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**2015 Amendments to the Arbitration Act are not applicable to cases in which invocation happened prior to amendment**

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2015 Amendment Act to the Arbitration and Conciliation Act, 1996 brought in many changes to ensure impartiality and independence of the Arbitrators. The above said Amendment Act, came into force on 23<sup>rd</sup> October 2015. The Amendment Act brought in a mandatory declaration by the Arbitrators under section 12(1)(a) declaring their relationship with the parties to the Arbitration and the Counsels appearing for the parties. In addition to that Schedule V and VII were introduced, which declared, certain types of persons and certain types of relationship either with the parties or with the counsels, as not eligible to be considered for appointment as arbitrators. The above said Schedule V and VII are formulated in the lines of the provisions of International Bar Association (IBA) rules on conflict of interest in international Arbitrations. After the said amendment act, the parties arbitrating in India can be sure of the independence and impartiality of the arbitrators. In India, the arbitration clauses providing authority to appoint a sole arbitrator, to one of the parties to the contract is a normal matter where a government or a public-sector undertaking is a party to the contract. In such matters, the appointing authority used to appoint their own officers as arbitrators. The said practice of appointing the officers of one of the party to the contract came to an end by the above said Amendment Act.

Even though the 2015 Amendment Act expressly provides that the amending provisions shall become applicable to arbitrations which are

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initiated on or after 23<sup>rd</sup> October 2015, there has been a doubt about the applicability of the amending act to arbitrations that were initiated prior to the above said date. High Courts in India also have given conflicting interpretations to the applicability of the amending act. In a recent judgement delivered on 12<sup>th</sup> September 2017 in Aravalli Power Co. Pvt. Ltd. Vs M/s Era Infra Engineering Ltd. (2017 SCC Online SC 1072). Supreme Court of India has dealt with a challenge proceeding against the appointment of an arbitrator in which it has held that for the cases which were initiated prior to the amendment act, the un-amended provisions only will apply.

**Facts and Contentions:**

Disputes arose between M/s Era Infra Engineering Limited and Aravalli Power Co. Pvt. Ltd in the contract relating to construction of permanent township for Indra Gandhi Super Thermal Power Project at Jhajjar, Haryana. In the said contract, it was provided that either the project in-charge or some other person appointed by the chairman of National Thermal Power Corporation (NTPC) shall be the sole arbitrator. By its letter dated 29.07.,2015 the respondent initiated arbitration proceedings seeking appointment of arbitrator by the appellant. The Chief Executive of APCPC was appointed as sole arbitrator. The arbitrator fixed the first hearing on 07.10.2015 and the parties appeared before him. None of the parties raised any objection questioning the appointment in that hearing. The respondent sent a letter to the arbitrator on 04.12.2015 seeking extension of time for filing the claim which was granted by the arbitrator. For the first time, the respondent challenged the appointment of the arbitrator on 12.01.2016. Arbitrator rejected the objection and hence approached Delhi High Court under section 14 of the act seeking termination of the mandate of the

arbitrator. The respondent also filed an application under Section.11(6) seeking appointment of an arbitrator.

**Conclusion of the High court:**

The High Court by its judgement set aside the appointment of the arbitrator made by the appellant and directed them to suggest names of the three panel arbitrators from different departments to the Respondent to choose one among them. The said order came to be challenged before the Supreme Court of India in which two main grounds were urged which are as follows:

- a) The respondent failed to challenge the arbitrator in the first instance as provided in section 13 of the un-amended act.
- b) It was not the case of the respondent that the un-amended section 12 stood violated.

**Conclusion of the Supreme Court:**

The Supreme Court held that the law laid in Northern Railways Administration, Ministry of Railways, New Delhi Vs Patel Engineering Company Limited, 2008 (10) SCC 240 as consistently followed by the Supreme Court in other judgement, must be applied to all arbitration matters which were initiated prior to amendment. Hence, the principles which emerged from above decision referred to are as follows:

- a) 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 direct subordinate to the officer whose decision is the subject matter of the dispute.

- b) Unless the cause of action for invoking jurisdiction under clauses (a),(b) or (c) of subsection (6) of section 11 of 1996 Act arises, there is no question of the Chief Justice or his designate exercising power under subsection (b) of Section 11.
- c) The Chief Justice or his designate while exercising power under subsection (6) of section 11 shall endeavor to give effect to the appointment procedure prescribed in the arbitration clause.
- d) While exercising such power under subsection (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.

But the High Court erroneously applied principles of neutrality and impartiality which have been expanded by way of amendment act even when no cause of action for exercise of power under section 11(6) has arisen. It also held that the respondent did not avail the remedy provided under section 13 of the act and hence there no other remedy available to the Respondent.

**Conclusion:** The said Judgment puts an end to the issue of applicability of Amending Act to the pre-amendment Arbitrations. Now it is made clear that the amending provisions will apply to cases where arbitrations were initiated after 23<sup>rd</sup> October 2015.