

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 06.12.2017

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

O.P.No.341 of 2017

and A.Nos.2670 and 7597 of 2017

M/s.Film Craft,
through its Sole Proprietor
Ms.Anjana G.Adhikari

.. Petitioner

-vs-

1. Prasar Bharati
Doordarshan Bhawan
Mandi House, Copernicus Marg,
New Delhi - 110 001.

2. Shri. Srinivasan Ramachandran,
Additional Director General (Engineering),
All India Radio & Doordarshan
5, Swami Sivananda Salai,
Chennai - 600 005.

.. Respondents

Prayer: Petition filed under Section 14 of the Arbitration & Conciliation Act, 1996 to terminate the mandate of the present Arbitrator, Respondent No.2 herein on the grounds of respondent No.2 being de jure unable to perform his functions effectively and on account of failure to act without undue delay.

For Petitioner : Mr.M.S.Krishnan, S.C.

for M/s.Cyril Amarchand Mangaldas

For Respondents : Mr.T.L.Thirumalaisamy

ORDER

This Original Petition is filed under section 14 of the Arbitration and Conciliation Act 1996 ('Act') seeking a termination of the mandate of R2 and, vide application in A.No.7597 of 2017 the appointment of an Arbitrator in terms of Section 11(6) of the Act to adjudicate upon disputes that have admittedly arisen between the parties from out of two Accreditation Agreements dated 31.10.1989 and 01.04.2002.

2. The petitioner is a sole proprietor engaged in the business of producing and marketing television programmes as well as other allied activities. The petitioner is henceforth referred to as 'Film Craft'. Prasar Bharati - R1, is a public broadcasting agency and R2, the ADG(Engineering) in Prasar Bharti, is the Arbitrator appointed by R1 as Sole Arbitrator to adjudicate upon the disputes between itself and Film Craft.

3. The disputes are not referred to in detail in so far as neither party questions the existence of disputes inter se. Admittedly, clause 5 of both agreements provides for the reference of disputes and differences to a sole Arbitrator to be appointed by the Director General, Doordarshan. Clause 5 is extracted hereunder:

'5. In the event of any question, dispute or difference arising under these presents or in connection therewith (except as to any matters the decision of which is specially provided for by these presents), the same shall be referred to the sole arbitration of an officer appointed to be the arbitrator by the Director General, Doordarshan. It will be no objection that the arbitrator is a Government servant, that he has to deal with the matters to which these presents relate or that in the course of

his duties as a Government servant, he has expressed views on all or any of the matters in dispute or difference. The award of the arbitration shall be final and binding on the parties to these presents.

In the event of the arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, it shall be lawful for the Director General, Doordarshan to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.

The arbitrator may, from time to time, with the consent of the parties to these presents on large time for making and publishing the award.

Upon every and any such reference, the assessment of the costs of and incidental to the references and the award respectively shall be in the discretion of the arbitrator. Subject as aforesaid the Arbitration Act, 1940 and the rules thereunder and any statutory modifications thereof for the time being in force shall be deemed to apply to the arbitration proceedings under this clause.

Doordharshan shall have the right to amend or alter terms and rules governing grant of accreditation status from time to time, as it may deem necessary and such amendments and alterations shall be binding on the agency.

The president of India, agrees to bear the stamp duty, if any, chargeable on these presents.'

4. The dates and events relevant to adjudicate upon the prayers in the present petition/application are as follows:

i) Disputes arose between the parties and Prasara Bharti called upon the petitioner in September 2004 to settle outstanding dues to the extent of Rs.71,89,28,664/- along with interest at the rate of 18% upto the date of payment. The petitioner rejected the claim of Prasara Bharti and raised a counter claim for an amount of Rs.16,52,00,000/-. The existence of disputes inter se the petitioner and Prasara Bharti is thus not in question.

ii) A notice of Arbitration was thereafter issued by Prasara Bharti on 30.11.2004 requesting the Director General (DG) to appoint an Arbitrator to adjudicate upon and resolve the disputes inter se the parties.

iii) The DG appointed by order dated 13.05.2008, one Mr.G.Jayalal, Deputy Director General of the All India Radio, as sole Arbitrator to arbitrate upon the disputes between the parties. The delay of four years in appointment is stated to be on account of a paucity of officers willing to accept the assignment.

iv) The appointment of Mr.G.Jayalal stood terminated on his superannuation from service and by order dated 28.2.2014 one Mr.S.K.Patnaik, DDG (P) in Prasara Bharti was appointed as sole Arbitrator.

v) Upon the demise of Mr.Patnaik, an order was passed on 15.07.2015 by the DG appointing Mr.Ramachandran, R2 herein and ADG (Eng) in Prasara Bharati to act as sole Arbitrator.

vi) The order of appointment states that Mr.Ramachandran was appointed in the place of Mr.G.Jayalal unmindful of the position that the appointment of Mr.Jayalal had been substituted with the appointment of Mr.Patnaik in 2014.

vii) In all, between the request for appointment of arbitrator made by Prasara Bharati in 2004 and the appointment of Mr.Ramachandran in

2015, two earlier appointments had been made. There is an elapse of

13 years from the date when the appointment of arbitrator was sought for, till date. Seen in the light of the fact that arbitration is resorted to as a speedy and efficacious method of resolving disputes, the present situation is both pathetic and absurd.

viii)After the appointment of Mr.Ramachandran, the first notice was issued by him on 18.07.2016 one year after his appointment intimating the parties of his appointment and issuing notice that the first sitting of the Tribunal would be on 12.08.2016 at the office of the All India Radio at Chennai.

ix)Adjournments appear to be sought for by Film Craft on 12.8.2016, 23.9.16 and 3.11.16 in deference to which the proceedings were adjourned by R2 to 22.12.2016. The minutes of proceedings dated 22.12.2016 reveal that there was no appearance on behalf of Film Craft on that date. The counsel for Prasara Bharati entered appearance and filed an affidavit to the effect that a statement of claim filed originally before the then Arbitrator Mr.G.Jayalal had been placed on 18.05.2016 before R2. The minutes further state that the statement of claim containing 5454 pages in 21 volumes had been received on 18.05.2016 by R2. However, both the statement of claim as well as the accompanying affidavit were unsigned and further it was unclear as to whether the documents had been served upon Film Craft. R2 records that a communication to the above effect had been issued by him to

authenticated by Prasar Bharati. However since the documents submitted were illegible, clear copies of the same had been sought. The Arbitrator directed service of a copy of the statement of claim upon Film Craft within three weeks and further directed Film Craft to file its statement of defence within six weeks from the date of receipt of the claim statement.

x)The second sitting of the Tribunal was held on 08.03.2017 and the minutes reflect appearance by both parties. Clean copies of the annexures accompanying the claim were received by Film Craft. R2 records that the claim petition had been forwarded to Film Craft on 12.01.2017 and Film Craft sought some time to obtain legal advice on the on-going proceedings. R2 issued further directions in relation to the filing of the statement of defence and rejoinder thereto and the matter was adjourned to 02.06.2017.

xi)The present petition was filed in April 2017 and a stay of arbitral proceedings granted by this Court on 27.04.2017. A counter has been filed by Prasar Bharati both to the Original Petition as well as to Application No.7597 of 2017. A rejoinder has been filed by Film Craft to the counter in Original Petition.

5. Mr.M.S.Krishnan, learned senior counsel appearing for Cyril Amarchand Mangaldas for Film Craft would highlight the substantial delay in the conduct of the proceedings as well as the irregularity in the procedure adopted. He would point out that there has been

communication exchanged between Prasar Bharati and the erstwhile Arbitrator as well as R2 to which Film Craft was not a party. This, according to him, renders the proceedings liable to be terminated in terms of the provisions of section 14(1)(a) of the Act.

6. Moreover, the Arbitrator appointed by Prasar Bharati is its own employee and as such the bar on such appointment under 12(5) of the Act would stand attracted. He would thus pray that the mandate of R2 be terminated and an Arbitrator be appointed by this Court to adjudicate upon the disputes between the parties.

7. Mr.T.L.Thirumalaisamy, learned counsel appearing for the respondents raises the following defences:

i) That this Petition and applications were not maintainable. The agreements had been executed in Delhi and the petitioner/applicant located in Bombay and as such no cause of action arose within the jurisdiction of this Court.

ii) That it was Film Craft that had sought numerous adjournments before R2 on the pretext that it had to assemble and organise its documents and thus the delay in the proceedings, if any, was attributable in equal measure to the petitioner.

iii) That the provisions of section 12(5) were not applicable to the present matter in so far as the present proceedings had commenced prior to coming into force of the amendments on 23.10.2015.

iv) Alternately, and if at all, the remedy lay in section 13 of the Act that provided for a challenge to an arbitrator to be made before the Arbitral Tribunal itself and not under Section 14, in terms of which the present petition has been filed.

8. The petitioner relies on the following judgments of the Supreme Court in support of its submissions:

1. *Bharat Aluminium Company (BALCO) vs. Kaiser Aluminium Technical Service Inc.* (2012) 9 SCC 552;
2. *Indus Mobile Distribution Private Limited vs. Datawind Innovations Private Limited* (2017) 7 SCC 678;
3. *Union of India and others vs. Uttar Pradesh State Bridge Corporation Limited* (2015) 2 SCC 52;
4. *Union of India vs. Singh Builders Syndicate* (2009) 4 SCC 523;
5. *North Eastern Railway and others vs. Tripple Engineering Works* in Civil Appeal No.6275 of 2014 dated 31.08.2014.

No decisions have been cited by the respondents.

9. I first deal with the objection raised on the maintainability of the petition and application. The agreement between the parties does not vest exclusive jurisdiction in any Court. The provisions of Section 2(1)(e) of the Act defining 'court' read thus:

"2(1)(e)"Court" means— (i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include

any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;'

10. The Supreme Court in the case of BALCO (supra), after taking into consideration the definition of 'Court' under the Act has expressed the opinion that 'subject matter of the arbitration' cannot be confused with 'subject matter of the suit' and the reference to 'subject matter' in Section 2(1)(e) is with reference to and in connection with the process of dispute resolution. The purpose of section 2(1)(e) has thus to be seen in the context of identification of the proper court that would have supervisory control over the proceedings for dispute resolution and has to be construed in tandem with the provisions of section 20 of the Act which accords recognition to the autonomy of parties.

Section 20 of the Act reads thus:

20. Place of arbitration.—(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

11. On a combined reading of Sections 2(1)(e) and 20, the conclusion that has been arrived at by the Supreme Court is that legislature has intended jurisdiction to be vested in two Courts – the Court where the cause of action is located and the Court where the proceedings for arbitration take place. This position has been reiterated by the recent judgement of the Supreme Court in the case of Indus (supra) in the following terms.

'19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction – that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Section 16 to 21 of the CPC be attracted. In arbitration law however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.'

12. In the present case, it is an admitted position that the proceedings for arbitration have commenced in Chennai, where R2 is stationed and this, in my view would vest jurisdiction in this Court. In the light of the aforesaid discussion, the petition and applications are held to be maintainable.

13. Prasar Bharti would point out that there is significant delay on the part of the petitioner in the proceedings initiated after the appointment of R2 as Arbitrator. In my view, this argument has merely

to be stated to be rejected. I do not see anything untoward by reason or the requests for time made by the petitioner between the first hearing on 22.12.2016 and 08.03.2017, which was the last session prior to the filing of the present petition in April 2017 seeing as the petitioner has had the Damocles sword of imminent proceedings over its head for nearly thirteen years.

14. The minutes of proceedings dated 08.03.2017 reveal that a copy of the claim has itself been served on Film Craft only on 12.01.2017. Therefore, the requests for adequate time and opportunity for collation of documents and obtaining legal advice appears to me, quite acceptable. This argument of Prasar Bharti has no merit and is rejected.

15. Yet another argument that has been raised relates to the applicability of sections 12(5) inserted in the Act by virtue of the 2015 amendment with effect from 23.10.2015. While Film Craft argues that the provisions of newly inserted section 12(5) are applicable, Prasar Bharti would argue that since the reference to arbitration was in the year 2004, only the erstwhile provisions of section 12 as it stood then would be applicable.

16. The provisions of Section 26 of the Amendment Act (2015) (3 of 2016) are extracted below:

'Nothing contained in this Act shall apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the

Principal Act, before the commencement of the Act, unless the parties otherwise agree but this Court shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.'

17. Section 26 stipulates that the amendments would apply to 'arbitral proceedings' commenced prior to the date of commencement of the amended Act, being 23.10.2015. The commencement of proceedings is dealt with in section 21 of the Act to the effect that '*unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent*'.

18. This Court in *New Tiruppur Area Development Corporation Ltd. vs. Hindustan Construction Company Ltd.* (Application Nos. 7674 and 7675 of 2015 in O.P. Nos. 931 and 932 of 2015 dated 27.01.2016) has drawn a distinction between 'arbitral proceedings' and proceedings before the Court consequent upon arbitration. Applying the provisions of Section 26 to proceedings pending in Court would tantamount to insertion of the words 'court proceedings' in Section 26 which is impermissible. As such the amendment would apply only to arbitral proceedings that have commenced under section 21 of the Act subsequent to 23.10.2015, the only exception being by agreement of parties.

19. The Delhi High Court in *Raffles Design* (supra) has accepted this argument of the applicant holding the section 26 of the Amendment

Act would not impact an application under section 9 of the Act citing the decision of this Court in *New Tiruppur Area Development* (supra) and a decision of the Bombay High Court in *Rendezvous Sports World vs. The Board of Control for Cricket in India* (order dated 14.06.2016 in Chamber Summons No.1530 of 2015 in Execution Application (L) No.2481 of 2015) in the context of Section 36 of the Act.

20. A different view has been taken by the Chief Justice of this Court in *Jumbo Bags vs The New Indian Assurance Company* (2016 (3) CTC 761 - decision dated 10.03.2016) in a petition filed under section 11 of the Act for the appointment of an Arbitrator. The Chief Justice was considering the impact of sub-section (6A) of section 11 in the appointment of an Arbitrator. The provisions of sub-section (6A) have been inserted with effect from 23.10.15 and provide that in appointing an arbitrator the court shall satisfy itself only about the existence of an arbitration agreement. The Chief Justice, considering the fact that the commencement of proceedings for Arbitration in terms of section 21 in that case had taken place prior to 23.10.15, held that the rigour of sub-section (6A) would not be applicable. An observation was also made to the effect that, had the proceedings commenced after 23.10.2015, his conclusion may well have been different. The decision in *New Tiruppur Area Development* was however not cited before the Court in the course of hearing of *Jumbo Bags*.

21. The issue can be seen in yet another context. One cannot lose sight of the fact that several of the amendments made, including the amendment to Section 12 was to correct undesirable situations caused in the application of the erstwhile provisions giving rise to doubts as to the impartiality and independence of the Presiding officers in arbitration proceedings. Section 12 as it stood then was evidently not effective enough to address such issues notwithstanding that the provision contained the requirement of independence and impartiality. The Law Commission in its 124th Report dealt with the issue extensively recommending various measures for neutral arbitrators and suggesting modifications to ensure independence and impartiality. The relevant portion is extracted hereunder:

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 –*

"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 has 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, Puri v. Gangaram Chhapolia*, 1984 (3) SCC 627; *Secretary to Government Transport Department, Madras v. Munusamy Mudaliar*, 1988 (Supp) SCC 651; *International Authority of India v. K.D.Bali and Anr*, 1988 (2) SCC 360; *S.Rajan v. State of Kerala*, 1992 (3) SCC 608; *M/s. Indian Drugs & Pharmaceuticals v. M/s. Indo-Swiss Synthetics Germ Manufacturing Co.Ltd.*, 1996 (1) SCC 54; *Union of India v. M.P.Gupta*, (2004) 10 SCC 504; *Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation 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 Corp. Ltd. v. Raja Transport (P) Ltd.*, 2009 8 SCC 520 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", and this exception was used by the Supreme Court in *Denel Propreitory Ltd. v. Govt. of India, Ministry of Defence*, AIR 2012 SC 817 and *Bipromasz Bipron Trading SA v. Bharat Electronics Ltd.*, (2012) 6 SCC 384, 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. PK 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 sub-set 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.

22. The lists contained in the International Bar Association Guidelines on Conflicts of Interest in International Arbitration 2014 stand incorporated in the amended Act as the 5th and 7th schedules to be read along with Section 12(1) and 12(5) enumerating the guidelines for appointment of arbitrators as well as those categories of persons who are prohibited from assuming the role of arbitrator.

23. The provisions of erstwhile Section 12 read as follows:

'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.'

24. The provisions of Section 12 (1) post amendment with newly inserted sub-sections (1) and (5) 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.'

25.A comparison of the two provisions extracted above reveal that

though clarified and amplified. Sub-sections (1) to (5) are to be read in conjunction with the 5th, 6th and the 7th Schedules inserted anew with effect from 23.10.2015 to determine the impartiality and independence of the arbitrator in a guided and more focussed manner. Section 12(1)(a) provides for a disclosure to be made by the arbitrator of any circumstances likely to give rise to justifiable doubts about his independence or impartiality and schedule 5 provides illustrations as to what might comprise such circumstances.

26. More aggressively, the provisions of section 12(5) bar certain specified relationships that are detailed in the 7th schedule subject to waiver by the parties in writing.

27. Both provisions strive to address neutrality of arbitrators and their impartiality and independence. In my view, the old provision is itself targeted to ensure neutrality of Arbitrators and the new provision, while providing more guidance on the methodology to be adopted in deciding the question of neutrality, encapsulates the same requirements and is hence clarificatory in nature. It is also relevant to note that the emphasis on party autonomy is retained even in the amended provision with the proviso to sub-section (5) permitting the parties to waive the bar, by express agreement in writing.

28. Normally, it is not for this Court to embark upon an exercise of fact finding to determine whether an Arbitrator satisfies the tests of

neutrality, impartiality or independence, as the statute provides for a procedure to challenge any deficiency in this regard.

29. However, the Supreme Court, in *Voestalpine Schienen GmbH V. Delhi Metro Rail Corporation Ltd.* (Manu/SC/0162/2017) carves out a distinction between independence and impartiality thus:

'21. Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings.'

30. In the present case, the independence of the Arbitrator, being an employee of Prasar Bharti is a factor to be taken into consideration. The Supreme Court in *HRD Corporation (Marcus Oil and Chemical Division V. Gail (India) Limited (formerly Gas Authority of India Ltd.)* (Civil Appeal No.11126 of 2017 dated 31.08.2017) considered the distinction on the application of the two terms 'impartiality' and 'independence'. The ineligibility on account of a bar as contained in the 7th Schedule would render the Arbitrator de facto and de jure unable to perform his functions and his appointment liable to be terminated under Section 14(1)(a) of the Act. However, the existence of any of the circumstances in the 5th Schedule, will, at best, give rise to a doubt that

has to be justified by way of a challenge to the appointment under Section 13 of the Act.

31. At paragraph 13, the Bench states thus:

13. After the 2016 [Amendment Act](#), a dichotomy is made by the Act between persons who become "ineligible" to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their

independence or impartiality. Since ineligibility goes to the root of the appointment, [Section 12\(5\)](#) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under [Section 14\(1\)\(a\)](#), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under [Section 13](#). Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under [Section 14\(2\)](#) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under [Section 13](#). If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under [Section 13\(4\)](#) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with [Section 34](#) on the aforesaid grounds. It is clear, therefore, that

any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal.

32. In the present case, the allegation is that both R2 as well as Mr. Jayapaul, have admittedly engaged in private correspondence with Prasar Bharati de hors Film Craft. Such apprehension of Film Craft would, at best, throw a doubt on the impartiality of the Officer and would have to be challenged only before the Arbitrator in accordance with the procedure in section 13 of the Act. However, the bar to appointment as an arbitrator in the light of the 7th Schedule attracts interference by this Court under section 14(2) of the Act.

33. The provisions of Section 14 of the Act reads thus:

14. Failure or impossibility to act.—(1) 3 [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.

34. Section 14 provides for a termination of the mandate of the Arbitrator in circumstances where there is undue delay caused by the Arbitrator or where such Arbitrator becomes de facto or de jure unable to perform his functions. In the present case, the appointment of R2, being an employee of Prasar Bharti, attracts the bar under item 1 of the 7th schedule reading 'The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party'. This bar, seen along the elapse of nearly 13 years from the date of reference to arbitration leading to significant delay and defeating the very purpose of arbitration, renders the mandate of the arbitrator liable to be terminated by this Court.

35. On the aspect of delay, the Apex Court in the case of *Uttar Pradesh State Bridge Corporation Limited* (supra) concludes that unexplained and unwarranted delay in the appointment of an Arbitrator leading to the frustration of proceedings for arbitration over a period of several years would bring the matter within the ambit of Section 14 of the Act. The Bench at para 17 notes as follows:

'17. Constituting Arbitral Tribunals with serving officers from different far away places should be avoided. There can be no hard and fast rule, but there should be a conscious effort to ensure that Arbitral Tribunal is constituted promptly and arbitration does not drag on for years and decades.'

36. The Supreme Court considered a situation where proceedings for arbitration had been pending for over a decade terming the same to be a 'mockery' of the process. The Bench states thus:

"15. The object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of the parties' choice. If the Arbitral Tribunal consists of serving officers of one of the parties to the dispute, as members in terms of the arbitration agreement, and such tribunal is made non-functional on account of the action or inaction or delay of such party, either by frequent transfers of such members of the Arbitral Tribunal or by failing to take steps expeditiously to replace the arbitrators in terms of the arbitration agreement, the Chief Justice or his designate, required to exercise power under Section 11 of the Act, can step in and pass appropriate orders.

16. We fail to understand why the General Manager of the Railways repeatedly furnished panels containing names of officers who were due for transfer in the near future. We are conscious of the fact that a serving officer is transferred on account of exigencies of service and transfer policy of the employer and that merely because an employee is appointed as arbitrator, his transfer cannot be avoided or postponed. But an effort should be made to ensure that officers who are likely to remain in a particular place are alone appointed as arbitrators and that the Arbitral Tribunal consisting of serving officers, decides the matter expeditiously.

17. Constituting Arbitral Tribunals with serving officers from different faraway places should be avoided. There can be no hard-and-fast rule, but there should be a conscious effort to ensure that the Arbitral Tribunal is constituted promptly and arbitration does not drag on for years and decades.

18. As noticed above, the matter has now been pending for nearly ten years from the date when the demand for arbitration was first made with virtually no progress. Having regard to the passage of time, if the Arbitral Tribunal has to be reconstituted in terms of Clause 64, there may be a need to change even the other two members of the Tribunal.

19. The delays and frequent changes in the Arbitral Tribunal make a mockery of the process of arbitration. Having regard to this factual background, we are of the view that the appointment of a retired Judge of the Delhi High Court as sole arbitrator does not call for interference in exercise of jurisdiction under Article 136 of the Constitution of India."

37. It is an even worse situation that I face in the present case. The agreement between the parties was executed in the year 1989 and the reference for arbitration, at the instance of Prasar Bharati, was in the year 2004. Over 13 years have elapsed from the date of reference to arbitration. Curiously, the dispute has been raised at the instance of Prasar Bharati and the question that then arises, is how serious the party is in pursuing the dispute and obtaining a resolution of the same. The question that also arises is whether at all such claims would be within limitation. The purpose of an alternate system resolution is to ensure a quick closure of disputes without systemic delays that are anticipated in conventional methods of litigation and such resolution has been, without doubt, frustrated in the present case.

38. In the light of the facts and circumstances as set out above, I am of the considered view that R2 is rendered defacto and de jure unable to continue as Arbitrator and his appointment liable to be terminated and I hold so.

39. The question that next calls for consideration is whether upon termination of mandate of an Arbitrator under section 14, the procedure for subsequent appointment of Arbitrator refers back to the procedure as set out in the agreement between the parties. In the present case, the appointment is liable to be made by the Director General Doordharshan in terms of Clause 5 of the agreement between the parties.

40. The 'classical notion' earlier in vogue was that the High Court, in exercising power under Section 11 of the Act, will appoint the Arbitrator as per the contract between the parties. This principal saw significant erosion in *ACE Pipeline Contractors (P) Ltd. vs. Bharat Petroleum Corporation Ltd.* ((2007) 5 SCC 304) wherein the Supreme Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. Thereafter in *Union of India vs. Bharat Battery Mfg. Co. (P) Ltd.* ((2007) 7 SCC 684), the Supreme Court following a Full Bench judgment in *Punj Lloyd Ltd. v. Petronet MHB Ltd.* [*Punj Lloyd Ltd. v. Petronet MHB Ltd.* (2006) 2 SCC 638], held that once an aggrieved party files an application Under Section 11(6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the contract. The implication that the Court would be free to deviate from the terms of the contract was thus obvious. The position was crystalized in *Indian Oil Corporation Ltd. vs. Raja Transport (P) Limited* ((2009) 8 SCC 520) to the effect that the Chief Justice/designate, while exercising power under Section 11(6) shall endeavour to give effect to the procedure set out in the agreement between the parties, but may decide to ignore and deviate from the same, in circumstances that are to be recorded. The Bench states thus:

'48.(vi) The Chief Justice or his designate while exercising power under Sub-section (6) of Section 11 shall endeavour to give effect

to the appointment procedure prescribed in the arbitration clause.
 (vii) *If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded, ignore the designated arbitrator and appoint someone else.'*

41. The Bench in *North Eastern Railway and others (supra)* also refers to the judgment of the Supreme Court in *Union of India vs. Singh Builders Syndicate* ((2009) 4 SCC 523) wherein the Supreme Court had suggested that government entities should consider phasing out arbitration clauses providing for the appointment of serving officers and encourage professionalism in arbitration. In this context, it is relevant to refer to para 25 of the aforesaid judgement to the following effect: -

25. We find that a provision for serving officers of one party being appointed as arbitrator/s brings out considerable resistance from the other party, when disputes arise. Having regard to the emphasis on independence and impartiality in the new Act, government, statutory authorities and government companies should think of phasing out arbitration clauses providing for serving officers and encourage professionalism in arbitration.

42. On the question of gross delay in the conduct of proceedings leading to the frustration of the agreed procedure, the Supreme Court in *Singh Builders Syndicate (supra)* states as follows:

'15. The object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of parties' choice. If the Arbitral Tribunal consists of serving officers of one of the parties to the dispute, as members in terms of the arbitration agreement, and such Tribunal is made non-functional on account of the action or inaction or delay of such party, either by frequent transfers of such members

of the Arbitral Tribunal or by failing to take steps expeditiously to replace the arbitrators in terms of the Arbitration Agreement, the Chief Justice or his designate, required to exercise power under [section 11](#) of the Act, can step in and pass appropriate orders.

16. We fail to understand why the General Manager of the Railways repeatedly furnished panels containing names of officers who were due for transfer in the near future. We are conscious of the fact that a serving officer is transferred on account of exigencies of service and transfer policy of the employer and that merely because an employee is appointed as arbitrator, his transfer cannot be avoided or postponed. But an effort should be made to ensure that officers who are likely to remain in a particular place are alone appointed as Arbitrators and that the Arbitral Tribunal consisting of serving officers, decides the matter expeditiously.

17. Constituting Arbitral Tribunals with serving officers from different far away places should be avoided. There can be no hard and fast rule, but there should be a conscious effort to ensure that Arbitral Tribunal is constituted promptly and arbitration does not drag on for years and decades.

18. As noticed above, the matter has now been pending for nearly ten years from the date when the demand for arbitration was first made with virtually no progress. Having regard to the passage of time, if the Arbitral Tribunal has to be reconstituted in terms of clause 64, there may be a need to change even the other two members of the Tribunal.

19. The delays and frequent changes in the Arbitral Tribunal make a mockery of the process of arbitration. Having regard to this factual background, we are of the view that the appointment of a retired Judge of the Delhi High Court as sole Arbitrator does not call for interference in exercise of jurisdiction under [Article 136](#) of the Constitution of India.'

43. The position as regards appointment of an Arbitrator upon the Court terminating the mandate of an existing Arbitrator has been authoritatively summarised thus by the Supreme Court in *Tripple Engineering Works (Supra)* thus:

'The theory of forfeiture of the rights of a party under the agreement to appoint its arbitrator once the proceedings Under Section 11(6) of

the Act had commenced came to be even more formally embedded in Deep Trading Co. [MANU/SC/0275/2013 : (2013) 4 SCC 35: (2013) 2 SCC (Civ) 449] subject, of course, to the provisions of Section 11(8), which provision in any event, had been held in Northern Railway Admn. [Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd. MANU/SC/7953/2008 : (2008) 10 SCC 240] not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction Under Section 11(6) of the Act'

44. After an exhaustive analysis of the position, the Supreme Court in *Voestalpine (supra)* holds thus:

'17. In the case of contracts between government corporations/State-owned companies with private parties/contractors, the terms of the agreement are usually drawn by the government company or public sector undertakings. Government contracts have broadly two kinds of arbitration clauses, first where a named officer is to act as sole arbitrator; and second, where a senior officer like a Managing Director, nominates a designated officer to act as the sole arbitrator. No doubt, such clauses which give the Government a dominant position to constitute the Arbitral Tribunal are held to be valid. At the same time, it also casts an onerous and responsible duty upon the persona designata to appoint such persons/officers as the arbitrators who are not only able to function independently and impartially, but are in a position to devote adequate time in conducting the arbitration. If the Government has nominated those officers as arbitrators who are not able to devote time to the arbitration proceedings or become incapable of acting as arbitrators because of frequent transfers, etc., then the principle of "default procedure" at least in the cases where Government has assumed the role of appointment of arbitrators to itself, has to be applied in the case of substitute arbitrators as well and the Court will step in to appoint the arbitrator by keeping aside the procedure

which is agreed to between the parties. However, it will depend upon the facts of a particular case as to whether such a course of action should be taken or not. What we emphasise is that Court is not powerless in this regard.'

45. In the facts and circumstances of the present case as discussed in detail above, I proceed to (i) terminate the mandate of R2 and (ii) appoint a neutral arbitrator to commence, conduct and complete the proceedings for arbitration.

46. In arriving at the aforesaid conclusion, I have taken into account the statutory bar and ineligibility of R2 to act as Arbitrator, the gross and inexcusable delay in commencement and conduct of the proceedings of nearly thirteen years and the instances of private communication of Prasar Bharati with the Arbitrator to which Film Craft was not privy.

47. I appoint Mr. Justice N. Paul Vasanthakumar, Former Chief Justice, as Arbitrator in the matter. He is requested to enter upon reference and adjudicate upon the disputes inter se the parties. The learned Arbitrator may decide the matter expeditiously seeing as the Agreements between the parties date back nearly three decades, to 1989. He is at liberty to fix his remuneration as well as schedule of expenses that shall be borne by both parties equally.

48.Original Petition and A.No.7597 of 2017 are allowed leaving the parties to bear their own costs. Consequently, A.No.2670 of 2017 is closed.

Sl/msv

06.12.2017

To

Hon'ble Mr.Justice N.Paul Vasanthakumar
'ASHIRVADH'
No.24-A, II Street,
Kamaraj Avenue, Adayar,
Chennai – 20.



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DR.ANITA SUMANTH,J.

Sl/msv



O.P.No.341 of 2017
and A.Nos.2670 and 7597 of 2017

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