

psv

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

**NOTICE OF MOTION NO.4 OF 2019
IN
ARBITRATION PETITION NO.1388 OF 2018
WITH
ARBITRATION PETITION NO.1388 OF 2018**

Kesari Printers Ltd.	..Applicant
In the matter between	
Kesari Printers Ltd.	..Petitioner
Vs.	
M/s.HDB Financial Services Ltd.	..Respondent

**WITH
NOTICE OF MOTION NO.6 OF 2019
IN
ARBITRATION PETITION NO.1389 OF 2018
WITH
ARBITRATION PETITION NO.1389 OF 2018**

Kesari Printers Ltd.	..Applicant
In the matter between	
Kesari Printers Ltd.	..Petitioner
Vs.	
M/s.HDB Financial Services Ltd.	..Respondent

Mr.Aayush Singhvi i/b. Mr.Arihant Associates for Applicant/Petitioner.
Mr.Viraj Kandpile with Bernardo Reis for Respondent.

CORAM : G.S. KULKARNI, J.

DATE : 26th MARCH, 2019

P.C.:

Learned Counsel for the petitioner submits that the amendment is carried out to the petitions and the copies of the amended petitions are already served on the respondent.

2. Heard learned Counsel for the petitioner and learned Counsel for the respondent.

3. These are the petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, “the ACA”) whereby the petitioner has challenged the awards dated 18 August 2018 as passed by the learned sole arbitrator. Learned Counsel for the petitioner has principally argued the following two points:-

(i) that the appointment of an arbitrator itself was hit by the provisions of Section 12(1) of the ACA read with fifth Schedule. It is his contention that in the disclosure dated 15 June 2018 which was required to be made by the arbitrator, learned arbitrator has disclosed that he has number of on-going arbitrations and there are approximately 350 arbitrations. He has been nominated as an arbitrator in multiple arbitration proceedings by the same claimant (respondent herein) and the law firm, however, the arbitrator has stated he does not have any relationship, with either of the parties or the law firm, which is likely to give rise to any doubts regarding his independence or impartiality (see page 30). Learned Counsel for the petitioner submits that such disclosure as made is clearly hit by the provisions of Section 12(1) read with item No.22 of the fifth Schedule of the Act. In support of

his submission, learned Counsel for the petitioner has placed reliance on the decision of this Court in **Meenu Arora and Others V. Dewan Housing Finance Corporation Ltd.**¹.

(ii) Second submission as urged on behalf of the petitioner is that the impugned award is in breach of the principles of natural justice in as much as the objections which were raised on behalf of the petitioner were not decided. It is further submitted that there is no evidence that the documents which were relied upon by the respondent in support of the statement of claim were furnished to the petitioner and the arbitral tribunal without giving an appropriate opportunity to the petitioner proceeded to hurriedly complete the arbitral proceedings and delivered the impugned award. It is submitted that even if the petitioner did not appear before the arbitral tribunal, however, it was mandatory for the arbitral tribunal to furnish all the documents and give appropriate notice to the petitioner, that the arbitral proceedings have been completed and award is to be delivered.

4. On the other hand, learned Counsel for the respondent in opposing the submissions as made on behalf of the petitioner, submits that there was appropriate notice to the petitioner. It is submitted that the petitioner despite notice refused to appear before the arbitral tribunal. It is submitted that the arbitrator has taken into consideration

1 2019 SCC OnLine Bom 367

the material on record and as there was a clear default on the part of petitioner in making payment of the installments, the arbitral tribunal has rightly proceeded to pass the impugned award.

5. Learned Counsel for the respondent submits that on the issue of law as urged on behalf of the petitioner that the award requires interference considering the provisions of Section 12(1) read with 5th Schedule of the ACA, it is submitted that the petitioner never raised an objection before the arbitral tribunal in regard to the impartiality of the arbitral tribunal or any bias of any nature and thus, there is an express consent on the part of petitioner in the arbitral tribunal continuing with the proceedings. A specific remedy was available to the petitioner under Section 13 of the ACA which was admittedly not availed and if that be so, there cannot be any fault in the arbitral tribunal proceeding and delivering the award. In support of this submission, learned Counsel for the respondent has placed reliance on the decision of Supreme Court in **HRD Corporation (Marcus Oil & Chemical Division vs. GAIL (India) Limited (formerly Gas Authority of India Ltd.)**².

6. Prima-facie I am inclined to accept the contentions as urged by the petitioner. In my opinion, the challenge in this petition raises an issue of law to be decided namely as to what would be the obligation of

² (2018) 12 SCC 471

the sole arbitrator under Section 12(1) of the ACA when disclosure is made in writing touching the issues which are falling under Sub-clauses (a) and (b) of Sub-Section (1) read with Explanation 1. This would go to the root of the matter.

7. This more particularly considering the observations of the Supreme Court in paragraph 20 of the decision as relied on behalf of the respondent in **HRD Corporation (Marcus Oil & Chemical Division vs. GAIL (India) Limited** (supra) wherein the Supreme Court has observed that every arbitrator shall be impartial and independent of the parties at the time of accepting his/her appointment and doubts as to these issues 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. It is further held that this test requires taking a broad common-sensical approach to the items stated in the Fifth and the Seventh Schedule to the ACA. It is held that this approach would, therefore, require a fair construction of the words used therein, neither tending to enlarge or restrict them unduly. The following observations of the Supreme Court are required to be noted which read thus:-

“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.”

8. This principle if applied to the facts of the present case, it appears to be quite clear from the disclosure of the learned sole arbitrator dated 15 June 2018 (page 30 of the paperbook) that the learned arbitrator at the given point of time had approximately 350 arbitration matters. The learned arbitrator had not disclosed as to how many arbitrations pertaining to the present respondent were in hand of the learned sole arbitrator at the given point of time. If the learned sole arbitrator was at the given point of time had more than 3 arbitrations of the present respondent, whether it would in any manner fall within the purview of Section 12(1) of the ACA read with item No.22 of the Fifth Schedule so as to suffer a disqualification considering the clear observations of the

Supreme Court in paragraph 20 of the decision in **HRD Corporation (Marcus Oil & Chemical Division vs. GAIL (India) Limited** (supra). All these issues in my opinion, are required to be decided at the final hearing of present petition.

9. Hence Admit. Respondent waives service.

10. The respondent to take steps to deposit in a sealed cover the record and proceedings of the arbitral tribunal with the Prothonotary and Senior Master, within two weeks from today.

11. If the pleadings of the petition are completed within eight weeks from today, liberty to the parties to mention the matter for final hearing.

12. Learned Counsel for the respondent on instructions would submit that the suggestion as made on behalf of the petitioner that in the facts of the case fresh adjudication be undertaken by an independent arbitrator is not acceptable to the respondent.

NOTICE OF MOTION NO.4 OF 2019

AND NOTICE OF MOTION NO.6 OF 2019

13. Heard learned Counsel for the parties. When these petitions were heard on the earlier occasion on 19 March 2019, this Court had granted

an ad-interim stay on the execution of the impugned award.

14. However when the petition is being admitted the stay cannot be unconditional. I have accordingly heard learned Counsel for the parties on the above Notices of Motions for stay.

15. It is stated that the respondent is appropriately secured in as much as the petitioner has already provided a security by way of deposit of original title deed of the property being B-221 to 227, Silver Square, Thaltej, Ahmedabad – 380009, Gujarat. This is not being disputed by the respondent. If that be the case, in my opinion, the respondent is sufficiently secured. The learned arbitrator in the operative portion of the award has already directed the petitioner not to alienate in any manner including by way of sale, mortgage, lease, parting with possession or otherwise the properties mortgaged to the respondent, at any time before execution of the awarded amount. The petitioner is accordingly directed to adhere to the said order passed by the learned arbitrator pending the final hearing of these petitions.

16. Both the motions are accordingly disposed of in the above terms.

[G.S. KULKARNI, J.]