

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 24.04.2017

+ **O.M.P. (T) (COMM.) 22/2017& IA Nos. 3579-3580/2017**

**HRD CORPORATION (MARCUS OIL AND
CHEMICAL DIVISION)**

..... Petitioner

versus

**GAIL (INDIA) LIMITED (FORMERLY GAS
AUTHORITY OF INDIA LTD.)**

..... Respondent

AND

O.M.P. (T) (COMM.) 23/2017& IA Nos. 3581-3582/2017

**HRD CORPORATION (MARCUS OIL AND
CHEMICAL DIVISION)**

..... Petitioner

versus

**GAIL (INDIA) LIMITED (FORMERLY GAS
AUTHORITY OF INDIA LTD.)**

..... Respondent

Advocates who appeared in these cases:

For the Petitioner : Mr Arvind K. Nigam, Senior Advocate with
Mr Shailendra Swarup, Ms Bindu Saxena and
Ms Aparajita Swarup.

For the Respondent : Mr Abhisar Bairagi.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. HRD Corporation (Marcus Oil and Chemical Division) (hereafter 'HRD'), a Corporation organised and existing under the laws of the State

of Texas, USA, has filed the present petitions under Section 14 and 15 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, seeking termination of the mandate of Justice Tejinder Singh Doabia (Retired), Justice K.K. Lahoti (Retired) as arbitrators comprising of arbitral tribunal of three members. According to HRD, circumstances exist which give rise to justifiable doubts as to the independence and impartiality of the said arbitrators. It is also claimed that the arbitrators are ineligible under Section 12(5) of the Act and this would warrant termination of the mandate of the said arbitrators and appointment of two other arbitrators in their place.

2. Briefly stated, the relevant facts necessary to address the controversy are as under:-

2.1 The respondent (hereafter 'GAIL') issued a notice inviting tender for sale and supply of Wax (a waste by-product) generated at GAIL's HDPE/LLDPE Plant at Petro Chemical Complex at Pata, Uttar Pradesh for a period of 20 years on an exclusive basis. HRD successfully tendered for the said contract and the parties entered into an agreement dated 01.04.1999 (hereafter 'the Agreement'). Certain disputes arose between the parties in connection with the Agreement. HRD claimed that GAIL had wrongfully withheld the supplies of Wax. Consequently, HRD invoked the arbitration clause, as included in the Agreement.

2.2 The disputes between the parties were referred to arbitration (being Arbitration Case No. 1001/2004-ICADR) (hereafter 'the first arbitration') before the Arbitral Tribunal comprising of Justice Late A.B. Rohatgi (Retired), presiding arbitrator, Justice J.K. Mehra (Retired) and Justice N.N. Goswamy (Retired). The said tribunal made and published an award

on 08.04.2006 (hereafter ‘the 2006 award’) directing specific performance of the Agreement dated 01.04.1999. The 2006 award was not challenged and has become final.

2.3 After the 2006 award was rendered, certain disputes arose mainly with respect to the price to be charged for Wax for the period of 13.07.2007 to 12.07.2010. The said disputes were also referred to arbitration before an arbitral tribunal comprising of the same members as in the first arbitration: Justice N.N. Goswamy (Retired), Justice J.K. Mehra (Retired) and Justice A.B. Rohatgi (Retired) as the presiding arbitrator.

2.4 HRD claims that GAIL supplied Wax at the prices determined by the arbitral tribunal.

2.5 The disputes in relation to the period 13.07.2010 to 12.07.2013 were also referred to the same arbitral tribunal (being Arbitration Case No. 38 of 2010-ICADR). While the proceedings were pending, Justice N.N. Goswamy (Retired) expired. Thereafter, in a petition filed under Section 15 of the Act, the Supreme Court, by an order dated 23.03.2012, appointed Justice Tejinder Singh Doabia (Retired), a former Judge of the Jammu and Kashmir High Court, to fill the vacancy caused by the demise of Justice N.N. Goswamy (Retired).

2.6 Subsequent thereto, Justice A.B. Rohatgi (Retired) tendered his resignation on 17.02.2013 as the presiding arbitrator, on account of ill health. The vacancy so caused was filled on 28.02.2013 with Justice Doabia and Justice Mehra jointly nominating Justice S.S. Chadha (Retired) as the presiding arbitrator. These arbitral proceedings culminated into two

separate awards dated 22.07.2015: one determining the price for Wax and the other determining the scope of supply of Wax under the Agreement.

2.7 HRD has filed a petition under Section 34 of the Act (OMP No. 525/2015) assailing the said award, which is pending before this Court.

2.8 In respect of the period commencing 13.07.2016 to 31.12.2019, GAIL claims that a price of ₹83,000/- per metric tonne of Wax was payable, on the basis as fixed in the 2006 award. This was disputed and HRD filed a petition under Section 9 of the Act, being OMP(I)(COMM) 389/2016), seeking interim directions. The said petition was disposed of by an order dated 03.10.2016 directing GAIL to offer all its production pertaining to the plant as specified in the award dated 22.07.2015 to HRD at the price of ₹60,000/- per metric tonne, subject to further orders that may be passed by the arbitral tribunal. This Court also directed the parties to nominate their respective arbitrators.

2.9 By a letter dated 10.10.2016, HRD nominated Justice K. Ramamoorthy (Retired) as its arbitrator. However, he subsequently withdrew from the case on account of personal reasons and communicated the same to ICADR by an email dated 14.12.2016. Accordingly, ICADR called upon HRD to nominate an arbitrator in place of Justice Ramamoorthy (Retired).

2.10 GAIL appointed Justice Doabia (Retired) as its nominee arbitrator by a letter dated 28.10.2016. In the meanwhile, HRD's Advocate sent a letter dated 25.10.2016 requesting ICADR to secure compliance with Section 12 of the Act. ICADR in turn requested the arbitrators appointed by the parties to make a disclosure in the form as prescribed in the Sixth

Schedule to the Act read with Rule 5(7) of the ICADR Arbitration Rules, 1996 together with the letter accepting their appointment.

2.11 Thereafter, HRD forwarded a copy of the disclosure received from Justice K. Ramamoorthy (Retired). It is HRD's case that it did not receive any letter of disclosure from Justice Tejinder Singh Doabia (Retired), the arbitrator nominated by GAIL. On 16.11.2016, both the arbitrators appointed Justice K.K. Lahoti (Retired) as the presiding arbitrator. On 16.11.2016, ICADR informed the parties as to the constitution of the arbitral tribunal and that a preliminary hearing had been fixed on 24.11.2016.

2.12 On 23.11.2016, HRD filed an application under Section 12 and 13 of the Act read with the ICADR Arbitration Rules, 1996 praying that the mandate of Justice Tejinder Singh Doabia as an arbitrator, be terminated. Subsequently, on 24.11.2016 during the course of hearing of HRD's application under Section 12 of the Act, a copy of the letter of disclosure dated 24.11.2016 furnished by Justice K.K. Lahoti (Retired), as also a copy of the letter of disclosure dated 31.10.2016 furnished by Justice Tejinder Singh Doabia (Retired) were handed over to HRD's counsel.

2.13 Thereafter, HRD filed another application under Section 12 of the Act praying for termination of the mandate of Justice K.K. Lahoti (Retired) as the presiding arbitrator. On 16.12.2016, Justice Mukul Mudgal (Retired) was nominated by HRD as its arbitrator in place of Justice Ramamoorthy.

3. The two applications filed by HRD under Section 12 - one seeking termination of the mandate of Justice Doabia and the other seeking termination of Justice Lahoti - were heard by the arbitral tribunal on

05.01.2017 and orders thereon were reserved. On 16.02.2017, the arbitral tribunal rejected HRD's application dated 23.11.2016 seeking termination of the mandate of Justice Doabia (Retired) by majority of 2:1, with Justice Mukul Mudgal (Retired) dissenting. HRD's application dated 26.11.2016 seeking termination of the mandate of Justice K.K. Lahoti (Retired), was unanimously dismissed by the arbitral tribunal. Each of the arbitrators entered separate orders in respect of HRD's aforesaid applications.

4. HRD has moved the present petitions, being OMP(T)(Comm) 22/2017, seeking termination of the mandate of Justice Tejinder Singh Doabia (Retired) and OMP(T)(Comm) 23/2017 for seeking termination of the mandate of Justice K.K. Lahoti (Retired).

Submissions in support of termination of the mandate of Justice Tejinder Singh Doabia (Retired)

5. Mr Nigam, learned senior counsel appearing for HRD contended that there were justifiable grounds to give rise to doubts as to the independence and impartiality of the arbitrator. He referred to the Fifth Schedule to the Act and submitted that the grounds referred to at serial nos. 15 and 16 clearly applied in respect of the arbitrator and, therefore, by virtue of Section 12(1) of the Act, as amended by the Arbitration and Conciliation (Amendment) Act, 2015 (hereafter 'the Amendment Act'), it was clear that there were justifiable grounds to doubt the independence and impartiality of the arbitrator. Further, it was contended that the relationship of the arbitrator to the dispute rendered him ineligible for being appointed as an arbitrator. He also referred to grounds mentioned at serial nos. 22 and 24 of the Fifth Schedule and submitted that Justice Doabia had been

appointed as an arbitrator on more than one occasion by GAIL and, therefore, HRD was justified in doubting his impartiality.

6. Next, Mr Nigam referred to the disclosure made by Justice Doabia and pointed out that the said disclosure was handed over to the learned counsel for HRD at a hearing held on 24.11.2016. He contended that in terms of Section 12(1) of the Act, the arbitrator was required to make a disclosure in the first instance when he was approached for his appointment and his failure to do so, itself gives rise to justifiable doubts as to his impartiality and independence. Lastly, he referred to the disclosure made by Justice Doabia and pointed out that the said disclosure was palpably erroneous inasmuch as Justice Doabia had disclosed that he was nominated as an arbitrator in the earlier round to fill the vacancy caused by resignation of Justice Rohatgi (Retired). He submitted that this was factually incorrect as Justice Doabia was appointed to fill the vacancy caused by the demise of Justice N. N. Goswamy (Retired). Further, according to Mr Nigam, Justice Doabia's statement that he was not associated with GAIL in any manner as detailed in Section 12(1)(b) read with the Fifth and the Seventh Schedule to the Act, is palpably erroneous. He earnestly contended that erroneous statements in the disclosure made at a belated stage, were sufficient to disqualify an arbitrator for acting as such.

7. Mr Nigam referred to the decision of a coordinate Bench of this Court in **M/s Era Infra Engineering Ltd. v. Aravali Power Company Pvt. Ltd.** (2016) 5 Arb.LR 385 (Delhi) and drew the attention of this Court to paragraph 37 of the said decision wherein this Court had emphasized that

existence of relationship or interest of any kind, is likely to give rise to justifiable doubts as to the arbitrator's neutrality.

8. He further contended that the scheme of Sections 12, 13 & 14 of the Act had undergone a material change with the amendments introduced by the Amendment Act. He submitted that the grounds as referred to in Fifth Schedule of the Act would render an arbitrator *de jure* unable to perform his functions and result in termination of the mandate of the arbitrator in terms of Section 14(1) of the Act as amended by the Amendment Act. He stated that the earlier regime of awaiting the final award to challenge the same on the ground of justifiable doubts as to impartiality and independence, was no longer applicable.

Submissions in support of termination of the mandate of Justice K. K. Lahoti (Retired) Presiding Arbitrator.

9. Mr Nigam contended that the letter of disclosure dated 24.11.2016 furnished by Justice K. K. Lahoti (Retired) clearly stated that there were no circumstances, which are likely to give rise to justifiable doubts as to his independence or impartiality. However, he had also made the following disclosure: *"That on a legal issue between GAIL and another Public Sector Undertaking, an opinion was given by me to GAIL, in the year 2014, but it has no concern with respect to the present matter. I am an Arbitrator in a pending matter between M/s Pioneer Power Limited and GAIL (India) Limited."*

10. It is also averred that Justice Lahoti is on the panel of arbitrators prepared by GAIL and this also gives rise to justifiable doubts as to the independence or impartiality as arbitrator. Mr Nigam contended that in view of the above, Justice Lahoti was ineligible for being appointed as an

arbitrator by virtue of Section 12(5) of the Act read with entry 1 of the Seventh Schedule. He submitted that admittedly, Justice Lahoti had given an opinion to GAIL and this indicated that he had relationship with GAIL as an advisor and in any event, had past business relationship with GAIL.

Reasoning and Conclusion

11. The controversy raised by HRD in these petitions essentially raises three questions. First, whether a petition under Section 14 would lie in respect of a challenge to an appointment of an arbitrator under Section 12 of the Act? Second, whether in the facts of the present case, Justice Doabia is *de jure* or *de facto* unable to act as an arbitrator? And third, whether Justice Lahoti is *de jure* or *de facto* unable to act as an arbitrator?

12. In order to address the first question, it would be apposite to examine the scheme of Sections 12, 13 and 14 of the Act prior to the Amendment Act coming into force and thereafter. The relevant provisions of Sections 12, 13 and 14, as existing prior to the Amendment Act, are set out below:-

“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.”

“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.”

13. The language of Section 12(3) of the Act is clear and an arbitrator can only be challenged if (a) circumstances exist, which give rise to justifiable doubts as to his independence or impartiality or (b) he does not possess the qualifications as agreed between the parties.

14. In terms of Section 13(1) of the Act, the parties are free to agree on the procedure for challenging an arbitrator. However, in terms of Section 13(2) of the Act, failing such procedure, the party who intends to challenge an arbitrator is required to file a written statement of reasons for challenge within fifteen days of becoming aware of the constitution of the arbitral tribunal or of the circumstances referred to in Section 12(3) of the Act. In terms of Section 13(3), the arbitral tribunal, on receiving a statement of reasons for challenge of the arbitral tribunal - unless the arbitrator challenged withdraws - is required to decide on the said challenge. If the challenge to the arbitrator(s) is not sustained, the arbitral tribunal is required to proceed further and make an award. In such cases, the party

laying a challenge to the arbitrator does not have immediate recourse to courts as Section 13(5) of the Act makes it amply clear that the party challenging the arbitrator is required to make an application for setting aside the arbitral award in accordance with Section 34 of the Act.

15. The scheme of Section 13 of the Act must be read in the context of the substratal legislative policy of minimizing judicial intervention in arbitral proceedings. In terms of Section 5 of the Act, no judicial authority would intervene in arbitral proceedings except where it is so provided. Thus, a party, who is unsuccessful in the challenge to an arbitrator before the arbitral tribunal, has recourse to courts, *albeit*, at the stage of Section 34 and not immediately on the challenge being rejected. The legislative intent is clear that the arbitral proceedings are not to be impeded in such cases.

16. The question whether at this stage, a party is entitled to take recourse to Section 14 of the Act to seek termination of the mandate of the arbitrator on account of a challenge under Section 12(3), must also be answered in the negative. This is so for the plain reason that the scheme under Section 12(3) and Section 13 of the Act enacts a specific mechanism to address the issue as to the challenge to an arbitrator. Since specific provisions have been enacted to address the issue, it would not be apposite to read Section 14 to provide a remedy in variance with the provisions of Section 13(5) of the Act.

17. In **Progressive Career Academy Pvt. Ltd. v. Fiitjee Ltd.**: (2011) 180 DLT 714 (DB), a Division Bench of this Court had held as under:-

“16. On a reading of Section 13(5), the legislative intent becomes amply clear that Parliament did not want to clothe the Courts with the power to annul an Arbitral Tribunal on the ground of bias at an intermediate stage. The Act enjoins the immediate articulation of a challenge to the authority of an arbitrator on the ground of bias before the Tribunal itself, and thereafter ordains that the adjudication of this challenge must be raised as an objection under Section 34 of the Act. Courts have to give full expression and efficacy to the words of the Parliament especially where they are unambiguous and unequivocal. The golden rule of interpretation requires Courts to impart a literal interpretation and not to deviate therefrom unless such exercise would result in absurdity.

20. A comparison of the provisions dealing with the challenge to the arbitrator's authority in the A&C Act and the UNCITRAL Model Law discloses that there are unnecessary and cosmetic differences in these provisions, except for one significant and far-reaching difference. The UNCITRAL Model Law, in Article 13(3), explicitly enables the party challenging the decision of the Arbitral Tribunal to approach the Court on the subject of bias or impartiality of the Arbitral Tribunal. However, after making provisions for a challenge to the verdict of Arbitral Tribunal on the aspect of bias, the UNCITRAL Model Law prohibits any further Appeal. It seems to us, therefore, that there is no room for debate that the Indian Parliament did not want curial interference at an interlocutory stage of the arbitral proceedings on perceived grounds of alleged bias. In fact, Section 13(5) of the A&C Act indicates that if a challenge has been made within fifteen days of the concerned party becoming aware of the constitution of the Arbitral Tribunal or within fifteen days from such party becoming aware of any circumstances pointing towards impartiality or independence of the Arbitral Tribunal, a challenge on this score is possible in the form of Objections to the Final Award under Section 34 of the A&C Act. Indeed, this is a significant and sufficient indicator of Parliament's resolve not to brook any interference by the Court till after the publication of the Award. Indian Law is

palpably different also to the English, Australia and Canadian Arbitration Law. This difference makes the words of Lord Halsbury in *Eastman Photographic Materials Co.* all the more pithy and poignant.

Relief against possible mischief has been provided by making clarification in Section 13(5) that apart from the challenges enumerated in Section 13(4), an assault on the independence or impartiality of the Arbitral Tribunal is permissible by way of filing Objections on this aspect after the publishing of the Award.”

18. The legislative scheme of not permitting recourse to courts at an interim stage, while the arbitral proceedings are pending, also finds expression in Section 16 of the Act.

19. In terms of Section 16(5) of the Act, the arbitral tribunal is required to decide on a plea that it does not have jurisdiction or that it is exceeding the scope of its authority - being pleas under Section 16(2) and 16(3) of the Act - and if the arbitral tribunal decides to reject such pleas, it is required to continue with the arbitral proceedings and make an award. This is similar to the provisions of Section 13(4) of the Act, where the party raises the challenge to the arbitrator, which is rejected. In terms of Section 16(6) of the Act, a party aggrieved by the arbitral award may make an application for setting aside such arbitral award in accordance with Section 13(4) of the Act. This is similar to the scheme of Section 13 of the Act where the party who is unsuccessful in challenging the arbitrator is granted the liberty to make an application for setting aside the award. It is not open for a party whose pleas raised under Sections 16(2) and/or 16(3) of the Act are rejected to approach the court at that stage; such party has to await the delivery of the arbitral award. However, if the challenge to the jurisdiction

of the arbitral tribunal is sustained, the other party is at liberty to appeal against the said decision under Section 37(2)(a) of the Act. Thus, whilst an appeal is provided from a decision accepting the challenge to jurisdiction, no appeal against a decision rejecting the challenge to the jurisdiction is provided till the award is passed and the unsuccessful party has to await the making of the final award.

20. In A. Ayyasamy v. A. Paramasivam & Ors.: (2016) 10 SCC 386, the Supreme Court had explained the above scheme in the following words:-

“12.2 When arbitration proceedings are triggered by one of the parties because of the existence of an arbitration agreement between them, Section 5 of the Act, by a non-obstante clause, provides a clear message that there should not be any judicial intervention at that stage scuttling the arbitration proceedings. Even if the other party has objection to initiation of such arbitration proceedings on the ground that there is no arbitration agreement or validity of the arbitration clause or the competence of the Arbitral Tribunal is challenged, Section 16, in clear terms, stipulates that such objections are to be raised before the Arbitral Tribunal itself which is to decide, in the first instance, whether there is any substance in questioning the validity of the arbitration proceedings on any of the aforesaid grounds. It follows that the party is not allowed to rush to the Court for an adjudication. Even after the Arbitral Tribunal rules on its jurisdiction and decides that arbitration clause is valid or the Arbitral Tribunal is legally constituted, the aggrieved party has to wait till the final award is pronounced and only at that stage the aggrieved party is allowed to raise such objection before the Court in proceedings under Section 34 of the Act while challenging the arbitral award.”

21. In this regard, it is also relevant to refer to the decision of the Supreme Court in **S.B.P. and Co. v. Patel Engineering Ltd. and Another:** (2005) 8 SCC 618, wherein the Supreme Court had observed as under:-

“45 Under Section 34, the aggrieved party has an avenue for ventilating its grievances against the award including any in-between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act.

46. The object of minimising judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 of the Constitution of India or under Article 226 of the Constitution of India against every order made by the Arbitral Tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage.”

22. It is also relevant to note that there are also judicial orders against which the Parliament in its wisdom, has not provided any recourse to an unsuccessful party. An order passed under Section 8 of the Act referring the parties to arbitration is not appealable and an appeal is only available (in terms of Section 37(1)(a) of the Act) against an order refusing to refer the parties to arbitration under Section 8 of the Act. Similarly, in Part II of the Act, an appeal would lie against an order refusing to refer the parties to arbitration under Section 45 or refusing to enforce a foreign award under

Section 48 of the Act. However, no appeal is provided in respect of an order referring the parties to arbitration under Section 45 of the Act or an order declining the request to refuse enforcement of a foreign award.

23. This court is also aware that in a recent decision, a Division Bench of this Court in **National Highways Authority of India v. Baharampore-Farakka Highways Ltd.**: FAO(OS) (COMM) 47/2017, decided on **02.03.2017**, has held that “*any adjudication of the contentions of the parties constitutes an award, orders are those issued under Section 31(2) and/or ministerial orders*”. However, it appears that neither the earlier decision of the Division Bench of this Court in ***Progressive Career Academy Pvt. Ltd.*** (*supra*) nor the decisions of the Supreme Court in ***A. Ayyasamy*** (*supra*) or ***S.B.P. and Co.*** (*supra*) were brought to the notice of the Court. In this regard, it is also relevant to mention the decision of the Supreme Court in **Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd.**: (2017) 2 SCC 228 wherein the Court had *inter alia* referred to the passages in ‘Comparative International Commercial Arbitration’ and observed as under:-

"The distinction between an award and a decision of an Arbitral Tribunal is summarized in Para 24-13. It is observed that an award:

- (i) concludes the dispute as to the specific issue determined in the award so that it has res judicata effect between the parties; if it is a final award, it terminates the tribunal's jurisdiction;
- (ii) disposes of parties' respective claims;
- (iii) may be confirmed by recognition and enforcement;

- (iv) may be challenged in the courts of the place of arbitration.

10. In International Arbitration [Chapter 9. Award in Nigel Blackaby, Constantine Partasides, et al., Redfern and Hunter on International Arbitration (Sixth Edition), 6th edition ((c) Kluwer Law International; Oxford University Press 2015) pp. 501-568] a similar distinction is drawn between an award and decisions such as procedural orders and directions. It is observed that an award has finality attached to a decision on a substantive issue. Paragraph 9.08 in this context reads as follows:

9.08 The term “award” should generally be reserved for decisions that finally determine the substantive issues with which they deal. This involves distinguishing between awards, which are concerned with substantive issues, and procedural orders and directions, which are concerned with the conduct of the arbitration. Procedural orders and directions help to move the arbitration forward; they deal with such matters as the exchange of written evidence, the production of documents, and the arrangements for the conduct of the hearing. They do not have the status of awards and they may perhaps be called into question after the final award has been made (for example as evidence of ‘bias’, or ‘lack of due process’).”

24. However, it is not necessary in this case to consider the distinction between an order or an award since it is not the case of either of the parties that the order of the arbitral tribunal rejecting HRD’s challenge to the arbitrators is an award and an application under Section 34 of the Act to set aside such decision is maintainable.

25. Having discussed the scheme of Sections 12 and 13 of the Act prior to the Amendment Act coming into force, it is now necessary to examine the effect of the amendments introduced by the Amendment Act.

26. There has been a material change in the scheme of Sections 12 and 14 of the Act by virtue of the Amendment Act. Although Section 13 has not been amended, Section 12 has been amended substantially; Section 12(1) of the Act has been modified and Section 12(5) has been introduced.

27. Section 12(1) of the Act as amended reads 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.”

28. It is at once seen that the scope of the disclosure required under Section 12(1) of the Act has been expanded. The circumstances which may

give rise to justifiable doubts as to the independence or an impartiality of the arbitrator have been illustratively indicated in Section 12(1)(a) of the Act. In addition, an arbitrator is also required to now disclose whether he has ability to devote sufficient time to arbitration [Section 12(1)(b)]. Explanations 1 and 2 have also been introduced to Section 12(1) of the Act. Explanation 1 indicates that the grounds stated in the Fifth Schedule to the Act would serve as a guide in determining whether the circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. As indicated in the 246th Report of the Law Commission of India -which is the basis of the amendments introduced by the Amendment Act - the Fifth Schedule (referred to as Fourth Schedule in the report of the Commission) has been drawn from the Red and Orange lists of the International Bar Association (IBA) Guidelines on Conflict of Interest in International Arbitration. Thus, the scope of the disclosure and the grounds which may give rise to justifiable doubts as to independence and impartiality of the arbitrator have been specifically illustrated. However, this does not change the basic scheme of Sections 12 and 13 of the Act. In other words, any challenge laid to an arbitrator on the grounds that there are circumstances that give rise to justifiable doubts as to his independence or impartiality or his qualifications, is required to be adjudicated before the arbitral tribunal and if such a challenge is rejected, the unsuccessful party has to await the delivery of the award.

29. Sub-section (5) of Section 12 of the Act as introduced by virtue of the Amendment Act, reads as under:-

“12(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.”

30. Correspondingly, the opening sentence of Section 14(1) of the Act has also been amended to read as under:-

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

- (a) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and
- (b) he withdraws from his office or the parties agree to the termination of his mandate.”

31. Section 12(5) stands on a separate footing. In terms of Section 12(5), any person whose relationship with parties, counsel or subject matter of the dispute falls under any of the categories specified in the Seventh Schedule would be ineligible to act as an arbitrator. Plainly, an arbitrator who is ineligible for being appointed as an arbitrator, *ipso jure* does not have the mandate to perform the functions of an arbitrator. Such person would lack the inherent jurisdiction to proceed with the arbitral proceedings and in such cases, it is not necessary for the party challenging the appointment to follow the procedure under Section 13 of the Act and it would be open for the party to take recourse to Section 14 of the Act and approach the court to decide on the matter regarding termination of the arbitrator’s mandate. This is not so say that a party alleging that an

arbitrator is ineligible to act, is precluded from raising the challenge before the arbitral tribunal as required under Section 13(2) of the Act.

32. The Seventh Schedule is essentially a subset of the Fifth Schedule of the Act. The grounds indicated in the Fifth Schedule would indicate circumstances giving rise to justifiable doubts as to the independence or impartiality of an arbitrator; it is not necessary that such grounds would render the arbitrator ineligible to act. The Fifth Schedule is only to serve as a guide for the disclosure to be made by an arbitrator. The schematic interpretation of Section 12(1) read with Section 13 of the Act indicates the legislative intent that in such cases, the challenge must be considered by the arbitral tribunal and an unsuccessful challenge before the arbitral tribunal must not be permitted to interdict the arbitral proceedings.

33. However, the most serious of such grounds are spelt out in the Seventh Schedule and in such cases, the recourse to courts under Section 14 is not precluded as closing a party's recourse to courts in such cases would perhaps only delay the dispute resolution. It is in this context that Section 14(1) of the Act has also been amended by the Amendment Act to expressly provide that the arbitrator whose mandate is terminated, would be substituted by another arbitrator. As indicated above, a person whose relationship with the *parties*, or *counsel* or *the subject-matter of the dispute* falls within the categories stated in the Seventh Schedule, would be ineligible to act as an arbitrator notwithstanding prior agreement of the parties being to the contrary. The introduction of Section 12(5) with amendment to Section 14(1) by the Amendment Act while bringing no changes in Section 13 of the Act plainly indicate the above legislative

scheme of culling out the cases falling under Seventh Schedule from the discipline of Section 13 of the Act.

34. It is also relevant to note that if the court accepts that the arbitrator is ineligible under Section 12(5) of the Act, the court would declare the mandate of such arbitrator to be terminated and also substitute the said arbitrator by another as is expressly indicated in the opening lines of Section 14(1) of the Act.

35. This scheme is also clearly explained in the 246th Report of the Law Commission. The relevant extract of the said report is quoted below:-

“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.”

36. In view of the above, the present petitions, insofar as they seek termination of the mandate of the arbitrators on account of Section 12(5) read with Seventh Schedule of the Act, cannot be rejected at the threshold as falling outside the scope of Section 14 of the Act. However, a challenge to the appointment of the arbitrators on grounds other than the existence of relationships falling under the categories specified in the Seventh Schedule, cannot be entertained in these proceedings.

37. Thus, the question whether the mandate of Justice Doabia (Retired) and Justice K.K. Lahoti (Retired) must be declared as terminated on the ground of their relationship with the parties or the dispute, must be considered on the interpretation as discussed above. In other words, the principal question to be addressed is whether the said arbitrators are ineligible to act as such as falling foul of Section 12(5) of the Act read with the Seventh Schedule.

38. The second question to be addressed is whether Justice Doabia (Retired) is unable to act as an arbitrator and his mandate should be declared as terminated. As indicated above, Justice Doabia's appointment as an arbitrator has been challenged essentially under entries 1, 15 and 16 of the Seventh Schedule. The said entries are set out below:-

"1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

XXXX XXXX XXXX

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case."

39. Insofar as category 1 is concerned, there is no allegation that Justice Doabia has acted as an employee, consultant or advisor. However, he has been appointed as an arbitrator in the past; does that constitute a past business relationship as contended on behalf of HRD? Surely, if he has not been regularly and repeatedly nominated as an arbitrator, it would not. Appointment as an arbitrator cannot be construed as a business relationship within the meaning of category 1 of Seventh Schedule. In **State of Andhra**

Pradesh v H. Abdul Bakhi and Bros: AIR 1965 SC 531, the Supreme Court had held that the expression business was a word of wide import and had further observed that: *“To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive”*. The word relationship also connotes a continuity in association and a co-relation. The word "business" qualifies the word "relationship" and restricts the same to an association, connection or correlation, which has commercial overtones. Thus, in the context of entry 1 of the Seventh Schedule, the expression “business relationship” would connote a course of dealings or association connected with the business or coordinated activities of the parties.

40. The expression “business relationship” must be understood in the context in which it is used. In the context of Seventh Schedule, it must mean a relationship which would establish a strong likelihood of bias that would be expected of such relationship between the parties. It implies a relationship, which would naturally place the arbitrator's disposition as one favorable to either party. Viewed from this perspective, being nominated as an arbitrator to adjudicate the disputes between the parties can hardly be termed as a business relationship. The logical *sequitur* to accepting HRD's contention, that appointment of an arbitrator indicates a business relationship, would be that arbitrators nominated by any party, including the arbitrator nominated by HRD, would stand disqualified as their nomination would also constitute a present business relationship with the nominating party.

41. Insofar as relationship falling under category 15 is concerned, there is no material to establish that Justice Doabia has given legal advice or

provided an expert opinion on the dispute to a party or an affiliate of any of the parties. Delivering an arbitral award does not constitute providing expert opinion to *a party*. The making of an award may involve expertise, but it is not an opinion addressed to GAIL; it answers the reference made by both the parties. The expression legal advice and expert opinion must also be understood in the common parlance. Thus, if a party had approached the arbitrator to obtain legal advice or an expert opinion, it would plainly be a ground to render the arbitrator ineligible to act; but, an arbitral award rendered on a reference made by both parties cannot be understood as giving an opinion to a party. Thus, the contention that an award rendered in the past indicates a relationship with the dispute falling within category 15 of the Seventh Schedule is, plainly, bereft of any merit.

42. The contention that the arbitrator has a previous involvement in the case as falling within category 16 of the Seventh Schedule, is also unpersuasive. In the context of the Seventh Schedule, an involvement with the case would plainly relate to an involvement other than as an arbitrator between the same parties. Merely, because the arbitrator had occasion to consider the controversy in the context of a prior period would not render him ineligible to act as an arbitrator. The involvement in a case must be such as would incapacitate the arbitrator from acting as an arbitrator; it must present a semblance of inherent conflict or at least a perception of it. The test of involvement of an arbitrator in a case cannot be different from an involvement of a judge. There is no principle where a judge in a court of law would be precluded from hearing a matter, merely because he has had an occasion to consider connected disputes; unless of course he is in appellate jurisdiction presented with an appeal from his decision as that may effectively deprive the appellant from a full blown de-novo

examination. In normal circumstances, all inter-connected disputes ought to have been heard by the same tribunal to avoid conflicting awards. However in this case, the same is not possible but that does not present HRD with an opportunity to avoid an arbitrator, which HRD perceives to be unfavorable to the case set up by it.

43. In view of the decision that a petition under Section 14 of the Act is unavailable for grounds other than falling within Section 12(5) read with Seventh Schedule to the Act above, it is not necessary to examine the question whether the appointment of Justice Doabia falls foul of clauses 22 and 24 of the Fifth Schedule. However, the said clauses are also inapplicable on a plain reading. Clause 22 relates to an arbitrator being appointed by a party on two or more occasions in the past three years. This would indicate a history of past services giving rise to doubts as to his impartiality or independence as an arbitrator. However, it is seen that in the present case, the disputes between the parties relate to the same agreement and connected issues and, therefore, the appointment cannot be considered as multiple appointments. As stated earlier, the Fifth Schedule is only to serve as a guide to indicate whether there are justifiable doubts as to the impartiality and independence of an arbitrator and it does not necessarily mean that if any of the grounds (other than the ones common to the Seventh Schedule) are established, the challenge to the appointment must succeed. The same have to be evaluated in the context of the facts relevant to such challenge.

44. The contention that the disclosure made by the arbitrator, Justice Doabia, was factually incorrect inasmuch as he incorrectly mentioned that he was appointed in the vacancy caused by resignation of Justice Rohatgi

instead of a vacancy caused by Justice N. N. Goswamy, is not material. Apart from the fact that the said inaccuracy is not significant, HRD being a party to the said disputes required no further disclosure as to the said facts in the first place. There was nothing in the disclosure letter furnished by Justice Doabia that was unknown to HRD. The contentions advanced in this regard can most charitably be considered as inconsiderable.

45. The final question to be addressed is regarding Justice Lahoti's appointment as an arbitrator. His appointment as an arbitrator has been challenged essentially under category 1, 8 and 15 of the Seventh Schedule.

46. Category 8 of the Seventh Schedule is set out below:

"8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom."

47. The contention that Justice Lahoti is an "advisor" to GAIL since GAIL has obtained legal opinion from Justice Lahoti in another matter is wholly unmerited. The word 'advisor' as used in category 1 of the Seventh Schedule indicates a ongoing relationship with one of the parties. In **Reliance Infrastructure Ltd. v. Haryana Power Generation Corp Ltd:** 2016 (6) Arb.LR 480 (P&H), the expression business relationship was interpreted to subsume the relationships of an *employee*, *advisor* and a *consultant* and the word "other" preceding the expression *business relationship* was interpreted to indicate business relationship other than as an employee, advisor and a consultant.

48. Plainly, the heading "Arbitrator's relationship with the parties or counsel" indicates that reference to categories falling under the said

heading (nos. 1 to 14) refers to a relationship between the arbitrator and the party/counsel. As discussed earlier, the word “relationship” means an association and a connection. In this perspective, a relationship of an advisor would signify an association that is continuing and would not include obtaining a solitary opinion from an independent practitioner. Taking a legal opinion does not constitute a relationship of an advisor to the party seeking such opinion. Merely, because Justice Lahoti has given a legal opinion to GAIL in another matter also cannot lead to a conclusion that he regularly advises GAIL so as to fall within the scope of the category nos. 1 or 8 of the Seventh Schedule.

49. Category 15 of the Seventh Schedule is wholly inapplicable as there is no allegation that Justice Lahoti had given a legal opinion on the disputes at hand to GAIL. Category 15 is specific to the disputes in question and not to any other dispute between a party and another person.

50. In view of the above, the present petitions and the pending applications are dismissed.

VIBHU BAKHRU, J

APRIL 24, 2017
RK/MK