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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on: 20.04.2017
Judgment Pronounced on: 15.05.2017

+ O.M.P. (T) (COMM.) 28/2017 & IA No.4598/2017 (stay)

WEST HARYANA HIGHWAYS PROJECTS PVT.LTD.....Petitioner
Through Mr.Manoj Singh, Mr.Nilava
Bandopadhyay, Mr.Puneet Sharma and
Mr.Anshuman Ray, Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Respondent
Through Mr.Varun K.Chopra and
Mr.Sandeepan Pathak, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. The present petition is filed under Section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') with a prayer to terminate the mandate of Sh.R.K. Jain, Former Chief Engineer, PWD Haryana to act as Co-Arbitrator and consequently, terminate the mandate of Justice N.Kumar (Retd.) to act as the Presiding Arbitrator.
2. The issue raised in the present petition is as to whether a party to an arbitration proceeding can approach the court under Section 14 of the Act to seek termination of the appointment of an arbitrator on the ground that he is ineligible to be appointed as an arbitrator under Section 12(5) read with the Seventh Schedule of the Act.

3. The case of the respondent is that in case the petitioner had a doubt regarding the eligibility of the Arbitrator nominated by the respondent, the petitioner had to challenge his appointment under Section 13 of the Act before the Arbitral Tribunal and in case the Arbitral Tribunal does not agree with the challenge raised by the petitioner, the petitioner had to await the award and thereafter raise the issue under Section 34 of the Act.

4. The brief facts leading to the present petition are that the petitioner Company entered into a Concession Agreement dated 06.11.2007 with the respondent for design, engineering, finance, operation and maintenance of Delhi Haryana Border to Rohtak Section of NH-10 from KM 29.70 to KM 87.00 including construction of Bahadurgarh and Rohtak by-passes in the State of Haryana under NHDP Phase-III A on build, operate and transfer (BOT) basis. The project was to be completed within a period of 24 months from the appointed date i.e. 02.05.2008. However, it is urged that on account of various delays and breaches committed by the respondent and for reasons beyond the control of the petitioner, the agreed date of completion could not be achieved and the provisional certificate of completion was issued by the respondent only on 26.11.2015 i.e. after a delay of five years and 7 months.

5. The petitioner further submits that while executing the project under the Concession Agreement, various disputes and differences have arisen between the parties. Hence, the petitioner sought to initiate arbitration proceedings in terms of Clause 44.3 of the Concession Agreement. The said Clause provides that in case of disputes, the matter would be decided by reference to a Board of three Arbitrators, each party to select one arbitrator and the two arbitrators so appointed to select the third arbitrator. In the event of disagreement on appointment of the third arbitrator, the appointment was

to be made in accordance with the rules of the International Centre for Alternate Disputes Resolution (ICADR), New Delhi (hereinafter referred to as the Rules). The Clause also provides that the arbitration shall be held in accordance with the above Rules of ICADR.

6. Accordingly, the petitioner is said to have nominated Justice Anil Kumar, (Retd.) as the Arbitrator. It is the case of the petitioner that as the respondent failed to nominate his arbitrator, the petitioner filed a petition under Section 11(6) of the Act being Arbitration Petition No. 114/2017 titled as “*West Haryana Highways Projects Pvt. Ltd. vs. National Highway Authority of India*”. This court in that case by its order dated 06.02.2017 noting that the respondent have nominated Sh.R.K. Jain, former Chief Engineer, PWD, Haryana as an Arbitrator disposed of the petition. As there was no agreement between the learned Arbitrators with regard to the appointment of the third arbitrator, ICADR was approached by the respondent who appointed Justice N. Kumar (Retd.) as the Presiding Arbitrator on 20.03.2017.

7. The petitioner claims that on receipt of the notice from ICADR about constitution of the Arbitral Tribunal, the petitioner wrote a letter dated 29.03.2017 to Sh. R.K.Jain, the learned Arbitrator nominated by the respondent requesting him to provide disclosure as per Section 12 of the Act, as the disclosure provided by him earlier was not proper. Sh. R.K. Jain, the learned Arbitrator by letter dated 08.04.2017 has now sent a communication in the format as per Sixth Schedule of the Act.

8. It is the case of the petitioner that the learned Arbitrator- Sh. R.K. Jain has admitted in his communication/disclosure that he is rendering help to two Project Directors of NHAI in the capacity of adviser and hence, is

disqualified under Seventh Schedule of the Act from acting as an Arbitrator and that his appointment is barred under Section 12(5) of the Act read with Seventh Schedule.

9. I have heard learned counsel for the parties.

10. Learned counsel appearing for the petitioner reiterates that as per the disclosure made by the Arbitrator-Sh. R.K. Jain, he is clearly an adviser of the respondent and was ineligible to be appointed as an Arbitrator in terms of the Seventh Schedule read with Section 12(5) of the Act. It is reiterated that there is no bar in approaching this court under Section 14 of the Act. Reliance was placed on the judgment of the Division Bench of this court in ***Progressive Career Academy Pvt. Ltd. vs. FIIT JEE Ltd., ILR (2011) IV Delhi 286*** to contend that in terms of the said judgment once a challenge under Section 13 does not succeed, the only remedy of the aggrieved party is to await the Award and raise the objections under Section 34 of the Act. Hence, he submits that the remedy under Section 13 of the Act is not the appropriate remedy to challenge the invalidity of the appointment of the said Arbitrator nominated by the respondent. He relies upon judgment of the learned Single Judge of this court in the case of ***Dream Valley Farms Pvt. Ltd. & Ors. vs. Religare Finvest Ltd. & Ors., MANU/DE/2898/2016*** to contend that in similar circumstances this court had terminated the mandate of an arbitrator who was so ineligible. He also relies upon the judgment of the Supreme Court in the case of ***Voestalpine Schienen GmbH vs. Delhi Metro Rail Corporation Ltd., MANU/SC/0162/2017*** in support of his contentions.

11. Learned counsel for the respondent has on instructions not disputed the fact that the said nominated Arbitrator, namely, Sh. R.K. Jain is on the

panel of Advisers of the respondent. His submission however is that the appointment could be challenged by the petitioner under Section 13(3) of the Act. In case the challenge was not accepted by the Arbitral Tribunal, the petitioner had to await the decision of the Tribunal and thereafter take steps under Section 34 of the Act. He relies upon the judgments of the learned Single Judges of this court in the case of ***Gangotri Enterprises Ltd. vs. NTPC Tamil Nadu Entergy Company*** in OMP (T) (COMM.) 47/2016 dated 16.01.2017, ***Steel Authority of India Ltd. vs. British Marine PLC., 234 (2016) DLT 99*** and ***MBL Infrastructures Ltd. vs. Telecommunication Consultants India Ltd., MANU/DE/0105/2015*** to support his contentions.

12. We may first see the disclosure made by the learned Arbitrator-Sh.R.K.Jain under Section 12 of the Act. The earlier communication made by the learned Arbitrator on 16.02.2017 is not very relevant. The second communication dated 8.04.2017 which is relevant makes a disclosure in the format as prescribed under the Sixth Schedule, relevant part of which reads as follows:-

“I, Help other two Project Directors of NHAI, 1.EPE-1 and 2.EPE-2 [EPE: Eastern Periphery Expressway) based on my expertise in concrete road construction, which is totally opposed of dispute in question and/ or before this Hon'ble Tribunal.”

13. From the above disclosure of Sh. R.K. Jain, it is manifest that he is advising the respondent-NHAI on two of its projects. Learned counsel for the respondent on instructions has confirmed that he is on the panel of advisers of NHAI.

14. We may see the legal position in this regard. Section 12(5) of the Act reads as follows:-

"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."

15. The first entry of seventh Schedule of the Act reads as follows:-

"Arbitrator's relationship with the parties or counsel

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

16. Hence a consultant/adviser of a party is ineligible from becoming an arbitrator in a proceeding relating to the said party. In the light of the above factual legal position, it is manifest that the learned arbitrator-Sh. R.K. Jain on account of his being an adviser/consultant to the respondent Company was ineligible for being appointed as an arbitrator.

17. The question that now arises is as to whether a petition under Section 14 of the Act would lie before this court to remove the said learned Arbitrator or as contended by the learned counsel for the respondent, the remedy of the petitioner was to approach the Arbitral Tribunal under Section 13 (3) of the Act and in the eventuality that the arbitral tribunal did not accept the contention, the petitioner would have to await the award of the Tribunal and thereafter, take steps under Section 34 of the Act, if so required.

18. Section 12, 13 and 14 of the Act reads 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.-

(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.

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 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.”

19. In *Dream Valley Farms Pvt. Ltd. & Ors. vs. Religare Finvest Ltd. & Ors.*, (*Supra*) , the petitioner therein had filed a petition under Section 11(6) and (8) of the Act for seeking appointment of an independent, impartial and qualified arbitrator. The facts of the case were that the arbitrator appointed was already acting as an arbitrator in 20 matters for the party who had already appointed him. In the initial declaration, this aspect was hidden by the arbitrator. This court noted that the arbitrator had made a misleading declaration which defeats the purpose of Section 12 (1) and Fifth Schedule of the Act. This court rejected the contention that the petitioner therein had

to challenge the appointment of the arbitrator under Section 13 of the Act noting as follows:-

“20. While in the normal course, that would be one option, in the present case not only are Clauses 22 and 24 of the Fifth Schedule attracted giving rise to justifiable doubts as to the independence and impartiality of the Arbitrator, but the conduct of the Arbitrator in seeking to mislead the Petitioner and suppress in the first instance the fact of his being a presiding Arbitrator in 27 arbitration matters relating to the Respondent smacks of dishonesty that is unbecoming of an Arbitrator.

21. The Court is satisfied that for the purposes of Section 14 (1) (a) of the Act the Arbitrator becomes de jure disqualified from continuing as an arbitrator. His mandate is accordingly terminated.”

20. Hence, the court came to a conclusion that the arbitrator was de jure disqualified from continuing as an arbitrator. His mandate was terminated.

21. A learned Single Judge of this court has in somewhat identical circumstances held that a petition under section 14 would lie to terminate the mandate of an Arbitrator in case he is ineligible to be appointed as an Arbitrator in terms of seventh Schedule of the Act. Reference in this context may be had to a judgment of this Court being OMP(T) (Comm.) 22/2017 decided on 24.4.2017 titled ***H.R.D. Corporation (Marcus Oil and Chemical Division) vs. Gail (India) Limited (Formerly Gas Authority of India Ltd.)*** where it was held as follows:-

“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.

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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.”

22. Similarly, a Division Bench of the Andhra Pradesh High Court in ***Gurcharan Singh Sahney and others vs. Harpreet Singh Chabbra and Others, 2016 SCC Online Hyd 90*** held as follows:-

“57. The distinction between Sections 12 and 13 on the one hand and Section 14 on the other, in immediately invoking the jurisdiction of the Court, is based on the ability or the capacity of the arbitrator to continue arbitral proceedings. The challenge to an arbitrator under Section 12(3)(a) of the Act, even if unsuccessful, does not disable or incapacitate the arbitrator from continuing arbitration proceedings. Section 14(1)(a) of the Act, however, relates to the inability/incapacity of the arbitrator to perform his functions, or where his performance is such as to needlessly delay early completion of arbitration proceedings. While the de jure or de facto inability of the arbitrator to perform his functions results in bringing arbitral proceedings to a grinding halt, needless delay in the early completion of arbitral proceedings is also a reflection of the arbitrators inability to complete arbitration proceedings expeditiously. It is for this reason that, unlike Section 13, Section 14 of the Act provides for the termination of the mandate of the arbitrator.

58. The incapacities, referred to in Section 14 (1) (a) of the Act, are such as to have a direct nexus with the inability of the arbitrator to perform his functions. This incapacity or disability should occur to the arbitrator himself so that he becomes, as a matter of law or fact, unable to perform his functions. (Priknit Retails Ltd.: 2013(2) ARBLR 35 (Delhi)). The de jure impossibility, referred to in Section 14(1)(a), is the impossibility which occurs due to factors personal to the arbitrator, and de facto inability occurs due to factors beyond the control of the Arbitrator. (Shyam Telecom Ltd. v. ARM Ltd.:2004 (3) ARBLR 146 Delhi; Priknit Retails Ltd. : 2013(2) ARBLR 35 (Delhi)). Examples would be the death of the arbitrator or his health problems etc. (Priknit Retails Ltd. : 2013(2) ARBLR 35 (Delhi)). Mere legal disability is not a condition precedent for invocation of Section 14. The de jure inability must relate to his ability to function. (Priknit Retails Ltd.)

60. The mandate of an arbitrator automatically terminates on the death of the arbitrator or his physical incapacity to proceed with

the mandate. Dejure incapacity refers to an arbitrator's legal incapacity to perform his functions under the law, for instance, bankruptcy, conviction for a criminal offence, etc. Defacto incapacity relates to factual inability, which includes factual situations in which the arbitrator is physically unable to perform his functions for instance, continuous ill-health, etc. (Shyam Telecom Ltd. :2008(4) ALT 266). If an arbitrator is genuinely lacking in physical or mental ability to discharge his obligations, or is found to have left his last known address without intimation and is untraceable for quite some time, or has been detained for custodial interrogation for a substantial period of time for his having committed an offence and there is uncertainty regarding his release from custody, and the Court is of the opinion that the arbitrator has acquired de facto inability and hence cannot act without undue delay, an order, terminating the mandate of the arbitrator, may be passed. Similarly, if the arbitrator becomes de jure unable to function as such, for any reason other than manifestation of lack of independence or impartiality for which he may have been approached to give his ruling, approach under Section 14 is not barred. (Himadri Chemicals & Industries Ltd.)

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71. The scheme of the Act makes it clear that the legislature did not intend (i) either to provide multiple remedies; (ii) or to provide mutually exclusive concurrent remedies. Section 13 operates in a field that is completely different from Section 14. One has no connection with the other. This is why both Sections stipulate both the right as well as the remedy. Section 13 is a complete code in that (i) it confers a right to challenge an arbitrator; (ii) it indicates the grounds on which such challenge could be made, by referring to Section 12(3); (iii) it prescribes the forum where such a challenge can be made (viz., the arbitral tribunal); and (iv) it also indicates the remedy available to a party whose challenge under Section 13(2) fails. Section 13(5) contains the remedy. (Chennai Metro Rail Limited : 2014(2) ARBLR 341 (Madras)). In view of the express language of Section 13(2) a challenge to an arbitrator,

on the grounds specified in Section 12(3), has to be made only before the Arbitral Tribunal. Similarly, a controversy concerning the de jure or de facto inability of the arbitrator to perform his functions, or a controversy concerning the failure of the arbitrator to act without undue delay in terms of Section 14(1)(a), can be agitated only before the Court under Section 14(2). Section 14 is not wide enough to include a challenge to an arbitrator on the grounds specified in Section 12(3). (Chennai Metro Rail Limited).”

23. Similarly, the Supreme Court in the case of *Voestalpine Schienen GmbH vs. Delhi Metro Rail Corporation Ltd.*(supra) held as follows:-

“17. Keeping in mind the afore-quoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In such an eventuality, i.e., when the arbitration Clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non-obstante Clause contained in Sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement.

24. In the light of the said legal position it becomes quite clear that under Section 12(5), if a person’s relationship with the parties or counsel or subject matter of dispute falls in any of the categories specified in the Seventh Schedule, the said person is ineligible to be appointed as an arbitrator. If a

party persists in nominating any such person as an arbitrator, it would be a completely futile and waste of efforts to permit the Tribunal to continue to adjudicate the matter and permit a challenge after completion of the arbitration, under Section 34 of the Act. If an arbitrator is appointed contrary to Section 12(5) read with the Seventh Schedule, he is *de jure* ineligible to perform his functions and the mandate of such an arbitrator can be terminated by the court under Section 14(2) of the Act. Section 13(3) and 13(5) would have no application in such circumstances.

25. Reliance of the learned counsel for the respondent on the judgment of the Division Bench of this court in the case of ***Progressive Career Academy Pvt. Ltd. vs. FIIT JEE Ltd.***(*supra*) is misplaced. That was a decision made prior to coming into force of the Arbitration and Conciliation (Amendment) Act, 2015.

26. The Division Bench of this court in the case of ***Progressive Career Academy Pvt. Ltd. vs. FIIT JEE Ltd.*** (*supra*) held as follows:-

“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."

27. Hence, the Division Bench there was considering the remedy provided under Section 13 (3) & 13(5) of the Act. The court held that in case a party challenges the appointment of an arbitrator on grounds as provided therein and the arbitrator does not withdraw then the party aggrieved would have a remedy under Section 13(3) of the Act before the Arbitral Tribunal. In case, it does not succeed before the tribunal, the aggrieved party would have to await the award and then challenge the same. By the present petition we are concerned with the Arbitrator being *de jure* unable to perform his functions in view of Section 12(5) read with the Seventh Schedule of the Act which are newly inserted provision pursuant to the recent amendments. Hence, the judgment of the Division Bench does not apply to the facts of the present case.

28. In view of the above legal position, where an arbitrator is ineligible to be appointed as an arbitrator as he suffers from disqualification stipulated under Section 12(5) and the Seventh Schedule of the Act and a party persists in appointing such an arbitrator, this court would have powers under Section 14(2) of the Act to terminate the mandate of such an arbitrator.

29. Accordingly, in view of the above factual position, i.e. the learned arbitrator Sh.R.K.Jain being on the panel of advisers of the respondent and presently advising the respondent on two projects, I terminate the mandate of Sh. R.K. Jain, learned Co-Arbitrator nominated by the respondent. The respondent are given 30 days time to nominate their new arbitrator in terms of Clause 44.3 of the Concession Agreement between the parties. In case of failure of the respondent to do the needful, the petitioner is free to approach this court.

30. As far as the prayer of termination of the mandate of the second Arbitrator, namely, Mr. Justice N. Kumar (Retd.) is concerned, the said request is baseless. His appointment has been made by ICADR as per agreed procedure. The argument is misplaced and the request of the petitioner to that extent is rejected.

31. The petition is allowed as above. All pending applications also stand disposed of.

(JAYANT NATH)
JUDGE

MAY 15, 2017/rb