

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

Raghani Tradelink Pvt. Ltd. & Ors. ..Petitioners
Vs.
HDB Financial Services Ltd. & Anr. ..Respondents

“(i) The Respondents do pay to the Claimant a sum of Rs.16881042/- (Rupees One Crore Sixty Eight Lakhs Eighty One Thousand Forty Two Only) together with interest calculated on this outstanding due amount Rs.16881042/- @ 18% per annum from the date of award till the payment by the Respondents of realization there of

by the Claimant. Besides this, the Claimant have their right to lien over the mortgaged immovable property situated at Siddha Villa Space – 4to7, Block (2nd), 1st Floor, 27 Marquis Street, Kolkata – 700016 until the payment of decrrial amount has been made by the Respondents in full.

(ii) The Claimant can recover the outstanding dues from the Respondents by appropriating the monies, securities, assets or deposits of the Respondents, which are in possession of the Claimant under any other account, scheme and agreement and can exercise all or any of its rights under any of the Borrower's or the Co-Borrower's or the Guarantor's Agreement (including this Agreement) with the Claimant at the sole discretion of the Claimant.

(iii) The Respondents, in the first instance, do pay to the Claimant the costs of arbitral proceedings including the fee of arbitrator quantified at Rs.6000/- and an amount of Rs.500/- towards expenses incurred in Stamp Duty imposed on this award, as the same has been received from the Claimant. The Claimant is further directed to deduct the amount from the award amount, if any, paid by the Respondents during the arbitration proceedings i.e. from the date of commencement till date of award.”

2. In brief the facts are: The petitioner No.1 is a company incorporated under the Companies Act, 1956 and is stated to be engaged inter-alia, in the business of textile brokerage of sarees and dress material for the past twenty years. It is stated that the business of petitioner No.1 is centered in the city of Kolkata and all business transactions are executed and performed in Kolkata.

3. As averred in the petition sometime in December 2013, the petitioner had approached respondent No.1 in its office at Maniktala,

Kolkata, with a proposal/request of availing a term loan of Rs.1,60,00,000/-. Respondent No.1 conducting a thorough study of the petitioner No.1's business and the related industry, sanctioned a term loan of Rs.1,60,70,059/- in favour of the petitioner No.1 and issued a sanction letter dated 28 December 2013, at an interest rate of 13.5% p.a.

4. Consequent to the sanction letter, an agreement dated 30 December 2013 was executed at "Kolkata" between respondent No.1 (branch at Maniktala, Kolkata) and the petitioner No.1. The agreement stipulated that the loan amount along with interest was to be repaid within 120 months in equal installments of Rs.2,44,706/- each. The equated monthly installments were to commence from 4 February 2014 and end on 4 January 2024. The loan amount was also disbursed to petitioner No.1 at Kolkata. It is stated that petitioner No.1 diligently remitted all the EMIs in spite of the industry being in severe recession resulting in a severe cash crunch for the petitioner No.1. All such remittances were from Petitioner No.1's bank account at Kolkata to respondent No.1's bank account at Kolkata.

5. It is the petitioners' case that in or around January 2016, owing to a continued recessionary spree, petitioner No.1 was constrained to

approach respondent No.1's-Maniktala, Kolkata Branch with a request for an extended time to clear the two overdue EMIs, for a reduction in the quantum of each EMI and an extension of the repayment period. However, this request of the petitioner No.1 was not considered and neglected by the respondents. The respondents in turn addressed a loan recall notice dated 18 January 2016 to the petitioner recalling the entire loan amount of Rs.1,58,59,229/-.

6. It is the petitioners' case that after repeated requests, respondent No.1's branch at Kolkata finally agreed to the petitioner No.1's request and agreed to restructure the entire loan schedule. This was informed to the petitioner No.1 by an e-mail dated 22 January 2016 whereby respondent No.1 recorded that it had approved the reduction of the EMI to Rs.1,65,000/- and the repayment tenure was extended to 12 years and the two overdue EMIs were to be paid by 26 March 2016 and 30 June 2016 respectively. Another letter dated 18 March 2016 was addressed by respondent No.1 to the petitioners whereby the rescheduled structure of the term loan and the reduction of the installment from Rs.2,45,341/- to Rs.1,65,000/- for 12 years with effect from 10 February 2016 was confirmed. The petitioners were instructed to pay the overdue amount by June 2016 in order to get the term loan account regularized.

7. It is stated by the petitioners that accordingly petitioner No.1 remitted the EMI of Rs.1,65,000/- for the month of February 2016. It is stated that in the meantime, the EMI has become overdue and the petitioner No.1 was arranging for funds to clear the overdue EMIs and to pay the EMI for March 2016 when a notice dated 22 March 2016 was received by the petitioners from the Advocates of respondent No.1 calling upon the petitioners to make immediate repayment of Rs.1,57,69,174/- with interest i.e. the entire loan amount, while also indicating the respondent No.1's intention to initiate arbitral proceedings against the petitioners.

8. The petitioners state that there was however no cause of action to initiate such proceedings as the petitioner No.1 had paid all but only two EMIs till March 2016 and respondent No.1 had itself allowed the petitioner No.1 to clear the 2 overdue EMIs by June 2016. It is stated that in fact, on the date of said notice petitioner No.1 was just 12 days behind remitting the EMI till March 2016 and was in fact in the process of remitting the same. Case of the petitioners is that the said notice was illegally and malafidely issued. The petitioners by their letter dated 7 April 2016 responded to the said notice of respondent No.1's Advocate.

9. It is stated that on this background, respondent No.1 initiated arbitral proceedings against the petitioners invoking the arbitration clause in terms of the agreement. It is stated that respondent No.1 appointed an arbitral tribunal by a letter dated 31 March 2016 which was addressed by respondent No.1 to Mr.Anis Ahmed, Advocate who was intended to be appointed as a sole arbitrator. This letter was referred as "Letter of Intent" for appointment of sole arbitrator under loan agreement 556880 dated 30 December 2013 a copy of which was forwarded to the petitioners. It is stated that on the same day (31.03.2016) learned arbitrator Mr.Anis Ahmed informed respondent No.1 that he was willing to take up the arbitration being appointed as a sole arbitrator by respondent No.1 and enclosed therewith a disclosure in the prescribed format as per the Sixth Schedule being a requirement of Section 12(1) of the Arbitration and Conciliation (Amendment) Act, 2015. Consequently, respondent No.1 issued a letter dated 11 April 2016 to the learned arbitrator inter-alia recording as under:-

“ Dated : 11.04.2016

To,
Shri ANIS AHMED, Advocate
313, 3rd Floor, D-Wing, Kanakia Zillion L.B.S. Marg
Junction, CST Road, Near Kurla Depot (West),
BKC Annexe, Kurla (West), Mumbai – 400 070,
Maharashtra.

Sub.: For initiation of Arbitration Proceedings against
Raghani Tradelink Pvt. Ltd., Dinesh Raghani & Deepak
Raghani & Smt. Lajwanti Raghani & Smt. Hemlata Raghani

& Smt. Aanchal Raghani & Kanayalal Raghani & Dilip Raghani in respect of Loan Agreement No.556880 Dated 30.12.2013.

Sir,

We HDB Financial Services Ltd., having Registered Office at Radhika, 2nd Floor, Law Garden Road, Navrangpura, Ahmedabad – 380009, Gujarat had entered into a contract dated 30.12.2013 Ref. No. 556880 with Raghani Tradelink Pvt. Ltd., Dinesh Raghani & Deepak Raghani & Smt. Lajwanti Raghani & Smt. Hemlata Raghani & Smt. Aanchal Raghani & Kanayalal Raghani & Dilip Raghani for Loan Against Property (finance) facility. The contract, inter alia, provides for settlement of any dispute arising under the contract by arbitration of a sole arbitrator. A dispute has arisen under the contract between the parties with regard to the terms and conditions of the agreement.

We would like to appoint you as the sole arbitrator for adjudication of the dispute in the captioned loan account, wherein Raghani Tradelink Pvt. Ltd., Dinesh Raghani & Deepak Raghani & Smt. Lajwanti Raghani & Smt. Hemlata Raghani & Smt. Aanchal Raghani & Kanayalal Raghani & Dilip Raghani, the parties to the contract have already agreed to the term wherein the power to appoint Sole Arbitrator is irrevocably vested with HDB Financial Services Ltd., hence they have explicitly concurred in your appointment and designation as sole arbitrator in the loan agreement aforesaid. The contract provides for the settlement of disputes in accordance with the Arbitration and Conciliation Act, 1996. If you are willing to accede to our request, kindly confirm acceptance in writing to Raghani Tradelink Pvt. Ltd., Dinesh Raghani & Deepak Raghani & Smt. Lajwanti Raghani & Smt. Hemlata Raghani & Smt. Aanchal Raghani & Kanayalal Raghani & Dilip Raghani and to us so that the dispute can be resolved.

The last known place of business/habitual residence of mailing address for service of Raghani Tradelink Pvt. Ltd., Dinesh Raghani & Deepak Rathani & Smt. Lajwanti Raghani & Smt. Hemlata Raghani & Smt. Aanchal Raghani & Kanayalal Raghani & Dilip Raghani is as follows:-

.....”

10. The petitioners contend that on the same day i.e. on 11 April 2016 when the learned sole arbitrator was informed of his appointment

by respondent No.1, a statement of claim dated 11 April 2016 came to be filed on behalf of the respondent No.1 making a claim for an award in the amount of Rs.1,57,69,174/- with interest. The petitioners appeared before the arbitral tribunal and submitted an application raising preliminary objection under Section 16 of the Act inter-alia contending that the arbitral tribunal would have no jurisdiction to conduct the arbitral proceedings at Mumbai in as much as, as per the loan agreement, the place of arbitration was supposed to be mentioned but it was left blank as the transaction had taken place in Kolkata where the said agreement was also executed and the address of the parties to the arbitration proceedings should be taken into consideration in order to decide the place of arbitration. The petitioners in support of its contention referred to the decisions of Supreme Court and Delhi High Court as set out in the said objection application and prayed before the arbitral tribunal to dismiss the arbitration proceedings.

11. On 10 June 2016, respondent No.1 replied to the petitioners' application filed under Section 16 of the ACA. The petitioners contend that the petitioners were surprised to note that on behalf of respondent No.1, a loan agreement was annexed to the reply, in which in clause 29 place of arbitration in the blank space was filled by a handwritten entry to be at Mumbai. The petitioners contended that it was apparent to the

naked eye that the handwriting in which the entire form was filled and the one in which the word “Mumbai” was written were totally different and were written in different ink. The petitioners contended that this was a serious misconduct on the part of respondent No.1. The petitioners raised an objection and requested the permission of respondent No.2 to file a rejoinder to the said reply of respondent No.1, however this permission was rejected by the arbitrator without giving any justifiable reason.

12. Thereafter learned arbitrator passed an order dated 22 July 2016 on the application of the petitioners under Section 16 of the ACA whereby it was held that in terms of clause 29 of the loan agreement the place of jurisdiction of the arbitration proceeding was to be at Mumbai and accordingly arbitral tribunal has jurisdiction to decide venue of the arbitration as Mumbai. The petitioners thereafter filed a written statement to the statement of claim. The respondents also filed an affidavit of evidence. Learned arbitrator thereafter recorded oral evidence of the parties.

13. It is stated that thereafter on 25 November 2016, Advocate for the petitioners filed an application under Sections 12 and 13 of the ACA praying that the learned arbitrator-respondent No.2 should recuse

himself from conducting the arbitration due to his biased and partial conduct. This application was replied by respondent No.1 on 27 December 2016. By an order dated 9 January 2017 arbitral tribunal dismissed the said application of the petitioners under Sections 12 and 13 of the ACA. The learned arbitrator thereafter proceeded to consider the written submissions as filed on behalf of the respondents and passed the impugned award on 17 March 2017. On the above background, the present petition has been filed.

14. Learned Counsel for the petitioners in challenging the impugned award would submit that the award is required to be set aside for the basic reason that the appointment of the learned arbitrator by respondents was itself illegal and thus, the entire arbitral proceedings were illegal. Secondly it is submitted that the learned arbitrator has failed to consider that the arbitral proceedings were initiated in pursuance of Clause 29 of the agreement dated 30 December 2013. It is submitted that on 18 March 2016 when respondent No.1 confirmed and restructured schedule of payment, there was no dispute with regard to the outstanding payment of the EMI for the month of March 2016 which according to the petitioners was evident from the letter dated 18 March 2016. Thus, on 22 March 2016 according to the petitioners, there was no dispute between the petitioners and respondent No.1. Let

alone a dispute which was notified for resolution under Clause 29 being arbitration clause and therefore, the arbitration itself could not have been invoked and arbitrator appointed, until such payments were to be made by the petitioners. Further a notice should have been issued to amicably resolve the disputes within a period of 30 days from the date of such notice, but no such notice was issued.

15. Learned Counsel for the petitioners next contended that the arbitral tribunal had no jurisdiction to adjudicate the disputes and differences which had actually arisen under the subject agreement which was executed at Kolkata, and the venue of the arbitration could not have been at Mumbai as the entire transaction between the parties had taken place at Kolkata, including execution of the loan agreement.

16. Learned Counsel for the petitioners would contend that respondent No.1 had appointed the learned arbitrator as per clause 29 of the loan agreement (dated 30 December 2013). The petitioners did not have any say whatsoever in such appointment as respondent No.1 was exclusively empowered in that regard. It is submitted that as such respondent No.1 was all the more obligated to ensure that such appointment adhered to the stipulations of the said Act. It is submitted that the petitioners had appeared before the arbitral tribunal and had

sought documents. It is stated that pertinently a copy of the disclosure made under Section 12(1) of the ACA by the learned arbitrator was not a part of such documents. It is submitted that the disclosure under Section 12(1) of the ACA was a *sine qua non* for an arbitrator under the scheme of the ACT as it casts an obligation on the arbitrator to act in a transparent and fair manner. This disclosure was provided to the petitioners at a belated stage.

17. Learned Counsel for the petitioners has referred to the answer of interrogatories filed by respondent No.1 (page 429, Exh.GG) in which the respondent has answered that there are more than 200 arbitrations with the same arbitrator of respondent No.1. Learned Counsel for the petitioners therefore would submit that there were sufficient grounds to raise justifiable doubts on the impartiality of the learned arbitrator. Learned Counsel for the petitioners submits that in the application filed by the petitioners under Section 12 and 13 of the ACA, the petitioners had clearly averred that the disclosure of the learned arbitrator is highly inaccurate as also there are contradictions as the respondent No.1 had stated that the learned arbitrator had appointed the arbitrator (respondent No.2) in more than 200 arbitration proceedings, initiated by respondent No.1 and on the other hand, disclosure of the arbitrator records that there are 80 arbitration proceedings. Learned Counsel for

the petitioners would submit that all this clearly raised justifiable doubts as to the impartiality of the arbitral tribunal in terms of item 22 of the Fifth Schedule to the Act. In support of his contentions, learned Counsel for the petitioners placed reliance on the decision of the Supreme Court in **HRD Corporation (Marcus Oil & Chemical Division vs. GAIL (India) Limited (formerly Gas Authority of India Ltd.)**¹. Learned Counsel for the petitioners would submit that on this basic premise, the arbitral award is required to be quashed and set aside.

18. In addition to the above submissions, learned Counsel for the petitioners would also submit that the impugned award is in breach of principles of natural justice, as the learned arbitrator did not permit the petitioners to conduct cross-examination of the respondents' witness. In support of his submission, learned Counsel for the petitioners placed reliance on the decision of this Court in *Vedansh Hospitality and Resorts Limited vs. New India Co-operative Bank Ltd.*².

19. It is next submitted that the arbitral tribunal acted without having jurisdiction in as much as the entire cause of action had taken place in Kolkata. It is submitted that learned arbitrator has failed to consider the evidence in regard to the insertion of word "Mumbai" in the

1 (2018) 12 SCC 471

2 2013(4) Bom CR 292

agreement and thus, the loan agreement as relied on behalf of the respondent being a forged document itself was not decided by the learned arbitrator. It is contended that a copy of the agreement as supplied to the petitioners by respondent (page No.500) in clause No.18 as produced by the respondent place of arbitration was kept blank. All these issues were required to be addressed by the learned arbitrator. Learned Counsel for the petitioners would accordingly contend that the impugned award is illegal being in conflict with the public policy.

20. Having heard learned Counsel for the parties and having perused the record and the impugned award, at the outset, arbitration agreement between the parties as contained in clause 29 of the loan agreement dated 30 December 2013 is required to be noted which reads thus:-

“29. Arbitration

In the event of any dispute or differences arising directly or indirectly out of any of the Facility Documents or otherwise, the Parties undertake to use all reasonable endeavours to resolve such disputes amicably. If disputes and differences cannot be settled amicably within a period of 30 (thirty) days from the date on which notice of the dispute is given to the other Party, then all disputes and differences arising between the Parties hereto in connection with any of the Facility Documents shall be referred to Arbitration. Such disputes, differences and/or claims arising out of the Facility Documents or as to the construction, meaning or effect thereof or as to the rights and liabilities of the parties thereunder shall be settled by Arbitration to be held at the place stated in Clause No. 18 of Schedule I hereto in accordance with the provisions of the (Indian) Arbitration

and Conciliation Act, 1996 or any statutory amendments thereof or any statute enacted for replacement therefore and shall be referred to the sole arbitration of a person to be appointed by HDBFSL. The expenses of the arbitration shall be borne in such manner as the arbitrator may determine. In the event of death, refusal, neglect, inability or incapability of the person so appointed to act as an arbitrator, HDBFSL shall appoint a new arbitrator. The arbitration proceedings shall be conducted in English. The award including interim award/s of the arbitration shall be final, conclusive and binding on all parties concerned. The arbitrator may lay down from time to time the procedure to be followed by him in conducting arbitration proceedings and shall conduct the arbitration proceedings in such manner as he considers appropriate.”

(emphasis supplied)

21. A perusal of the above arbitration clause makes it clear that the parties agreed that in the event after making all endeavours to resolve the disputes amicably, if the disputes cannot be settled amicably within 30 days from which a notice of disputes is given only in that event any disputes and differences arising between the parties under the said agreement, disputes shall be referred to the sole arbitration of a person to be appointed by respondent No.1. It is the case of the respondent that the disputes and differences between the parties arose sometime in March 2016 this without any 30 days notice that an endeavour of amicable resolution has failed, respondent No.1 straightway issued a letter of intent dated 31 March 2016 to the learned arbitrator seeking to appoint him to arbitrate the disputes between the parties instantly on the same day. On the same day the learned arbitrator issued an

acceptance letter dated 31 March 2016 granting his consent to adjudicate the disputes between the parties. Also the learned arbitrator issued a disclosure statement dated 31 March 2016. It would be appropriate to note this letter dated 31 March 2016 addressed by learned arbitrator to respondent No.1 in regard to the disclosure a copy of the same was also forwarded to the petitioners which reads thus:-

“To,
HDB Financial Services Ltd.
Registered Office at
Radhika, 2nd Floor, Law Garden Road, Navrangpura,
Ahmedabad – 380009, Gujarat.

Sub: Disclosure under Arbitration and Conciliation Act, 1996.

In Re: Agreement No.556880

Dear Sir,

This is with reference to your letter dated 31.03.2016 regarding your intent to appoint me as a Sole Arbitrator.

Please find enclosed the statutory Disclosure in the prescribed format under Sixth Schedule as per Section 12(1) of Arbitration and Conciliation (Amendment) Act, 2015, in connection with my possible appointment of Sole Arbitrator.

Thanking you,

sd/-

Shri ANIS AHMED
(Sole Arbitrator)

Enclosure: Letter of Intent for appointment as an Arbitrator, Consent Letter and Disclosure under Sixth Schedule, Arbitration and Conciliation (Amendment) Act, 2015.”

22. Significantly on 11 April 2016 respondent No.1 filed its statement of claim praying for an award in the sum of Rs.1,57,69,174/-. The petitioners having received a notice, filed an application under Section

16 of the ACA challenging the jurisdiction of the arbitral tribunal as also indisputedly an application under Section 12 and 13 of the ACA was filed by the petitioners (Exhibit – H, page 477 of the paperbook) subsequently raising a plea in regard to the non-disclosure and/or appropriate disclosure as required from the learned arbitrator. In paragraph 16 of the said application, the petitioner made the following averments:-

“16. The Ld. Arbitrator merely allowed the Respondents to file interrogatory which was to be answered by the Claimant. As such, the Respondents filed the interrogatory dated 11th November, 2016 i.e. before it received a certified copy of the disclosure and the Claimant responded to the same on 17th November, 2016. While responding to the said interrogatory the Respondent completely ignored or gave false / evasive replies to all but one question posed by the Respondents regarding the relationship between the Ld. Arbitrator and the Claimants. The one accurate answer given by the Claimant stated that it had appointed the Ld. Arbitrator in more than 200 arbitration proceedings initiated by the Claimant. Pertinently, the answer says that this fact is recorded in the disclosure given by the Ld. Arbitrator, however, the disclosure states that the Ld. Arbitrator has been appointed by the Claimant in above 80 arbitration proceedings. Hence, the disclosure given by the Ld. Arbitrator is wildly inaccurate even as per the Claimant, who had appointed the Ld. Arbitrator in the first place. Copies of the interrogatory filed by the Respondent, the Claimant's answers to the same and the disclosure u/s.12(1) are annexed hereto and marked as Annexure “D” Colly.”

(emphasis supplied)

23. On this application, a witness of respondent No.1 was also examined. Apart from this, respondent No.1 filed a reply to the petitioners' application under Section 12 and 13 of the ACA and in

dealing with the number of arbitrations, the averments as made in paragraph 9 of the reply are required to be noted which read thus:-

“9) That the contents of the Para No. 16 are admitted to the extent that the Ld. Tribunal had allowed the respondents to file an interrogatory which was duly answered by the claimant. The manner in which rest of the assertions are narrated in wrong and denied. It is admitted that the witness of the claimant has stated the number of arbitration proceedings as “more than 200” while the Ld. Arbitrator has mentioned it as “above 80”. It is worthwhile to put it to the notice that there is no ill intent and the Ld. Arbitrator disclosure statement as “above 80” is the same as witness's statement as “more than 200” as in both the statements, upper limit of the arbitration proceedings have not be stated. As such, the meaning of both the word is the same one. Therefore, the respondents are making frivolous assertions to escape their liability from paying the outstanding amount to the claimant company.”

(emphasis supplied)

24. A statement as made in the answers to interrogatories by the respondents are required to be noted which read thus:-

“30. Yes, disclosure letter along with disclosure prescribed under 6th schedule as per sec 12(1) of Arbitration and Conciliation Act, issued to the respondent shows that there are more than 200 matters with the same arbitrator.”

25. It is thus abundantly clear that the arbitrator at the relevant time had about 200 arbitrations of respondent No.1. It may be observed that the invocation of the arbitration in the present case by respondent No.1 is by respondent No.1's notice dated 31 March 2016 which is after coming into force of the amended Act (Act No.3 of 2016 with effect from 23 October 2015). Section 12 of the ACA was amended by the

said Amending Act making it mandatory for the arbitrator who would be so appointed to disclose in writing any circumstances as set out in sub-section (1) clause (a) and (b) of the said provision, which are likely to give justifiable doubts as to his independence and impartiality. Further Explanation 1 below sub-section (1) provides that the grounds stated in the Fifth Schedule shall provide in determining another circumstance exists which gives rise to justifiable doubts as to independence or impartiality of an arbitrator. The amended provision is required to be noted and reads thus:-

“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.]”

(emphasis supplied)

26. As can be clearly seen Section 12 takes within its ambit the grounds as stated in the Fifth Schedule to guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Further Explanation 2 below sub-section (1) mandates that the disclosure shall be made by the arbitrator so appointed in the form specified in the Sixth Schedule.

27. It would also be necessary to note the relevant provisions of the Fifth Schedule of the Act, which read thus :-

“The Fifth Schedule”

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

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator

or his or her firm derives a significant financial income therefrom.

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.”

(emphasis supplied)

28. The above items in the Fifth Schedule are required to be understood in a practical sense so as to derive a logical and rational meaning which would flow from these provisions. On a plain and prudent reading of these items and attributing such meaning to these items when an arbitrator has about eighty arbitrations of one party, which would permit him to derive a significant financial income from such arbitrations from one of the party, the rationale under item 1 and 14 are also certainly attracted, apart from the fact that it is clearly hit by item 22 so as to create a justifiable doubt on the impartiality and independence of an arbitrator. Thus, in my opinion, the present arbitration proceedings were clearly hit by the provisions of Section 12 read with Item 1, 14, 22 of the Fifth Schedule to the Act. Admittedly as clearly seen from the record the learned Arbitrator at the relevant point of time had about 200 arbitrations of respondent no. 1 in hand, when the legislature has set the standard of impartiality under item 22 at two or more arbitrations in the last three years of the appointment of the arbitrator. The question is by which prudent standard this

staggering figure of 200 arbitrations of the respondent with the learned arbitrator can escape the rationale and requirement of impartiality as envisaged under item 22 of the Fifth Schedule. The principle to be followed is justice should not only be done but should manifestly and undoubtedly seen to be done as held in **R. Vs. Sussex Justices Exparte Mc Garthy [1924] 1KB 256**. The principle enunciated in this celebrated decision is that nothing is to be done which creates even a suspicion that there has been some element which will dilute the course of justice. This assumes significance in the present context for another reason, namely that the arbitrator was unilaterally appointed by respondent No.1. Thus by all force the requirement mandated by Item No. 22 of the Fifth Schedule is attracted in the present case.

29. The law in this regard is no more *res-integra*. The learned counsel for the petitioner would be correct to place reliance on the decision of the Supreme Court in **HRD Corporation (Marcus Oil and Chemical Division), (supra)**, wherein the Supreme Court considering the provisions of Section 12(5) and Schedule 5 & 7 under the Act has observed thus:-

“20. 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.”

30. There is another facet which needs to be mentioned namely a safeguard which is created in regard to independence and impartiality of an Arbitrator as set out under Section 11(8) read with Section 12(1) of the Act. At the outset this provisions would require disclosure to be made in the Sixth Schedule. The disclosure is required to be crystal clear in regard to all the aspects which this provision would contemplate. It is clear that in the present case, at the outset, there were reasonable doubts on the legal validity and competence of the Arbitrator to adjudicate the disputes inasmuch as at the relevant time before the learned Arbitrator could enter a reference, there were about 200 arbitrations in hand of respondent no.1. In this situation the learned Arbitrator ought not to have entered a reference. However, no clear opportunity of objection was given to the petitioner and only on repeated requests, a clear disclosure as to the number of arbitrations

was furnished. This itself created grave doubts in the manner in which the whole arbitration exercise was undertaken. The provisions of Section 11(8) read with Section 12(1) and Schedule V and VII are required to be adhered to in letter and spirit as the issues which may fall under these Schedule would go to the very root and sanctity and solemnity of the arbitral proceedings. At this stage a decision of this Court in “*Meenu Arora & Ors. Vs. Dewan Housing Finance Corporation Ltd.*”³ needs to be referred. In this decision the Court has raised a concern in cases where claimants have a sort of in-house arbitration mechanism, whereby one single Arbitrator is appointed in large number of arbitrations by such claimants to arbitrate the disputes on recovery of loans. In the said decision it was also finance company which had appointed one arbitrator in several of its arbitral proceedings. The Court in this context had made the following observations:-

“23. It is required to be noted and as seen in many cases, as also can be seen from the arbitration agreement in the present case, that there is an intention to have an in-house arbitration proceedings. It is also seen that arbitrators are attached to the office of the claimants and who considering the nature of business of such concerns, have large number of arbitrations of the same claimants at a given point of time. This is now not permissible, under the amended provisions of Section 12 of the Act read with the Fifth and the Seventh Schedule. In such a mechanism there is definitely likelihood of the arbitral tribunal to cease to be independent and impartial as such arbitrators are appointed across the board, by such claimants in large number of cases, where recovery is required to be made from the defaulting parties.”

3 Commercial Arbitration Petition No.396 of 2017 decided on 4 March 2019

31. The aforesaid discussion makes it clear that the award is required to be held to be illegal for above basic reasons rendering the appointment of the learned Arbitrator itself as illegal and contrary with the provisions of Section 12 read with Fifth Schedule to the Act.

32. Apart from the above ground, the learned Counsel for the petitioner submits that the award suffers from illegality and perversity on another ground namely that the learned Sole Arbitrator has failed to determine as to whether the jurisdiction of the arbitral tribunal was at Mumbai. It is submitted that a copy of the agreement which was forwarded to the petitioner alongwith the statement of claim clearly contend a blank in regard to the jurisdiction being conferred by the parties. When the petitioner raised an objection that the arbitral tribunal would not have jurisdiction to conduct the arbitral proceedings in Mumbai and jurisdiction would be at Calcutta, the respondent placed on record of the arbitral tribunal a copy of the loan agreement wherein in the jurisdiction clause word "Mumbai" was handwritten in different ink. The petitioner challenged the said document on the ground that there is interpolation. The contention of the petitioner on this objection is not decided by the arbitral tribunal in accordance with law. Learned

Counsel for the petitioner has drawn the attention of the Court to the averments as made on behalf of the petitioner in the Section 16 application, as contained in paragraph 4.11 (page 191) which reads thus:-

“4.11 The Clause No.18 of the Schedule I, mentioned in the above excerpt is blank as per the Loan Agreement submitted by the Claimant with the statement of claim. As such it is clear that the subject Agreement does not prescribe any place of arbitration. Thus in the absence of the place of arbitration in the agreement, it is a settled law that the place where the said transaction took place and where the said agreement was executed and further where the parties to the arbitration resides should be taken into consideration in order to decide the place of arbitration. The Respondent further relies on the ruling of the Hon'ble Apex Courts and Hon'ble High Courts to substantiate that the entire invocation of the arbitration by the Claimant at Mumbai is against the prescribed law and against the principle of natural justice.”

33. These objections were decided by the learned Arbitrator by his order dated 22.07.2016 passed on the petitioners application under Section 16. A perusal of this order clearly indicates that the learned arbitrator has not taken any steps to consider the objections as raised by the petitioner on the issue of interpolation and accepted the documents as supplied by the respondent no. 1 to be the correct document. The contention of the petitioner that the jurisdiction of Mumbai were written different ink and evidence required in that regard has not been considered. It is also on this count, the impugned award in my opinion would be required to be held illegal, on a complete failure of the

learned Arbitrator to overlook the evidence on record in adjudicating the Section 16 application, recording perverse findings contrary to the record.

34. The above discussion clearly indicates that the arbitral award stands vitiated by illegality and perversity and is in contravention and/or is opposed to the fundamental policy of Indian Law as also in conflict with the most basic notions of morality and justice.

35. Resultantly the petition is required to be allowed. The impugned award of the sole arbitrator is accordingly set aside. Being a commercial cause the petition cannot be allowed without cost. Respondent no.1 is directed to pay to the petitioner cost of Rs. 50,000/- within a period of two weeks from today.

[G.S. KULKARNI, J.]