are as under:-

2.1 That the appellant herein and the respondents entered into an agreement *vide* agreement dated 22.07.2010 for additions/alterations to Senior Non-Commissioned Officers mess and repairs/renewals to floors in tech area at Air Force Academy, Hyderabad. The appellant raised a revised final bill for the aforesaid work on 10.07.2012. The payment in respect of the final bill was made to the appellant on 29.04.2013. The appellant also issued “no further claim” certificate.

2.2 The appellant sent a notice dated 20.12.2013 invoking the arbitration clause. The appellant preferred an application under Section 11(6) of the Act, 1996 before the High Court on 27.04.2016 and prayed to appoint an arbitrator. The application was opposed by the respondents *inter alia* on the ground that the entire

amount due and payable under the final bill was paid as far as back on 29.04.2013 and that even the appellant issued the “no further claim” certificate and therefore, on the ground of “accord and satisfaction”, the dispute is not required to be sent for arbitration. However, it was the case on behalf of the appellant that in view of the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as “Amendment Act, 2015”) by which Section 11(6A) came to be inserted, while deciding the application under Section 11(6), the Court would have a very limited jurisdiction and to consider only whether there is an existence of the arbitration agreement or not and no further inquiry is permissible at the stage of deciding the application under Section 11(6) and the issue with respect to the “accord and satisfaction” has to be left to be decided by the arbitrator / arbitral tribunal. Therefore, it was the case on behalf of the appellant that the provisions of the Amendment Act, 2015 shall be applicable.

2.3 It was the case on behalf of the respondents that as per Section 26 read with Section 21 of the Amendment Act, 2015, Amendment Act, 2015 shall not be applicable in a case where arbitration proceedings as per Section 21 of

the Arbitration Act, has been commenced prior to the Amendment Act, 2015.

2.4 By the impugned judgment and order, the High Court has dismissed the arbitration petition and has refused to appoint the arbitrator / arbitral tribunal on the ground that the Amendment Act, 2015 shall not be applicable and the Act, pre-amendment, 2015, shall be applicable. That thereafter, after holding that there was a full and final settlement of the payment as per the final bill as far as back on 29.04.2013 and even the appellant issued the “no further claim” certificate and even the application under Section 11(6) of the Act, 1996 was filed after a period of approximately three years, the High Court has dismissed the said arbitration application. The impugned judgment and order passed by the High Court is the subject matter of present appeal.

3. Shri K. Parameshwar, learned counsel has appeared on behalf of the appellant.

3.1 it is submitted by Shri Parameshwar, learned counsel appearing on behalf of the appellant that the issue that arises for consideration in the present appeal is the interpretation of Section 26 of the Amendment Act,

2015 insofar as the applicability of the amended provisions, more specifically, insertion of Section 11(6A) and its applicability to judicial proceedings initiated after the Amendment Act, 2015 came into force w.e.f. 23.10.2015.

3.2 Shri Parameshwar, learned counsel appearing on behalf of the appellant has vehemently submitted that as such the aforesaid issue is squarely covered by the decision of this Court in the case of **Board of Control for Cricket in India (BCCI) Vs. Kochi Cricket Private Limited and Ors., (2018) 6 SCC 287** (paras 37 and 39).

3.3 Relying upon the aforesaid decision, it is submitted that in the said decision it is specifically observed and held by this Court that the Amendment Act, 2015 shall be applicable prospectively and that even in a case where the arbitration proceedings were initiated as per Section 21 of the Act, prior to the Amendment Act, 2015, the Amendment Act, 2015 shall be applicable.

3.4 It is further submitted that this Court in **BCCI (supra)** had the occasion to analyse and interpret Section 26 of the Amendment Act, 2015. The Court specifically traced the legislative history and thereafter came to the

conclusion that Section 26 is divided into two parts. The first part applies to arbitral proceedings before the arbitrator and the second part applies to the proceedings in relation to arbitral proceedings, which means judicial proceedings. The Court held as follows:

> **"38.** That the expression "the arbitral proceedings" refers to proceedings before an Arbitral Tribunal is clear from the heading of Chapter V of the 1996 Act, which reads as follows:
>
> "Conduct of arbitral proceedings"
>
> The entire chapter consists of Sections 18 to 27 dealing with the conduct of arbitral proceedings before an Arbitral Tribunal. What is also important to notice is that these proceedings alone are referred to, the expression "to" as contrasted with the expression "in relation to" making this clear. Also, the reference to Section 21 of the 1996 Act, which appears in Chapter V, and which speaks of the arbitral proceedings commencing on the date on which a request for a dispute to be referred to arbitration is received by the respondent, would also make it clear that it is these proceedings, and no others, that form the subject-matter of the first part of Section 26. Also, since the conduct of arbitral proceedings is largely procedural in nature, parties may "otherwise agree" and apply the Amendment Act to arbitral proceedings that have commenced before the

Amendment Act came into force. [Section 29-A of the Amend (*sic* Amended) Act provides for time-limits within which an arbitral award is to be made. In *Hitendra Vishnu Thakur* v. *State of Maharashtra*, (1994) 4 SCC 602 at p. 633 : 1994 SCC (Cri) 1087, this Court stated: (SCC p. 633, para 26)"*26.* … (*iii*) Every litigant has a vested right in substantive law but no such right exists in procedural law. (*iv*) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.(*v*) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication." It is, inter alia, because timelines for the making of an arbitral award have been laid down for the first time in Section 29-A of the Amendment (*sic* Amended) Act that parties were given the option to adopt such timelines which, though procedural in nature, create new obligations in respect of a proceeding already begun under the unamended Act. This is, of course, only one example of why parties may otherwise agree and apply the new procedure laid down by the Amendment Act to arbitral proceedings that have commenced before it came into force.] In stark contrast to the first part of Section 26 is the second part, where the Amendment Act is made applicable "in relation to" arbitral proceedings which commenced on or after the date of commencement of the

Amendment Act. What is conspicuous by its absence in the second part is any reference to Section 21 of the 1996 Act. Whereas the first part refers only to arbitral proceedings before an Arbitral Tribunal, the second part refers to court proceedings "in relation to" arbitral proceedings, and it is the commencement of these court proceedings that is referred to in the second part of Section 26, as the words "in relation to the arbitral proceedings" in the second part are not controlled by the application of Section 21 of the 1996 Act.

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

> relation to arbitral proceedings" would, therefore, apply only to court proceedings which relate to the arbitral proceedings. The scheme of Section 26 is thus clear : that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to court proceedings which have commenced on or after the Amendment Act came into force."

3.5 It is further submitted that it is specifically held that the phrase 'in relation to arbitral proceedings' appearing in the second part of Section 26 refers to commencement of court proceedings and are not controlled by Section 21 of the principal Act. It is submitted that in such circumstances, the relevant date so far as the applicability of Section 11(6A) is concerned, is not the date of invocation of arbitration but the date of commencement of judicial proceedings before a court under Section 11. It is submitted that therefore viewed in this light, the finding of the High Court that Section 11(6A) shall not be applicable in the present case is clearly erroneous.

3.6 It is submitted that in the case of **Union of India Vs. Parmar Construction Company**, **(2019) 15 SCC 682** (Two Judge Bench) (paras 25-27), without noticing the judgment in **BCCI (supra)**, a coordinate Bench has held,

relying on Section 21, that, the relevant date for applicability of Section 26 of the Amendment Act, 2015 is the date when request for appointment of arbitrator was made. It is further submitted that this has been followed in the judgment in the case of **Union of India Vs. Pradeep Vinod Construction Company, (2020) 2 SCC 464** (Three Judge Bench), which also did not refer to the case of **BCCI (supra)** but has only followed the judgment in **Parmar Construction Company (supra)**.

3.7 It is submitted that the judgment in **BCCI (supra)** was rendered in the context of Section 36 of the Act and not in the context of Section 11. Both **Pradeep Vinod Construction Company (supra)** and **Parmar Construction Company (supra)** were cases relating to Section 11. However, neither of the case distinguished the second part of Section 26 of the Amendment Act, 2015 as relating to judicial proceedings. It is further submitted that, in **Parmar Construction Company (supra)**, reliance was placed on **Aravali Power Company Private Limited Vs. Era Infra Engineering Limited, (2017) 15 SCC 32** (Para 22), to examine the effect of Section 21 of the principal Act read with Section 26 of the Amendment Act, 2015. It is submitted that the reliance placed on **Aravali Power Company Private Limited (supra)** in the case of **Parmar**

Construction Company (supra) is completely misplaced. Firstly, neither Section 21 of the principal Act nor Section 26 of the Amendment Act, 2015 were discussed in **Aravali Power Company Private Limited (supra)**. Secondly, the decision in **Aravali Power Company Private Limited (supra)** did not concern judicial proceedings but applications filed before the arbitrator challenging his qualification under Sections 12 and 13. It is submitted that therefore, the second part of Section 26 did not come for consideration at all.

3.8 It is submitted that similarly, the reliance placed in **Parmar Construction Company (supra)** on **S.P. Singla Constructions Private Limited Vs. State of Himachal Pradesh and Anr., (2019) 2 SCC 488** (Para 16) is again misplaced because in **S.P. Singla Constructions Private Limited (supra)** issue also involved was disqualifications of an arbitrator under Section 12 and consequent filing of Section 11 petitions prior to coming into force of the Amendment Act, 2015.

3.9 It is submitted that on the other hand, this Court in **Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India (NHAI), (2019) 15 SCC 131** (Para 19), has held that,

Section 34 as amended in 2015, will apply only to Section 34 applications that have been made to the Court on or after 23.10.2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date and while doing so, this Court followed the judgment in **BCCI (supra)**.

3.10 It is submitted that in order to get over the judgment in **BCCI (supra)**, the Parliament omitted Section 26 of the Amendment Act, 2015 w.e.f. 23.10.2015 by way of Section 15 of the Arbitration and Conciliation (Amendment) Act, 2019, which was notified on 30.08.2019. It is further submitted that the validity of Section 15 was *inter alia* challenged in **Hindustan Construction Company Limited and Anr. Vs. Union of India and Ors., (2020) 17 SCC 324** (Three Judge Bench). It is submitted that this Court held that, though the basis for the judgment in **BCCI (supra)** was removed, but still found that Section 15 of the Amendment Act, 2019 was unconstitutional as being manifestly arbitrary. What is noteworthy is that despite having noticed that the Justice Srikrishna committee report held that the Amendment Act, 2015 must apply to arbitrations, which commenced on or after 23.10.2015 and related court proceedings, the Court

struck down the amendment and resurrected the law as stated in **BCCI (supra)**. The Court emphatically held that,

> "**66.** The result is that Kochi Cricket [BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC] judgment will therefore continue to apply so as to make applicable the salutary amendments made by the 2015 Amendment Act to all court proceedings initiated after 23-10-2015."

3.11 It is further submitted that the judgment in **BCCI (supra)**, so far as it differentiated between arbitral proceedings and court proceedings, was followed in **Government of India Vs. Vedanta Limited, (2020) 10 SCC 1** (Three Judge Bench), and the Court emphasized that the Amendment Act, 2015 would be applicable to court proceedings arising out of arbitration proceedings, irrespective of whether such arbitration proceedings commenced prior to or after the Amendment Act, 2015.

3.12 It is further submitted that the judgment in **BCCI (supra)** has also been followed in **Patel Engineering Limited Vs. North Eastern Electric Power Corporation Limited, (2020) 7 SCC 167** (Para 15) (Three Judge Bench).

3.13 In light of this brief conspectus of the aforesaid decisions, it is submitted that, the decision in **BCCI**

(supra), regarding judicial proceedings referred to in Section 26 not being controlled by Section 21 of the principal Act, has been followed by a coordinate bench of this Hon'ble Court in **Ssangyong Engineering and Construction Company Limited (supra)** and the three-judge benches in **Hindustan Construction Company Limited and Anr. (supra)**, **Vedanta Limited (supra)** and **Patel Engineering Limited (supra)**. It is further submitted that on the other hand, the decision by the coordinate bench in **Parmar Construction Company (supra)** was rendered in ignorance of the decision in **BCCI (supra)**. Further, the coordinate bench in **Parmar Construction Company (supra)** placed reliance on the decisions in **Aravali Power Company Private Limited (supra)** and **S.P. Singla Constructions Private Limited (supra)**, neither of which concerned judicial proceedings as they were rendered on the issue of qualification or disqualification of the arbitrator. It is further submitted that the decision in the case of **Parmar Construction Company (supra)** was followed by the three-judge bench in **Pradeep Vinod Construction Company (supra)** without any reference to **BCCI (supra)**.

3.14 It is therefore, the submission on behalf of the appellant that the decision of this Court in the case of

BCCI (supra) was binding on the coordinate bench which rendered the decision in the case of **Parmar Construction Company (supra),** this Court has not noticed the said decision and therefore, the decision in the case of **Parmar Construction Company (supra)** can be said to be *per incuriam* and/or *sub silentio.* It is submitted that therefore, the decision in the case of **Parmar Construction Company (supra)** being per incuriam, the larger Bench, which rendered the decision in the case of **Pradeep Vinod Construction Company (supra)** ought not to have placed reliance on **Parmar Construction Company (supra)** . Therefore, relying upon the decision of this Court in the case of **BCCI (supra)**, which has been subsequently followed in other decisions referred to hereinabove, it is prayed to allow the present appeal.

4. Present appeal is vehemently opposed by Shri Padmesh Mishra, learned counsel appearing on behalf of the respondents.

4.1 It is vehemently submitted by the learned counsel appearing on behalf of the respondents that as such the Hon'ble High Court has rightly dismissed the Section 11(6) application by observing and holding that the pre-amendment Arbitration Act, 2015 shall be applicable.

4.2 It is submitted that in the present case, admittedly the notice invoking the arbitration was issued on 20.12.2013, i.e., much prior to the Amendment Act, 2015. It is further submitted that admittedly the application under Section 11(6) of the Act, 1996 was preferred and filed on 27.04.2016, i.e., much after the Amendment Act, 2015 came into force. It is submitted that therefore, taking into consideration section 26 of the Amendment Act, 2015 and when the notice invoking the arbitration was issued much prior to the Amendment Act, 2015, therefore, the arbitration proceedings can be said to have commenced on 20.12.2013 and therefore, pre-Amendment Act, 2015 shall be applicable and not the Amendment Act, 2015.

4.3 Now, insofar as the reliance placed upon the decision of this Court in the case of **BCCI (supra)** relied upon on behalf of the appellant is concerned, it is submitted that the decision in the case of **BCCI (supra)** and the subsequent decisions following the **BCCI (supra)** are all with respect to the proceedings under Sections 34 and 36 of the Act, 1996. It is submitted that therefore, considering Sections 34 and 36 proceedings as judicial/court proceedings, this Hon'ble Court has interpreted Section 26, bifurcating Section 26 into two

parts and to that it is observed and held that with respect to judicial proceedings under Sections 34 and 36, the Amendment Act, 2015 shall be applicable. It is submitted that, however, on the other hand, there is a direct decision of this Hon'ble Court in the case of **Parmar Construction Company (supra)** dealing with the very issue of application under Section 11(6) of the Act, 1996 and in the said decision it is specifically observed and held that so far as the application under Section 11(6) of the Act, 1996 is concerned, in case the notice invoking the arbitration is invoked prior to the Amendment Act, 2015, pre Amendment Act, 2015 shall be applicable. It is submitted that as such the decision of this Court in the case of **Parmar Construction Company (supra),** which is a Two Judge Bench decision has been subsequently considered and followed by a Three Judge Bench in the case of **Pradeep Vinod Construction Company (supra).**

4.4 It is further submitted that in the case of **BCCI (supra)**, this Court has unequivocally held that from the scheme contained in Section 26 of the Amendment Act, it is clear that the Amendment Act is prospective in nature and will only apply to those arbitral proceedings that commence in terms of Section 21 of the Act, on or after the Amendment Act, and to Court proceedings, which

have commenced on or after the Amendment Act came into force. It is submitted that it necessarily follows that in such cases, where the arbitration proceedings have been initiated prior to 23.10.2015, it will continue to be governed by the legal position as it existed prior to the coming into force of the Amendment Act, 2015.

4.5 It is submitted that as submitted hereinabove, the judgments in **Parmar Construction Company (supra)** and **Pradeep Vinod Construction Company (supra)** are with respect to the applications under Section 11(6) and the decision of this Court in the case of **BCCI (supra)** is with respect to the proceedings under Sections 34 and 36 and even the observations made in paragraphs 37 to 39 are with respect to the "court proceedings" and therefore, the aforesaid two decisions cannot be said to be in conflict with the judgment in the case of **BCCI (supra).**

4.6 It is submitted that the reliance by the appellant on the expression "court proceedings in relation thereto" as it occurs in Section 26 of the Amendment Act, 2015 to contend that applications under Section 11 of the Act, 1996 would fall in such category is misplaced. It is submitted that it must be borne in mind that this Hon'ble Court was called upon to interpret Section 26 of the

Amendment Act, 2015, to answer as to whether applications under Section 36, which was amended by the Amendment Act, 2015 would apply in its amended form in respect of Section 34/36 proceedings initiated before the commencement of the Amendment Act, 2015. It is submitted that, thus, any observation in **BCCI (supra)** ought to be understood in the context in which the issue arose therein and the same cannot be said to have laid down the law as regards applicability of the Amendment Act, 2015 to Section 11 applications.

4.7 It is submitted that the judgment in **Parmar Construction Company (supra)** follows the judgment of this Hon'ble Court in **S.P. Singla Constructions Private Limited (supra)** in order to conclude that Section 11 petitions in respect of proceedings initiated prior to the commencement of the Amendment Act, 2015, would be governed by the pre-amended legal position. It is submitted that the said judgment in **S.P. Singla Constructions Private Limited (supra)** in turn follows the observations of this Hon'ble Court in **BCCI (supra).**

4.8 It is further submitted that the issue as to whether the Amendment Act, 2015 would apply to proceedings under Section 11, with respect to arbitration commenced

prior to 23.10.2015 (the date on which the Amendment Act, 2015 came into force) has been elaborately dealt with by a Three Judge Bench in the case of **S.P. Singla Constructions Private Limited (supra),** after analysing threadbare the judgment in **BCCI (supra)** to conclude as under:-

> "**16.** Considering the facts and circumstances of the present case, we are not inclined to go into the merits of this contention of the appellant nor examine the correctness or otherwise of the above view taken by the Delhi High Court in Ratna Infrastructure Projects case [Ratna Infrastructure Projects (P) Ltd. v. Meja Urja Nigam (P) Ltd., 2017 SCC OnLine Del 7808]; suffice it to note that as per Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015, the provisions of the amended 2015 Act shall not apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the principal Act before the commencement of the Amendment Act unless the parties otherwise agree. In the facts and circumstances of the present case, the proviso in Clause (65) of the general conditions of the contract cannot be taken to be the agreement between the parties so as to apply the provisions of the amended Act. As per Section 26 of the Act, the provisions of the Amendment Act, 2015 shall apply in relation to

> arbitral proceedings commenced on or after the date of commencement of the Amendment Act, 2015 (w.e.f. 23-10-2015). In the present case, arbitration proceedings commenced way back in 2013, much prior to coming into force of the amended Act and therefore, provisions of the amended Act cannot be invoked.
>
> **17.** In BCCI v. Kochi Cricket (P) Ltd. [(2018) 6 SCC 287], this Court has held that the provisions of the Amendment Act, 2015 (with effect from 23-10-2015) cannot have retrospective operation in the arbitral proceedings already commenced unless the parties otherwise agree and held as under :
> **...**……..”

4.9 It is submitted that it is a settled law that arbitration commences upon invocation of the notice as per Section 21 of the Act, 1996. It is submitted that therefore, in a case where the notice invoking the arbitration has been issued prior to the Amendment Act, 2015, on true interpretation of Section 26 read with Section 21 of the Amendment Act, 2015, the Amendment Act, 2015 shall not be applicable and the arbitration would be governed by the unamended provision.

4.10 Making above submissions and relying upon the decisions of this Court in the case of **Parmar Construction Company (supra); Pradeep Vinod Construction Company (supra)** and **S.P. Singla Constructions Private Limited (supra)**, it is prayed to dismiss the present appeal.

5. We have heard learned counsel for the respective parties at length.

The short question which is posed for the consideration of this Court is, in relation to the arbitration proceedings, in a case where the notice invoking arbitration is issued prior to the Amendment Act, 2015, the old Act shall be applicable (pre-amendment 2015) or the new Act?

6. While considering the aforesaid issue the relevant provisions of the Amendment Act, 2015 are required to be referred to, namely, Sections 11(6A), 21 and 26, which are as under:

> "(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

> 21. Commencement of arbitral proceedings – Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.
>
> 26. Act not to apply to pending arbitral proceedings – Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

6.1 Section 11(6A) has been inserted by Amendment Act, 2015, by which the powers of the Court dealing with an application under Section 11(6) of the Act are restricted and as per section 11(6A), the powers of the Court while deciding application under Section 11(6) of the Act are confined to the examination of the existence of an arbitration agreement, which powers were not restricted in the pre-amendment Act, 2015. However, Section 26 of the Amendment Act, 2015 provides that nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the

commencement of this Act unless the parties otherwise agree. At this stage, it is required to be noted that as per Section 21 of the principal Act, unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to the arbitration is received by the respondent. Therefore, as per section 21 of the principal Act, the arbitral proceedings can be said to have commenced on the date on which a request for the dispute to be referred to the arbitration is received by the respondent. Therefore, as per section 21 of the principal Act the arbitral proceedings can be said to have commenced on the date on which a request for the dispute to be referred to the arbitration is received by the respondent. At this stage, it is required to be noted that by Amendment Act, 2015, Sections 34 and 36 of the Arbitration Act also came to be amended and the interference of the Court in challenge to the award has been restricted and/or narrowed down.

7. The question of applicability of the Arbitration Amendment Act, 2015 fell for consideration before this Court in catena of decisions, few of them are as under:

i) In the case of ***Mayawati Trading v. Pradyut Debbarman, (2019) 8 SCC 714***, it is observed and held that the position of law that prevails after insertion of section 11(6A) is that Supreme Court or, as the case may be, the High Court, while considering any application under Sections 11(4) to 11(6) is to confine itself to examination of existence of arbitration agreement, nothing more, nothing less, and leave all other preliminary issues to be decided by arbitrator;

ii) In the case of ***BCCI (supra),*** while interpreting section 26 of the Amended Act, 2015, this Court has observed in paragraphs 37 to 39 as under:

> **"37.** What will be noticed, so far as the first part is concerned, which states—
>
> > "**26.** ***Act not to apply to pending arbitral proceedings***. — Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree…."
>
> is that: (*1*) "the arbitral proceedings" and their commencement is mentioned in the context of Section 21 of the principal Act; (*2*) the expression used is "to" and not "in relation to";

and (*3*) parties may otherwise agree. So far as the second part of Section 26 is concerned, namely, the part which reads, "… but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act" makes it clear that the expression "in relation to" is used; and the expression "the" arbitral proceedings and "in accordance with the provisions of Section 21 of the principal Act" is conspicuous by its absence.

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

"Conduct of arbitral proceedings"

The entire chapter consists of Sections 18 to 27 dealing with the conduct of arbitral proceedings before an Arbitral Tribunal. What is also important to notice is that these proceedings alone are referred to, the expression "to" as contrasted with the expression "in relation to" making this clear. Also, the reference to Section 21 of the 1996 Act, which appears in Chapter V, and which speaks of the arbitral proceedings commencing on the date on which a request for a dispute to be referred to arbitration is received by the respondent, would also make it clear that it is these proceedings, and no others, that form the subject-matter of the first

part of Section 26. Also, since the conduct of arbitral proceedings is largely procedural in nature, parties may "otherwise agree" and apply the Amendment Act to arbitral proceedings that have commenced before the Amendment Act came into force. [Section 29-A of the Amend (*sic* Amended) Act provides for time-limits within which an arbitral award is to be made. In *Hitendra Vishnu Thakur* v. *State of Maharashtra*, (1994) 4 SCC 602 at p. 633 : 1994 SCC (Cri) 1087, this Court stated: (SCC p. 633, para 26)"*26.* … (*iii*) Every litigant has a vested right in substantive law but no such right exists in procedural law. (*iv*) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.(*v*) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication." It is, inter alia, because timelines for the making of an arbitral award have been laid down for the first time in Section 29-A of the Amendment (*sic* Amended) Act that parties were given the option to adopt such timelines which, though procedural in nature, create new obligations in respect of a proceeding already begun under the unamended Act. This is, of course, only one example of why parties may otherwise agree and apply the new procedure laid down by the Amendment Act to arbitral proceedings that have commenced before it came into

force.] In stark contrast to the first part of Section 26 is the second part, where the Amendment Act is made applicable "in relation to" arbitral proceedings which commenced on or after the date of commencement of the Amendment Act. What is conspicuous by its absence in the second part is any reference to Section 21 of the 1996 Act. Whereas the first part refers only to arbitral proceedings before an Arbitral Tribunal, the second part refers to court proceedings "in relation to" arbitral proceedings, and it is the commencement of these court proceedings that is referred to in the second part of Section 26, as the words "in relation to the arbitral proceedings" in the second part are not controlled by the application of Section 21 of the 1996 Act.

39. Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings — arbitral proceedings themselves, and court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative

> form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, "arbitral proceedings" having been subsumed in the first part cannot re-appear in the second part, and the expression "in relation to arbitral proceedings" would, therefore, apply only to court proceedings which relate to the arbitral proceedings. The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to court proceedings which have commenced on or after the Amendment Act came into force."

Thus, in the case of ***BCCI (supra)***, it is observed and held that the Amendment Act, 2015 is prospective in nature. However, it is required to be noted that in the case of ***BCCI (supra)***, this Court was considering the proceedings under sections 34 and 36 of the Amendment Act, 2015 and to that while interpreting section 26, it is observed that the Amendment Act is prospective in nature, and will apply even to those arbitral proceedings that are commenced, as understood by section 21 of the principal Act, prior to the Amendment Act, and to Court proceedings which have commenced on or after the Amendment Act came into force.

iii) In the case of ***Parmar Construction Company (supra)***, in relation to application under section 11(6) of the Act, in a case where notice for arbitration is received/invoked prior to the Amendment Act, 2015, but the application under section 11(6) of the Act is filed post Amendment Act, 2015, it is observed in paragraphs 25 to 28 as under:

> **"25.** As on 1-1-2016, the 2015 Amendment Act was gazetted and according to Section 1(2) of the 2015 Amendment Act, it was deemed to have come into force on 23-10-2015. Section 21 of the 1996 Act clearly envisages that unless otherwise agreed by the parties, the arbitral proceedings in respect of a dispute shall commence from the date on which a request for that dispute to be referred to arbitration is received by the respondent and the plain reading of Section 26 of the 2015 Amendment Act is self-explicit, leaves no room for interpretation. Sections 21 and 26 of the 1996 Act/the 2015 Amendment Act relevant for the purpose are extracted hereunder:
>
> > "**21.** ***Commencement of arbitral proceedings***.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred

> to arbitration is received by the respondent.
>
> ***
>
> **26.** ***Act not to apply to pending arbitral proceedings***.—Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

26. The conjoint reading of Section 21 read with Section 26 leaves no manner of doubt that the provisions of the 2015 Amendment Act shall not apply to such of the arbitral proceedings which have commenced in terms of the provisions of Section 21 of the principal Act unless the parties otherwise agree. The effect of Section 21 read with Section 26 of the 2015 Amendment Act has been examined by this Court in *Aravali Power Co. (P) Ltd.* v. *Era Infra Engg. Ltd.* [*Aravali Power Co. (P) Ltd.* v. *Era Infra Engg. Ltd.*, (2017) 15 SCC 32 : (2018) 2 SCC (Civ) 642] and taking note of Section 26 of the 2015 Amendment Act laid down the broad principles as under : (SCC p. 53, para 22)

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

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

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

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

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

22.1.4. While exercising such power under sub-section (6) of Section 11, if

> circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.
>
> *22.2*. In cases governed by the 1996 Act after the Amendment Act has come into force : If the arbitration clause finds foul with the amended provisions, the appointment of the arbitrator even if apparently in conformity with the arbitration clause in the agreement, would be illegal and thus the court would be within its powers to appoint such arbitrator(s) as may be permissible."

which has been further considered in *S.P. Singla Constructions (P) Ltd. case* [*S.P. Singla Constructions (P) Ltd.* v. *State of H.P.*, (2019) 2 SCC 488 : (2019) 1 SCC (Civ) 748] : (SCC p. 495, para 16)

> "*16*. Considering the facts and circumstances of the present case, we are not inclined to go into the merits of this contention of the appellant nor examine the correctness or otherwise of

> the above view taken by the Delhi High Court in *Ratna Infrastructure Projects case* [*Ratna Infrastructure Projects (P) Ltd.* v. *Meja Urja Nigam (P) Ltd.*, 2017 SCC OnLine Del 7808] ; suffice it to note that as per Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015, the provisions of the amended 2015 Act shall not apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the principal Act before the commencement of the Amendment Act unless the parties otherwise agree. In the facts and circumstances of the present case, the proviso in Clause (65) of the general conditions of the contract cannot be taken to be the agreement between the parties so as to apply the provisions of the amended Act. As per Section 26 of the Act, the provisions of the 2015 Amendment Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of the 2015 Amendment Act (w.e.f. 23-10-2015). In the present case, arbitration proceedings commenced way back in 2013, much prior to coming into force of the amended Act and therefore, provisions of the amended Act cannot be invoked."

27. We are also of the view that the 2015 Amendment Act which came into force i.e. on 23-10-2015, shall not apply to the arbitral proceedings which have commenced in

> accordance with the provisions of Section 21 of the principal Act, 1996 before the coming into force of the 2015 Amendment Act, unless the parties otherwise agree.
>
> **28.** In the instant case, the request was made and received by the appellants in the appeal concerned much before the 2015 Amendment Act came into force. Whether the application was pending for appointment of an arbitrator or in the case of rejection because of no claim as in the instant case for appointment of an arbitrator including change/substitution of arbitrator, would not be of any legal effect for invoking the provisions of the 2015 Amendment Act in terms of Section 21 of the principal Act, 1996. In our considered view, the applications/requests made by the respondent contractors deserve to be examined in accordance with the principal Act, 1996 without taking resort to the 2015 Amendment Act which came into force from 23-10-2015."

In the case of ***Parmar Construction Company (supra)***, this Court heavily relied upon para 16 of the decision in the case of ***S.P. Singla Constructions Private Limited (supra)***.

iv) Then comes the decision of this Court in the case of ***Pradeep Vinod Construction Company (supra)***. In the said case, a three Judge Bench of this Court has

followed the decision in the case of ***Parmar Construction Company (supra)*** and in the said decision it is specifically observed that unamended 1996 Act, i.e., prior to Amendment Act, 2015 for appointment of arbitrator shall be applicable where the request to refer the dispute to arbitration was made before 2015 amendment came into effect.

v) In the case of ***Ssangyong Engg. & Construction Co. Ltd. (supra)***, in which the decision in the case of ***BCCI (supra)*** was followed, it is observed and held that section 34, as amended, will apply to only section 34 applications that have been made to the Court on or after 23.10.2015 irrespective of the fact that the arbitration proceedings may have commenced prior to that date. (See para 19). However, it is required to be noted that in the case of ***Ssangyong Engg. & Construction Co. Ltd. (supra),*** this Court has followed the decision in the case of ***BCCI (supra)*** (See para 17).

8. It is the case on behalf of the appellant that therefore in the case of ***BCCI (supra)***, the decision which has been subsequently followed in the case of ***Ssangyong Engg. & Construction Co. Ltd. (supra)*** and

other decisions, it has been specifically observed and held that the Amendment Act, 2015 is prospective in nature. It is the case on behalf of the appellant that while taking a contrary view in the cases of ***Parmar Constructions Company (supra)*** and ***Pardeep Vinod Construction Company (supra)***, this Court had not noticed and/or considered the binding decision of this Court in the case of ***BCCI (supra)*** and therefore the decisions of this Court in the cases of ***Parmar Constructions Company (supra)*** and ***Pardeep Vinod Construction Company (supra)*** are *per incuriam***.** It is also the case on behalf of the appellant that so far as the decision in the case of ***Aravali Power Company Private Limited (supra)***, which was considered by this Court in the case of ***Parmar Constructions Company (supra)*** is concerned, in the said decision also, there is no reference to the decision in the case of ***BCCI (supra)***. It is also the case on behalf of the appellant that though in the case of ***S.P. Singla Constrictions Private Limited (supra)***, there is a reference to the decision in the case of ***BCCI (supra),*** but in the said decision paragraphs 38 and 39 are not referred to and/or considered and except reproduction of para 37, there is no further discussion in the case of ***BCCI (supra)***. Therefore, it is the specific

case on behalf of the appellant that as the decisions in the cases of ***Parmar Constructions Company (supra)*** and ***Pardeep Vinod Construction Company (supra)*** are *per incuriam,* we must hold that in the present case Amendment Act, 2015 shall be applicable and therefore the High Court has committed a very serious error in opining on accord and satisfaction which is not permissible as per the Amendment Act, 2015, i.e., Section 11(6A).

9. Submission on behalf of the appellant, as above, seems to be attractive but has no substance. This Court is required to consider whether the decision in the cases of ***Parmar Constructions Company (supra)*** and ***Pardeep Vinod Construction Company (supra)*** can be said to be *per incuriam* as the decision of this Court in the case of ***BCCI (supra)*** has not been considered by this Court in the said decisions. However, on a fair reading of the decisions in the case of ***BCCI (supra)*** and the observations made in paragraphs 37 to 39 and on a fair reading of decisions in the cases of ***Parmar Constructions Company (supra)*** and ***Pardeep Vinod Construction Company (supra)***, we are of the opinion that this Court in the case of ***BCCI (supra)*** has held that the Arbitration Amendment Act, 2015 is prospective in

nature insofar as the proceedings under sections 34 & 36 are concerned. It is required to be noted that in the case of ***BCCI (supra)***, application under section 11(6) was not the subject matter and there was no issue before the Court that even in a case where the notice invoking the arbitration is issued prior to the Amendment Act, 2015, but the application under section 11(6) is filed post Amendment Act, 2015, what will be the position and whether the old Act will be applicable or the amended Act. On the other hand, the decisions in the case of ***Parmar Constructions Company (supra)*** is directly on the point, namely, the application under section 11(6) of the Act. In the case of ***Parmar Constructions Company (supra)***, it is specifically observed and held that in a case where notice invoking arbitration is issued prior to Amendment Act, 2015 and the application under section 11(6) is filed post amendment, as per section 21 of the principal Act, the date of issuance of the notice invoking arbitration shall be considered as commencement of the arbitration proceedings and therefore as per section 26 of the Amendment Act, 2015, the Amended Act, 2015 shall not be applicable and the parties shall be governed by the pre-amendment Act, 2015.

9.1 The submission on behalf of the appellant, as above, cannot be accepted for the simple reason that this Court in the case of ***BCCI (supra)*** was considering the court proceedings under sections 34 and 36. To that, this Court interpreted section 26 in paragraphs 37 to 39, reproduced hereinabove, and held that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced as understood by section 21 of the principal Act, on or after the Amendment Act, 2015 and to court proceedings which have commenced on or after the Amendment Act, 2015 came into force. Therefore, any observations made by this Court in paragraphs 37 to 39 in the case of ***BCCI (supra)*** shall be understood and construed with respect to court proceedings which have commenced on or after the Amendment Act coming into force, namely, the proceedings under sections 34 & 36. Therefore, the decisions of this Court in the cases of ***Parmar Constructions Company (supra)*** and ***Pardeep Vinod Construction Company (supra)*** cannot be said to be *per incuriam* and/or in conflict with the decision of this Court in the case of ***BCCI (supra)***. As observed hereinabove, in the case of ***Parmar Constructions Company (supra)*** which is directly on the point, it is

specifically observed and held that the 2015 Amendment Act, which came into force w.e.f. 23.10.2015 shall not apply to the arbitral proceedings which are commenced in accordance with the provisions of section 21 of the principal Act, 1996 before the coming into force the 2015 Amendment Act, unless parties otherwise agree (para 27). Similar view has been expressed in the case of ***S.P. Singla Constructions Private Limited (supra)***.

10. Applying the law laid down by this Court in the cases of ***Parmar Constructions Company (supra)*** and ***Pardeep Vinod Construction Company (supra)*** and ***S.P. Singla Constructions Private Limited (supra)*** to the facts of the case on hand as in the present case the notice invoking arbitration clause was issued on 26.12.2013, i.e., much prior to the Amendment Act, 2015 and the application under Section 11(6) of the Act has been preferred/filed on 27.04.2016, i.e., much after the amendment Act came into force, the law prevailing prior to the Amendment Act, 2015 shall be applicable and therefore the High Court has rightly entered into the question of accord and satisfaction and has rightly dismissed the application under section 11(6) of the Act applying the principal Act, namely, the Arbitration and Conciliation Act, 1996, prevailing prior to the Amendment

Act, 2015. We are in complete agreement with the view taken by the High Court. It is observed and held that in a case where the notice invoking arbitration is issued prior to the Amendment Act, 2015 and the application under Section 11 for appointment of an arbitrator is made post Amendment Act, 2015, the provisions of pre-Amendment Act, 2015 shall be applicable and not the Amendment Act, 2015.

11. In view of the above and for the reasons stated above, the present appeal fails and the same deserves to be dismissed and is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

……..J.
[M.R. SHAH]

……..J.
[C.T. RAVIKUMAR]

NEW DELHI;
MAY 09, 2023.