

\$~50

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Date of decision: 29.08.2017

+ O.M.P. (T) (COMM.) 67/2017 & I.A.Nos.9769-71/2017

TEEKAYS INTERIORS PVT LTD

..... Petitioner

Through Mr.D.K.Sharma & Mr.Anuj Saini,
Advocates

versus

FIITJEE FOUNDATION FOR EDUCATION
RESEARCH & TRAINING

..... Respondent

Through None.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

I.A.No.9770-9771/2017(exemptions)

Allowed subject to all just exceptions.

O.M.P. (T) (COMM.) 67/2017 & I.A.No.9769/2017(stay)

1. This petition is filed under Section 14(2) and 15 of the Arbitration & Conciliation Act, 1996 (*hereinafter referred to as 'the Act'*) seeking to *set aside* the appointment of the sole arbitrator and to constitute an arbitral tribunal.
2. Some of the relevant facts are that first agreement was entered into between the parties for carrying out civil and interior works by petitioner at Vittalwadi Centre, Hyderabad 08.05.2010. The second agreement is said to have been entered into between the parties on 09.06.2010.

3. Disputes having been arisen between the parties. On 01.12.2011, the respondents issued a notice to the petitioner intimating about the appointment of Sh.Subhash Tagra, Advocate as an arbitrator. On 15.04.2013 the respondents have filed a statement of claim and the matter has been pending before the learned arbitrator.

4. The petitioner had moved a petition for appointment of a new arbitrator before the Andhra Pradesh High Court. This petition was dismissed as withdrawn on 06.02.2015. He has thereafter again moved a petition under Section 11 of the Act before this court which was also dismissed as withdrawn on 18.05.2015.

5. Thereafter, on 21.09.2016, the petitioner moved an application before the learned arbitrator for disclosing the requisite information as stated in the application. On 12.05.2017, the learned arbitrator has dismissed the said application of the petitioner.

6. I have heard the learned counsel for the petitioner.

7. The grievance of the petitioner is that the learned arbitrator is said to be an arbitrator acting on behalf of the respondent in various arbitration proceedings. It is urged that even though un-amended provisions of Section 12 of the Act would apply, the learned arbitrator was obliged to file a declaration. He submits that in view of the fact that he is repeatedly appointed as an arbitrator by the respondent, his conduct would be biased and accordingly submits that the learned arbitrator is *de jure* and *de facto* not entitled to act as an arbitrator and his appointment is liable to be terminated under Section 14 of the Act.

8. The Division Bench of this court in the case of ***Progressive Career Academy Pvt. Ltd. v. FIITJEE Ltd., (2011) ILR 4 Delhi***

286/(MANU/DE/2194/2011), while considering the remedy provided under Section 13 (3) & 13(5) of the Act, 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, the learned arbitrator does not accept the plea of the aggrieved party, the aggrieved party would have to await the award and then challenge the same.

9. Section 14 of the Act would have no application. The 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. De jure incapacity refers to an arbitrator's legal incapacity to perform his functions under the law, for instance, bankruptcy, conviction for a criminal offence, etc. De facto 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.)”

10. In the present case, due to the alleged bias of the arbitrator, it cannot be said that the learned arbitrator is *de jure or de facto* unable to act. There is no merit in the present petition and the same is dismissed. All the pending applications, if any, are also dismissed.

11. Needless to say that any observations made by this court in the order would not prejudice to the petitioner in making a challenge to the appointment of the learned arbitrator as per law at the appropriate stage.

JAYANT NATH, J.

AUGUST 29, 2017/v



सत्यमेव जयते