Neutral Citation Number 2022/DHC/005381

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Order reserved on: December 07, 2022**
Order pronounced on: December 09, 2022

\+ O.M.P.(T) (COMM.) 125/2022 & I.A. 20680/2022 (Stay)

UNION OF INDIA ..... Petitioner

Through: Mr. A. K. Ganguli, Sr. Adv. with Mr. Shailendra Swarup, Ms. Bindu Saxena, Mr. Kirit Javali, Ms. Mamta Tiwari, Mr. Arunav Ganguli and Ms. Charu Ambwani, Advs. for UOI.

versus

RELIANCE INDUSTRIES LIMITED AND ORS.
..... Respondents

Through: Mr. Harish N. Salve, Sr. Adv. with Mr. Sameer Parekh, Ms. Shonali Basu, Mr. Ishan Nagar, Mr. Prateek Khandelwal, Mr. Abhishek Thakral and Mrs. Chetna Rai, Advs. for R-1.
Mr. K. R. Sasiprabhu, Adv. for R-2.
Mr. Mahesh Agarwal, Mr. Rishi Agrawala, Ms. Niyati Kohli, Mr. Pranjit Bhattacharya, Mr. Pratham Vir Agarwal, Advs. for R-3.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

O R D E R

1. The Ministry of Petroleum and Natural Gas in the Union Government has instituted these proceedings purportedly under

Sections 14(2) read with Section 15(2) of the **Arbitration and Conciliation Act, 1996**[1] for a declaration that the majority of the members of the Arbitral Tribunal consisting of the Chairman Sir Michael D. Kirby AC CMG and Sir Bernard Rix, the two Arbitrators nominated by respondent Nos. 1 to 3 are de jure/de facto unable to discharge their functions and consequently their mandate stands terminated in terms of Section 14 of the Act.

2. The arbitration proceedings emanate from a **Production Sharing Contract**[2] dated 12 April 2000 executed between the petitioner and the respondent Nos. 1 to 3 and related to the development and production of gas from D1 to D3 gas discoveries falling in the D-6 block and marketing of gas in terms thereof.

3. The allegation in the present petition essentially is that the various procedural orders passed by the Arbitral Tribunal and the manner in which proceedings have been conducted clearly leads the petitioner to apprehend an evident bias and harboring justifiable doubts as to the independence and impartiality of the arbitrators. The petitioner alleges that the various procedural orders passed by the Tribunal would indicate that it has treated them unfairly, denied them reasonable opportunity and of favoring the cause of respondent Nos. 1 to 3.

4. However, and before the Court proceeds to elaborate upon the submissions which were addressed in support of the present petition by Mr. Ganguli, learned Senior Counsel, it would be

[1] The Act
[2] PSC

pertinent to consider and rule upon a preliminary objection which was raised by Mr. Harish Salve, learned Senior Counsel appearing for respondent Nos. 1 to 3 with respect to the maintainability of the petition itself.

5. Taking the Court through the relevant statutory provisions, Mr. Salve submitted that in terms of Section 12 of the Act, an arbitrator is obliged to make a disclosure with respect to the existence of any relationship or interests that he may have with any of the parties or in relation to the subject matter of the dispute and which is likely to give rise to justifiable doubts as to their independence or impartiality.

6. Proceeding then to Explanation 1 to Section 12(1) of the Act, Mr. Salve submitted that a reading thereof would indicate that the grounds set out in the Fifth Schedule act as a guide in determining whether circumstances exist which may give rise to justifiable doubts being harbored. Proceeding further, learned Senior Counsel submitted that the procedure for challenge to the mandate of an Arbitrator in a situation that gives rise to justifiable doubts as to his independence or impartiality is set forth in Section 12(3) of the Act.

7. Mr. Salve, then submitted that sub-section (5) of Section 12 which came to be introduced by virtue of the Arbitration and Conciliation (Amendment) Act, 2016 creates an ineligibility criterion on grounds set out in the Seventh Schedule to the Act and which would operate notwithstanding any prior agreement to

the contrary between parties. Mr. Salve further clarified that the aforesaid is subject to the solitary exception of a situation where parties may waive the applicability of sub-section (5) by way of an express agreement in writing.

8. According to Mr. Salve, since Section 12(5) read with the Seventh Schedule constructs a non-derogable disqualification, an Arbitrator accused of being affected by the aforesaid provisions would become de jure unable to perform his functions. According to Mr. Salve, it is this de jure disqualification alone which can be challenged under Section 14.

9. Mr. Salve further contended that a challenge to an Arbitrator on grounds enumerated in Section 12(3) would have to necessarily follow and abide by the procedure set out in Section 13. Learned Senior Counsel submitted that in terms of sub-sections (3), (4) and (5) of Section 13, once a challenge to an arbitrator is raised in terms of Section 12(3) and that arbitrator fails to withdraw from office, the Arbitral Tribunal would have to necessarily rule upon the challenge. It was further pointed out that in terms of Section 13(4), if a challenge laid in accordance with the procedure noticed above fails, the Arbitral Tribunal is mandatorily obliged to continue the arbitral proceedings and render an award. That award could be assailed by a party challenging the arbitrator by way of an application for setting aside the same in accordance with Section 34 of the Act.

10. According to Mr. Salve, since the challenge to the Arbitral Tribunal in the present case is raised on the ground of bias and a justifiable doubt with respect to the independence and impartiality of the arbitrators, it is the procedure specified in Section 13 alone which could have been pursued.

11. Mr. Salve urged that a de jure disqualification and which could possibly form subject matter of a petition under Section 14 would have to necessarily be confined to the arbitrator suffering a disqualification by virtue of the provisions contained in the Seventh Schedule. The de jure disqualification, according to Mr. Salve, cannot extend to bias or justifiable cause which would necessarily be subjects which would stand confined to Sections 12 and 13 of the Act.

12. Mr. Salve contended that the aforesaid issue is no longer res integra and stands duly explained by the Supreme Court in **HRD Corporation (Marcus Oil and Chemical Division) versus GAIL (India) Limited (Formerly Gas Authority of India Limited)[3].** Learned Senior Counsel referred to the following passages of that reported decision: -

> "**12.** After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become "ineligible" to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(*a*), he

[3] (2018) 12 SCC 471

then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal.

13. Confining ourselves to ineligibility, it is important to note that the Law Commission by its 246th Report of August 2014 had this to say in relation to the amendments made to Section 12 and the insertion of the Fifth and Seventh Schedules:

> "59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his *possible* appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the red and orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed Section 12(5) of the Act and the Fifth Schedule which incorporates the categories from the red list of the IBA Guidelines (as above), the person proposed to be

> appointed as an arbitrator shall be *ineligible* to be so appointed, *notwithstanding any prior agreement* to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed Explanation to Section 14. Therefore, while the *disclosure* is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the red and orange lists of the IBA Guidelines), the *ineligibility* to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the red list of the IBA Guidelines).
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> 60. The Commission, however, feels that *real* and *genuine* party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, *subsequent to disputes having arisen between them*, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all other cases, the general rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1) and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator."
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> (emphasis in original)

14. The enumeration of grounds given in the Fifth and Seventh Schedules have been taken from the IBA Guidelines, particularly from the Red and Orange Lists thereof. The aforesaid guidelines consist of three lists. The Red List, consisting of non-waivable and waivable guidelines, covers situations which are "more serious" and "serious", the "more serious" objections being non-waivable. The Orange List, on the other hand, is a list of situations that may give rise to doubts as to the arbitrator's impartiality or independence, as a consequence of which the arbitrator has a duty to disclose such

situations. The Green List is a list of situations where no actual conflict of interest exists from an objective point of view, as a result of which the arbitrator has no duty of disclosure. These Guidelines were first introduced in the year 2004 and have thereafter been amended, after seeing the experience of arbitration worldwide. In Part 1 thereof, general standards regarding impartiality, independence and disclosure are set out.

15. General Principle 1 reads as follows:

> "***IBA Guidelines on Conflicts of Interest in International Arbitration***
>
> (1) *General Principle*
>
> Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated."
>
> On "conflicts of interest", Guidelines laid down are as follows:
>
> "(2) *Conflicts of Interest*
>
> (*a*) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.
>
> (*b*) The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard 4.
>
> (*c*) Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.
>
> (*d*) Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence in any of the situations described in the Non-Waivable Red List."

17. It will be noticed that Items 1 to 19 of the Fifth Schedule are identical with the aforesaid items in the Seventh Schedule. The only

> reason that these items also appear in the Fifth Schedule is for purposes of disclosure by the arbitrator, as unless the proposed arbitrator discloses in writing his involvement in terms of Items 1 to 34 of the Fifth Schedule, such disclosure would be lacking, in which case the parties would be put at a disadvantage as such information is often within the personal knowledge of the arbitrator only. It is for this reason that it appears that Items 1 to 19 also appear in the Fifth Schedule.
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> **20.** However, to accede to Shri Divan's submission that because the grounds for challenge have been narrowed as aforesaid, we must construe the items in the Fifth and Seventh Schedules in the most expansive manner, so that the remotest likelihood of bias gets removed, is not an acceptable way of interpreting the Schedules. As has been pointed out by us hereinabove, the items contained in the Schedules owe their origin to the IBA Guidelines, which are to be construed in the light of the general principles contained therein—that every arbitrator shall be impartial and independent of the parties at the time of accepting his/her appointment. Doubts as to the above are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision. This test requires taking a broad commonsensical approach to the items stated in the Fifth and Seventh Schedules. This approach would, therefore, require a fair construction of the words used therein, neither tending to enlarge or restrict them unduly. It is with these prefatory remarks that we proceed to deal with the arguments of both sides in construing the language of the Seventh Schedule."

13. Mr. Salve further submitted that the dichotomy in the challenge procedure with respect to persons who may become ineligible to be appointed as arbitrators and persons against whom a justifiable doubt may exist was again recognised and reiterated by the Supreme Court in **Bharat Broadband Network Ltd. v. United Telecoms Ltd.**[4] where after reiterating the principles which were enunciated in **HRD Corporation** the Supreme Court held as follows: -

[4] (2019) 5 SCC 755

"**14.** From a conspectus of the above decisions, it is clear that Section 12(1), as substituted by the Arbitration and Conciliation (Amendment) Act, 2015 ["the Amendment Act, 2015"], makes it clear that when a person is approached in connection with his possible appointment as an arbitrator, it is his duty to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality. The disclosure is to be made in the form specified in the Sixth Schedule, and the grounds stated in the Fifth Schedule are to serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Once this is done, the appointment of the arbitrator may be challenged on the ground that justifiable doubts have arisen under sub-section (3) of Section 12 subject to the caveat entered by sub-section (4) of Section 12. The challenge procedure is then set out in Section 13, together with the time-limit laid down in Section 13(2). What is important to note is that the Arbitral Tribunal must first decide on the said challenge, and if it is not successful, the Tribunal shall continue the proceedings and make an award. It is only post award that the party challenging the appointment of an arbitrator may make an application for setting aside such an award in accordance with Section 34 of the Act.

15. Section 12(5), on the other hand, is a new provision which relates to the *de jure* inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, *subsequent* to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may *after* disputes have arisen between them, waive the applicability of this sub-section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.

> **17.** The scheme of Sections 12, 13 and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case i.e. a case which falls under Section 12(5), Section 14(1)(*a*) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e. *de jure*), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become *de jure* unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being *de jure* unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them."

14. In view of the aforesaid, Mr. Salve contended that the instant petition which seeks to invoke the powers of this Court conferred by Section 14 of the Act is not maintainable. Mr. Salve further submitted that the petitioner has independently also filed an application before the Arbitral Tribunal itself purporting to be under Section 14 of the Act. According to Mr. Salve, even if that petition were to be understood as having been

incorrectly titled as being one under Section 14 of the Act and constituting a challenge raised in terms contemplated under Section 13, the petitioner must be relegated to pursue that application before the Arbitral Tribunal itself and if aggrieved by any final decision that may be rendered thereon to take appropriate steps as contemplated under Section 13(4) and (5) of the Act.

15. Appearing for the petitioner, Mr. Ganguli, learned Senior Counsel, submitted that an allegation of bias or where justifiable doubts are raised with respect to the independence or impartiality of an Arbitrator would necessarily fall within the ambit of a de jure disqualification which is contemplated under Section 14 of the Act. Learned Senior Counsel submitted that once an allegation of bias or justifiable doubt is raised, it would be wholly inequitable for a party to seek a ruling in that respect from the very members of the Arbitral Tribunal against whom such allegations have been levelled. Mr. Ganguli submitted that the Section 14 remedy which is provided to a party to arbitration proceedings must necessarily be interpreted as including the power of the Court to rule on an allegation of bias that may come to be laid against an arbitrator. According to Mr. Ganguly, the avenue provided by Section 14(1)(a) subserves the objective of safeguarding a valuable right inhering in a party to question the independence or impartiality of an arbitrator. According to learned senior counsel, it would be wholly incorrect to deprive such a party of a salutary remedy provided under the Act and

compelling it to pursue its remedies before the Arbitral Tribunal. Mr. Ganguly argued that acceptance of the submission as advanced on behalf of the petitioner would render Section 14(2) of the Act otiose.

16. Mr. Ganguli submitted that the issue of bias and the right of a party to challenge the same in terms of Section 14 has been accorded judicial recognition in the decisions rendered by two learned Judges of this Court in **National Highways Authority of India versus K.K. Sarin & Ors.**[5] as well as **Alcove Industries Ltd. v. Oriental Structural Engineers Ltd.**[6]

17. In **National Highways Authority of India**, the learned Judge while dealing with the question of the remedy available to a party where an allegation of bias comes to be laid against an arbitrator held as follows: -

> "**25.** As far as the first of the aforesaid questions is concerned, Section 14 permits a party to approach the Court to return a finding if "a controversy remains" as to whether the arbitrator has become *de jure* or *de facto* unable to perform his functions. The 1996 Act in Section 5 thereof otherwise prohibits judicial intervention except where so provided by the Act itself. Thus unless Section 14 permits judicial intervention in the case of a bias being made out against the arbitrator, the petition on the said ground shall not lie.
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> **28.** I have already in *Sharma Enterprises* v. *National Building Constructions Corporation Ltd.*, 153 (2008) DLT 594 : MANU/DE/1238/2008, held that Section 5 of the 1940 Act as interpreted in *Panchu Gopal Bose* (supra) finds place in the form of Section 14 of the 1996 Act. There can be no other interpretation of the power given to the Court to terminate the mandate of the arbitrator when the arbitrator de jure is unable to perform this

[5] 2009 SCC OnLine Del 764
[6] 2007 SCC OnLine Del 1709

function. The de jure impossibility can be nothing but impossibility in law. Bias vitiates the entire judicial/arbitration process and renders the entire proceedings nugatory. Reference in this regard may also be made to *state of West Bengal* v. *Shivananda Pathak*, (1998) 5 SCC 513, cited by the ASG, though in a different context, holding that all judicial functionaries have necessarily to decide a case with an unbiased mind; an essential requirement of a judicial adjudication is that Judge is impartial and neutral and in a position to apply his mind objectively—if he is predisposed or suffers from prejudices or has a biased mind he disqualifies himself from acting as a Judge. This equally applies to arbitrators, as statutorily provided in Sections 12 and 13. In my opinion, if the arbitrator is biased, he is *de jure* unable to perform his functions within the meaning of Section 14. Thus if the Court without any detailed inquiry is able to reach a conclusion of arbitrator for the reason of bias is unable to perform his functions, the Court is empowered to, without requiring the parties to in spite of so finding go through lengthy costly arbitration, hold that the mandate of arbitrator stands terminated. However, the said power under Section 14 has to be exercised sparingly with great caution and on the same parameters as laid down by Apex Court in *SBP & Company* v. *Patel Engineering Limited.*, (2005) 8 SCC 618, in relation to Section 11(6). Only when from the facts there is no doubt that a clear case of bias is made out, would the Court be entitled to interfere. Else it would be best to leave it to be adjudicated at the stage of Section 34.

29. The next question is whether the party alleging bias can move a petition under Section 14 without following the procedure in Sections 12 and 13 of the Act. Section 12(3) of the Act permits challenge by a party to the arbitrator if circumstance exists that give rise to the justifiable doubt as to his independence or impartiality. Sub-section (4) permits a party who has participated in the appointment of the arbitrator to challenge the authority of the said arbitrator also. Section 13 provides the procedure for such challenge in the absence of any agreed procedure. No agreed procedure has been cited in the present case and in the absence thereof, the petitioner who is challenging the arbitrator was required to within 15 days of becoming aware of the circumstances giving rise to justifiable doubts as to the independence of the arbitrator was required to send a written statement of the reasons for the challenge to the Arbitral Tribunal. No such thing has been done in the present case. Of course, Sub-section (4) provides that if the challenge is not successful, the Arbitral Tribunal will proceed with the arbitration and Sub-section (5) provides that the remedy of the aggrieved party would then be only under Section 34 of the Act.

34. I have also wondered as to whether Section 13(5) leads to an inference that upon the challenge to the arbitrator under Section

> 13(1) being unsuccessful, the only remedy is under Section 34 of the Act inasmuch as Section 13(5) does not make any reference to Section 14. However, if we are to hold so then we would be rendering the *de jure* inability of the arbitrator to perform his functions *otiose*. To me, the scheme of the Act appears to be that the challenge has to be first made before the arbitrator in accordance with the Section 13 of the Act and upon such challenge being unsuccessful the challenging party has a remedy of either waiting for the award and if against him to apply under Section 34 of the Act or to immediately after the challenge being unsuccessful approach the Court under Section 14 of the Act. The Court when so approached under Section 14 of the Act will have to decide whether the case can be decided in a summary fashion. If so, and if the Court finds that the case of *de jure* inability owing to bias is established, the Court will terminate the mandate. On the contrary, if the Court finds the challenge to be frivolous and vexatious, the petition will be dismissed. But in cases where the Court is unable to decide the question summarily, the Court would still dismiss the petition reserving the right of the petitioner to take the requisite plea under Section 34 of the Act. This is for the reason of the difference in language in Section 14 and in Section 34 of the Act. While Section 14 provides only for the Court deciding on the termination of the mandate of the arbitrator, Section 34 permits the party alleging bias to furnish proof in support thereof to the Court. Section 34(2)(a) is identically worded as Section 48. The Apex Court in relation to Section 48 has in *Shin-Etsu Chemicals Co. Ltd.* v. *Aksh Optifibre Ltd.*, (2005) 7 SCC 234 : AIR 2005 SC 3766, held that leading of evidence is permissible. *Per contra*, Section 14 does not permit any opportunity to the petitioner to furnish proof. Thus all complicated questions requiring may be trial or appreciation of evidence in support of a plea of bias are to be left open to decision under Section 34 of the Act.
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> **34.1** therefore conclude that a party alleging bias is required to first follow the procedure in Sections 12 and 13 and if unsuccessful has choice of either waiting till the stage of Section 34 or if he feels that bias can be summarily established or shown to the Court, approach the Court immediately under Section 14, after the challenge being unsuccessful, for the Court to render a decision."

18. **Alcove Industries Ltd.** which was noticed and approved in **National Highways Authority of India** had while dealing with

the scheme underlying Sections 12, 13 and 14 of the Act entered the following pertinent observations: -

> "**24.** This means that the termination of the mandate of the arbitrator upon the occurrence of any of the said contingencies is automatic by sheer force of law, i.e. *ipso jure*. There may be cases where there may be no scope at all for the parties to get into a controversy with regard to the automatic termination of the mandate of the arbitrator, such as, where he is declared to have become insolvent or insane, and such determination has attained finality, or where he may have suffered from such a debilitating diseases or ailment which robs him of his mental faculties. However, there may be cases where one party is of the view that the Arbitrator has ipso jure lost his mandate, while the other contends that the mandate of the arbitrator still subsists. When such a controversy arises, the same is to be resolved by the court by virtue of section 14(2) of the Act, which reads as under.
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> > "14 (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."
>
> **25.** Therefore, a petition under Section 14(2) of the Act, to determine the issue as to whether the mandate of the arbitrator stands terminated on the occurrence of one or more of the contingencies contained in clauses (a) and (b) of Section 14(1) of the act would be maintainable. While deciding a petition under Section 14(2) of the Act, all that the court does is to declare whether the termination of the mandate of the arbitrator *ipso jure* has taken place or not. To that extent, the order of the court passed under Section 14(2) of the Act is merely declaratory, and is not in the nature of a mandatory or perpetual injunction to remove the arbitrator or to restrain him from acting as an arbitrator. Removal of an arbitrator postulates that the arbitrator is otherwise vested with mandate to proceed to function as an arbitrator, but the Court, for certain reasons, removes or dislodges him from that position. What follows post that declaration is a different matter. If the Court finds that the mandate of the Arbitrator stands terminated, it may or may not proceed to supply the vacancy, depending on the facts and circumstances of a particular case. However, merely because the Court may in the facts of a given case declare that the mandate of the existing Arbitrator stands terminated and thereafter proceeds to fill up the vacancy, that would not tantamount to the removal of the Arbitrator by the Court.
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> xxx xxx xxx

33. Similarly, in my view, it would not serve any meaningful purpose to negate the rights of a party which are statutorily granted under Section 14 of the Act, on account of the desire to see that the arbitral proceedings are not allowed to be stalked or interfered with at the behest of one of the parties during their progress. To deny such a right would be in the teeth of the law. Of course, it would be for the Court to evaluate in the facts of a given case whether there is any merit in the petition or it is merely a delaying tactics on the part of the petitioner.

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37. The purpose of Section 14 is thus clearly to prevent an Arbitrator, who has *inter alia*, become de jure or de facto unable to perform his functions as an Arbitrator from dragging a party though the process of a long wait or futile arbitration proceedings which may adversely affect his rights or impose on him financial liability.

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40. Section 12 of the Act casts a duty on the Arbitrator to disclose in writing at the outset, such facts which may give rise to justifiable doubts as to his independence or impartially. This obligation continues throughout the arbitral proceedings i.e. whenever such facts come into being during the arbitral proceedings. Therefore, what the law stipulates as a disqualification to become or remain an Arbitrator in a given dispute, is not the existence of actual bias, but the existence of such facts and circumstances as are "*likely to give rise to justifiable doubts as to his independence and impartiality*". An Arbitrator may be challenged only on limited grounds i.e. if circumstances exist that give rise to justifiable doubts as to his independence or impartiality or that he does not possess the qualifications agreed to by the parties. Even this challenge is limited only to such cases where the party raising the challenge who has participated in the appointment of the Arbitrator becomes aware of the grounds on which the challenge is made after the Arbitrator has been appointed. Therefore, if a party was aware of such facts and circumstances at the time of participating in the process of appointment of the Arbitrator as would otherwise be considered good enough to give rise to justifiable doubts as to the independence or impartiality of the Arbitrator, that party is disentitled from challenging the Arbitrator on the same ground. Moreover, the challenge is required to be made within 15 days of the party learning of the relevant circumstances. If the challenge is not made in a timely manner, the same may fail as having being condoned and waived on the ground of his acquiescence in the holding of further proceedings.

> **41.** The procedure for challenge to the authority of the arbitrator is contained in Section 13. The Arbitrator is empowered to rule on this issue. However, his decision (if he overrules the objection) is not final and is open to judicial review by a competent Court in exercise of the power conferred by Section 34 read with 13 (5) of the Act. No doubt Section 13(4) states that if the challenge under the procedure agreed upon by the parties or under the procedure prescribed by sub-Section (2) is not successful, the arbitral Tribunal shall continue the arbitral proceedings and make the arbitral award. What this means is that the party challenging the Arbitrator cannot endlessly enter into a dialogue or argument with the Arbitrator on the same issue and after the said challenge is rejected by the Arbitrator, the Arbitrator shall be entitled to proceed with the Arbitral proceedings and to make his award. The party raising the challenge cannot validly refuse to participate in the Arbitral proceedings and stall the same. Section 13(5) also shuts out a challenge to the determination of the Arbitrator with regard to his competence and authority under Section 13 as an interim award, lest the same is challenged under Section 34 of the Act by the aggrieved party even before the culmination of the arbitral proceedings into a final award on the merits of the claims and counter claims, if any. One cannot read into the said provision a limitation on the right of one or the other party to move the Court under Section 14 of the Act on the ground that the Arbitrator has become de jure and de facto to unable to perform his functions. In that sense the Act does not contemplate an election of one or the other remedy by the aggrieved party to choose between the remedy under Sections 12 & 13 on one hand, and the remedy under Section 14 on the other hand.
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> **43.** Applying the aforesaid guidelines in the present case, I am of the view that there is no inconsistency between the remedies available to a party under Sections 12 and 13 on the one hand and Section 14 on the other and the invocation of one remedy by a party does not restrict that party from invoking the other remedy as well. In fact these remedies appear to be constitute a single scheme, wherein the aggrieved party would first be expected to challenge the arbitrator under Sections 12 and 13, and if that fails, and the party is still aggrieved, and can make out a case of de jure or de facto inability of the Arbitrator to act, to move the Court under Section 14."

19. Apart from the aforenoted two decisions rendered by this Court on the question, Mr. Ganguli also placed reliance upon the following observations as appearing in the decision of the

Supreme Court in **Swadesh Kumar Agarwal v. Dinesh Kumar Agarwal**[7]:-

> "20. Section 15 provides other grounds for termination of the mandate of the arbitrator. It provides that 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 an agreement of the parties. Where the mandate of an arbitrator is terminated on the aforesaid grounds mentioned in Sections 15(1)(a) and (b) in such a situation a substitute arbitrator shall have to be appointed and that too, according to the rules that were applicable to the appointment of the arbitrator being replaced.
>
> 21**.** Therefore, on a conjoint reading of Sections 13, 14 and 15 of the Act, if the challenge to the arbitrator is made on any of the grounds mentioned in Section 12 of the Act, the party aggrieved has to submit an appropriate application before the Arbitral Tribunal itself. However, in case of any of the eventualities mentioned in Section 14(1)(*a*) of the 1996 Act and the mandate of the arbitrator is sought to be terminated on the ground that the sole arbitrator has become de jure and/or de facto unable to perform his functions or for other reasons fails to act without undue delay, the aggrieved party has to approach the "court" concerned as defined under Section 2(1)(*e*) of the 1996 Act. The court concerned has to adjudicate on whether, in fact, the sole arbitrator/arbitrators has/have become de jure and de facto unable to perform his/their functions or for other reasons he fails to act without undue delay. The reason why such a dispute is to be raised before the court is that eventualities mentioned in Section 14(1)(*a*) can be said to be a disqualification of the sole arbitrator and therefore, such a dispute/controversy will have to be adjudicated before the court concerned as provided under Section 14(2) of the 1996 Act."

20. Apart from the above, Mr. Ganguli, learned Senior Counsel had taken the Court through the copious material and evidence which stands placed before the Arbitral Tribunal as well as the allegations which had been leveled by the petitioner in the petition under Section 14 of the Act. Mr. Ganguli had addressed elaborate submissions in support of the allegation of the petitioner that

[7] (2022) 10 SCC 235

serious distrust and justifiable doubts existed with respect to the independence and impartiality of the members of the Arbitral Tribunal as would be evident from the detailed disclosures made in the petition filed before them on 28 November 2022.

21. It was then submitted that the majority members of the Arbitral Tribunal have in terms of the communication of 01 December 2022 virtually rejected the challenge as laid and thus the petition as preferred before it has clearly rendered otiose and that in any case calling upon the members of the Arbitral Tribunal to formally rule on that application would be a "useless formality".

22. Mr. Ganguli laid stress upon the following observations as appearing in the aforenoted communication in order to buttress the aforesaid contention:-

> "3. The Respondent's Application concludes with its submission that the mandate of the majority of the Tribunal stands terminated in accordance with section 14 by reasons of the facts and circumstances set out in the Application. The Claimants' contention is that the Application is misconceived and without effect. I should state that Sir Bernard and I (subject to argument) do not accept the Respondent's allegation that we are "explicitly biased" - or lack independence and impartiality in any way.
>
> 4. By the Tribunal's communication dated 29 November 2022, in conformity with successive Procedural Orders and correspondence appointing and fixing 10.30 am on Monday 5 December 2022 at the Taj Palace Hotel, New Delhi, as the time and date and venue of the commencement of the final hearing on the merits of this arbitration, the Tribunal referred to that hearing and the necessary preparations for it. That date and time remain unchanged. They have not been altered by any order of the Tribunal or by any other lawful order. Accordingly, it remains at present the duty of all concerned,

> including the Parties and their advocates (and in due course the witnesses), to attend in fulfilment of their respective obligations to the arbitration and to any additional orders that the Tribunal may make.
>
> 5. It is clear from the foregoing correspondence that a difference has arisen between the Parties to the arbitration as to the Respondent's Application. In accordance with the obligation of procedural fairness including duties to hear both sides, the Tribunal will receive any submissions from the Parties, including any applications for relief from the Tribunal, which they might wish to make concerning the Respondent's Application (seeing that the Application itself makes no request for relief) before proceeding to the opening submissions of the Parties on the merits of the case. The Parties and their advocates should be prepared for any such submissions or applications. It may be hoped that proceeding in this way will assist both sides in the observance of their duties."

23. While the Court acknowledges the elaborate submissions which were addressed in this respect and the asserted prejudice caused to the petitioner in light of the procedural orders passed by the Tribunal from time to time, it is of the considered opinion that those issues and an evaluation thereof would have to necessarily be deferred and await the determination of the preliminary objection which stands raised. The Court thus proceeds accordingly.

24. The challenge which stands raised would have to be evaluated in the backdrop of the provisions contained in Sections 12 to 14 of the Act. Those provisions are extracted hereinbelow: -

> "**12. Grounds for challenge**.— [(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—
>
> (a) such as the existence either direct or indirect, of any past or present relationship with or interest in any

of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

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.]

(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.]

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

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances

referred to in sub-section(3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

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

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

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

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

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

25. Section 12(1) mandates that where a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances which amongst others are

likely to give rise to justifiable doubts and apprehensions as to his independence or impartiality. In terms of sub-section (3) of Section 12, the jurisdiction of an arbitrator may be challenged by a party, if circumstances exist and give rise to justifiable doubts as to his independence or impartiality. In terms of Explanation 1 which stands placed in Section 12(1), the grounds stated and set out in the Fifth Schedule are to act as a guide for determining the aforesaid. Explanation 1 is couched in mandatory terms and uses the expression "*shall guide in determining….*".

26. The challenge procedure where such an objection is taken is then specified and set out in Section 13. Dealing specifically with a challenge which is referable to Section 12(3) of the Act, Section 13(2) stipulates that a party who intends to challenge an arbitrator shall send a written statement of reasons for challenge to the Arbitral Tribunal. Upon receipt of that statement, it would be open for an arbitrator to recuse or withdraw from the arbitral proceedings. However, the contingency where an arbitrator fails or refuses to withdraw is one which is duly conceived of under the Act. Section 13(3) prescribes that if the arbitrator fails to withdraw, the Arbitral Tribunal shall decide on the challenge. In terms of Section 13(4) if that challenge fails, the Arbitral Tribunal would be entitled in law to continue the proceedings and make an award.

27. On a due consideration of the relevant statutory provisions which would govern the question which stands posited, the Court

is of the view that while Sections 12, 13 and 14 of the Act, the trinity provisions, may be recognised as constituting a composite statutory scheme dealing with the subject of challenge to an arbitrator and termination of mandate, they clearly appear to construct separate causeways for a challenge that may be laid. While Sections 12 and 13 lay down the procedure for challenges which must mandatorily be mounted before the Arbitral Tribunal, Section 14 speaks of challenges that may be instituted before a court as defined under the Act.

28. Section 12 relates to a challenge to the jurisdiction of an arbitrator that may be based either on the Fifth or the Seventh Schedule. Insofar as the question of "justifiable doubts" is concerned, the same is statutorily ordained to draw color from the provisions incorporated in the Fifth Schedule. The Seventh Schedule on the other hand lists out the disqualifications which are incurable and non-derogable except where parties expressly concur on a waiver.

29. A careful reading of the Seventh Schedule would establish that it does not deal with the aspect of justifiable doubts relating to independence or impartiality that may arise by virtue of the conduct of an arbitrator or the manner in which proceedings may be conducted by the Arbitral Tribunal at all. It deals with disqualification by virtue of the arbitrator's relationship with parties, counsel or the dispute and extending to situations where the arbitrator may be said to have a direct or indirect interest in the dispute. These non derogable disqualifications are predetermined and decreed by law.

30. On a conjoint reading of Sections 12, 13 and 14 of the Act, the Court is of the considered opinion that it is the disqualifications set out in the Seventh Schedule alone which can be recognised as being the de jure disqualifications under the Act. De jure, as is well settled, would mean something stipulated or prescribed by law or according to law. It would thus include disqualifications which would automatically render an arbitrator ineligible to be either appointed or to continue. These disqualifications would inevitably result in the termination of mandate.

31. Bias as distinct from the above, would be an issue which would have to axiomatically be established in fact. An allegation of bias would have to be alleged and proven. Viewed in that light, it is manifest that it would clearly fall outside the pale of a de jure disqualification. The view taken by the Court stands fortified from a reading of Section 12(3) of the Act which mandates a party establishing that *"circumstances exist"* giving rise to a justifiable doubt with respect to the independence or impartiality of an arbitrator.

32. The Court for the following additional reasons finds itself unable to countenance the submission that a bias allegation would fall within the ambit of Section 14(1)(a) of the Act. As has been noticed above, the subject of bias and justifiable doubt is specifically dealt with in Section 12. If the Court were to accord an interpretation upon Sections 12 and 14 and treat such an allegation as falling within an overlap of the aforesaid provisions, it would not only be contrary to

well settled rules of interpretation but would also clearly violate the evident scheme and intent of the Legislature.

33. A Section 12(3) challenge is guided by the provisions of Section 13. Sub-sections (4) and (5) thereof provide for the consequences which would ensue once such a challenge fails. They mandate that in such an eventuality, the proceedings before the Arbitral Tribunal would have to be continued and terminate only once an award is rendered. They perceive of the party challenging the mandate of an arbitrator to await the making of an award and only then assailing the same in accordance with Section 34. The provision does not contemplate a curial challenge being raised or pursued at the intermediate stage. Recognising the right to raise such a challenge at the interim stage by recourse to Section 14(1)(a) would clearly be contrary to the evident legislative intent and resolve to debar such a recourse.

34. The expression de jure as occurring in Section 14 would necessarily have to be construed as conditions which are recognized and so ordained by law. The subject of bias and justifiable doubts is clearly one which is specifically provisioned for in Section 12. Once that subject stands taken note of by the legislature in the said provision, it would be tenuous to hold an allegation of bias as being one which would be triable in a Section 14 proceeding also. Sections 12 and 13 when read together thus appear to constitute a complete and an independent code for the purposes of trial of such an allegation. They clearly mandate and

oblige the Arbitral Tribunal to examine whether circumstances exist that give rise to justifiable doubts. The factual enquiry which would necessarily have to be undertaken in connection with the aforesaid clearly appears to be controlled and governed by Sections 12 and 13 exclusively. Once the aforesaid issue stands governed by the aforenoted two provisions, it would be incorrect to recognize an identical enquiry being undertaken by the court under Section 14. This would not only fall foul of the principles enunciated in **HRD Corporation** and **Bharat Broadband**, it would also appear to be contrary to the legislative intent enshrined in sub-sections (3), (4) and (5) of Section 13.

35. The aforesaid conclusions of the Court would also be in consonance with the decisions of the Supreme Court which were commended for the consideration of the Court by Mr. Salve. The Supreme Court in **HRD Corporation** observed that once an arbitrator becomes ineligible by falling in any one of the categories specified in the Seventh Schedule, he would in turn be liable to be viewed as having become de jure unable to perform his functions. This since in law [Section 12(5) and the Seventh Schedule] he is to be regarded as ineligible. **HRD Corporation** goes on to explain that once an arbitrator suffers ineligibility in terms of Section 12(5) read with the Seventh Schedule, it would clearly lack the inherent jurisdiction to proceed any further and in such a situation his mandate would be liable to be terminated in accordance with Section 14 of the Act. The Supreme Court in **HRD Corporation** further went on to pertinently observe that

where a challenge be on grounds set out in the Fifth Schedule and relate to justifiable doubts with respect to the arbitrator's independence or impartiality, those issues would have to be determined in accordance with the challenge procedure set out in Section 13. It is this dichotomy between the challenges which may be raised on the basis of the Fifth and Seventh Schedules which were highlighted and underlined in **HRD Corporation.**

36. The Court notes that the Supreme Court in the aforesaid decision went on to further hold that where a challenge based on the grounds of independence or impartiality fails, the Tribunal "*must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds*."

37. **HRD Corporation** is thus an incontestable authority for the proposition that challenges which may be raised with respect to justifiable cause relating to impartiality or independence would have to necessarily follow the route prescribed by Sections 12 and 13 of the Act. The aforesaid authority also exposits the legal position that a disqualification with which an arbitrator may be visited and which would fall within the ambit of the grounds set out in the Seventh Schedule would have to be considered

exclusively by the court as defined under the Act and under Section 14.

38. The aforesaid view as expressed in **HRD Corporation** finds resonance in the principles enunciated in **Bharat Broadband**. In the aforesaid decision too, a clear distinction was recognised to exist between an ineligibility which may be incurred by virtue of Section 12(5) of the Act read with the Seventh Schedule and the issue of a justifiable doubt as to the independence or impartiality of an arbitrator. The de jure disqualification thus clearly appears to have been recognized to be one which would be relatable to Section 12(5) and the Seventh Schedule alone.

39. While the decisions rendered by this Court in **National Highways Authority of India** and **Alcove Industries Ltd.** appear to have taken the view that an allegation of bias would also fall within the ambit of a de jure inability to perform, the Court notes that the principles laid down in the aforenoted two decisions would have to necessarily yield and be appreciated bearing in mind the two subsequent decisions handed down by the Supreme Court in **HRD Corporation** and **Bharat Broadband**.

40. Additionally, it would be pertinent to note that both **National Highways Authority of India** as well as **Alcove Industries Ltd.** came to be rendered prior to the insertion of Section 12(5) and the Seventh Schedule in the Act. The correctness of the view expressed in those two decisions would also have to be considered and weighed in light of the subsequent

decision rendered by a Division Bench of this Court in **Progressive Career Academy Pvt. Ltd. Vs. FIIT Jee Ltd.**[8], which though not cited by parties, clearly appears to set the issue at rest insofar as precedents delivered by this Court on the question are concerned. The issue which arose for consideration in **Progressive Career Academy** was culled out by the Division Bench as under: -

> "The question in this bunch of Appeals concerns the legal proprietary of judicial directions for the removal of an arbitrator even before the publishing of an Award. Several judgments of our esteemed Single Benches have been cited before us, a perusal of which manifests the existence of a polarity of opinion. On one side of the watershed is the view that assertions as to the de jure or de facto incompetence of the Arbitral Tribunal must immediately be addressed by the Court, and in deserving cases remedied, whilst on the other side is the contrary view that the statutorily provided procedure postulates an immediate remonstration but a deferred assailment of the Award, inter alia on this ground, by way of an invocation of Section 34 of the Arbitration & Conciliation Act, 1996 (A&C Act for short)."

41. Proceeding then to rule on whether curial challenges relating to bias of an arbitrator could be entertained even before an award is pronounced, the Division Bench held as follows: -

> "**10.** In the present analysis of the law, we cannot concur with the ratio of *Interstate Constructions* v. *NPCC Limited*, 2004 (3) R.A.J. 672 (Del) in which one of us (Vikramajit Sen, J.) had terminated the authority of the Arbitrator keeping in mind the directions of the latter requiring the claimants to travel from New Delhi to Andhra Pradesh solely to carry out inspection of documents. Bias was found to pervade the arbitral proceedings in that the Arbitrator was manifestly functioning to the detriment of the Claimant and to the advantage of the party who had appointed him. This dialectic appears to have found favour with another learned Single Judge in *Indira*

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Rai v. *Vatika Plantations (P) Ltd.*, 127 (2006) DLT 646. The mandate of the Arbitrator was accordingly terminated and another Arbitrator was appointed in his stead. Our Learned Brother had also drawn support from the decision of the Division Bench in *Sushil Kumar Raut* v. *Hotel Marina*, 121 (2005) DLT 433. While doing so, the Bench was cautious to record that its action may not be technically or strictly in tune with the provisions of the Act. The Division Bench considered it necessary to 'break the impasse' and accordingly removed the existing arbitrator and appointed a third person as the Arbitrator. In *National Highways Authority of India* v. *K.K. Sarin*, 159 (2009) DLT 314, a Single Bench of this Court (Rajiv Sahai Endlaw, J.) has concluded that the 'party alleging bias is required to first follow the procedure in Sections 12 and 13 and if unsuccessful has choice of either waiting till the stage of Section 34 or if he feels that bias can be summarily established or shown to the Court, approach the Court immediately under Section 14, after the challenge being unsuccessful, for the Court to render a decision'. In *Shyam Telecom Ltd.* v. *Arm Ltd.*, 113 (2004) DLT 778 a Single Bench (R.C. Jain, J.) has concluded that Section 14(2) of the Act empowers the Court to decide the question of termination of the mandate if a controversy arises concerning the termination of the Arbitrator's mandate on one or the other grounds.

14. There are a few judgments which clearly and unequivocally hold that the Applications filed in a Court of Law assailing arbitral proceedings on the grounds of bias, thus making out a case of de jure and de facto failure to perform arbitral functions, are not maintainable at the pre Award stage. The decisions brought to our notice laid before us emanating from the High Court of Delhi are those of S.N. Dhingra, J. in *Neeru Walia* v. *Inderbir Singh Uppal*, 160 (2009) DLT 55 and of Aruna Suresh J. in *Ahluwalia Contracts (India) Ltd.* v. *Housing and Urban Development Corporation*, 2008 (100) DRJ 461. We have already noted Pinaki Das Gupta where Mukul Mudgal, J. has concluded that "*de jure and de facto*, the authority of the Arbitrator cannot be questioned under Section 14". This is also the position in Newton *Engineering and Chemicals Ltd.* v. *Indian Oil Corporation Ltd.*, where Reva Khetrapal, J. expressed the view that where the Arbitrator does not recuse from the proceedings, the Award must be published and the challenge under Section 34 would thereafter provide complete remedy.

16. On a reading of Section 13(5), the legislative intent becomes amply clear that Parliament did not want to clothe the Courts with the power to annul an Arbitral Tribunal on the ground of bias at an intermediate stage. The Act enjoins the immediate articulation of a challenge to the authority of an arbitrator on the ground of bias before the Tribunal itself, and thereafter ordains that the adjudication of this

challenge must be raised as an objection under Section 34 of the Act. Courts have to give full expression and efficacy to the words of the Parliament especially where they are unambiguous and unequivocal. The golden rule of interpretation requires Courts to impart a literal interpretation and not to deviate therefrom unless such exercise would result in absurdity. In *Raghunath Rai Bareja* v. *Punjab National Bank*, (2007) 2 SCC 230, the Hon'ble Supreme Court, while emphasizing on the rule of literal interpretation, held as under:

> 40. It may be mentioned in this connection that the first and the foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation e.g. the mischief rule, purposive interpretation, etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule, vide *Swedish Match AB* v. *Securities and Exchange Board of India*, (2004) 11 SCC 641 : AIR 2004 SC 4219. As held in *Prakash Nath Khanna* v. *CIT*, (2004) 9 SCC 686, the language employed in a statute is the determinative factor of the legislative intent. The legislature is presumed to have made no mistake. The presumption is that it intended to say what it has said. Assuming there is a defect or an omission in the words used by the legislature, the court cannot correct or make up the deficiency, especially when a literal reading thereof produces an intelligible result, vide *Delhi Financial Corpn.* v. *Rajiv Anand*, (2004) 11 SCC 625. Where the legislative intent is clear from the language, the court should give effect to it, vide *Govt. of A.P.* v. *Road Rollers Owners Welfare Assn.*, (2004) 6 SCC 210and the court should not seek to amend the law in the garb of interpretation.
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> 41. As stated by Justice Frankfurter of the US Supreme Court (see "*Of Law & Men: Papers and Addresses of Felix Frankfurter*"):
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> > "Even within their area of choice the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature.

> To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent non-sense or internal contradiction."

42. As observed by Lord Cranworth in *Gundry* v. *Pinniger*, (1852) 21 LJ Ch 405 : 42 ER 647

> "To adhere as closely as possible to the literal meaning of the words used', is a cardinal rule from which if we depart we launch into a sea of difficulties which it is not easy to fathom."

43. In other words, once we depart from the literal rule, then any number of interpretations can be put to a statutory provision, each judge having a free play to put his own interpretation as he likes. This would be destructive of judicial discipline, and also the basic principle in a democracy that it is not for the Judge to legislate as that is the task of the elected representatives of the people. Even if the literal interpretation results in hardship or inconvenience, it has to be followed (see *G.P. Singh's Principles of Statutory Interpretations*, 9th Edn., pp. 45-49). Hence departure from the literal rule should only be done in very rare cases, and ordinarily there should be judicial restraint in this connection.

44. As the Privy Council observed (per Viscount Simonds, L.C.): (IA p. 71)

> "Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used." (See *King Emperor* v. *Benoari Lal Sarma*, (1944-1945) 72 IA 57 : AIR 1945 PC 48, AIR at p. 53.)

45. As observed by this Court in *CIT* v. *Keshab Chandra Mandal*, 1950 SCC 205 : AIR 1950 SC 265 : (AIR p. 270, para 20)

> "Hardship or inconvenience cannot alter the meaning of the language employed by the legislature if such meaning is clear on the face of the statute…."

46. The rules of interpretation other than the literal rule would come into play only if there is any doubt with regard to the express language used or if the plain meaning would lead to an absurdity. Where the words are unequivocal, there is no scope for importing any rule of interpretation vide *Pandian Chemicals Ltd.* v. *CIT*, (2003) 5 SCC 590.

47. It is only where the provisions of a statute are ambiguous that the court can depart from a literal or strict construction vide *Nasiruddin* v. *Sita Ram Agarwal*, (2003) 2 SCC 577 : AIR 2003 SC 1543. Where the words of a statute are plain and unambiguous effect must be given to them vide *Bhaiji* v. *Sub-Divisional Officer*, (2003) 1 SCC 692.

48. No doubt in some exceptional cases departure can be made from the literal rule of the interpretation e.g. by adopting a purposive construction, Heydon's mischief rule, etc. but that should only be done in very exceptional cases. Ordinarily, it is not proper for the court to depart from the literal rule as that would really be amending the law in the garb of interpretation, which is not permissible vide *J.P. Bansal* v. *State of Rajasthan*, (2003) 5 SCC 134: 2003 SCC (L&S) 605 : (2003) 5 SCC 134 : AIR 2003 SC 1405, *State of Jharkhand* v. *Govind Singh*, (2005) 10 SCC 437: 2005 SCC (Cri) 1570: JT (2004) 10 SC 349. It is for the legislature to amend the law and not the court vide *State of Jharkhand* v. *Govind Singh* (supra). In *Jinia Keotin* v. *Kumar Sitaram Manjhi*, (2003) 1 SCC 730 this Court observed (SCC p. 733, para 5) that the court cannot legislate under the garb of interpretation. Hence there should be judicial restraint in this connection, and the temptation to do judicial legislation should be eschewed by the courts. In fact, judicial legislation is an oxymoron.

20. A comparison of the provisions dealing with the challenge to the arbitrator's authority in the A&C Act and the UNCITRAL Model Law discloses that there are unnecessary and cosmetic differences in these provisions, except for one significant and far-reaching difference. The UNCITRAL Model Law, in Article 13(3), explicitly enables the party challenging the decision of the Arbitral Tribunal to approach the Court on the subject of bias or impartiality of the Arbitral Tribunal. However, after making provisions for a challenge to the verdict of Arbitral Tribunal on the aspect of bias, the UNCITRAL Model Law prohibits any further Appeal. It seems to us, therefore, that there is no room for debate that the Indian Parliament

> did not want curial interference at an interlocutory stage of the arbitral proceedings on perceived grounds of alleged bias. In fact, Section 13(5) of the A&C Act indicates that if a challenge has been made within fifteen days of the concerned party becoming aware of the constitution of the Arbitral Tribunal or within fifteen days from such party becoming aware of any circumstances pointing towards impartiality or independence of the Arbitral Tribunal, a challenge on this score is possible in the form of Objections to the Final Award under Section 34 of the A&C Act. Indeed, this is a significant and sufficient indicator of Parliament's resolve not to brook any interference by the Court till after the publication of the Award. Indian Law is palpably different also to the English, Australia and Canadian Arbitration Law. This difference makes the words of Lord Halsbury in *Eastman Photographic Materials Co.* all the more pithy and poignant."

42. The Court in **Progressive Career Academy** proceeded to record its conclusions as follows: -

> **"21.** In this analysis, we must immediately observe that the approach taken by one of us (Vikramajit Sen, J.) in *Interstate Constructions* is not correct as it transgresses and infracts the provisions of the A&C Act. Learned Single Benches have interfered and removed arbitrators obviously on pragmatic considerations, viz. the futility and idleness of pursuing arbitral proceedings despite lack of faith therein because of justifiable doubts as to the independence or impartiality of the arbitrators. Clearly, Parliament has also proceeded on the compelling expediency and advisability of expeditious conclusion of these proceedings. Relief against possible mischief has been provided by making clarification in Section 13(5) that apart from the challenges enumerated in Section 13(4), an assault on the independence or impartiality of the Arbitral Tribunal is permissible by way of filing Objections on this aspect after the publishing of the Award. We, therefore, affirm the approach in *Pinaki Das Gupta, Neeru Walia, Ahluwalia Contracts (India) Ltd.* and *Newton Engineering and Chemicals Ltd.*. We are of the opinion that the Single Benches who interfered with the progress of the proceedings of the Arbitral Tribunal in the pre-Award stage fell in error. Humans often fall prey to suspicions which may be proved to be ill-founded on the publication of an Award. There is compelling wisdom in Parliament's decision to allow adjudication on grounds of bias, lack of independence or impartiality of the Tribunal only on the culmination of the arbitral proceedings."

43. It may be additionally noted that **Swadesh Kumar Agarwal** clearly does not appear to hold or lay down a principle which may be possibly viewed as being contrary to **HRD Corporation** and **Bharat Broadband**. It would be pertinent to note that the Supreme Court even in **Swadesh Kumar Agarwal** while elucidating on the ambit of Sections 13, 14 and 15 of the Act had categorically observed that if the challenge be on any of the grounds which are mentioned in Section 12, the party aggrieved would have to submit a petition before the Arbitral Tribunal itself. The learned Judges of the Court went on to observe that in the case of eventualities contemplated by Section 14(1)(a) alone would a party be entitled to approach the concerned court as defined in Section 2(1)(e) of the Act. Thus, **Swadesh Kumar Agarwal** cannot possibly be read as including the subject of bias or justifiable doubts with respect to independence and impartiality as falling within the scope of Section 14(1)(a).

44. The Court also finds itself unable to sustain the submission of Mr. Ganguly that compelling a party to proceed in the arbitration even though it may have lost faith in its members would not only be a useless formality but also cause grave prejudice for the following reasons. It may at the outset be noted that the provisions of the Act leave no space of ambiguity with respect to the procedure to be adopted once a challenge on the ground of bias fails before the Arbitral Tribunal. In fact, and to the contrary, the Act unequivocally commands the parties to proceed further till such time as an award is made. The right to challenge a ruling by the Arbitral Tribunal on the

question of justifiable doubt thus stands statutorily deferred till such time as the award is rendered. The Court draws sustenance for the aforesaid conclusion also from the explicit enunciation of the legal position by the Division Bench of the Court in **Progressive Career Academy**. The Court is thus of the firm opinion that it would be wholly impermissible for it to either create or countenance such a right by interpreting Section 14(1)(a) in the manner as suggested by the petitioner.

45. The fact that the Arbitral Tribunal stands statutorily empowered to deal with such a challenge also does not appear to be an incongruous or incompatible facet when one bears in mind the principles of *kompetenz-kompetenz* which inform Section 16 of the Act. In fact, the power of the Arbitral Tribunal to rule on its own jurisdiction constitutes a key stone of the Act and the UNCITRAL Model Law on International Commercial Arbitration (1985) provisions which have been adopted.

46. The Court fails to find any merit in the submission of Mr. Ganguly that the members of the Arbitral Tribunal have already prejudged the entire issue and that relegating the petitioner to pursue the pending application would be an empty formality for the following reasons. The Court notes that the Chairman and the other member of the Arbitral Tribunal have unequivocally recorded that they, "subject to argument", do not accept the allegations as levelled by the petitioner. In paragraph 3 of that communication the members have proceeded to observe that differences appear to have arisen between the parties with respect to the application made by the petitioner here.

It was in that backdrop that the Tribunal had placed the matter for consideration of submissions of respective parties on the challenge that stood raised and before commencing the process of hearing on merits. The Court thus finds itself unable to read or construe that communication as indicative of the members having prejudged the challenge raised by the petitioner. In fact, the members clearly appear to have acted in accord with the challenge procedure which stands engrafted in Sections 12 and 13 of the Act.

47. Accordingly, and for all the aforesaid reasons, the preliminary objection is upheld. The petition shall consequently stand dismissed as being not maintainable.

48. The present order, however, shall not preclude the petitioner from pursuing its application dated 28 November 2022 preferred before the Arbitral Tribunal. While that application is titled as having been preferred under Section 14 of the Act, since an application under the aforenoted provision can only be presented before a court as defined, it would be open for the petitioner to amend the nomenclature of the said application, if so chosen and advised.

49. The Court further clarifies that it has neither considered nor ruled upon the allegations that have been levelled by the petitioner against the members of the Arbitral Tribunal. All contentions of respective parties in that respect are kept open.

50. Order *dasti*.

YASHWANT VARMA, J.

DECEMBER 09, 2022 / *Neha/SU*