

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 252 OF 2016

Mr. Chandrakant P. Sanghvi
and Ors

...Applicants

Versus

Mr. Anilkumar Phoolchand Sanghvi
and Ors

...Respondents

....

Mr. S.U. Kamdar, Senior Advocate a/w. Mr. Prateek Saksaria,
Mr. Manik Joshi, Mr. Pushkar Salgaonkar i/b. M/s. Crawford
Bayley & Co., for the Applicants.

Mr. Shiraz Rustamjee, Senior Advocate i/b. Dastur Kalambi &
Associates, for Respondent Nos.1 to 3.

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CORAM : R. G. KETKAR, J.

DATE : 27th APRIL, 2016

P.C.

1. Heard Mr. S.U. Kamdar, learned Senior Counsel for the applicants and Mr. Shiraz Rustamjee, learned Senior Counsel for respondent Nos.1 to 3, at length.

2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, 'CPC'), the applicants have challenged the judgment and order dated 22.4.2016 passed by the learned Principal District Judge, Pune in Civil Misc.

Application (Arbitration) No.395/2016. By that order, learned Principal District Judge rejected the application on the ground that it is not maintainable.

3. It is not necessary to burden the judgment by giving detailed facts. Suffice it to note that the applicants herein filed Arbitration Petition No.605/2015 before the District Court, Pune under Section 14 of the Arbitration and Conciliation Act, 1996 (for short, 'Act'). During pendency of that proceedings, the applicants preferred application at Exhibit-5 on 3.8.2015 for ad-interim stay of the arbitral proceedings. It appears that no relief was granted. On 21.8.2015, the applicants filed application under Section 13 of the Act before the learned Arbitrator. On 22.8.2015, learned Arbitrator directed the respondents, hereinafter referred to as 'claimants', to file reply to that application and matter was adjourned to 7.9.2015. Respondent Nos.1 to 3-claimants filed reply on 3.9.2015. On 4.9.2015, the applicants sought three weeks time to file rejoinder to the reply. On 7.9.2015, namely, the adjourned date, none appeared on behalf of the applicants. Learned Arbitrator fixed the hearing of the application of bias from 28.9.2015 to 30.9.2015. On

28.9.2015 none appeared on behalf of the applicants. On 14.10.2015, the applicants filed rejoinder to the affidavit-in-reply filed by the claimants. On 14.10.2015, the claimants were directed to file sur-rejoinder by 25.11.2015. Learned Arbitrator directed that the bias application shall be taken up first on 8.12.2015. On 26.11.2015, affidavit-in-sur-rejoinder to the bias application was filed by the claimants. On 8.12.2015 and 9.12.2015, request was made on behalf of the applicants to take up the bias application on hearing on the next date. Learned Arbitrator acceded to the request and adjourned the hearing of the bias application to 9.2.2016. Mr.Rustamjee submitted that on 9.2.2016, the applicants stated that they do not wish to press the bias application in these sittings. The bias application was, therefore, ordered to be taken up on 21.3.2016. On 21.3.2016, the applicants moved this Court by way of Civil Revision Application. On 21.3.2016 to 23.3.2016 none appeared on behalf of the applicants before the learned Arbitrator and consequently the bias application was adjourned to 25.4.2016. On 22.3.2016, the applicants withdrew Civil Revision Application No.163/2016 with liberty to file application under Section 14 of the Act only on the ground of bias. The applicants were permitted to

withdraw the application with liberty to file application under Section 14 of the Act only on the ground of bias, if permissible in law. All the contentions of the claimants including ground of maintainability were kept open.

4. The applicants have thereafter filed application before the learned Principal District Judge, Pune under Section 14 of the Act on 5.4.2016. By the impugned order, learned Principal District Judge has rejected the application on the ground that it is not maintainable. It is against this order, the applicants have instituted the present application.

5. In support of this application, Mr. Kamdar strenuously contended that the applicants have two remedies to challenge the arbitrator one is under Sections 12 and 13 and other remedy is under Section 14 of the Act. He submitted that Section 12 of the Act lays down the grounds for challenging the appointment of Arbitrator. Under sub-section (3) an Arbitrator may be challenged only if (a) circumstances exist that give rise to justifiable doubts as to his independence and impartiality. Section 13 lays down the procedure for challenging the Arbitrator. Sub-section (1) thereof lays down that subject to

sub-section (4), the parties are free to agree on a procedure for challenging an Arbitrator. Sub-Section (2) lays down that failing any agreement referred under 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. Sub-section (3) thereof lays down unless the Arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to challenge, the arbitral tribunal shall decide the challenge. Sub-section (4) lays down that if a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

6. Mr. Kamdar submitted that in the present case the applicants had filed application before the learned Arbitrator on 21.8.2015 and till date said application is not decided by the learned Arbitrator. If learned Arbitrator were to decide that challenge then it will not be open to the parties to file

application under Section 14(1)(a) of the Act. However, as the learned Arbitrator has not decided the application filed under Section 13 of the Act, the applicants can invoke section 14(1)(a) for declaration that the mandate of an Arbitrator is terminated. He further submitted that in the present case, Section 5 of the Act has no application. He submitted that the learned Principal District Judge committed serious error in holding that the application under Section 14 of the Act is premature and is not maintainable and that after application under Section 13(3) of the Act is decided, the applicants can agitate their grievance as per Section 14 of the Act. Thus, only on this ground the learned Principal District Judge has rejected the application and not on any other ground. In support of his submissions, he relied upon following decisions :

- [i] ***Lalitkumar V. Sanghavi (Dead) through LRs Neeta Lalit Kumar Sanghavi and another vs. Dharamdas V. Sanghavi and others, (2014) 7 SCC 255*** and in particular paragraphs-10.1, 10.2 and 12 thereof;
- [ii] ***V.K. Dewan and Co. vs. Delhi Jal Board & Ors., 112(2004) Delhi Law Times 646***, AND the decision of the Apex Court in the same case reported in ***(2010) 15***

SCC 717;

[iii] *State of Arunachal Pradesh vs. Subhash Projects & Marketing Ltd. and anr. (2006) 3 Gau LR 939* and particular paragraphs-21 onwards as also paragraph-34.

[iv] *Rashtriya Chemical Fertilizers Ltd and another vs. J.S. Ocean Liner Pvt. Ltd. and others, (2010) 6 Bom CR 402* and in particular paragraph-21 thereof.

[V] *Hasmukhlal H. Doshi and another vs. M.L. Pendse, Retired Chief Justice, Karnataka High Court and others, 2000(3) Mh.L.J. 690;*

[vi] *Madras Fertilizers Limited, Manali, Chennai-600 068 vs. SICGIL India Limited and another, 2010(2) CTC 357[Madras High Court];* and

[vii] *Imaging Solutions Pvt. Ltd., vs. Hughes Communications India Ltd. and another, (2013) 3 RCR (Civil) 83* of Punjab and Haryana High Court, and in particular paragraph-18 thereof.

7. On the other hand, Mr. Rustamjee submitted that having regard to the scheme of the Act and in particular Sections 5, 12 and 13 of the Act, the applicants cannot invoke provisions of Section 14 of the Act challenging the appointment of the

Arbitrator on the ground of bias. He submitted that though the applicants have filed application under Section 13 of the Act raising the issue of bias, they did not pursue that application and went on seeking adjournment before the learned Arbitrator. In fact in paragraph-1 of the application filed before the learned Arbitrator under Section 13(2) read with Section 12(3)(a) of the Act on 21.8.2015, it is contended that said application will be pressed before the Arbitrator only if the final decision of the Courts is that the mandate of the arbitral tribunal does not stand terminated. In pursuance of the liberty granted by this Court on 22.3.2016, as the applicants have filed fresh application under Section 14 of the Act before the learned Principal District Judge, Pune on 5.4.2016. Till such time that application is decided they will not press the application made by them under Section 13(2) read with 12(3)(a) of the Act. He, therefore, submitted that on one hand the applicants have moved before the learned Arbitrator under Section 13 of the Act and on the other they did not proceed with the hearing of that application. He also relied upon the following decisions :

[I] Vilas Laxmanrao Kaware vs. Ganesh Builders and

Ors.,2005(2) MhLJ 912, and in particular paragraphs-6 and 7 thereof; and

[II] M/s. Kitiku Imports Trade Pvt. Ltd. vs. M/s. Savitri Metals Ltd., 1998(4) Bom.C.R. 602

8. Mr. Rustamjee invited my attention to paragraph-14 of the impugned order. In paragraph-14, learned District Judge observed thus:

“14. So, as per Section 13(3) of the Arbitration and Conciliation Act, 1996, the sole arbitrator shall decide the said challenge and thereafter only the petitioners can agitate their grievance as per Section 14 of the Arbitration and Conciliation Act, 1996.”

9. Mr. Rustamjee submitted that this statement of law is contrary to the decision of this Court in the case of **Hasmukhlal H. Doshi (supra)**. On the other hand, Mr. Prateek Saksaria submitted that as respondent Nos.1 to 3 have not challenged that finding by adopting appropriate proceedings, they are precluded from raising this contention.

10. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused

the material on record.

11. The short question is whether the applicants could have invoked the provisions of Section 14 of the Act when admittedly application under Section 13 of the Act made by them before the learned Arbitrator is pending.

12. In order to appreciate the controversy between the parties, it is necessary to make a reference to some of the provisions of the Act. The Parliament thought it expedient to make law respecting Arbitration and Conciliation taking into account the fact that United Nations Commission on International Trade Law [UNCITRAL] has adopted the UNICITRAL Model Law on International Commercial Arbitration in 1985, Bill was introduced. Amongst others, the main objectives of the Bill is Clause 4(v) “to minimise the supervisory role of Courts in the arbitral process”. Section 5 lays down that notwithstanding contained in any other law for the time being in force, in matters governed by part-I, no judicial authority shall intervene except where so provided in that Part. Section 12 lays down the grounds for challenging Arbitrator. Section 13 lays down the procedure for challenging arbitrator. Sections 12 and

13 of the Act read thus :

“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 likely to give rise to justifiable doubts as to his independence or impartiality.

(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.

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 sub-section (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.”

13. Section 14 of the Act provides for termination of the Mandate of an Arbitrator and reads thus :

“14. Failure or impossibility to act.-- (1) The mandate of an arbitrator shall terminate 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.”

14. Perusal of sub-section (1) of Section 12 shows that when a person is approached in connection with his possible appointment as an Arbitrator, he has to disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. This stage is prior to his appointment as an Arbitrator. Sub-section (2) of Section 12 lays down that 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 been informed of them by him. Thus, the law casts an obligation upon the Arbitrator so appointed to disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him. Sub-section (3) of Section 12 lays down that an Arbitrator may be challenged only if – (a) circumstances exist that give rise to the justifiable doubts as to his independence or impartiality. In the present case, we are not concerned with clause (b) of sub-section (3) of Section 12. We

are also not concerned here with sub-section (4) of Section 12.

15. Section 13 lays down the procedure for challenging the Arbitrator. Sub-section (1) thereof lays down that subject to sub-section (4), the parties are free to agree on a procedure for challenging the Arbitrator. In the present case, it is not disputed that there is no agreement between the parties to that effect. Sub-section (2) thereof lays down the period within which as also the grounds on which challenge to the arbitral tribunal can be made. Sub-section (3) thereof lays down that unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to challenge, the arbitral tribunal shall decide on the challenge. In the present case, learned Arbitrator has not withdrawn. The parties have also not agreed to the challenge. In other words, the learned Arbitrator has to decide on the challenge so raised by the applicants. Sub-section (4) of Section 13 lays down that if the challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. Sub-section (5) thereof lays down that 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. Sub-section (6) thereof lays down that 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.

16. Thus, Sections 12 and 13 of the Act lay down the grounds for challenge and the procedure for challenging the Arbitrator. Sub-section (4) of Section 13 lays down that if a challenge under the procedure under sub-section (2) is not successful, the Arbitral Tribunal shall continue the arbitral proceedings and make an arbitral award. In other words, the Parliament never intended that any party should raise the challenge to the order passed by the Arbitrator challenging his appointment. After turning down said challenge, the Arbitrator has to proceed and make an arbitral award. Sub-section (5) thereof, provides for challenging such an award in accordance with section 3. Sub-section (6) thereof lays down that if the award is set aside, the Court may decide **as to whether**

arbitrator who is challenged is entitled to any fees. Thus, at the time of challenge to the award, a party aggrieved is entitled to challenge appointment of the Arbitrator.

17. As noted earlier in the present case on 1.8.2015 the applicants had filed Arbitration Petition No.605/2015 before the learned Principal District Judge, Pune. By order dated 8.2.2016, the learned Principal District Judge rejected the application filed under Section 14(2) of the Act for declaring that the mandate of Mr.Justice N.K. Sodhi (Retd.), who was appointed vide the order dated 20.6.2013 to act as the sole Arbitrator for adjudication of disputes and differences between the applicants and the respondents, stood terminated. Aggrieved by that decision, the applicants instituted, Civil Revision Application No.163/2016 in this Court. Said application was allowed to be withdrawn with liberty to file application under Section 14 of the Act only on the ground of bias, if permissible in law. All contentions of the respondents, including the ground of maintainability, were kept open. In the meantime, on 21.8.2015, the applicants have filed application under Section 13(2) read with Section 12(3)(a) of the Act before the learned Arbitrator. In paragraph-1 of the

application, the applicants contended as under :

“ These Respondents (applicants herein) clarify that the present Application will be pressed before this Hon'ble Tribunal only if the final decision of the courts is that the mandate of the Hon'ble Tribunal does not stand terminated.”

18. On 22.8.2015, learned Arbitrator directed the claimants (respondents herein) to file their reply and bias application was to be taken up on 7.9.2015. On 3.9.2015, the claimants filed affidavit-in-reply to that application. On 4.9.2015, the applicants herein sought three weeks time to file their rejoinder to the reply. The matter was kept for hearing of the application and was adjourned from time to time. In pursuance of the liberty granted by this Court on 22.3.2016, the applicants instituted fresh application under Section 14 of the Act before the learned Principal District Judge on 5.4.2016. It is not disputed and is rather accepted by learned Counsel for the applicants that the applicants did not proceed with the hearing of the application filed before the learned Arbitrator in view of the portion in paragraph-1 extracted hereinabove. By the impugned order, learned Principal District Judge rejected the application on 22.4.2016. Thus, it is evident that though the

applicants had filed application on 21.8.2015 before the learned Arbitrator under Section 13(2) read with 12(3)(a) of the Act, they did not pursue that application and went on pursuing application under Section 14 of the Act one after the other. Thus, it cannot be said that there was failure on the part of the learned Arbitrator or that there was delay attributable to the claimants in disposal of the application filed by the applicants before the learned Arbitrator. In other words, the delay is solely attributable to the applicants in not disposing the application under Section 13(2) read with 12(3)(a) of the Act filed by them.

19. Mr. Kamdar submitted that the applicants have two fold remedies for challenging the arbitrator. He submitted that one mode is to follow the procedure laid down under Sections 12 and 13 of the Act. Other mode is to invoke section 14 of the Act. In the present case, Section 14(1)(a) is applicable. He submitted that the mandate of an Arbitrator shall terminate if he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay. Mr. Kamdar heavily relied upon the decisions referred in paragraph-6 above.

20. In the case of ***Lalitkumar V. Sanghavi (supra)***, by order dated 29.10.2007, learned Arbitrator, Mr. Justice H. Suresh (Retired) informed the appellants before the Apex Court that the arbitration proceedings stood terminated. Original applicant requested to the learned Arbitrator to revoke the letter dated 29.10.2007. On 17.1.2008, the original applicant filed Arbitration Application No.44 of 2008 for appointment of some fit and proper person as an Arbitrator. The High Court dismissed that application on the ground that application under Section 11 is not maintainable and the remedy is to file writ petition and not an application under Section 11 of the Act. Said order was subject matter of challenge before the Apex Court. Apex Court considered the provisions of Sections 12, 14 and 32 of the Act and observed in paragraph-12 that order dated 29.10.2007 by which the Tribunal terminated the arbitral proceedings could only fall within the scope of Section 32(2)(c) i.e. the continuation of the proceedings has become impossible. Perusal of this decision does not show that the contention based on bias was raised at all. In view thereof, this decision relied upon by Mr. Kamdar does not advance the case of the applicants.

21. Mr. Kamdar relied upon the decision of Apex Court in the case of **V.K. Dewan & Co. (supra)**. Before the Apex Court, the decision of Delhi High Court in the case of **V.K. Dewan & Co. vs. Delhi Jal Board & Ors. (2004) 112 DLT 646** was challenged. Perusal of the decision of the Delhi High Court shows that application under Sections 12, 13, 14 and 15 of the Act was filed by the petitioner praying for termination of the mandate of the sole arbitrator-respondent No.4 and appointment of another Arbitrator in his place preferably a retired Judge. In paragraph-4, the learned Single Judge observed thus :

“4. After hearing the petitioner in person and learned counsel for respondent no.1, this Court finds that under [Section 12](#) of the Act the appointment of an Arbitrator can be challenged and his mandate terminated if clear and convincing circumstances exist to raise justifiable doubt as to his independence or impartiality. The mere fact that an Arbitrator has been offered some assignment being a retired Officer cannot give rise to any justifiable doubt in regard to his independence and impartiality. Even serving officers of the Government, PSUs, and statutory authorities are appointed arbitrators and in a large number of cases their Awards are found going in favor of the parties opposite to their own departments. Mere suspicion cannot be made a ground for concluding that the Arbitrator would not act

fairly or impartially. Only a well founded and justifiable doubt about the Arbitrator covered by [Section 12](#) of the Act can be made a ground for terminating the mandate of an Arbitrator. Had the Arbitrator-respondent No.4 accepted the assignment offered by respondent No.1, the petitioner could contend and the Court might have accepted the plea that the petitioner entertains a justifiable doubt about his independence or impartiality but since the Arbitrator has declined the assignment there remains no good ground for holding so. The mere fact that the Arbitrator has not passed an interim Award or has been trying to expedite the proceedings are no grounds to hold that the Arbitrator is not independent or impartial.”

22. Perusal of paragraph-4, extracted hereinabove, shows that learned Single Judge observed that the mere fact that an Arbitrator has been offered some assignment being a retired Officer cannot give rise to any justifiable doubt in regard to his independence and impartiality. While allowing the appeal against this order, Apex Court noted in paragraph-1 that the grievance made by the appellant was that when the arbitration was proceeding, the arbitrator-respondent No.4 was issued an order on 5.5.2003 by the first respondent, Delhi Jal Board appointing him as a full time consultant on certain stipulated salary. That order was made during the course of arbitration proceedings. Immediately thereafter on 14.5.2013, arbitration

proceedings were continued and no information with regard to the order made was given by respondent No.4 to the appellant as required under Section 12(2) of the Act. As noted earlier, section 12(2) of the Act requires an Arbitrator, from the time of his appointment and throughout the arbitral proceedings to disclose to the parties in writing any circumstances referred to in sub-section (1), without delay, unless they have already been informed of them by him. It is in those circumstances, Apex Court observed that the High Court was not justified in dismissing the petition by taking the view that it was mere suspicion on the part of appellant. The Apex Court was, therefore, of the view that a fresh Arbitrator needs to be appointed and accordingly set aside Delhi High Court order and terminated the mandate of the Arbitrator. Mr. Kamdar heavily relied upon this decision and contended that Apex Court entertained the petition under Section 14(1)(a) of the Act and terminated the mandate of the arbitrator. I do not find any merit in this submission. Perusal of the decision of the Delhi High Court shows that the appellant had made application under Sections 12, 13, 14 and 15 of the Act for termination of mandate of the sole arbitrator mainly on the ground that the

appointment of respondent No.4 as a full time consultant on certain stipulated salary by the first respondent Delhi Jal Board was not disclosed as contemplated under Section 12(2) of the Act. In view thereof, I do not find that the decision of the Apex Court in **V.K. Dewan and Company (supra)** advances the case of the applicants.

23. Mr. Kamdar heavily relied upon the decision of Gauhati High Court in the case of State of **Arunachal Pradesh (supra)** and in particular paragraphs-34 and 38, to contend that Section 14(1)(a) of the Act can be invoked on the ground of bias for terminating mandate of the arbitrator without invoking Sections 12 and 13 of the Act. Paragraphs-34 and 38 of that report read thus:

“**34.** It is now time to turn to Section 14. Sub-section (1) perceives an automatic termination of the mandate of the arbitrator if he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay and if he withdraws from his office or the parties agree to the termination of his mandate. In the prescribed eventualities as above, there is a statutory termination, of the arbitrator's mandate. If the facts constituting the eventualities in Sub-section (1) of

Section 14 are neither in dispute nor demand any proof to be established, termination of the mandate of the arbitrator takes place on statutory prescription. However, if one or more of the circumstances enumerated hereinabove, requires to be established, a party may unless otherwise agreed to by the parties, apply to the court to decide on the termination of the mandate. Considering the scheme of Chapter III of the Act dealing with the composition of an arbitral Tribunal and challenge to the appointment and continuance of an arbitrator, we are of the view that Section 14 has a role and relevance independent of Section 13 of the Act. The applicability thereof, therefore, is not contingent on Section 13. The width and amplitude of Section 14 having regard to the precepts thereof are more comprehensive. Two provisions are not mutually exclusive so much so that a party not raising a challenge under Section 13 of the Act would be excluded from availing a remedy under Section 14 even if the ground(s) urged is/are within the prescribed parameters of the said provision. To reiterate, though a party unsuccessful in his challenge under Section 13 would be debarred from carrying the same to any other forum resting on some other provision of the Act except to the extent permissible under Section 34, such an impediment does not stare at a party omitting and/or failing to question the independence and impartiality of the arbitrator under Section 33(2) within the time prescribed.

38. Axiomatically, the *de jure* inability referred to in Section 14 has to necessarily comprehend all conceivable legal shortcomings existing or acquired by an arbitrator disqualifying him to discharge the

role assigned under the Act. Bearing in mind, the avowed purpose of an arbitration proceeding, the modalities whereof have been statutorily ordained by the Act to ensure unbiased, expeditious, inexpensive resolution of disputes, any restrictive interpretation on the above expression would emasculate the legal provision of its efficacy and purpose. The instances of *de jure* inability cited by the learned Counsel for the respondent-company drawing sustenance from Syam Telecom Ltd., are essentially illustrative and not exhaustive by any means. It is incomprehensible that in a given fact situation exhibiting justifiable doubts about the independence and impartiality, of the arbitrator his mandate would continue and the challenge to his authority would have to wait till the completion of the process only because the party aggrieved had failed to act in terms of Section 13(2) within the period prescribed. It is not unlikely that in such an eventuality, irreversible consequences may follow, a situation neither statutorily conceived nor countenanced. Understandably such a view cannot enjoy judicial imprimatur as well. We, therefore, hold that a party who had either abstained from or omitted to raise a challenge to the independence or impartiality of an arbitrator under Section 13(2) of the Act would not be debarred from invoking Section 14 contending that the arbitrator had become *de jure* unable to perform his functions. Independence and impartiality of an arbitrator being inseverable attributes to vest him with the legal authority to adjudicate the differences between the parties in an arbitration exercise, he would be *de jure* disqualified from discharging his functions once he renounces the above qualities. This according to us is the mandate of

Sections 12, 13 and 14 which form a complete scheme with the underlying objective of securing the sanctity and probity of an arbitration proceeding.”

24. Perusal of paragraph-34, extracted hereinabove, shows that the Division Bench of Gauhati High Court held that Section 14 has a role and relevance independent of Section 13 of the Act. The applicability thereof, therefore, is not contingent on Section 13. The width and amplitude of Section 14 having regard to the precepts thereof are more comprehensive. Two provisions are not mutually exclusive so much so that a party not raising a challenge under Section 13 of the Act would be excluded from availing a remedy under Section 14 even if the ground(s) urged is/are within the prescribed parameters of the said provision. Though a party unsuccessful in his challenge under Section 13 would be debarred from carrying the same to any other forum resting on some other provision of the Act except to the extent permissible under Section 34, such an impediment does not stare at a party omitting and/or failing to question the independence and impartiality of the arbitrator under Section 13(2) within the time prescribed. In paragraphs-35 and 36, Division Bench dealt with the expression '*de jure*'. In

paragraph-38 it was observed that axiomatically the *de jure* inability referred to in Section 14 has to necessarily comprehend all conceivable legal shortcomings existing or acquired by an arbitrator disqualifying him to discharge the role assigned under the Act. It was further observed that the expression *de jure* cannot be construed in a restrictive manner. Division Bench held that a party who had either abstained from or omitted to raise a challenge to the independence or impartiality of an arbitrator under Section 13(2) of the Act would not be debarred from invoking Section 14 contending that the arbitrator had become *de jure* unable to perform his functions. Independence and impartiality of an arbitrator being inseverable attributes to vest him with the legal authority to adjudicate the differences between the parties in an arbitration exercise, he would be *de jure* disqualified from discharging his functions once he renounces the above qualities. This is the mandate of Sections 12, 13 and 14 which form a complete scheme with the underlying objective of securing the sanctity and probity of an arbitration proceeding. It is no doubt true that this decision supports the contention advanced by Mr. Kamdar. I will deal with this decision a little later. Suffice it to say that in view of

the decisions of this Court which I will presently refer, I respectfully defer from the view expressed by the Division Bench of Gauhati High Court.

25. Mr. Kamdar relied upon Division Bench decision of this Court in the case of ***Rashtriya Chemical Fertilizers Ltd. (supra)*** and in particular paragraphs-21 to 23 thereof. He submitted that judicial intervention of the Court is specifically provided for under Section 14(2) of the Act while controversy concerning de jure or de facto inability of the arbitrator to perform his functions continues. The Court is empowered to consider (a) inability i.e., legal disability of the arbitrator or want of his legitimate authority to arbitrate, and (b) defacto inability of the arbitrator to perform his functions as an arbitrator, and can terminate the mandate of the arbitrator on any of the above grounds. There is inbuilt statutory alternative remedy for a party aggrieved by undue delay in arbitral proceedings.

26. In my opinion, this decision does not advance case of the applicants. In paragraph-23 of that report, Division Bench observed that if the party becomes aware subsequently that the

arbitrator does not possess the eligibility and qualification as required, the appointment may be challenged in view of section 12 of the Act by adopting the procedure prescribed to challenge such appointment as indicated in Section 13 of the Act. The arbitrators are at liberty to withdraw from their office if their appointment is challenged or have option to proceed further and decide the challenge and to make an award. Such arbitral award can be challenged in accordance with Section 34 of the Act. It was further observed that the judicial authority or the Court is concerned, when approached, is required to bear in mind the object of the Act to achieve speedy disposal of arbitral proceedings with minimal court intervention in such matters. The legislative intention is clear that arbitral proceedings shall not be unduly prolonged by time consuming tactics by one or other party to the dispute. In fact this decision supports the claimants.

27. Mr. Kamdar relied upon the decision of this Court in the case of ***Hasmukhlal H. Doshi (supra)***. He submitted that learned Single Judge of this Court (Coram: F.I. Rebello,J., as the learned Chief Justice then was) considered various

contingencies. It was observed that there could be no dispute that bias may constitute a ground to hold that de jure the Arbitrator cannot perform his function. What happens in a case where the Arbitral Tribunal though objections have been raised chooses not to decide on the objection. Would then the provisions of section 14 apply. If section 14 could apply in such excepted cases, than would that make a difference in a case where the Arbitral Tribunal decides the objection. If the Court *prima facie* can entertain a petition on failure by the Arbitral Tribunal to decide the objections, will the Court be precluded to decide in a case where the Arbitral Tribunal decides the objections. In that case, the arbitrator had admittedly decided the matter and, therefore, it was made clear that the issue as to whether in a case where Arbitrator does not decide challenge is not decided. Relying upon this decision, Mr.Kamdar submitted that in the present case also the learned Arbitrator has not decided the bias application and bias constitutes a ground to hold de jure the arbitrator cannot perform his function. The applicants, therefore, justified in invoking section 14(1)(a) of the Act.

28. In my opinion, said decision does not advance the case of the applicants and rather supports respondent Nos.1 to 3. Perusal of paragraph-9 of the decision shows that the contention whether after decision rendered under Section 13(3), the Court can interfere in a petition under Section 14 was examined. It was observed that the importance of a challenge and decision under sections 12(3) and 13(3) in the case of bias becomes important as bias can be waived by a party participating in the proceedings even though aware of the circumstances of possible bias. The second could be that there may be circumstances under which a party in order, to delay or to avoid an arbitration may move the Court under section 14. Under section 14 the Court, on the material before it, may be in a position to examine the real possibility of bias. There could be other situations in which the Court may have to gather material for the purpose of finding out whether in fact there was any real possibility of bias. In these circumstances, a decision under section 13(2) would throw light on the matter. As an illustration an Arbitrator may not be aware of the material giving rise to a possibility of bias, and may conduct the proceedings. In these circumstances the real possibility of bias may diminish or the possibility itself may

disappear. An Arbitrator confronted with material as to circumstances which give rise to justifiable doubt as to independence or impartiality would be the best person if circumstances so warrant to meet the contentions raised or to answer, the same. The Court thereafter made reference to section 14(3) and posed a question, namely, will mere reference to Section 12(3) or 13(3) result in the Court coming to a conclusion that such a challenge is also open under Section 14 of the Act. Merely because they are found in section 14 cannot lead to the conclusion, that the challenge always be made under section 14. In paragraph-11 it was observed that if section 13(4) is construed the legislature in its wisdom has provided for a remedy whilst challenging the Award. After considering the object of legislation which is to restrict judicial interference, in a case decided under Section 13(3), it would not be open to a Court to decide and consider the mandate of the Arbitrator has been terminated under Section 14 of the Act. That challenge in a case where the arbitrator decides the objections will have to be taken as a ground in a challenge to the Award under section 34. The object seems to be to allow the Arbitral proceedings to be concluded at the earliest. If the challenge is

successful finally, the remedy is not lost as time is saved by virtue of section 43(4) of the Act.

29. Apart from that, in the case of **Vilas Laxmanrao Kaware (supra)**, learned Single Judge considered the decision in the case of **Hasmukhlal H. Doshi (supra)** in paragraph-6 and observed that as Section 13(5) provides for a challenge of forum, it would not be open to Court to decide and consider that the mandate of the Arbitrator has been terminated under Section 14. I, therefore, do not find that decision of **Hasmukhlal H. Doshi (supra)** advances the case of the applicants. Rather it supports the contentions of respondent Nos.1 to 3. I have already held that the delay is attributable to the applicants for not disposal of the bias application filed by them on 21.8.2015.

30. Mr. Kamdar relied upon the decision of Madras High Court in the case of **Madras Fertilizers Limited, Manali, Chennai (supra)**, and in particular paragraph-23 thereof. Perusal of that decision shows that the petitioner in that case was a sick company incurring loss. The fee fixed by the second respondent-arbitrator was beyond the reach of the petitioner.

The petitioner expressed its inability to pay their share towards the fee and requested the second respondent to accept lesser sum as their share of arbitration fees. The petitioner, therefore, instituted petition under Section 14 read with Section 11(6) of the Act for appointment of fresh arbitrator terminating the second respondent and fixing the arbitrators remuneration under Section 14. Thus the issue of bias of second respondent-Arbitrator was not at all raised.

31. Mr. Kamdar relied upon the decision of Punjab and Haryana High Court in the case of ***Imaging Solutions Pvt. Ltd. (supra)***. In paragraph-16 of that report, learned Single Judge of Punjab and Haryana High Court referred to two decisions of Delhi High Court in (1) ***Progressive Career Academy Pvt. Ltd. vs. Fiit Jee Ltd., 2011(2) Arbi LR 323***, and (2) ***Neeru Walia vs. Inderbir Singh Uppal, 2010 (7) R.C.R (Civil) 508***, and one decision of Andhra Pradesh High Court in the case of ***Chintakayala Siva Rama Krishna vs. Nadimpalli Venkata Rama Raju, 2006 (2) R.A.J 507 (AP)*** which held that Arbitrator having rejected application moved under Sections 12 and 13 of the Act, the only remedy available is to challenge the ultimate

award under Section 34 and remedy to seek termination of mandate of arbitrator by filing petition under Section 14 is not available. Learned Single Judge also referred to the decisions of Punjab and Haryana High Court in the case of **Satish Chander Gupta vs. Union of India, 2003(1) R.C.R. (Civil) 721** and **Opbk Construction Pvt. Ltd. vs. Punjab Small Industries, 2008 (3) ARBLR 189 PH**. Learned Single Judge preferred to follow the Division Bench judgment in the case of **Satish Chander Gupta (supra)** and the judgment of learned Single Judge of Punjab and Haryana High Court in **Opbk Construction Pvt. Ltd. (supra)**. In paragraph-17, it was observed thus :

“17. Even on principle, the petitioner cannot be left remedyless. It would be futile to go through the whole exercise of arbitration proceedings leading to the final Award and then challenging the same under Section 34 of the Act. On the contrary, if the Arbitrator becomes de jure unable to perform his function, then his mandate is liable to termination under Section 14 of the Act. In the instant case, respondent no. 2 became de jure unable to perform his functions as arbitrator because of his being Director of respondent no. 1, which fact was not earlier known to the petitioner.”

32. Perusal of said decision shows that in view of two

decisions of the same High Court (one of Division Bench and one of Single Judge), learned Single Judge preferred not to follow two decisions of Delhi High Court and one decision of Andhra Pradesh High Court. In view of Division Bench decision of this Court in the case of ***Rashtriya Chemical Fertilizers Ltd. (supra)*** as also two decisions of learned Single Judge of this Court in the cases of ***Hasmukhlal H. Doshi (supra)*** and ***Vilas Laxmanrao Kaware (supra)***, I do not prefer to follow the decision in the case of ***Imaging Solutions Pvt. Ltd. (supra)***. That apart, Section 5 of the Act which lays down that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part-I, no judicial authority shall intervene except where so provided in Part-I, was with great respect not considered. In view of the decision of this Court referred earlier, I respectfully defer from the view of the Division Bench of Gauhati High Court in the case of ***State of Arunachal Pradesh (supra)*** as I am bound by the decision of the Division Bench of this Court in the case of ***Rashtriya Chemical Fertilizers Ltd. (supra)*** and I see no good reason for taking different view than the view taken by two learned Single

Judges of this Court.

33. This brings me to submission of Mr. Rustamjee as regards the finding recorded by learned District Judge in paragraph-14, extracted hereinabove. Mr. Saksaria submitted that as respondent Nos.1 to 3 have not instituted any proceedings challenging that finding, they are precluded from agitating this contention. In view of the decision of Apex Court in the case of **Banarsi vs. Ram Phal, (2003) 9 SCC 606** and in particular paragraphs-9 to 11 thereof, I do not find any merit in the submission of Mr. Saksaria. In the case of **Banarsi (supra)**, Apex Court has considered provisions of Order 41 Rule 22 of CPC and has observed that any respondent though he may not have filed an appeal from any part of the decree may still support the decree to the extent to which it is already in his favour by laying challenge to a finding recorded in the impugned judgment against him. The law remained so even post amendment of CPC. It was further observed that under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross objection laying challenge to any finding adverse to him as the decree is entirely in his favour

and he may support the decree without cross-objection.

34. In the light of the aforesaid discussion, I do not find any merit in Civil Revision Application. Hence, Civil Revision application fails and the same is dismissed.

(R. G. KETKAR, J.)

Deshmane (PS)