

Neutral Citation No. - 2023:AHC-LKO:69771**Court No. - 19**

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 7 of 2019

Appellant :- Satendra Kumar Dubey

Respondent :- U.P.S.R.T.C. Lucknow Thru. M.D. And Anr.

Counsel for Appellant :- Manish Jauhari, Bhanu Pratap Singh, Pramod Mitra

Counsel for Respondent :- Ratnesh Chandra

Along with

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 8 of 2019

Appellant :- Bhupendra Singh

Respondent :- U.P.S.R.T.C. Lucknow Thru. M.D. And Anr.

Counsel for Appellant :- Manish Jauhari, Bhanu Pratap Singh, Pramod Mitra

Counsel for Respondent :- Ratnesh Chandra

Along with

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 9 of 2019

Appellant :- Adesh Kumar

Respondent :- U.P.S.R.T.C. Lucknow Thru. M.D. And Anr.

Counsel for Appellant :- Manish Jauhari

Counsel for Respondent :- Ratnesh Chandra

Along with

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 10 of 2019

Appellant :- Vimlesh Kumar

Respondent :- U.P.S.R.T.C. Lucknow Thru. M.D. And Anr.

Counsel for Appellant :- Manish Jauhari

Along with

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 11 of 2019

Appellant :- Veerendra Singh

Respondent :- U.P.S.R.T.C. Lucknow Thru. M.D. And Anr.

Counsel for Appellant :- Manish Jauhari

Counsel for Respondent :- Ratnesh Chandra

Along with

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 12 of 2019

Appellant :- Sarvesh Singh

Respondent :- U.P.S.R.T.C. Lucknow Thru. M.D. And Anr.

Counsel for Appellant :- Manish Jauhari

Counsel for Respondent :- Ratnesh Chandra

Along with

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 13 of 2019

Appellant :- Ram Saran Singh

Respondent :- U.P.S.R.T.C. Lucknow Thru. M.D. And Anr.

Counsel for Appellant :- Manish Jauhari

Counsel for Respondent :- Ratnesh Chandra

Along with

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 14 of 2019

Appellant :- Santosh Kumar

Respondent :- U.P.S.R.T.C. Lucknow Thru. M.D. And Anr.

Counsel for Appellant :- Manish Jauhari

Counsel for Respondent :- Ratnesh Chandra

Along with

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 15 of 2019

Appellant :- Sirajuddin

Respondent :- U.P.S.R.T.C. Lucknow Thru. M.D. And Anr.

Counsel for Appellant :- Manish Jauhari

Counsel for Respondent :- Ratnesh Chandra

Along with

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 19 of 2019

Appellant :- Ramji Lal

Respondent :- U.P.S.R.T.C. Thru. M.D. And Anr.

Counsel for Appellant :- Hari Prasad Gupta, Bal Keshwar Srivastava

Counsel for Respondent :- Ratnesh Chandra

Along with

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 20 of 2019

Appellant :- Kuldeep Kumar Yadav

Respondent :- U.P.S.R.T.C. Thru. M.D. And Anr.

Counsel for Appellant :- Hari Prasad Gupta, Balkeshwar Srivastav

Counsel for Respondent :- Ratnesh Chandra

Along with

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 21 of 2019

Appellant :- Name Singh

Respondent :- U.P.S.R.T.C. Thru. M.D. And Anr.

Counsel for Appellant :- Hari Prasad Gupta, Bal Keshwar Srivastava

Counsel for Respondent :- Ratnesh Chandra

Along with

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 22 of 2019

Appellant :- Sunil Prajapati

Respondent :- U.P.S.R.T.C. Thru. M.D. And Anr.

Counsel for Appellant :- Hari Prasad Gupta, Bal Keshwar Srivastava

Counsel for Respondent :- Ratnesh Chandra

Hon'ble Jaspreet Singh, J.

1. This is a batch of 13 appeals filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “The Act of 1996”) assailing the judgment and order dated 06th March, 2019 passed by the District Judge, Lucknow whereby the petitions preferred by the appellants under Section 34 of the Act of 1996 were dismissed.

2. All the appellants in this batch of 13 appeals were the contractual employees of the Uttar Pradesh State Road Transport Corporation (hereinafter referred to as “Corporation”). An agreement was executed

between the appellant and the Corporation which contained an arbitration clause, in Clause 22, which reads as under:-

“22. यह कि इस अनुबन्ध की अवधि में अथवा अनुबन्ध की समाप्ति के पश्चात यदि द्वितीय पक्ष से इस अनुबन्ध के क्रियान्वयन या तत्सम्बन्धी अन्य विषय पर कोई विवाद उत्पन्न होता है तो उस स्थिति में प्रथम पक्ष के प्रबन्ध निदेशक, उनके द्वारा नामांकित (नामिनी) विववायक (आरबीट्रेटर) जो निगम में कार्यरत अधिकारी होगा, द्वारा विवायन किया जायेगा तथा उनके द्वारा लिया गया निर्णय एवं अभिनिर्णय उभय पक्षों को मान्य एवं बाध्यकारी होगा। इस संबंध ने किया गया सभी व्यय द्वितीय पक्ष द्वारा देय होगा। ऐसे सभी संदर्भों के आरबीट्रेशन एक्ट 1996 के प्राविधानों एवं उसके अन्तर्गत निर्मित नियम निस्तारण हेतु लागू होंगे।

अनुबन्ध अंकित प्राविधानों व शर्तों पर सहमति व्यक्त करते हुए आज दिनांक.. ... का हस्ताक्षरित एवं निष्पादित किया गया।”

3. It is stated that the Corporation had terminated the services of the appellants and it is in the aforesaid backdrop that the petitioners had invoked the arbitration clause and the record suggests that an order dated 27.01.2016 was passed by an Arbitral Tribunal reinstating the appellants. It is thereafter that the Corporation initiated another arbitral proceedings post the 2015 amendment in the Act of 1996 and by the award dated 30.04.2016 the earlier award/order dated 27.01.2016 passed by the earlier Arbitral Tribunal was found to be invalid, illegal and as such was set aside, consequently, the appellants were again removed from service. The appellants, being aggrieved against the said award dated 30.04.2016, filed separate petitions under Section 34 of the Act of 1996 before the District Judge, Lucknow who after hearing the parties did not find favour with the appellants and dismissed their petitions under Section 34 by means of judgment dated 06th March, 2019. The appellants being aggrieved against the said order dismissing the petition under Section 34 have approached this Court in Appeal under Section 37 of the Act of 1996.

4. Since the ground of challenge and the core issues involved are

common to all the cases, accordingly, all the appeals have been clubbed together and are being decided by this common judgment.

5. Before proceeding further, a brief resume of facts relating to each of the appeals is being noticed hereinafter, whereafter the legal issues involved in all the appeals shall be considered including the submissions made by the respective parties and the discussion and conclusion drawn by the Court.

(I) Satyendra Nath Dubey Vs. U.P.S.R.T.C. in ARPL No. 7 of 2019:-

6. Sri Satyendra Nath Dubey was a contractual employee working in the Corporation in its Regional Office in Etawah. He was terminated from service on the ground that during an inspection made, it was found that some of the passengers of the bus were travelling without ticket and despite the appellant being the conductor did not notice or take care of this fact, hence, without affording any opportunity his contract was cancelled on 25.04.2012.

7. After termination of the contract, the appellant preferred a representation and requested for resuming of contract. It is also the case that an Arbitration Committee comprising of three officers was formed by the Competent Authority. The said Committee vide its award/decision dated 27.01.2016 reinstated the appellant and the contract stood revived.

8. In pursuance of the said award dated 27.01.2016, the appellant on 30th January, 2016 was required to deposit Rs. 10,000/- and also executed an affidavit in shape of an undertaking to the Corporation. Later, on 02nd March, 2016 again the contract of the appellant was cancelled on the basis

of some decision given by the Chief Regional Manager (Transport) issued from the Headquarters at Lucknow.

9. On 12.08.2016, the Assistant Regional Manager wrote a letter to the Chairman of the earlier Arbitral Committee namely Sri Nagendra Singh Yadav seeking information regarding passing of the arbitral award dated 27.01.2016. The arbitral award was confirmed by the erstwhile Chairman of the Committee indicating that there was no illegality in the said award. The corporation vide order dated 06.07.2016 constituted another Arbitration Committee under the Chairmanship of Sri J.N. Sinha, Managing Director, U.P.S.R.T.C., Lucknow and a Tribunal comprising of three Arbitrators passed the impugned award dated 29.09.2016 whereby the earlier award dated 27.01.2016 was set to naught.

10. The appellant being aggrieved preferred a petition under Section 34 of the Arbitration and Conciliation Act, 1996 before the District Judge, Lucknow bearing No. 121 of 2017 which also was dismissed on 06.08.2019 prompting the appellant to file the instant appeal.

(II) Bhupendra Singh Vs.U.P.S.R.T.C. through M.D. and Another bearing ARPL No. 8 of 2019:-

11. In the case of Bhupendra Singh, the facts are common with that of Satendra Kumar Dubey, inasmuch as, even Bhupendra Singh was a contractual employee and his services were also terminated on similar grounds as during an inspection it was found that certain passengers were travelling without ticket.

12. He was also the beneficiary of the award dated 27.01.2016 in terms

whereof his services were reinstated and later by the award dated 29.09.2016, his services were again terminated and his attempt to assail the award in a petition under Section 34 of the Act of 1996 before the District Judge, Lucknow bearing No. 118 of 2017 was also dismissed on 06.03.2019, hence the appeal.

(III) Adesh Kumar Vs.U.P.S.R.T.C. through M.D. and Another bearing ARPL No. 9 of 2019:-

13. In the case of Adesh Kumar, the facts are common with that of Satendra Kumar Dubey, inasmuch as, even Adesh Kumar was a contractual employee and his services were also terminated on similar grounds as during an inspection it was found that certain passengers were travelling without ticket.

14. He was also the beneficiary of the award dated 27.01.2016 in terms whereof his services were reinstated and later by the award dated 29.09.2016, his services were again terminated and his attempt to assail the award in a petition under Section 34 of the Act of 1996 before the District Judge, Lucknow bearing No. 136 of 2017 was also dismissed on 06.03.2019, hence the appeal.

(IV) Vimlesh Kumar Vs.U.P.S.R.T.C. through M.D. and Another bearing ARPL No. 10 of 2019:-

15. In the case of Vimlesh Kumar, the facts are common with that of Satendra Kumar Dubey, inasmuch as, even Vimlesh Kumar was a contractual employee and his services were also terminated on similar grounds as during an inspection it was found that certain passengers were

travelling without ticket.

16. He was also the beneficiary of the award dated 27.01.2016 in terms whereof his services were reinstated and later by the award dated 29.09.2016, his services were again terminated and his attempt to assail the award in a petition under Section 34 of the Act of 1996 before the District Judge, Lucknow bearing No. 111 of 2017 was also dismissed on 06.03.2019, hence the appeal.

(V) Veerendra Singh Vs.U.P.S.R.T.C. through M.D. and Another bearing ARPL No. 11 of 2019:-

17. In the case of Veerendra Singh, the facts are common with that of Satendra Kumar Dubey, inasmuch as, even Veerendra Singh was a contractual employee and his services were also terminated on similar grounds as during an inspection it was found that certain passengers were travelling without ticket.

18. He was also the beneficiary of the award dated 27.01.2016 in terms whereof his services were reinstated and later by the award dated 03.10.2016, his services were again terminated and his attempt to assail the award in a petition under Section 34 of the Act of 1996 before the District Judge, Lucknow bearing No. 115 of 2017 was also dismissed on 06.03.2019, hence the appeal.

(VI) Sarvesh Singh Vs.U.P.S.R.T.C. through M.D. and Another bearing ARPL No. 12 of 2019:-

19. In the case of Sarvesh Singh, the facts are common with that of Satendra Kumar Dubey, inasmuch as, even Sarvesh Singh was a contractual

employee and his services were also terminated on similar grounds as during an inspection it was found that certain passengers were travelling without ticket.

20. He was also the beneficiary of the award dated 27.01.2016 in terms whereof his services were reinstated and later by the award dated 29.09.2016, his services were again terminated and his attempt to assail the award in a petition under Section 34 of the Act of 1996 before the District Judge, Lucknow bearing No. 134 of 2017 was also dismissed on 06.03.2019, hence the appeal.

(VII) Ram Saran Singh Vs.U.P.S.R.T.C. through M.D. and Another bearing ARPL No. 13 of 2019:-

In the case of Ram Saran Singh, the facts are common with that of Satendra Kumar Dubey, inasmuch as, even Ram Saran Singh was a contractual employee and his services were also terminated on similar grounds as during an inspection it was found that certain passengers were travelling without ticket.

21. He was also the beneficiary of the award dated 27.01.2016 in terms whereof his services were reinstated and later by the award dated 06.10.2016, his services were again terminated and his attempt to assail the award in a petition under Section 34 of the Act of 1996 before the District Judge, Lucknow bearing No. 119 of 2017 was also dismissed on 06.03.2019, hence the appeal.

(VIII) Santosh Kumar Vs.U.P.S.R.T.C. through M.D. and Another bearing ARPL No. 14 of 2019:-

22. In the case of Santosh Kumar, the facts are common with that of Satendra Kumar Dubey, inasmuch as, even Santosh Kumar was a contractual employee and his services were also terminated on similar grounds as during an inspection it was found that certain passengers were travelling without ticket.

He was also the beneficiary of the award dated 27.01.2016 in terms whereof his services were reinstated and later by the award dated 05.10.2016, his services were again terminated and his attempt to assail the award in a petition under Section 34 of the Act of 1996 before the District Judge, Lucknow bearing No. 110 of 2017 was also dismissed on 06.03.2019, hence the appeal.

(IX) Sirajuddin Vs.U.P.S.R.T.C. through M.D. and Another bearing ARPL No. 15 of 2019:-

23. In the case of Sirajuddin, the facts are common with that of Satendra Kumar Dubey, inasmuch as, even Sirajuddin was a contractual employee and his services were also terminated on similar grounds as during an inspection it was found that certain passengers were travelling without ticket.

He was also the beneficiary of the award dated 27.01.2016 in terms whereof his services were reinstated and later by the award dated 30.09.2016, his services were again terminated and his attempt to assail the award in a petition under Section 34 of the Act of 1996 before the District Judge, Lucknow bearing No. 109 of 2017 was also dismissed on 06.03.2019, hence the appeal.

(X) Ramji Lal Vs.U.P.S.R.T.C. through M.D. and Another bearing ARPL No. 19 of 2019:-

24. In the case of Ramji Lal, the facts are common with that of Satyendra Kumar Dubey, inasmuch as, even Ramji Lal was a contractual employee and his services were also terminated on similar grounds as during an inspection it was found that certain passengers were travelling without ticket.

He was also the beneficiary of the award dated 27.01.2016 in terms whereof his services were reinstated and later by the award dated 06.10.2016, his services were again terminated and his attempt to assail the award in a petition under Section 34 of the Act of 1996 before the District Judge, Lucknow bearing No. 117 of 2017 was also dismissed on 06.03.2019, hence the appeal.

(XI) Kuldeep Kumar Yadav Vs.U.P.S.R.T.C. through M.D. and Another bearing ARPL No. 20 of 2019:-

25. In the case of Kuldeep Kumar Yadav, the facts are common with that of Satendra Kumar Dubey, inasmuch as, even Kuldeep Kumar Yadav was a contractual employee and his services were also terminated on similar grounds as during an inspection it was found that certain passengers were travelling without ticket.

He was also the beneficiary of the award dated 27.01.2016 in terms whereof his services were reinstated and later by the award dated 30.09.2016, his services were again terminated and his attempt to assail the award in a petition under Section 34 of the Act of 1996 before the District

Judge, Lucknow bearing No. 116 of 2017 was also dismissed on 06.03.2019, hence the appeal.

(XII) Name Singh Vs.U.P.S.R.T.C. through M.D. and Another bearing ARPL No. 21 of 2019:-

26. In the case of Name Singh, the facts are common with that of Satendra Kumar Dubey, inasmuch as, even Name Singh was a contractual employee and his services were also terminated on similar grounds as during an inspection it was found that certain passengers were travelling without ticket.

He was also the beneficiary of the award dated 27.01.2016 in terms whereof his services were reinstated and later by the award dated 29.09.2016, his services were again terminated and his attempt to assail the award in a petition under Section 34 of the Act of 1996 before the District Judge, Lucknow bearing No. 113 of 2017 was also dismissed on 06.03.2019, hence the appeal.

(XIII) Sunil Prajapati Vs.U.P.S.R.T.C. through M.D. and Another bearing ARPL No. 22 of 2019:-

27. In the case of Sunil Prajapati, the facts are common with that of Satendra Kumar Dubey, inasmuch as, even Sunil Prajapati was a contractual employee and his services were also terminated on similar grounds as during an inspection it was found that certain passengers were travelling without ticket.

He was also the beneficiary of the award dated 27.01.2016 in terms whereof his services were reinstated and later by the award dated

29.09.2016, his services were again terminated and his attempt to assail the award in a petition under Section 34 of the Act of 1996 before the District Judge, Lucknow bearing No. 120 of 2017 was also dismissed on 06.03.2019, hence the appeal.

Submissions of the learned counsel for the appellants.

28. On behalf of the appellants, Sri Manish Jauhari, and Sri Balkeshwar Srivastava, learned counsel have made the following submissions:-

29. The primary submissions of the learned counsel for the appellant is that post the amendment made in the Act of 1996 in the year 2015, it was not open for the Corporation to have appointed its own officers as members of the Arbitral Tribunal, consequently, the composition of the Tribunal was coram-non-judice and was hit by Section 12(5) of the Act of 1996 duly amended in the year 2015 read with Schedule V and VII appended to the said Act of 1996.

30. It is also urged that an erstwhile Arbitral Committee had been constituted which had passed an award reinstating the appellants on 29.09.2016 and in furtherance of the said award a direction was issued in pursuance whereof the appellants had furnished a sum of Rs. 10,000/- and also an undertaking/indemnity

31. The appellants had thereafter started working and were even paid their salaries. Later, the Corporation formed another Panel of Arbitrators comprising of Sri Ashok Kumar, Sri Ajay Srivastava and the Presiding Arbitrator Sri J.N. Sinha. It is urged that this constituted Tribunal first and foremost could not have been constituted as it was hit by Section 12(5) of

the Act of 1996. Another reason why the said constituted Tribunal was bad is that once an earlier award was made by the erstwhile Arbitral Committee dated 29.09.2016 and in furtherance thereof the direction which was issued on 30.01.2016 was complied with and it had attained finality as it was not assailed by the Corporation by filing a petition under Section 34 of the Act of 1996.

32. Once the said award of 2016 had attained finality, the same could not have been set aside by constituting another Tribunal unilaterally of the officers of the Corporation itself and adjudicate upon the same.

33. Taking the submissions forward, it is also submitted that neither the Corporation before constituting the Tribunal headed by Sri Sinha, sought the consent or the waiver from the appellants in terms of Section 12 (5) of the Act of 1996 nor any such waiver was given by the appellants and it is in this view of the matter, the constitution of the Tribunal was per se illegal.

34. It is urged that a new methodology has been adopted by the Corporation to nullify an award which had attained finality by constituting a Tribunal of its own officers who did not even hold any proper hearing or sitting nor the appellants submitted any statements nor any evidence was led by the Corporation and in a complete derogation to the principles as well as provisions of the Act of 1996 the alleged award dated 29.09.2016 was delivered.

35. It is further urged that the issue which was purely legal, relating to the composition and the jurisdiction of the Tribunal, was raised in a petition under Section 34 of the Act of 1996 before the District Judge who also

completely ignored the legal submissions and though it has referred to certain decisions of the Apex Court but there is no proper appreciation regarding the contentions raised by the appellants as a result the petition under Section 34 of the Act of 1996 has been dismissed which has caused substantial injustice to the appellants.

Submissions of the learned counsel for the Corporation.

36. Sri Ratnesh Chandra, learned counsel for the respondents has combatted the aforesaid submissions and has submitted that the entire proceedings initiated at the behest of the appellants is fraudulent in nature. Elaborating his submissions, Sri Chandra submits that all the appellants, no doubt were contractual employees and the contract signed with them also contained an Arbitration Clause, however, it is stated that the term of the agreement had already expired and therefore the appellants ceased to be in the contractual employment of the Corporation. Once, the term of the employment had already come to an end, the arbitration clause also died its natural death.

37. It is further submitted that the alleged arbitral award said to have been made by the erstwhile Tribunal dated 29.09.2016 is a void instrument, inasmuch as, it was signed only by one member of the Tribunal and that too just a couple of days prior to his retirement and the order dated 30.01.2016 issuing directions to the appellants to deposit the amount and the undertaking was also de-hors the provision of the award, inasmuch as, all the members of the said Tribunal did not sign the award rather it was only at the behest of one single member that the reinstatement was made.

38. It is thus urged that the earlier alleged award dated 29.09.2016 is no award in the eyes of law, accordingly, there was no requirement to set aside the same by approaching the Court under Section 34 of the Act of 1996.

39. It is further submitted that the Tribunal which was subsequently constituted with Sri Sinha, as the Presiding Arbitrator, held the arbitral meetings and the record would indicate that the appellants had participated and at no point of time they ever raised any issue regarding the composition of the tribunal being hit by the provisions of Section 12 read with Vth and VIIth Schedule nor any objections in terms of Section 16 of the Act was raised before the Tribunal and now once the award has been passed, it is not open for the appellants to assail the same on the basis that the Tribunal was composed against the provisions of the Act of 1996 which was duly amended in October, 2015. In the aforesaid circumstances, it is stated that the appeals are devoid of merits and all the aforesaid issues have been appropriately considered by the District Judge in exercise of the powers under Section 34 of the Act of 1996, hence, all the appeals deserve to be dismissed.

Discussions:-

40. Before advertng to the submissions made by the learned counsel for the parties, it will be necessary to notice certain provisions of the Act of 1996 which read as under:-

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.

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.]

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality; or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

[(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.]

14. Failure or impossibility to act.—*(1) [The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if]—*

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

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

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

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

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

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

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

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

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

(4) The arbitral tribunal may, in either of the cases referred to in sub-

section (2) or sub-section (3), admit a later plea if it considers the delay justified.

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

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

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

Notes : This section casts a twofold duty on the arbitral tribunal:

(i) it must be independent and impartial and must mete out equal treatment to each party. [See Section 12 Note (1)]

(ii) it must give each party a full opportunity to present its case. Sections 23 and 24 provide for the giving of such opportunity.

There was no specific provision in the Arbitration Act, 1940, corresponding to Section 18, but such provisions were applicable as principles of natural justice.

23. Statements of claim and defence.—(1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

33[(2-A) The respondent, in support of his case, may also submit a counter claim or plead a set-off, which shall be adjudicated upon by the arbitral tribunal, if such counter claim or set-off falls within the scope of the arbitration agreement.]

(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

34[(4) The statement of claim and defence under this section shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing, of their appointment.

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

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application 45[establishes on the basis of the record of the arbitral tribunal that]—

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be

separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

46[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

47[(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

48[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]

41. From the perusal of the aforesaid sections which gives a birds eye view of the scheme of the Act, it is clear that the provisions of Section 12 especially after the amendment in the year 2015 prohibits the appointment

of Departmental Arbitrator or an Arbitrator who otherwise would come within the prohibited degree which has been elaborated in the V^h and VIIth Schedule.

42. A close scrutiny of Section 12 (5) of the Act of 1996 would indicate that though preserving the party autonomy, it is open for the parties to still continue with the old regime of Departmental arbitration or an arbitration by a Tribunal which is within the degree as enumerated in the Vth and the VIIth Schedule but only once the party gives his consent expressly waiving his rights to raise objections thereto.

43. It is clear that such consent is not to be readily inferred rather must be express and in the instant case there is no such material available on record to indicate that any point of time the Corporation had informed the appellants regarding the constitution of the Tribunal headed by Sri Sinha and seeking express waiver and consent of the appellants to participate before such a Tribunal.

44. At this juncture, it will be relevant to notice that this Court by means of order dated 07.08.2023 had called upon the learned counsel for the respondents to produce the record which was before the Arbitral Tribunal. The same was produced by the learned counsel for the respondents and it was thoroughly perused by the Court and it reveals that there is not a single document, intimation, communication issued at the behest of the Corporation or the Tribunal seeking the consent of the appellants to waive their rights in terms of Section 12 (5) of the Act of 1996.

45. In light of the aforesaid, apparently, the submission of learned

counsel for the respondents that by mere participation before the Tribunal headed by Sri Sinha, the appellants had waived their rights and is not open for them to challenge the composition of the Tribunal as being hit by Section 12 (5) of the Act of 1996 is not tenable in the eyes of law.

46. In this regard, the dictum of the Apex Court in ***Ellora Paper Mills Ltd Vs. State of Madhya Pradesh (2022) 3 SCC 1*** will be gainful to pursue and the relevant portion thereof reads as under:-

“16. As observed hereinabove, the Arbitral Tribunal—Stationery Purchase Committee consisted of officers of the respondent State. Therefore, as per Amendment Act, 2015 — sub-section (5) of Section 12 read with Seventh Schedule, all of them have become ineligible to become arbitrators and to continue as arbitrators. Section 12 has been amended by the Amendment Act, 2015 based on the recommendations of the Law Commission, which specifically dealt with the issue of “neutrality of arbitrators”. To achieve the main purpose for amending the provision, namely, to provide for “neutrality of arbitrators”, sub-section (5) of Section 12 lays down that 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, he shall be ineligible to be appointed as an arbitrator. In such an eventuality i.e. when the arbitration clause is found to be foul with the amended provision, the appointment of the arbitrator would be beyond the pale of the arbitration agreement, empowering the Court to appoint such an arbitrator as may be permissible. That would be the effect of the non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist upon the appointment of the arbitrator in terms of the arbitration agreement.

17. It cannot be disputed that in the present case, the Stationery Purchase Committee—Arbitral Tribunal comprising of officers of the respondent State are all ineligible to become and/or to continue as arbitrators in view of the mandate of sub-section (5) of Section 12 read with Seventh Schedule. Therefore, by operation of law and by amending Section 12 and bringing on statute sub-section (5) of Section 12 read with Seventh Schedule, the earlier Arbitral Tribunal—Stationery Purchase Committee comprising of the Additional Secretary, Department of Revenue as President, and: (i) Deputy Secretary, Department of Revenue, (ii) Deputy Secretary, General Administration Department, (iii) Deputy Secretary, Department of Finance, (iv) Deputy Secretary/Under-Secretary, General Administration Department, and (v) Senior Deputy Controller of Head Office, Printing as Members, has lost its mandate and such an Arbitral Tribunal cannot be permitted to continue and therefore a fresh arbitrator has to be appointed as per the Arbitration Act, 1996.

18. An identical question came to be considered by this Court in Jaipur Zila Dugdh Utpadak Sahkari Sangh [Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730] , and after considering the decisions of this Court in TRF [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] and other decisions on the point, it is observed and held as under : (Ajay Sales &

Suppliers case [Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730] , SCC paras 8.3 to 12)

“8.3. So far as the submission on behalf of the petitioners that the agreement was prior to the insertion of sub-section (5) of Section 12 read with Seventh Schedule to the Act and therefore the disqualification under sub-section (5) of Section 12 read with Seventh Schedule to the Act shall not be applicable and that once an arbitrator — Chairman started the arbitration proceedings thereafter the High Court is not justified in appointing an arbitrator are concerned the aforesaid has no substance and can to be accepted in view of the decision of this Court in TRF Ltd. v. Energo Engg. Projects Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] ; Bharat Broadband Network Ltd. v. United Telecoms Ltd. [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] ; Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd. [Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd., (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] In the aforesaid decisions, this Court had an occasion to consider in detail the object and purpose of insertion of sub-section (5) of Section 12 read with Seventh Schedule to the Act.

9. In Voestalpine Schienen GmbH [Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd., (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] it is observed and held by this Court that the main purpose for amending the provision was to provide for “neutrality of arbitrators”. It is further observed that in order to achieve this, sub-section (5) of Section 12 lays down that 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, he shall be ineligible to be appointed as an arbitrator. It is further observed that in such an eventuality i.e. when the arbitration clause finds foul with the amended provisions [sub-section (5) of Section 12 read with Seventh Schedule] the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator as may be permissible. It is further observed that, that would be the effect of non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of the arbitration agreement.

10. It is further observed and held by this Court in Voestalpine Schienen GmbH [Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd., (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] that independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which apply to all judicial and quasi-judicial proceedings. It is further observed that it is for this reason that notwithstanding the fact that relationship between the parties, to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator would render him ineligible to conduct the arbitration. It is further observed that the genesis behind this rationale is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties.

11. In paras 16 to 18 it is observed and held as under : (Voestalpine Schienen GmbH case [Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd., (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , SCC pp. 679-83)

‘16. Apart from other amendments, Section 12 was also amended and the amended provision has already been reproduced above. This amendment is also based on the recommendation of the Law Commission which specifically dealt with the issue of “neutrality of arbitrators” and a discussion in this behalf is contained in paras 53 to 60 and we would like to

reproduce the entire discussion hereinbelow:

“Neutrality of arbitrators

53. *It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators viz. their independence and impartiality, is critical to the entire process.*

54. *In the Act, the test for neutrality is set out in Section 12(3) which provides—*

‘12. (3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality....’

55. *The Act does not lay down any other conditions to identify the “circumstances” which give rise to “justifiable doubts”, and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any actual bias for that is setting the bar too high; but, whether the circumstances in question give rise to any justifiable apprehensions of bias.*

56. *The limits of this provision have been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court [see Executive Engineer, Irrigation Division v. Gangaram Chhapolia [Executive Engineer, Irrigation Division v. Gangaram Chhapolia, (1984) 3 SCC 627] ; State of T.N. v. Munuswamy Mudaliar [State of T.N. v. Munuswamy Mudaliar, 1988 Supp SCC 651] ; International Airports Authority v. K.D. Bali [International Airports Authority v. K.D. Bali, (1988) 2 SCC 360] ; S. Rajan v. State of Kerala [S. Rajan v. State of Kerala, (1992) 3 SCC 608] ; Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co.Ltd. [Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd., (1996) 1 SCC 54] ; Union of India v. M.P. Gupta [Union of India v. M.P. Gupta, (2004) 10 SCC 504] ; ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd. [ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd., (2007) 5 SCC 304]] that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd. [Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd., (2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460] carved out a minor exception in situations when the arbitrator*

“was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject-matter of the dispute” (SCC p. 533, para 34)

and this exception was used by the Supreme Court in Denel (Pty) Ltd. v. Ministry of Defence [Denel (Pty) Ltd. v. Ministry of Defence, (2012) 2 SCC 759 : (2012) 2 SCC (Civ) 37] and Bipromasz Bipron Trading Sa v. Bharat Electronics Ltd. [Bipromasz Bipron Trading Sa v. Bharat Electronics Ltd., (2012) 6 SCC 384 : (2012) 3 SCC (Civ) 702] , to appoint an independent arbitrator under Section 11, this is not enough.

57. *The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the Arbitral Tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles — even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the*

parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr P.K. Malhotra, the *ex officio* member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous — and the right to natural justice cannot be said to have been waived only on the basis of a “prior” agreement between the parties at the time of the contract and before arising of the disputes.

58. Large-scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators, which the Commission believes is critical to the functioning of the arbitration process in India. In particular, amendments have been proposed to Sections 11, 12 and 14 of the Act.

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 subset of situations (as set out in the Fifth Schedule, and as based on the red list of the IBA Guidelines).

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.”

17. We may put a note of clarification here. Though, the Law Commission

discussed the aforesaid aspect under the heading “Neutrality of Arbitrators”, the focus of discussion was on impartiality and independence of the arbitrators which has relation to or bias towards one of the parties. In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In international sphere, the “appearance of neutrality” is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term “neutrality” used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties. In fact, the term “neutrality of arbitrators” is commonly used in this context as well.

18. Keeping in mind the aforequoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, sub-section (5) of Section 12 lays down that 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, he shall be ineligible to be appointed as an arbitrator. In such an eventuality i.e. when the arbitration clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement.’

12. In Bharat Broadband Network [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] , it is observed that sub-section (5) of Section 12 read with Seventh Schedule made it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes “ineligible” to act as an arbitrator. It is further observed that once he becomes “ineligible”, it is clear that he then become de jure unable to perform his functions inasmuch as in law, he is regarded as “ineligible”. It further is observed in the said decision that where a 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 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 and this being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator.”

(emphasis in original)

19. In the aforesaid decision in Ajay Sales & Suppliers case [Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730] , this Court also negated the submission that as the contractor participated in the arbitration proceedings before the arbitrator therefore subsequently, he ought not to have approached the High Court for appointment of a fresh arbitrator under Section 11 of the Arbitration Act, 1996. After referring to the decision of this Court in Bharat Broadband Network Ltd. v. United Telecoms Ltd. [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] , it is observed and held in para 18 as under : (Ajay Sales & Suppliers case [Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730])

“18. Now so far as the submission on behalf of the petitioners that the respondents participated in the arbitration proceedings before the sole arbitrator — Chairman and therefore he ought not to have approached the High Court for appointment of arbitrator under Section 11 is concerned, the

same has also no substance. As held by this Court in *Bharat Broadband Network [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1]* there must be an “express agreement” in writing to satisfy the requirements of Section 12(5) proviso. In paras 15 & 20 it is observed and held as under : (SCC pp. 768 & 770-71)

‘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.

20. This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an “express agreement in writing”. The expression “express agreement in writing” refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. Here, Section 9 of the Contract Act, 1872 becomes important. It states:

“9. Promises, express and implied.—Insofar as a proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.”

It is thus necessary that there be an “express” agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court [*Bharat Broadband Network Ltd. v. United Telecoms Ltd., 2017 SCC OnLine Del 11905*] as indicating an express agreement on the facts of the case is dated 17-1-2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by

the Supreme Court in TRF [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] which, as we have seen hereinabove, was only on 3-7-2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 7-10-2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in TRF [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] and asking him to declare that he has become de jure incapable of acting as an arbitrator. Equally, the fact that a statement of claim may have been filed before the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such. This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2), and Section 16(2) of the Act to the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also incorrect in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate.' ”
(emphasis in original)

20. In view of the above and for the reasons stated hereinabove, the impugned judgment and order [Ellora Paper Mills Ltd. v. State of M.P., 2021 SCC OnLine MP 2796] passed by the High Court is contrary to the law laid down by this Court in TRF [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , Bharat Broadband Network [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] and the recent decision of this Court in Jaipur Zila Dugdh Utpadak Sahkari Sangh [Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730] . It is held that the earlier Arbitral Tribunal—Stationery Purchase Committee comprising of the Additional Secretary, Department of Revenue as President, and : (i) Deputy Secretary, Department of Revenue, (ii) Deputy Secretary, General Administration Department, (iii) Deputy Secretary, Department of Finance, (iv) Deputy Secretary/Under Secretary, General Administration Department, and (v) Senior Deputy Controller of Head Office, Printing as Members, has lost its mandate by operation of law in view of Section 12(5) read with Seventh Schedule and a fresh arbitrator has to be appointed under the provisions of the Arbitration Act, 1996. The impugned judgment and order [Ellora Paper Mills Ltd. v. State of M.P., 2021 SCC OnLine MP 2796] passed by the High Court is therefore unsustainable and deserves to be quashed and set aside.

21. In view of the above and for the reasons stated above, the present appeal succeeds. The impugned judgment and order passed by the High Court of Madhya Pradesh dated 27-8-2021 passed in Ellora Paper Mills Ltd. v. State of M.P. [Ellora Paper Mills Ltd. v. State of M.P., 2021 SCC OnLine MP 2796] is hereby quashed and set aside and the application being AC No. 100 of 2019 filed by the appellant herein before the High Court is hereby allowed. It is declared that the earlier Arbitral Tribunal—Stationery Purchase Committee comprising of the Additional Secretary, Department of Revenue as President, and : (i) Deputy Secretary, Department of Revenue, (ii) Deputy Secretary, General Administration Department, (iii) Deputy Secretary, Department of Finance, (iv) Deputy Secretary/Under Secretary, General Administration Department, and (v) Senior Deputy Controller of Head Office, Printing as Members are ineligible to act/continue as arbitrators in view of sub-section (5) of Section 12 read with Seventh

Schedule of the Arbitration Act, 1996 and therefore a fresh arbitrator under the provisions of the Arbitration Act, 1996 is to be appointed to adjudicate upon and resolve the dispute between the parties.”

47. This issue was also flagged by the Apex Court in its earlier decision in *T.R.F. Vs. Energo Engineering Projects Limited (2017) 8 SCC 377* and *Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation Ltd. (2017) 4 SCC 665* which has been followed by the Apex Court in a later decision in *Perkins Eastman Architects DPC & Ors. Vs. HSCC (India) Ltd.(2020) 20 SCC 760* which have been noticed in *Ellora Paper Mills (Supra)*.

48. The aforesaid decisions have made the picture crystal clear that there can be no departmental arbitration and even if it has to be done then the clear mandate of Section 12 (5) has to be followed in its letter and spirit. The burden to show that Section 12(5) is complied in its letter and spirit lies also on the Department/Corporation who desires that the departmental arbitration should continue.

49. As already noticed above, there has been no material brought on record and even from the perusal of the original records placed before the Court, this fact could not be established, hence, this Court finds that the respondent-corporation cannot take the benefit of the fact that once the appellants participated, it amounts to waiver of their right without anything being in writing also in view of the fact that the appellants were mere contractual employees and they were contesting against the Corporation for their sustenance.

50. A glaring feature which revealed from the perusal of the original record placed before the Court is the fact that there was no notice ever

issued by the Tribunal headed by Sri Sinha nor any formal proceedings were taken. This is to be seen in context with the fact that earlier a three member Arbitral Committee was formed and in terms of the award dated 29.09.2016, though, it was signed by one member and even though it may not have any sanctity in the eyes of law yet the fact remain that it is the Corporation which in its wisdom had sought to get the same annulled by constituting another Tribunal.

51. In this view of the matter, before constituting the Tribunal, it was incumbent upon the Corporation to have sought the consent or involved the appellants for mutual appointment of an independent Arbitrator since the amendment of 2015 by then had entrenched itself with full rigours.

52. From the perusal of the Sections of the Act of 1996 which had been reproduced in the earlier part of this judgment, it would be found that there was no statement of claim filed by the Corporation nor any copy thereof was served to any of the appellants who in response thereto filed their statement of defence. There is nothing on record to suggest that any Presenting Officer was present before the Tribunal headed by Sri Sinha representing the Department. There is nothing on record to indicate that any evidence was led by the Corporation before the Tribunal headed by Sri Sinha, a copy of which was provided to the appellants or they were provided with an opportunity to furnish their evidence or statements to submit and buttress their statement of defence.

53. This Court finds that the alleged proceedings before the Tribunal headed by Sri Sinha was a complete farce and a unilateral method to achieve results which were beneficial for the Corporation by the members

and serving officers of the Corporation. This apparently is not acceptable and any award passed by such a Tribunal cannot be sustained as not only it is hit by the public policy as envisaged in Section 34 of the Act of 1996 but the composition is also bad apart from the fact that it cannot be said that appropriate and adequate opportunity to contest the proceedings before the Tribunal headed by Sri Sinha was provided to the appellants.

54. Another aspect which needs to be noticed is in case if the Corporation had any doubts regarding the award passed on 29.09.2016 for whatever reasons but a fact remains that a three member committee was constituted by the Corporation itself and may be at the culmination of the proceedings, the alleged award was signed by one and not by the other two yet it is indicative of the fact that the Corporation had initiated earlier arbitral proceedings and once the alleged award was made on 29.09.2016 even if the said award was patently illegal on account of the fact that it was not signed by all the three Arbitrators yet there is only one method for getting such an award set aside is by taking recourse to the provisions of Section 34 of the Act of 1996.

55. However, the Corporation failed to invoke the said provisions and once the said award had attained finality as it was not challenged by the Corporation within the time prescribed under Section 34 of the Act of 1996 but on the contrary it was duly implemented, inasmuch as, the appellants were reinstated and therefore the only option was to have the earlier award set aside or in case a fresh cause of action arose and for which the Tribunal had to be constituted then it had to adhere to the provisions of law as it existed in the year 2016 i.e. noticing the rigours of Section 12 read with

Schedule V and Schedule VII of the Act of 1996.

56. Having failed to do so, the respondent-corporation could not derive any benefit nor could save the award as it was an award nullity in the eyes of law being coram-non-judice. This issue, though, raised by the appellants before the District Judge, Lucknow in exercise of the powers under Section 34 of the Act but it has not been appropriately considered.

57. It is in this context that if the provisions of the Section 34 of the Act of 1996 is seen, it clearly provides that such are the grounds which are envisaged in Section 34 of the Act of 1996. In this regard, the decision of the Apex Court *Associate Builders v. DDA, (2015) 3 SCC 49* fortifies the view of this Court.

58. In the aforesaid factual matrix which is intertwined with the provisions of law which have been interpreted by the Apex Court in the decisions noted hereinabove, it is clear that the award passed by the alleged Tribunal could not be sustained.

59. The scope of appeal under Section 37 has been delineated by the Apex Court in *MMTC Limited Vs. Vedanta Limited reported in 2019 (4) SCC page 163* and the relevant paragraphs read as under:-

“10. Before proceeding further, we find it necessary to briefly revisit the existing position of law with respect to the scope of interference with an arbitral award in India, though we do not wish to burden this judgment by discussing the principles regarding the same in detail. Such interference may be undertaken in terms of Section 34 or Section 37 of the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act"). While the former deals with challenges to an arbitral award itself, the latter, inter alia, deals with appeals against an order made under Section 34 setting aside or refusing to set aside an arbitral award.

11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b) (ii) i.e. if the award is against the public policy of India. As per the legal

position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and *Wednesbury* [*Associated Provincial Picture Houses v. Wednesbury Corpn.*, (1948) 1 KB 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See *Associate Builders v. DDA* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Also see *ONGC Ltd. v. Saw Pipes Ltd.* [*ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705] ; *Hindustan Zinc Ltd. v. Friends Coal Carbonisation* [*Hindustan Zinc Ltd. v. Friends Coal Carbonisation*, (2006) 4 SCC 445] ; and *McDermott International Inc. v. Burn Standard Co. Ltd.* [*McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181])

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence."

14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.

60. Considering the entire facts, the law as well as the material which emerges from the perusal of the original record, this Court has no hesitation

to allow the aforesaid appeals, set aside the order dated 06.03.2019 passed by the District Judge, Lucknow under Section 34 of the Arbitration and Conciliation Act, 1996 in Case No. 121 of 2017 (Satyendra Nath Dubey Vs. U.P.S.R.T.C and Another), Case No. 118 of 2017 (Bhupendra Singh Vs. U.P.S.R.T.C and Another), Case No. 136 of 2017 (Adesh Kumar Vs. U.P.S.R.T.C and Another), Case No. 111 of 2017 (Vimlesh Kumar Vs. U.P.S.R.T.C and Another), Case No. 115 of 2017 (Veerendra Singh Vs. U.P.S.R.T.C and Another), Case No. 134 of 2017 (Sarvesh Singh Vs. U.P.S.R.T.C and Another), Case No. 119 of 2017 (Ram Saran Singh Vs. U.P.S.R.T.C and Another), Case No. 110 of 2017 (Santosh Kumar Vs. U.P.S.R.T.C and Another), Case No. 109 of 2017 (Sirajuddin Vs. U.P.S.R.T.C and Another), Case No. 117 of 2017 (Ramji Lal Vs. U.P.S.R.T.C and Another), Case No. 116 of 2017 (Kuldeep Kumar Yadav Vs. U.P.S.R.T.C and Another), Case No. 113 of 2017 (Name Singh Vs. U.P.S.R.T.C and Another), Case No. 120 of 2017 (Sunil Prajapati Vs. U.P.S.R.T.C and Another) including the impugned award dated 29.09.2016 passed by the Tribunal headed by Sri J.N. Sinha. However, liberty is granted to the respondent-Corporation that in case if they may so chose, they may initiate the arbitral proceedings strictly in accordance with law noticing the provisions post the 2015 Amendment in the Act of 199 and subject to the law of limitation, as applicable. All appeals are ***allowed***, costs are made easy and record of the Court below be returned forthwith.

(Jaspreet Singh, J.)

Order Date :- 11.10.2023/Asheesh