

\$~31 to 34 and 36 to 49

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

Date of decision: 17th January, 2018

+ ARB.P. 32/2018
+ ARB.P. 33/2018
+ ARB.P. 34/2018
+ ARB.P. 35/2018
+ ARB.P. 37/2018
+ ARB.P. 38/2018
+ ARB.P. 39/2018
+ ARB.P. 40/2018
+ ARB.P. 41/2018
+ ARB.P. 42/2018
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+ ARB.P. 45/2018
+ ARB.P. 46/2018
+ ARB.P. 47/2018
+ ARB.P. 48/2018
+ ARB.P. 49/2018
+ ARB.P. 50/2018

SUDESH PRABHAKAR	 Petitioner
HPS AHLUWALIA	 Petitioner
ANEESH SHARMA	 Petitioner
SARABHJEET SINGH SA WHNEY	 Petitioner
MADHUR JAIN	 Petitioner
GEETA SHARMA AND ANR	 Petitioners
DEEPA VIG	 Petitioner
NANDINI PRABHAKAR AND ANR	 Petitioners
VISHAL KAPUR & ANR.	 Petitioners
VIJAY DARDA	 Petitioner
VIRENDRA SAKLANI	 Petitioner
JAGDISH PRASAD SHUKLA	 Petitioner
RAVISH KUMAR KHOSLA	 Petitioner
VINOD KUMAR DHALL	 Petitioner
RAJ NATH KHOSLA & ANR.	 Petitioners

MAHINDRA KUMAR ROHATGI Petitioner
MANISHI MOHAN SANWAL & ANR. Petitioners
SARABHJEET SINGH SAWHNEY Petitioner
Through Mr.Dhruv Gupta and Mr.Ujjal
Banerjee, Advs.

versus

EMAAR MGF CONSTRUCTIONS PVT. LTD Respondent
Through Ms.Manmeet Arora, Ms.Samapaha
Biswal, Mr.Taran Gupta, Mr.Arjun
Jain and Mr.Rakesh Kumar Singh,
Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA No.749/2018 (Exemption) in Arb. P.32/2018
IA No.751/2018 (Exemption) in Arb. P.33/2018
IA No.753/2018 (Exemption) in Arb. P.34/2018
IA No.755/2018 (Exemption) in Arb. P.35/2018
IA No.758/2018 (Exemption) in Arb. P.37/2018
IA No.760/2018 (Exemption) in Arb. P.38/2018
IA No.762/2018 (Exemption) in Arb. P.39/2018
IA No.765/2018 (Exemption) in Arb. P.40/2018
IA No.768/2018 (Exemption) in Arb. P.41/2018
IA No.770/2018 (Exemption) in Arb. P.42/2018
IA No.772/2018 (Exemption) in Arb. P.43/2018
IA No.774/2018 (Exemption) in Arb. P.44/2018
IA No.776/2018 (Exemption) in Arb. P.45/2018
IA No.778/2018 (Exemption) in Arb. P.46/2018
IA No.780/2018 (Exemption) in Arb. P.47/2018
IA No.782/2018 (Exemption) in Arb. P.48/2018
IA No.784/2018 (Exemption) in Arb. P.49/2018
IA No.786/2018 (Exemption) in Arb. P.50/2018

Allowed, subject to all just exceptions.

ARB.P. 32/2018 & I.A. No.748/2018
ARB.P. 33/2018 & I.A. No.750/2018
ARB.P. 34/2018 & I.A. No.752/2018
ARB.P. 35/2018 & I.A. No.754/2018
ARB.P. 37/2018 & I.A. No.757/2018
ARB.P. 38/2018 & I.A. No.759/2018
ARB.P. 39/2018 & I.A. No.761/2018
ARB.P. 40/2018 & I.A. No.764/2018
ARB.P. 41/2018 & I.A. No.767/2018
ARB.P. 42/2018 & I.A. No.769/2018
ARB.P. 43/2018 & I.A. No.771/2018
ARB.P. 44/2018 & I.A. No.773/2018
ARB.P. 45/2018 & I.A. No.775/2018
ARB.P. 46/2018 & I.A. No.777/2018
ARB.P. 47/2018 & I.A. No.779/2018
ARB.P. 48/2018 & I.A. No.781/2018
ARB.P. 49/2018 & I.A. No.783/2018
ARB.P. 50/2018 & I.A. No.785/2018

1. These petitions under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as to the 'Act') have been filed by the petitioner(s) seeking appointment of a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Apartment Buyer's Agreement and Sales Deed executed between the parties. The dispute involved is with respect to the demand of payment of Value Added Tax (VAT) raised by the respondent on the petitioner(s).
2. In terms of the Arbitration Agreement, the respondent has appointed Justice M.L.Mehta (Retd.) as an Arbitrator in all these petitions as a common question of law and facts is involved in all these cases.
3. The petitioner(s) had challenged the appointment before the Sole Arbitrator in the form of an application under Section 12 read with Section 13 of the Act and upon rejection of the said application, they have filed the

present petitions.

4. The challenge to the authority of the Arbitrator is premised on the fact that in his disclosure dated 31.03.2017 (in all matters the date for disclosure is same), the Arbitrator had disclosed the following in compliance with Section 12 of the Act:

“2. Whereas the undersigned having accepted to act as Sole Arbitrator, makes the following declaration regarding impartiality and independence in terms of Schedule V, VI and VII of Section 12 of the Arbitration and Conciliation Act, 1996 (as amended in 2015):

“I, Justice M.L. Mehta (Retd.) Former Judge of Delhi High Court do hereby disclose and declare that I have never been associated (past or present) in any capacity, personally or otherwise with either of the parties and no circumstances exist under schedule V, VI & VII which may give rise to any justifiable doubt my independence or impartiality. I also declare that I do not have any financial, personal or any other kind of interest, direct or indirect, in the Arbitration proceedings or the outcome of the Award.

Further, I disclose and declare that I have judicial experience of about 36 years, having worked in different positions through subordinate courts to High Court of Delhi. Though, at present I am having good number of arbitrations matters, but there does not exist any circumstance likely to affect my ability to devote sufficient time to the present Arbitration or finish the same within twelve months and render award within three months.”

5. It is further contended that as the petitioner(s) came to know that the same Arbitrator has been appointed in various other matters of the respondents, they filed an application under Section 12 read with Section 13 of the Act before the Sole Arbitrator praying to him to recuse himself from the proceedings. It is contended that only after filing of the said application, the Sole Arbitrator tendered yet another disclosure dated 15.05.2017, which reads as under:

“3. In furtherance to the same, I additionally declare as under:-

- i. *There does not exist any circumstance of my having any relationship, past or present, with any of the parties, or interest in any of the parties or relation with the subject matter in dispute (whether financial, business, professional or other kind), which is likely to give rise to any justifiable doubt as to my independence or impartiality.*
- ii. *I further declare that currently I do not serve or have served or been appointed within past three years as arbitrator or counsel in another arbitration or any case or on any occasion on a related or unrelated matter involving any of the parties or affiliate of any of these except the present batch matters relating to VAT*
- iii. *My firm/ office has not within the past three years acted for any of the parties or an affiliate of either of the parties in any unrelated matter without the involvement of arbitrator.*
- iv. *I have not within the past three years received any appointment by the same counsel or the same law firm of the Claimant and dealt with any other matters except the present batch matters.*
- v. *I further declare that though I have good number of arbitration cases but there does not exist any circumstance like to affect my ability to devote sufficient*

time to this proceedings and to finish the same within the stipulated period of twelve months.”

6. It is contended that the Arbitrator is liable to be substituted as he had not made a full disclosure while making the disclosure for the first time and only upon being confronted, the second disclosure was made by the Arbitrator. It is contended that this was a case of wrongful disclosure, making the Arbitrator ineligible to continue the arbitration proceedings. It is further contended that in any case, the Arbitrator having admitted that he has been appointed in large number of matters of the respondents, would be ineligible to continue as an Arbitrator in terms of Item 22 and 24 of Fifth Schedule of the Act. It is contended that each arbitration is a separate proceeding and therefore, the ineligibility of the Arbitrator in terms of Item 22 and 24 would clearly be attracted to the facts of the present case.

7. Counsels for the petitioner(s) have placed reliance on the judgement of this Court dated 19.10.2016 in Arbitration Petition No.635/2016, ***Dream Valley Farms Pvt. Ltd. v. Religare Finvest Limited & Ors.*** and also on the judgment of the Supreme Court in ***TRF Ltd. v. Energo Engineers Projects Ltd.***, (2017) 8 SCC 377 to contend that if the Arbitrator is ineligible to continue with the proceedings, a substitute Arbitrator can be appointed by this Court in exercise of its power under Section 11 of the Act. It is lastly contended by learned counsels for the petitioner(s) that a Coordinate Bench of this Court has passed an interim order staying further proceedings in the arbitration on an identical plea by one of the flat buyers in Arbitration Petition No.810/2017 and therefore, the same order should be passed in the present petitions as well.

8. On the other hand, learned counsel for the respondent submits that the present petitions are liable to be dismissed on the ground of concealment alone. It is submitted that the petitioner(s) were at all times aware that the Sole Arbitrator has been appointed by the respondent, in the batch of matters that raised the identical issue of demand of VAT from the flat buyers. This fact was brought to their notice in the letter invoking Arbitration Clause itself and no objection was raised by the petitioner(s) at that stage. It is further contended that the present petitions would not be maintainable even otherwise as the petitioner(s) having filed an application under Section 12 read with Section 13 of the Act and the same having been rejected by the Arbitrator, necessarily have to wait for the Arbitral Award is to be passed and any challenge to the Sole Arbitrator can be taken only as a ground for challenge to the final award; therefore, the petitions under Section 11 of the Act would not be maintainable at this stage. In this regard she placed reliance on the judgment of the Supreme Court in **Antrix Corporation Limited v. Devas Multimedia Pvt.Ltd.** (2014) 11 SCC 560 and the judgment dated 22.10.2016 of this Court in OMP(T)(COMM) 48/2016, **Steel Authority of India Ltd.v. British Marine PLC**. It is further contended that a common Arbitrator was appointed in all these petitions only because a common question of law and fact in relation to the demand of VAT by the respondent arises in all these matters and even otherwise, it would be in the interest of justice that a common Arbitrator adjudicates these disputes rather than having different Arbitrators adjudicate the same as this may lead to a possibility of conflicting awards being passed in the matters.

9. I have considered the submissions made by the counsels for the parties. It is first to be noticed that the objection raised by the petitioner(s)

is by invoking Item 22 and 24 of the Fifth Schedule to the Act. The same are quoted herein below:

“22. The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.

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24. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.”

10. Supreme Court in the case of ***HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Ltd.***, 2017 SCC OnLine SC 1024 has considered the effect of Item 24 of the Fifth Schedule of the Act and the remedy in case such challenge is rejected by the Arbitrator in the following words:

“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.

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20. However, to accede to Shri Divan's submission that because the grounds for challenge have been narrowed as aforesaid, we must construe the items in the Fifth and Seventh Schedules in the most expansive manner, so that the remotest likelihood of bias gets removed, is not an acceptable way of interpreting the Schedules. As has been pointed out by us hereinabove, the items contained in the Schedules owe their origin to the IBA Guidelines, which are to be construed in the light of the general principles contained therein – that every arbitrator shall be impartial and independent of the parties at the time of accepting his/her appointment. Doubts as to the above are only justifiable if a reasonable third person having

knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision. This test requires taking a broad common-sensical approach to the items stated in the Fifth and Seventh Schedules. This approach would, therefore, require a fair construction of the words used therein, neither tending to enlarge or restrict them unduly. It is with these prefatory remarks that we proceed to deal with the arguments of both sides in construing the language of the Seventh Schedule.

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23. Coming to Justice Doabia's appointment, it has been vehemently argued that since Justice Doabia has previously rendered an award between the same parties in an earlier arbitration concerning the same disputes, but for an earlier period, he is hit by Item 16 of the Seventh Schedule, which states that the arbitrator should not have previous involvement "in the case". From the italicized words, it was sought to be argued that "the case" is an ongoing one, and a previous arbitration award delivered by Justice Doabia between the same parties and arising out of the same agreement would incapacitate his appointment in the present case. We are afraid we are unable to agree with this contention. In this context, it is important to refer to the IBA Guidelines, which are the genesis of the items contained in the Seventh Schedule. Under the waivable Red List of the IBA Guidelines, para 2.1.2 states:

"The Arbitrator had a prior involvement in the dispute."

24. On reading the aforesaid guideline and reading the heading which appears with Item 16, namely "Relationship of the arbitrator to the dispute", it is obvious that the arbitrator has to have a previous involvement in the very dispute contained in the present arbitration. Admittedly, Justice Doabia has no such involvement. Further, Item 16 must be read along with Items 22 and 24 of the Fifth Schedule. The disqualification contained in

Items 22 and 24 is not absolute, as an arbitrator who has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties or an affiliate, may yet not be disqualified on his showing that he was independent and impartial on the earlier two occasions. Also, if he currently serves or has served within the past three years as arbitrator in another arbitration on a related issue, he may be disqualified under Item 24, which must then be contrasted with Item 16. Item 16 cannot be read as including previous involvements in another arbitration on a related issue involving one of the parties as otherwise Item 24 will be rendered largely ineffective. It must not be forgotten that Item 16 also appears in the Fifth Schedule and has, therefore, to be harmoniously read with Item 24. It has also been argued by learned counsel appearing on behalf of the respondent that the expression “the arbitrator” in Item 16 cannot possibly mean “the arbitrator” acting as an arbitrator, but must mean that the proposed arbitrator is a person who has had previous involvement in the case in some other avatar. According to us, this is a sound argument as “the arbitrator” refers to the proposed arbitrator. This becomes clear, when contrasted with Items 22 and 24, where the arbitrator must have served “as arbitrator” before he can be disqualified. Obviously, Item 16 refers to previous involvement in an advisory or other capacity in the very dispute, but not as arbitrator. It was also faintly argued that Justice Doabia was ineligible under Items 1 and 15. Appointment as an arbitrator is not a “business relationship” with the respondent under Item 1. Nor is the delivery of an award providing an expert “opinion” i.e. advice to a party covered by Item 15.”

11. A reading of the above judgment would show that the Supreme Court has held that the disqualification contained in item 22 and 24 is not absolute and even an Arbitrator who has been appointed on two or more occasions by the parties or affiliates in the past three years, may yet not to be disqualified on showing that he was independent and impartial on the earlier two

occasions. In any case, distinction has to be drawn between ineligibility to be appointed as an Arbitrator for the reason contained in the Seventh Schedule of the Act and the reasons which may give rise to justifiable doubts as to their independence or impartiality as contained in Fifth Schedule of the Act. Where Seventh Schedule gets attracted, party may straightway approach the Court under Section 14 of the Act, however, in cases of Fifth Schedule, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge made by the Arbitral Tribunal under Section 13 of the Act. 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 grounds on which such party had sought to challenge the authority of the arbitrator.

12. In the present case there is no challenge to the Arbitrator on any reason contained in the Seventh Schedule of the Act. As noted above, the only allegation to the Arbitrator is confined to the Item 22 and 24 of Fifth Schedule of the Act. The Arbitrator has already rejected the said challenge vide his order dated 15.11.2017 and therefore, the remedy of the petitioner(s), would lie only in the form of challenge to the final Arbitral Award that may be passed by the Arbitrator and not at this stage.

13. In my opinion, prima facie the challenge of the petitioner(s) to the Arbitrator even on facts does not appear to be justified. It is not denied

before me that all other cases in which the Arbitrator has been appointed relates to the same issue regarding the demand of VAT by the respondent. Learned counsel for the respondent makes a statement before the Court that the Arbitrator in question has not been appointed in any other matter by the respondent or has acted as an Arbitrator where the respondent is a party, except for the present batch of petitions. As a common issue of law and facts arises in batch of these petitions, it is even otherwise appropriate for one Arbitrator to decide the entire batch. These references in fact form a single reference and are technically different arbitration proceedings only for the reason that one of the party, i.e. the Petitioners in each case would be different as the Arbitration Agreements are different for each party. However, that does not mean that there are actually more than one arbitration proceedings so as to attract provisions of Item 22 or 24 of Fifth Schedule of the Act.

14. In ***HRD Corporation (supra)*** Supreme Court had also quoted with approval from a leading text book, *Liability Insurance in International Arbitration*, 2nd ed. (2011), which states that in a situation where a loss, whether from boom or batch, gives rise to a number of arbitrations against different insurers who have subscribed to the same programme, a number of arbitrations may be commenced at around the same time, and the same arbitrator may be appointed at the outset in respect of all these arbitrations. In such circumstance, it would not attract the prohibition or disqualification as contained in Item 22 or 24 of Fifth Schedule of the Act.

15. I also find merit in the objection raised by the learned counsel for the respondent that the petitioner(s) are guilty of suppression of facts and the present petitions are accordingly liable to be dismissed on this ground itself.

The petitioner(s) have intentionally concealed from this Court the notice invoking the arbitration clause which clearly recorded as under:

“5. Kindly note that in order to save time and costs, we are nominating Hon’ble Justice Mr.M.L.Mehta in all the arbitrations involving the issue of outstanding VAT payments under the DVAT Act 2004 connected to the Commonwealth Games Village Apartments, Delhi. In this regard, we seek to emphasize that there is no legal bar in respect of such appointment under the Arbitration & Conciliation Act, 1996, as amended by the Arbitration & Conciliation Amendment Act, 2015. A perusal of Section 12(i), more specifically Explanation 1 thereof, shows that the grounds stated in the Fifth Schedule of the Act are indicative of the factors to facilitate the determine of whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an Arbitrator. Therefore, the Fifth Schedule contains only guidelines. The Fifth Schedule, we positively state that neither Sl. No.22 or Sl. No.24 thereof would be relevant to this case as they do not deal with the simultaneous and concurrent appointment of a single Arbitrator in multiple disputes involving the identical question, i.e. outstanding liability quo VAT due from the Buyers Agreement and the Conveyance Deed (which are identical in the case of all customers). Clauses 22 and 24 of the Fifth Schedule of the Arbitration & Conciliation Act, 1996 are reproduced hereunder:

“22. The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.

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24. The arbitrator currently severs, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.”

16. Therefore, the petitioner(s) were aware that a common arbitrator has been appointed for adjudication of the dispute that have arisen between the respondent and all the flats buyers. The question of asking for disclosure or making any grievances regarding the disclosure by the arbitrator on this ground thereafter, could not arise at all. This was an important document to be filed before the Court in the present proceedings and the petitioner(s) have clearly withheld the same with mala fide intention and this Court cannot approve the same.

17. For the same reason, the grievance made with respect to first disclosure statement made by the Sole Arbitrator cannot be sustained. As noted, the petitioners were always aware that the same Arbitrator is dealing with the entire batch of the matters with respect to the disputes between the respondent and the flat buyers. In fact, the learned counsel for the respondent submits that all these matters were listed before the Arbitrator *albeit* in different batches only because in some matters the flat buyers have been proceeded *ex-parte* while in others they were appearing and pleadings were being completed.

18. In view of the above, the judgment of this Court in ***Dream Valley Farms Pvt. Ltd.(supra)*** and judgment of the Supreme Court in ***TRF Ltd. (supra)*** would have no application to the facts of the present case. I may only note that ***TRF Ltd. (Supra)*** was dealing with case where the ineligibility were attracted on the ground of Seventh Schedule of the Act and not in Fifth Schedule.

19. The plea of the petitioner(s) that as a Coordinate Bench of this Court had passed an interim order, the same order should be passed in the present petitions, also cannot be accepted. It may only be noted that the order dated

15.12.2017 passed by the Coordinate Bench is in the nature of *ex-parte* ad-interim injunction while issuing notice of the petition to the Respondent. The respondent was not present in the Court on the said date and therefore they had not been heard. In the present case, I have heard the respondent and have gone through the entire documents and law cited by the parties and do not feel that merely because another Bench had passed an ad-interim *ex-parte* order, I should withhold from passing the final order in the present batch matters.

20. In view of the above, I find no merit in the above petitions and the same are accordingly dismissed with all pending applications, with no order as to cost.

NAVIN CHAWLA, J

JANUARY 17, 2018/Arya