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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 20th March, 2018

Pronounced on: 12th April, 2018

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O.M.P. (COMM) 149/2017 and IA No.3726/2017

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through : Mr.Manish K Bishnoi,
Mr.Devansh Srivastava, and
Mr.Ashok C Parkash Malhotra,
Advocates.

versus

NCC-VEE(JV)

..... Respondent

Through : Mr.T.K.Ganju, Sr Advocate with
Mr.manish Dembla and Ms.Ankita
Rai, Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This petition is under Section 34 of the Arbitration and Conciliation Act, 1996 read with section 10(2) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Court Act 2015 arising out of the majority order dated 06.01.2017 passed by the learned tribunal.

2. The learned arbitral tribunal had allowed an application filed by the respondent under Section 12(3) of the Arbitration and Conciliation Act

allegedly in contradiction to the right of the petitioner in the said appointment.

3. The brief facts as alleged are:-

- a)* The petitioner had appointed/substituted an arbitrator Mr.Y.P.Khurana on 09.12.2015 in Reference I and the copy of the said appointment was sent to the respondent on 14.12.2015. It is alleged the respondent knew about the appointment of Mr.Y.P.Khurana as an arbitrator on 14.12.2015 and if had any apprehension against his appointment the respondent ought to have moved an application within 15 days thereof but rather moved an application under section 12(3) of the Act challenging his appointment only on 02.04.2016, hence there was a delay of more than three months in moving such application;
- b)* Mr.Y.P. Khurana is now acting as an arbitrator not only in reference no.1 but is also an arbitrator in Reference II wherein on 20.02.2015 the respondent had moved an application against Mr.Y.P. Khurana on allegation of bias;
- c)* such allegation of bias was made only because Mr.Y.P. Khurana asked a question about the existence of an alleged joint venture on the date of the filing of the complaint;

4. The learned counsel for the petitioner has challenged the interim arbitral award primarily on two grounds **a)** filing of an application under section 13(2) of the Act was beyond limitation; and **b)** no bias on the part of Mr.Y.P. Khurana is made out.

5. The learned counsel for the petitioner refers to the combined minutes of the 7th and 8th internal meeting of the arbitral tribunal, held on

10.03.2015 and 11.03.2015 at New Delhi and para 8 of the minutes is relevant:

“8.1 The points raised in CV-:13 are summarised as under:-

(a) The Tribunal should treat the continued existence of JV as a settled issue, since Respondent is on record that it has no objection to it in making this assertion, the claimant relied upon respondent's statement in Para 3.4 (c) of 30 Oct 2014 hearing.

(b) In the light of respondent's no objection, there was no need for the Tribunal to rake up the settled issue in the meeting held on 21.01.2015, by posing biased queries and leading questions to the disadvantage of the claimant. This action of the Tribunal was not in keeping with the principles of natural justice,

(c) There was no unanimity with us the Tribunal whether questions listed in Para's 5.4.1 and 5.4.2 of Minutes of Hearing held on 21.01.2015 needed to be asked. These were raised at the behest of a particular Arbitrator.

8.4 AT is of the view that question posted to parties can in no way be construed as biased or raised with the intention to favour one or the other party. These pertain to the point at issue and are intrinsic to the resolution of the matter in dispute.

8.5 The Claimant's objection to the questions posed to the parties in the Meeting of 21.01.2015, is based on wrong assumptions, consciously ignoring the facts on its records and the documents held with the claimant.

8.6 The recorded minutes of 21.01.2015 meeting are self evident that the Tribunal was one in raising its questions and queries on the parties.”

6. Hence it is argued that arbitral tribunal was unanimous in putting such question. It is submitted the respondent herein even tried to remove Mr.Y.P. Khurana from reference and filed a petition in High Court but no stay was granted.

7. The learned counsel for the petitioner has challenged the award on ground a) the facts were not properly appreciated and simply raising queries by a learned arbitrator would not make him bias against anyone when admittedly such inquiries were made with the consent of the members of the arbitral tribunal. There is no cogent ground as to why the arbitrator be treated as biased simply upon raising some queries. No other conduct of the arbitrator is alleged which may render him incapable on

grounds of partiality or otherwise and even as per the arbitral tribunal only declaration was not given under section 12(1). Admittedly arbitral tribunal in its meeting dated 04.04.2016 has noted Lieutenant governor Y.P. Khurana (retd.) had declared that *neither he has any personal interest in the subject disputes under adjudication of this arbitral tribunal nor to its final outcome, which could give rise to any justifiable doubts as to his independence and impartiality.* This declaration is as per provisions of section 12 of Arbitration and Conciliation Act 1996.

8. It is argued if an application under section 12(3) was to be entertained it ought to have been filed within the time period prescribed under section 13(2) of the Arbitration Act which runs as under:

“13(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.”

9. It is alleged by the petitioner such an application ought to have been moved within 15 days of the appointment of Mr.Y.P. Khurana or on respondent coming to know of the circumstances which led to an apprehension of Mr.Y.P. Khurana being biased. Admittedly Mr.Y.P. Khurana was appointed as an arbitrator on 09.12.2015 and his appointment was communicated to the respondent on 14.12.2015. Moreso on 14.12.2015 the respondent was allegedly aware of circumstances of his alleged bias as admittedly the respondent had filed an application dated 20.02.2015 in Reference II, thus ought to have moved an application under Section 13(2) of the Act on or before 29.12.2015. It is alleged since the said application was never moved within a period of 15 days from 14.12.2015 the impugned order entertaining the application under section

12(3) of the Act was bad/illegal on grounds of limitation and even on merits too it cannot be sustained.

10. Considering the history of this case where this learned arbitrator was appointed in reference-II and there being enough evidence to show the respondent had challenged the appointment of Mr.Y.P.Khurana in Reference II, then the petitioner yet again insisting to appoint the same arbitrator in Reference I do show its intention to create unnecessary dispute. Mr.Y.P. Khurana since was appointed in Reference I despite his opposition in Reference II so the respondent rightly asked the learned arbitrator to make a declaration which he initially refused and hence it was only on 13.03.2016 when the respondent received an intimation about constitution of new Arbitral Tribunal, inclusive of Mr.Y.P.Khurana that it filed an application on 28.03.2016 challenging his appointment viz., within 15 days as contemplated in Section 12(3) of the Act and ultimately on 02.04.2016 such application was taken up and decided by the impugned order dated 06.01.2017. Hence such objection was within limitation.

11. The Arbitral tribunal has dealt with the issue of limitation as under:-

“3. The Respondent and the esteemed arbitrator facing the challenge are strongly advocating that since the Claimant did not file its application within 15 days after 14th December 2015, application is time barred and needs to be rejected on this ground alone. We sincerely feel that this is just a technical ground and its okay for the respondent to say so. But the person who has been challenged should not avoid tendering his/her resignation on the basis of such flimsy grounds. Delivering justice through adjudication process is based on beliefs of both the parties that the adjudicating body is independent, fair and impartial. An adjudication process cannot and should not proceed with doubt about the independence and impartiality of the adjudicating body in the minds of one of the parties.

4. We do not agree that the Claimant did not file application within the time limit of 15 days specified in the Act on following grounds-

(a) Claimant sought declaration of the nominee arbitrator from the Respondent within 5 days after the issue of letter of the Respondent nominating its Arbitrator. (Ref: Letters dated. 09th December 2015 and 14th December 2015 from the Respondent/Claimant respectively).

(b) Respondent responded vide its letter dated 23rd December 2015 that such a declaration is not necessary. We disapprove of the stand taken by the Respondent on following counts-

(i) Amendment Ordinance was promulgated by Government of India on 23rd October 2016, Ordinance did not specifically mention in so many words that "Nothing contained in this Act/Ordinance (Amendment Ordinance 2015) shall apply to the proceedings commenced in accordance with Section 21 of the principal Act (meaning A&C Act 1996) unless the parties otherwise agree. This Act /Ordinance shall apply in relation to arbitral proceedings. commenced on or after the date of commencement of this Act/Ordinance."

(ii) Such specific mention about the date from which the Amendment Act would apply was brought out for the first time in Section 26 of the "Arbitration and Conciliation (Amendment) Act, 2015 "(Act 3of 2016), published on 1st January 2016.

(iii) I am enclosing herewith soft copy of the Government of India Gazette dated 23rd October 2015. You may please show me such provision in this Ordinance, if there is any. My perception is there is none. And therefore Respondent could not have said on 23rd December 2015 that the Ordinance is not applicable to existing arbitrations. The Respondent we feel has erred.

(iv) I am also enclosing soft copy of the Government of India Gazette dated 01st January 2016. Please see Section 26 on page 15 of this Gazette of India Extraordinary. These provisions/clarifications to my mind came into existence only on 01st January 2016. And only after publication of the notification dated 01st January 2016, it became evident that the amendment brought into operation with effect from 23rd October 2016 is not applicable to arbitration where proceedings had begun before 23rd October 2016.

(v) Claimant has brought on record some correspondence pertaining to reference-II Arbitration between the same parties and relating to the same project. This contains an application dated 20th February 2015 from the Claimant addressed to that Arbitral Tribunal. Para 2 of the said application reads as under-

"Conduct of the Learned Arbitrator is suggestive of a strong bias and prejudice towards the respondent and against the Claimant at any cost." We know that before this application could be decided by that Arbitral Tribunal, the Presiding Arbitrator resigned on personal grounds and that Tribunal is yet to be reconstituted. (vi) Section 12(1) of the principal Act (A&C Act, 2015) reads as under-

"When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give justifiable doubts as to his independence and impartiality."

It is thus clear that under the principal Act also such declaration in writing is necessary.

(vii) Please note such a declaration in writing is to be given when a person is approached in connection with his possible appointment. This provision is usually interpreted in such away that a negative declaration is not necessary. That is to say that if no circumstances

exist giving rise to any justifiable doubt etc. such a declaration in advance "when a person is approached etc." is not necessary. And therefore Arbitrators by and large, make such declarations during first hearing of the Arbitral Tribunal. In this connection a reference is invited to paragraph 40 of the Delhi High Court Judgment 2069(2) Arb. LR 238 NTPC Ltd. Vs. WIG Brothers Ltd.

(viii) in this particular case, there existed a background and the Claimant had already raised a plea challenging your independence and impartiality on 20th February 2015. Therefore a specific declaration under Section 12(1) of the A&C Act 1996, when you were approached with possible appointment as an arbitrator, was very much mandatory in your case.

(ix) Respondent was also aware that such an application of the claimant alleging bias against you was on record in an another arbitration between the same parties and pertaining to the same project. And therefore Respondent could not and should not have said that the such a declaration from you was not necessary, even if it believed that no declaration is necessary in the formats scheduled under the new Ordinance was not necessary.

(c) Claimant persisted in its letter dated 11th January 2016 addressed to the Respondent with a copy to you that the provisions contained in the Ordinance dated 23rd October 2016 are applicable. It further stated that "Lt General Khurana is not willing to make such a declaration. It would give justifiable doubts regarding his independence and impartiality. The said doubts would be further compounded by previous conduct of Lt. General Khurana in reference No.2 in which the Claimant had filed written objections in the said proceedings.

(d) No reply to this communication either from you or from the Respondent is on record.

(e) It may please be noted that once the Claimant specifically brought out on 11th January 2016 his apprehensions in your appointment as an Arbitrator, you were duty bound to provide such a declaration as per Section 12(1) of old Act of 1966. Claimant had full right to not to accept your appointment as an arbitrator till it does not receive such a declaration from you. Therefore, we hold that your appointment as Arbitrator was not final and conclusive, till such a declaration was not received by the Claimant and was not accepted by you.

(f) In the meanwhile, as Presiding Arbitrator, I went ahead with scheduling the next date of hearing in consultation with both the esteemed arbitrators and issued my notification dated 13th March 2016 specifying the date of the hearing as 02nd April 2016.

(g) We agree with the Claimant's argument that on receipt of copy of this notification, the Claimant knew about the re-constitution of the Arbitral Tribunal. Claimant's application under Section 12(3) is dated 28th March 2016. Please note Section 13(2) of the Act mandates that "Party who intends to challenge the, arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal etc. send a written statement of reasons for the challenge to the Arbitral Tribunal."

(h) Taking the above facts into account, we hold that the application of the Claimant challenging the appointment of the newly inducted arbitrator under Section 12(3) of the Act is not time barred. Claimant was awaiting Declaration from the arbitrator as per Section 12(1) of

the Act, which did not come about. In the meanwhile Claimant learnt vide Presiding Arbitrator's notification dated 13th March 2016 that the Arbitral Tribunal has been constituted and the date of the hearing has also been notified. After learning about these developments, Claimant submitted its application dated 28th March 2016. Therefore this application cannot be considered as time barred.

(i) In view of the circumstances as explained above, we do not see the direct applicability of Madras High Court Judgment Novel Granites Ltd. Vs. Lakshmi General Finance Ltd. referred to by the respondent. In the present case, there existed a specific instance where the Claimant had already filed an application raising doubt over the independence and impartiality in a different matter a couple of months ago. After knowing about the appointment of the same arbitrator in the present case once again, the Claimant was just insisting on the Declaration from the arbitrator under Section 12(1). On the basis of previous background, such a declaration from the person concerned was an obligatory requirement as per Section 12(1) of the old Act of 1996. There was legitimate reason why the Claimant did not move the application immediately. The moment it became evident that the said declaration is not forthcoming and the arbitral tribunal has been constituted, the Claimant filed the application under Section 12(3) of the Act. Therefore it cannot be stated that the Claimant delayed filing the application under Section 12(3) and the matter is time barred."

12. Qua bias I may refer to the finding of the learned tribunal as under:

"45. We feel that Arbitration is a quasi-judicial process, where parties are referring their differences and disputes to an independent and impartial body for adjudication. If one of the parties feels that the forum is not impartial and harbors a feeling that the forum is biased, the very basis of belief that the body is independent and impartial gets a severe jolt. Yes, the person challenged has full right to hold his or her own opinion that the allegations are false. One would feel hurt too. But traditions and prestige of the adjudication system need to be given priority.

46. We imagined ourselves individually in such a situation and came to a conclusion after analyzing the situation as it prevails in this particular matter dispassionately, that the benefit of doubt in such circumstances has to go to the party who has raised this plea.

47. The Respondent: and the esteemed arbitrator facing the challenge are strongly advocating that since the Claimant did not file its application within 15 days after 14th December 2015, application is time barred and needs to be rejected on this ground alone. We sincerely feel that this is just a technical ground and its okay for the Respondent to say so. But the person who has been challenged should not avoid tendering his/her resignation on the basis of such flimsy grounds. Delivering justice through adjudication process is based on beliefs of both the parties that the adjudicating body is independent, fair and impartial. An adjudication process cannot and should not proceed with doubt about the independence and impartiality of the adjudicating body in the minds of one of the parties, particularly when the party concerned has very forcefully pleaded its case, citing reasons behind its apprehensions.

48. xxxxxx

vi. The Act clearly specifies that such a declaration in writing is to be given when a person is approached in connection with his possible appointment. This provision is usually interpreted in such a way that a negative declaration is not necessary. That is to say that if no circumstances exist giving rise to any justifiable doubt etc. such a declaration in advance "when a person is approached etc." is not necessary. And therefore Arbitrators by and large, make such declarations during first hearing of the Arbitral Tribunal. In this connection a reference is invited to paragraph 40 of the Delhi High Court Judgment 2009(2) Arb. LR 238 NTPC Ltd. Vs. WIG Brothers Ltd.

53. Application under Section 12(3) dated 28th March 2016 was filed by the Claimant during 1st hearing of the reconstituted Arbitral Tribunal held on 02nd April 2016, After induction of Lt. General Khurana. Three subsequent hearings were held to hear arguments on 19th September 2016 and 05th October 2016. We were expecting Lt. General Khurana to be a silent spectator during these hearings because he was the person who was facing the allegations. We did not expect him to be freely confronting the Claimant during arguments but he did. His body language was also not proper. Things didn't stop at that. Two internal meetings were held on 15th October 2016 and 17th November 2016. Immediately after first Internal Meeting, he addressed a letter enclosing a seventeen pages note to both of us explaining as to how the application needs to be rejected. During second internal meeting/ he handed over to us a legal citation supporting his case. We feel that if Lt. General Khurana is in such a state of mind and he is emotionally involved with the outcome of this application to such an extent, how would he be able to pardon the Claimant who is cause of this embarrassment to him? Would he be able to look at the matter that would be placed before him neutrally?

54. We now deal with the legal citations referred to by the Respondent and by the learned Arbitrator Lt. General Khurana himself supporting their respective cases individually.

55. Novel Granites Ltd. vs. Lakshmi General Finance Ltd.

a. The Respondent has contended that the Claimant has not challenged the appointment of the arbitrator within 15 days starting from its letter dated 09.12.2015, therefore the present challenge to appointment is not maintainable. In support of the said argument, the Respondent has submitted this judgment wherein it has been held that belated challenge to the appointment of an arbitrator cannot be entertained in terms of section 13(2) of the Arbitration and Conciliation Act, 1996.

b. However, we are of the view that the present Application is not hit by 15 days limitation as mentioned in section 13(2) of the Act. The reasons for the same have already been discussed in the preceding section of this order. Further, Novel Granites Ltd. judgment (supra) has no applicability in the present case. In the said case, the petitioner had, in fact, participated in the arbitral proceedings and later, approached the court in order to challenge the appointment of arbitrator. However, in the instant case, the Claimant had moved the Application at the very first opportunity without participating in the proceedings of the Tribunal.

56. NATIONAL THERMAL POWER CORPORATION LTD.

V. WIG BROTHERS (BUILDERS AND ENGINEERS) LTD.

a. In this case, the petitioner had filed objections under section 34 read with sections 12, 13, 16, 18, 28(3) and 31 of the Act against the award before Hon'ble High Court. The said award was largely upheld by the High Court.

b. However, the High Court had rejected the challenge to the award on the ground that petitioner has justifiable doubts as to the 'independence/ impartiality of the arbitral tribunal in view of the manner in which it was constituted. In this regard, the Hon'ble High Court observed that the manner in which the arbitral tribunal is constituted cannot give rise to any justifiable doubts about tribunal's independence or impartiality. The Hon'ble High Court also observed that the Act provides that the disclosure has to be given by arbitrators only if there exists grounds, which would give rise to justifiable doubts about their independence or impartiality.

c. We agree with the aforesaid observations made by the Hon'ble High Court. However, the present application is not about doubts arising due to manner in which the arbitrator was appointed. Further, we agree that mere reproduction of the words "justifiable doubts as to the independence or impartiality" in themselves do not confer any right and doesn't automatically give rise to justifiable doubt. Such bias has to be shown from the record with reference to specific instances.

d. In the present case, the Petitioner has pointed out specific instances and produced stack of evidence, in the form of minutes from 2nd hearing till 9th hearing passed by the arbitral tribunal in Reference II and correspondence exchanged between the parties at the relevant point in time, to establish that the Ld. Member has given an impression that he is not independent or impartial.

61. After going through the deliberations made above, the question that we need to address ourselves is that "whether a reasonable person, in possession of relevant information which is before us, would think that the bias is likely." And when we analyze the matter keeping this perspective in our minds, we come to a conclusion that the answer is affirmative."

13. A bare perusal of the above would reveal the reasoning is self explanatory. All facts were taken into consideration by the learned tribunal to determine if there is bias on the part of the learned arbitrator or not or whether in the circumstances Sh.Y.P.Khurana should continue or not. Hence this part of the order also needs no intervention.

14. Another issue raised before me is if the decision dated 06.01.2017 could be considered as an award or an interim award which could be subject to challenge under Section 34 of the Act. The petitioner relied upon *National Highway Authority of India vs. Baharampore-Farakka*

Highways Ltd. FAO (OS) (COMM.) 47/2017 decided on 02.03.2017

wherein the Division Bench of this Court held:

“35. Sub Section 4 of Section 13 provides that 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 is to continue with the arbitral proceedings and make an arbitral award. Sub Section 5 provides that 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.

36. On a conjoint reading of Section 13 with Section 34 of the 1996 Act, it appears to us that there is no bar in law to challenging a decision of an Arbitral Tribunal on the challenge to the constitution of the Arbitral Tribunal, which is an interim award, by filing an application under Section 34 of the 1996 Act. Section 13 read with Section 34 is to be construed to mean that an unsuccessful challenge to the Arbitral Tribunal would not in itself entitle the unsuccessful appellant to stay away from the arbitral proceeding or to insist on stay of the arbitral proceedings. The arbitral proceedings would continue until and unless the challenge succeeded. If the unsuccessful party filed an application under Section 34 for setting aside of the interim award, the arbitral proceedings would continue until party challenging the Arbitrator succeeded and the interim award was actually set aside by the Court.”

15. The Division Bench though held the order under Section 12(3) would amount to an interim award but I may say the judgment above did not consider various other judgments e.g., *a) Union of India & Another vs. M/s. East Coast Boar Builders & Engineers Ltd. 76 (1998) DLT 958* which notes:

“xxxxxxx The difficulty, however, is in accepting the submission that the order of the arbitrators dated 6th Sept, 1973 is an interim award. Before an order of the arbitrators may be held to be an interim award, it must decide a part of the claim or an issue of liability. What the arbitrators did in this case was to decide a preliminary issue relating to their jurisdiction. As the order of the arbitrators does not decide the claim or even any part of the claim of any issue of liability, it cannot be held to be an interim award. xxxxxxxx

“By an interim award the arbitrator has to decide a part of the dispute referred to him. He may decide some of the issues or some of the Claims referred. He may determine the issue of liability by leaving the question of the amount of damages to be dealt with later. An interim award must determine some part of the dispute referred to the arbitrator.”

b) *Centrotrade Minerals & Metal Inc. vs. Hindustan Copper Limited* (2017) 2 SCC 228 which notes:

“9. The general principle that we have accepted is supported by two passages in *Comparative International Commercial Arbitration*.¹ In paragraph 24-3 thereof reference is made to Article 31(1) of the United Nations Commission on International Trade Law (or UNCITRAL) Rules to suggest that while all awards are decisions of the arbitral tribunal, all decisions of the arbitral tribunal are not awards. Similarly, while a decision is generic, an award is a more specific decision that affects the rights of the parties, has important consequences and can be enforced. The distinction between an award and a decision of an arbitral tribunal is summarized in Paragraph 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 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').

11. In *International Commercial Arbitration*³ the general characteristics of an award are stated. In Paragraph 1353 it is stated as follows:

1353.-An arbitral award can be defined as a final decision by the arbitrators on all or part of the dispute submitted to them, whether it concerns the merits of the dispute, jurisdiction, or a procedural issue leading them to end the proceedings.”

c) *Progressive Career Academy Pvt. Ltd. vs. FIIT JEE Ltd.* in O.M.P. 297/2006 decided on 16.05.2011 which notes:

“1. The question in this bunch of Appeals concerns the legal propriety of judicial directions for the removal of an arbitrator even before the publishing of an Award. xxxxx

20. xxxx 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.

22. xxxxx...The Referral Order is answered by reiterating that the statute does not postulate judicial interference in arbitral proceedings till the Award is published, whereupon Objections can be raised also on the platform of the alleged bias of the Tribunal. This challenge is possible provided the grievance is articulated in consonance with Section 13 of the A&C Act."

d) A.Ayyasamy vs. A.Paramsivam and others (2016) 10 SCC 386

the Court which notes:

"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."

e) SBP & Co. vs. Patel Engineering Ltd. and Another (2005) 8

SCC 618 which held:

"45. It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. 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. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible.

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 or under Article 226 of the Constitution 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.

47. xxxx

(vi) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

xxxx”

f) in HRD Corporation (Marcus Oil And Chemical Division) vs. GAIL (India) Limited O.M.P.(T) (COMM) 22/2017 decided on 24.04.2017 wherein the Single Judge considered Baharampore (supra) and various other judgments cited by me above, in para 23 noted as below:

“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 Centrotech 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."

g) the supreme court upheld the above judgment in *HRD Corporation vs. GAIL* 2017(10) SCALE 371 as follows:

"xxxxx 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. xxxxxx"

16. Thus in view of the judgments cited above, it would even otherwise be not appropriate to entertain this petition under Section 34 of the Arbitration and Conciliation Act since the impugned decision cannot be treated as an *interim award*. Moreso even if it is to be treated as an award then also I need not interfere as the learned tribunal had considered all aspects, including challenges made against the learned arbitrator in Reference-II and his adverse behavior and only then have rendered its decision qua **(a)** limitation and **(b)** bias. I need not interfere in the reasoned order of the tribunal since am not sitting in appeal against such order.

17. Since the petitioner initially had nominated two separate arbitrators for two References viz. I and II hence if a different arbitrator is appointed in Reference I it shall hardly prejudice the petitioner. The petition has no

merit and is thus dismissed. The pending application also stands dismissed.

18. No order as to costs.

YOGESH KHANNA, J

APRIL 12, 2018

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