

THE HIGH COURT FOR THE STATE OF TELANGANA:: AT HYDERABAD

ARBITRATION APPLICATION No.115 of 2015

Between:

1. V.Balakrishnan, S/o.N.S.Venkata
Raman, Aged about 59 years,
Occu : Business, R/o.Plot No.16,
Road No.2, Jyoti Colony,
Secunderabad and another.

..... Applicants.

And

Capital First Limited,
Indiabulls Finance Centre, 15th Floor,
Tower-2, Senapati Bapat Marg,
Elphinstone Road, Mumbai-400 013.

..... Respondent.

Date of Judgment pronounced on : 14-08-2019

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

1. Whether Reporters of Local newspapers : No
May be allowed to see the judgments?
2. Whether the copies of judgment may be marked : Yes
to Law Reporters/Journals:
3. Whether The Lordship wishes to see the fair copy : Yes/No
Of the Judgment?

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

ARBITRATION APPLICATION No.115 of 2015

%14-08-2019

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Raman, Aged about 59 years, Occu :
Business, R/o.Plot No.16, Road No.2,
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..... Applicants.

Versus

\$ Capital First Limited,
Indiabulls Finance Centre, 15th Floor,
Tower-2, Senapati Bapat Marg,
Elphinstone Road, Mumbai-400 013.

.....Respondent.

< **GIST:**

> **HEAD NOTE:**

!Counsel for the Petitioners : Sri Srikanth Hari Haran
^Counsel for respondent : Sri S.Sudarshan

? **Cases referred**

1. (2014) 5 SCC 1
2. (2017) 7 SCC 678
3. (2014) 11 SCC 560
4. (2019) 2 SCC 488
5. (2017) 15 SCC 32
6. (2017) 8 SCC 377
7. (2015) 3 SCC 800
8. (2013) 4 SCC 44
9. 1998(3) ALD 478
10. (2004) 1 An.W.R 67 (DB)
11. (2011) 14 SCC 105
12. (1979) 1 SCC 308

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

ARBITRATION APPLICATION No.115 of 2015

ORDER :

Heard Sri Srikanth Hariharan, learned counsel for applicants and Sri S.Sudarshan, learned counsel for respondent.

2. This Arbitration Application is filed under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 (for short “the Act”) seeking appointment of an Arbitrator to resolve the disputes between the applicants and the respondent in respect of loan Account bearing No. HE387555.

The case of the applicants

3. The applicants are spouses residing at Hyderabad. They contend that they had approached M/s.Citi Financial Consumer Finance Limited (for short “Citi Financial”), Nallakunta Branch, Hyderabad seeking a housing loan; that after discussions between themselves and the representative of Citi Financial at Hyderabad, a loan of Rs.32 lakhs was sanctioned to them for construction of first floor on the residential house property in the name of the 2nd applicant at Secunderabad; but it is their contention that copy of the Home Loan Agreement was not handed over to them by the Citi Financial though their signatures were taken on blank sheets of paper at the latter’s Hyderabad office.

4. They alleged that in 2008, Citi Financial offered to increase the loan amount to Rs.60 lakhs with corresponding increase in the E.M.I. promising that the tenure of the loan would not change, that apportionment of E.M.Is. paid towards the principal amount and interest shall remain constant and shall not be subjected to change. They contend that on the basis of the said understanding, they executed an Agreement dt.30-03-2008 and after that, the loan was sanctioned.

5. According to the applicants, there was no complaint from Citi Financial for 3 years thereafter, but suddenly on 07-04-2011, they were informed by one M/s.Future Capital Holdings Limited that the applicants' loan account was assigned by Citi Financial to it.

6. They contended that M/s.Future Capital Holdings Limited was taken over by the respondent Company; that the Deed of Assignment was never supplied to them; and their consent was also not taken for such assignment.

7. They contended that unilaterally and arbitrarily the respondent Company changed the rate of interest from 11.98% to 12.48%, and when they approached the office of the respondent at Hyderabad, they stated that consumer queries or problems should be pursued only with the Mumbai Office of the respondent. They contended that in 2012 also when such unilateral change of interest was made, they had protested through a letter dt.03-11-2012.

8. According to the applicants, they asked the respondent to furnish copy of statement of their loan account bearing No.HE387555 and when the same was given to them, they noted that even the tenure of the loan which was to expire on 05-04-2023 was changed to 05-06-2025; that the respondent had even reduced the amounts adjusted towards the principal amount from the amount paid as EMIs; and thus violated the terms and conditions agreed between the parties. They contended that they protested to the same through their letter dt.21-11-2012.

9. They also alleged that they had been regularly paying the EMIs under protest and had also addressed letters on 06-02-2013, 17-05-2013, 28-08-2013 to the respondent; due to certain financial difficulties they could not make payment in time in December, 2013; respondent then issued a letter dt.03-01-2014 to immediately pay the same; and in spite of protest of the applicants, they did not withdraw the same in spite of letter dt.11-01-2014 sent by the applicants.

10. They contended that they were informed by letter dt.03-11-2014 that there was a default in payment of loan installment for November, 2014; that the respondent also gave a legal notice dt.02-06-2015 under Section 25 of the Payment of Settlement of Systems Act, 2007; and the respondent on 02-07-2015 even recalled the entire loan amount.

11. Later through letter dt.06-07-2015, the respondent appointed one Uma Kanth Sharma, New Delhi as an Arbitrator invoking clause-10.7(h) of the loan agreement providing for arbitration, but the applicants did not agree for the same in their reply dt.15-07-2015 by questioning its invocation and seeking copies of the loan agreement and also the deed of assignment of their loan account from M/s.Citi Financial in favour of the respondent.

12. Thereafter two legal notices were issued by the respondent, one on 14-08-2015 through their counsel Sagar & Sagar Law Offices, New Delhi and another dt.18-08-2015 through their Hyderabad counsel M.Srinivasa Reddy asking applicants to appear before the sole Arbitrator appointed by the respondent. In the latter notice it was stated that all documents sought by the applicants would be furnished during the arbitration proceedings and the applicants were directed to participate in the arbitration on 28-08-2015.

13. The applicants replied on 26-08-2015 pointing out that they dispute the existence of the arbitration agreement and do not submit to the same with the respondent, that they do not consent to the arbitrator appointed by the respondent, that such appointment itself is illegal and contrary to law. They nominated one V.Srihari as an Arbitrator to adjudicate the disputes between the parties by reiterating that the initiation and appointment of arbitrator by the respondent is illegal and contrary to law. Copy of the letter dt.26-08-2015 is also marked

to the Arbitrator Sri Uma Kanth Sharma, who was nominated by the respondent.

14. They then filed this Arbitrator Application on 30-09-2015 invoking Section 11(5) and (6) of the Act to appoint an Arbitrator contending that there is no agreement of arbitration between the applicants and the respondent for appointment of arbitrator; that *the arbitrator Sri Uma Kanth Sharma appointed by the respondent is likely to be biased in favour of the respondent as he is also a counsel belonging to the same firm of Lawyers who represent the respondent;* and the office address of both the Arbitrator and M/s.Sagar and Sagar Law Offices, representing the respondent, and which had issued the legal notice dt.14-08-2015 to the applicants is identical i.e. 18, Hargobind Enclave, Bhartendu Harish Chandra Marg, New Delhi – 110 092. They alleged that since they have grave doubt about the independence and impartiality of the Arbitrator Sri Uma Kanth Sharma appointed by the respondent, another arbitrator should be appointed. They alleged that they had paid excess of over Rs.10,000/- p.m. to the respondent to the tune of Rs.4,22,672/- and they are entitled to interest @ 24% p.a. on each month's excess amounts paid by them.

The events after filing this application

15. After moving this application, applicants also filed a Memo dt.14-11-2015 before the arbitrator objecting to his appointment on the above grounds and stating that he is likely to be biased in favour

of the respondent for the above reason. The Arbitrator was requested by the applicants to drop the arbitration proceedings pending disposal of this Arbitration Application. The Arbitrator appointed by the respondent passed an Award vide Claim Case No.38 of 2018 on 22-04-2016 and the Award was also questioned by the applicants in Arbitration O.P.No.178/2016 in the Court of I Additional Chief Judge, Secunderabad and was pending.

The stand of the Respondent

16. Counter is filed by respondent on 27-02-2019 refuting the contentions of the applicants and contending that the Arbitration Application itself is not maintainable. It also stated that Sri Uma Kanth Sharma, the Arbitrator appointed by the respondent passed an Award vide Claim Case No.38 of 2018 on 22-04-2016 and the Award was also questioned by the applicants in Arbitration O.P.No.178/2016 in the Court of I Additional Chief Judge, Secunderabad and was pending.

17. It contended that the Delhi High Court alone has jurisdiction to adjudicate upon the matter since the *venue* of arbitration was New Delhi, that the respondent was bound by the Loan Agreement and had acted only in terms of the said Agreement and the applicants wanted to avoid liability and have filed this Application. The respondent contended that it is at liberty to appoint an arbitrator for settlement of disputes as per Clause 10.7(h) of the Loan Agreement dt.30-03-2008 between the applicants and the respondent.

18. It is also contended that the Award passed by the Arbitrator is neither illegal nor without any jurisdiction and valid reasons were given in the award. It is also stated that after the appointment of the arbitrator, he declared his independence and issued notices to the applicants directing them to appear and file statements of defence, but they did not appear before him.

19. It however admitted that the memo was filed by applicants through post before the arbitrator and he referred to it in his award.

20. It is also contended that once the arbitration clause has been invoked by the respondent, the applicants cannot invoke it and so the Arbitration Application ought to be dismissed on the said ground.

The Points for consideration

21. From the above rival contentions, the following points arise for consideration:

(a) Whether the High Court at Hyderabad can entertain the Application under Section 11(5) and (6) of the Act ?

(b) Whether this Arbitration Application is maintainable when the arbitration clause has been invoked by the respondent by appointing Sri Uma Kanth Sharma?

(c) Whether there is material to doubt the independence and impartiality of the Arbitrator Sri Uma Kanth Sharma?

(d) To what relief?

Point (a)

22. The Loan Agreement dt.30-03-2008 between the parties, which has been filed by the applicants along with this Application, sets out the arbitration clause as under:

“10.7 (h): In the event of any dispute or difference arises under this agreement including any dispute as to any amount outstanding, the real meaning or purport thereof (‘dispute’), such dispute shall be finally resolved by arbitration. Such arbitration shall be conducted in accordance with the provisions of Indian Arbitration and Conciliation Act 1996 or any amendment thereof or reenactment thereof by a single arbitrator to be appointed by the lender. The venue of the arbitration shall be at New Delhi and the arbitration shall be conducted in English language.”

23. Thus, only the *venue* of arbitration has been mentioned in the Loan Agreement, but there is no mention of *seat* of arbitration. There is also no clause in the loan agreement restricting the jurisdiction exclusively to the Courts at New Delhi.

24. In **Enercon (India) Limited and others Vs. Enercon GMBH and another**¹, the Supreme Court held that location of the *seat* will determine the Courts that will have exclusive jurisdiction to oversee the arbitration proceedings. Where the contract used the words “*venue* shall be in London”, the Supreme Court held that London is not the *seat* of arbitration and the principle of *the closest and intimate connection* to arbitration would have to be applied. In that case, the parties had agreed that the provisions of the Indian Arbitration Act,

¹ (2014) 5 SCC 1

1996 would apply to the arbitration proceedings. So the Court held that by making such choice, the parties have made the curial law provisions contained in Chapters III to VI of the said Act applicable and so the law governing the contract, the law governing the arbitration agreement and the law of arbitration/curial law would all be Indian. Consequently, though London is mentioned as *venue* of arbitration, it cannot be read as *seat* of arbitration. It therefore held that parties did not intend to fix the seat of arbitration as London and the term *venue* cannot be read as *seat*.

25. This was reiterated in **Indus Mobile Distribution (P) Limited Vs. Datawind Innovations Private Limited and others**². In that case, the clause dealing with arbitration stated that arbitration shall be conducted at Mumbai but another clause stated that all disputes and differences of any kind whatever arising out of or in connection with the agreement shall be subject to *the exclusive jurisdiction of Courts of Mumbai only*. The Supreme Court referred to Section 2(1)(e) and Section 20 of the Act and held that both above clauses make it clear that jurisdiction exclusively vests in Mumbai Courts, and that the seat of arbitration is Mumbai. It observed that an agreement as to *seat* of an arbitration is analogous to an exclusive jurisdiction clause, and once the seat of arbitration has been fixed, it would be in the nature of an exclusive jurisdiction clause as to the Courts which exercise supervisory powers over the arbitration.

² (2017) 7 SCC 678

26. In the instant case, since there is no clause in the loan agreement that Courts at New Delhi have exclusive jurisdiction to deal with disputes in relation to the agreement and since New Delhi is not mentioned as *seat* of arbitration, it cannot be said that the Delhi High Court alone would have jurisdiction to entertain this application when the agreement says that New Delhi is only the *venue* of the arbitration.

27. Also, admittedly, the applicants belong to Hyderabad, the loan was granted in relation to a property belonging to the applicants at Hyderabad, and the allegation of the applicants that they dealt with the City Financial, Nallakunta branch at Hyderabad while obtaining the loan in 2003 and also in 2008 when the loan amount was enhanced to Rs.60.00 lakhs from Rs.32.00 lakhs, is undisputed.

28. Therefore, Hyderabad is the place with which there is the closest and intimate connection to arbitration and not New Delhi. I therefore hold that this Court has jurisdiction to entertain this Arbitration Application.

Point (b)

29. Learned counsel for respondent raised a contention that respondent, having appointed an arbitrator invoking the arbitration clause on 06-07-2015, the applicants cannot invoke the said clause for a second time. He relied on **Antrix Corporation Limited Vs. Devas**

Multimedia Private Limited³ and SP Singla Constructions Pvt Ltd. Vs. State of Himachal Pradesh and another⁴.

30. Learned counsel for applicants refuted the same and relied on **Aravali Power Company Private Limited Vs. Era Infra Engineering Limited⁵** and **TRF Limited Vs. Energo Engineering Projects Limited⁶**.

31. No doubt the two Judge Benches in **Antrix Corporation** (3 supra) and in **SP Singla** (4 supra) did take a view that once appointment of an arbitrator has been made at the instance of a party, the arbitration agreement could not have been invoked for the second time. It has held that such appointment cannot be challenged in a subsequent proceeding initiated by the other party also for the appointment of an arbitrator. It was held that the other party can certainly challenge it, but not by way of an independent proceeding under Section 11 (6) of the Act. It indicated that under Section 13, a proceeding can be initiated to challenge it, but not in another proceeding under Section 11; and an arbitrator once appointed already in exercise of the arbitration agreement cannot be replaced in exercise of power under Section 11 of the Act.

32. But in **Aravali Power** (5 supra), a Two Judge Bench of the Supreme Court held that while exercising such power under sub-Section (6) of Section 11, if circumstances exist, giving rise to

³ (2014) 11 SCC 560

⁴ (2019) 2 SCC 488

⁵ (2017) 15 SCC 32

⁶ (2017) 8 SCC 377

justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded, ignore the designated arbitrator and appoint someone else.

33. The Court in **Aravali Power** (5 supra) observed that while exercising power under Section 11(6) of the Act, the Chief Justice or his designate shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause; the fact that the named arbitrator is an employee of one of the parties is not *ipso facto* a ground to raise a presumption of bias or partiality or lack of independence on his part; but there can be *justifiable apprehension* about the independence or impartiality of an employee arbitrator, in cases arising *before* the amendment to the Act by Act 3 of 2016, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate to the officer whose decision is the subject matter of the dispute.

34. Thus in principle the Court had accepted that *in circumstances giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate, while exercising such power under Section 11(6) of the Act, for reasons to*

be recorded, ignore the designated arbitrator and appoint someone else.

35. This judgment in **Aravali Power** (5 supra) was not noticed in **SP Singla** (4 supra).

36. In **TRF Limited** (6 supra), a Three Judge Bench of the Supreme Court considered the judgment in **Antrix Corporation** (3 supra) and held that it is distinguishable and *it cannot be said in absolute terms that the proceeding once initiated could not be interfered with in a proceeding under Section 11 of the Act*. It held that **Antrix Corporation** (3 supra) was a case pertaining to the ICC Rules and the said case rests upon its own facts. It referred to its judgment in **Walter Bau AG Vs. Municipal Corporation of Greater Mumbai**⁷ and **Newton Engineering and Chemicals Limited Vs. Indian Oil Corporation Limited**⁸ followed them.

37. In **Walter Bau AG** (7 supra), the clause in the agreement between the parties provided for appointment of one arbitrator by each party and on failure of one of the parties to do so within 30 days, the International Centre for Alternative Dispute Resolution in India (ICADR) shall appoint arbitrator. In the said case, on failure by respondent to appoint its arbitrator, the ICADR called on the respondent to appoint its arbitrator or choose one from amongst a panel of three arbitrators. Pursuant to the said communication,

⁷ (2015) 3 SCC 800

⁸ (2013) 4 SCC 44

respondent appointed its arbitrator. This was questioned. The Supreme Court held that the option given to the respondent to go beyond panel submitted by ICADR and to appoint any person of its choice was not the procedure agreed upon. The agreed upon procedure contemplated appointment of arbitrator by the respondent within 30 days of receipt of notice from the petitioner and upon failure to do so, the arbitrator should be appointed by ICADR. Rules of ICADR were held not to contemplate an alternative procedure giving respondent liberty to appoint arbitrator of its choice once it failed to appoint its arbitrator within the agreed period of 30 days and so such appointment was held to be impermissible. *It rejected the contention of the respondent that as arbitrator was already appointed prior to the filing of the present application, such appointment cannot be interfered with and that the Supreme Court is entitled to appoint another arbitrator under Section 11(6) of the Act.* It held that *unless appointment of arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) of the Act cannot be countenanced in law.*

38. This principle was specifically approved in **TRF Limited** (6 supra) by the Three Judge Bench therein.

39. In **Newton Engineering** (8 supra), which was also followed in **TRF Limited** (6 supra), while the arbitration clause specified that

Executive Director (N.R) was to be the arbitrator as per the agreement, the said post was abolished by the time disputes arose; and the respondent had appointed Director (Marketing) as the arbitrator. An application under Section 11(6) of the Act was filed in the Delhi High Court which dismissed it, but the Supreme Court held that in the circumstances it was not open to either of the parties to unilaterally appoint any arbitrator. It set aside the appointment of the arbitrator by the respondent and declared all his proceedings to be of no legal consequence. It observed that the arbitration clause itself did not survive in those circumstances.

40. In **Ushodaya Enterprises Limited Vs. Commissioner of Commercial Taxes, A.P., Hyderabad**⁹, a Full Bench of this Court held that in a case of conflict arising from the decisions of co-equal Benches of the Supreme Court, the High Court is free to disregard the decision which is based on an obvious mistake of fact or the one which purports to follow the ratio of an earlier decision though such ratio is found to be non-existent. It held that *the High Court can legitimately decline to follow such decision and follow the earlier decision which is backed by reasoning.*

41. In **Special deputy Collector, Land acquisition v. Narla Gopalakrishniah**¹⁰, a Division bench of this Court held that in a situation where there is a direct conflict between decisions of the Supreme Court of co-equal Benches, the High Court has to follow the

⁹ 1998(3) ALD 478

¹⁰ (2004) 1 An.W.R 67 (DB)

judgment which appears to it to state the law better and more elaborately and accurately and date of rendering of judgment by Supreme Court cannot be a guiding principle.

42. I am of the view that the law has been better stated in **TRF Limited** (6 supra), **Walter Bau AG** (7 supra) and **Newton Engineering** (8 supra), and so I choose to follow these decisions instead of the view in **Antrix Corporation Limited** (3 supra) and **SP Singla Constructions** (4 supra).

43. I hold that in certain circumstances, even if one party (in the instant case, the respondent) has invoked the arbitration clause first, there can also be a second invocation by the applicants if the impartiality or independence of the arbitrator is established by applicants to be justifiably doubtful.

44. Point (b) is answered accordingly in favour of the applicants and against the respondent.

Point (c)

45. Now I shall consider the point whether there is material to doubt the independence and impartiality of the Arbitrator Sri Uma Kanth Sharma.

46. The plea raised by the respondent in the counter is that the arbitrator declared his independence and pronounced an award on 22-04-2016. It is not denied that this was done even after receiving

the memo dt.14-11-2015 filed by the applicants doubting his independence and impartiality on the ground that the arbitrator also belongs to the same firm of Sagar & Sagar Law Offices.

47. It was the said firm which had issued the legal notice dt.18-09-2015 to the applicants mentioning the arbitration clause in the Loan Agreement and contending that under the said clause, only the respondent can appoint an arbitrator.

48. It is important to note that there is no denial in the counter-affidavit of the respondent that the arbitrator Sri Uma Kanth Sharma did not belong to the firm of Lawyers Sagar & Sagar Law Offices which had issued legal notice dt.18-09-2015 to the counsel for the applicants. It is also not denied that the address of the arbitrator and the address of the Firm of Lawyers is not one and the same.

49. No statement of the arbitrator declaring his independence in the matter is shown to have been communicated by the said arbitrator to the applicants and no such document has been filed along with the counter-affidavit of the respondent.

50. Therefore the inevitable conclusion to be drawn is that the allegations leveled by the applicants against the arbitrator are true.

51. Section 12 of the Act as it stood prior to its amendment by Act 3 of 2016 stated:

“ (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in

writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(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.”

52. In **Jaipur Vikas Pradhikaran v. Ashok Kumar Choudhary**¹¹, the Supreme Court considered a case where a Advocate, appearing for a party in a reference under the Land Acquisition Act, 1894, suppressed the fact that he had appeared against the very same party in the same Reference on behalf of his own (advocate's) relative. The Supreme Court held that it is professional misconduct. It observed:

“22. The records available also disclose that the aforesaid relatives of Respondent 2 and Smt Asha Gupta, wife of Respondent 3 also got themselves substituted in the reference proceedings, which is Reference Case No. 14 of 1982. These persons got themselves substituted only on the basis of such assignment without which they had no right to get themselves substituted in place of the original owners. After substitution, Smt Asha Gupta, the wife of Respondent 3 and sister of Respondent 1 and the aforesaid relatives of Respondent 2 were parties in the reference proceedings as claimants. Respondent 1 appeared in the said reference case on 19-1-1990 for his sister (wife of Respondent 3).

¹¹ (2011) 14 SCC 105

23. *Despite the aforesaid fact, Respondent 1 accepted the engagement given to him by the appellant as its counsel to contest the claim of the aforesaid contesting claimants, one of which was his own sister. We also find from the records that in fact Respondent 1 was the retaining counsel of the appellant from the year 1989 and, therefore, he could not have entered appearance on behalf of the wife of Respondent 3 on 19-1-1990. Respondent 1 therefore not only appeared for the wife of Respondent 3 in the same reference in which he also appeared for the appellant, who were contesting the claims of the claimants including his own sister. These activities of Respondent 1 were unbecoming of a professional lawyer and also clear cases of misconduct.*

24. *The defence taken was that there was some confusion with regard to the appearance slip on 19-1-1990 for the appearance slip which was filed in the aforesaid reference case on 19-1-1990 was meant for a different case. But the said appearance slip appears to have been manipulated later on by making overwriting on the same. The misdemeanour of Respondent 1 did not end only with the aforesaid position. On 7-12-1991, the written statement was required to be filed, but no such written statement was prepared nor was it filed and even Respondent 1 did not appear in the said proceedings on that date, for which the defence of the appellant was struck off. Even the said fact was not brought to the notice of the appellant by Respondent 1.*

25. *Even thereafter when the matter was listed for recording of evidence on 10-11-1993, Respondent 1 informed the court that no evidence was being produced on behalf of the appellant. That statement appears to have been made without any positive instructions of the appellant in that regard and without even informing the appellant about the said fact. Consequent upon the aforesaid representation made by Respondent 1, the evidence of the appellant was closed on 10-11-1993 and the case was fixed for arguments. On 2-12-1993 the order was passed by the Reference Court enhancing the compensation from Rs 16,200 to Rs 1.25 crores. The said order was also not communicated by Respondent 1 to the appellant.*

26. The counsel appearing for Respondent 1 however, during his course of arguments, submitted that he was not required to apply for any certified copy and send the same to the appellant in terms of his engagement. But the said fact is belied from the fact that in terms of his engagement and he being a retaining counsel, it is his obligation to provide all information regarding the development of the case and also to provide copies of the orders passed along with his opinion. It was necessary on his part and he was duty-bound to take steps for recalling the order of striking off the defence. At least he should have sent such an advice. He had conducted the case at one stage against the appellant despite being a paid retainer of the appellant and also despite the fact that there was a conflict of interest. In fact, Respondent 1 was under an obligation to disclose his interest in the case and should have refused to accept the brief when offered to him. Nothing of the nature was done and rather he paved the way for getting enhancement of compensation for his sister. It is therefore established that Respondent 1 stage-managed the entire proceeding and set the course so that the higher claim of the newly substituted claimants are accepted.

27. In **V.C. Rangadurai v. D. Gopalan**¹², a three-Judge Bench of this Court has stated and outlined the duties and responsibilities of a counsel. In para 30 of the said judgment this Court has held that a counsel's paramount duty is to the client and accordingly where he forms an opinion that a conflict of interest exists, his duty is to advise the client that he should engage some other lawyer. It was further held that it is unprofessional to represent conflicting interests, except by express consent given by all concerned after a full disclosure of the facts. The Court further went on to hold that the relation between a lawyer and his client is highly fiduciary in its nature and of a very delicate, exacting, and confidential character requiring a high degree of fidelity and good faith and that it is purely a personal relationship, involving the highest personal trust and confidence which cannot be delegated without consent. This Court also held that when a lawyer is entrusted with a brief, he is expected to follow the norms of professional ethics and try

¹² (1979) 1 SCC 308

to protect the interests of his clients, in relation to whom he occupies a position of trust.

28. In the present case, it appears to us that Respondent 1 had not only not disclosed the conflicting interests that he had in the matter but had gone a step further by betraying the trust reposed on him by the complainant. The facts which are analysed clearly prove the guilt of Respondent 1. He acted in a manner unbecoming of a lawyer, who was bound by ethical conduct and failed to protect the interest of his client.

31. The factual narration which has been given and the conduct of Respondent 1 in conducting the case clearly proves and establishes his misdemeanour and misconduct and, therefore, we find Respondent 1 guilty of professional misconduct. We, therefore, order and direct that Respondent 1 be suspended as an advocate from practise for a period of six months from today.”(emphasis supplied)

53. In the instant case too, there was a duty cast on the arbitrator to disclose that he was a member of the Law Firm Sagar & Sagar Law Offices, New Delhi which represented the respondent in the very same case against the applicants by issuing the legal notice dt.18-09-2015. Even when the applicants had not known about it, such duty is cast on him not only to disclose it but also to refuse to be an arbitrator to adjudicate the dispute between the applicants and the respondent. Thus there are justifiable doubts about his independence and impartiality because he ought to have disclosed the conflict of interest against the applicants to them and he failed to do so.

54. Instead, he merrily went on to pass an *ex parte* award on 22-04-2016 against the applicants.

55. No doubt this award was questioned in Arbitration O.P. No.178/2016 by the applicants before the I Additional Chief Judge, City Civil Court, Secunderabad under Section 34 of the Act, though not under Section 13 of the Act.

56. But in my opinion, there is no bar to the applicants to invoke Section 11(6) of the Act and bring it to the notice of this Court that there are justifiable doubts as to the independence and impartiality of the arbitrator and get him replaced as held in **Aravali Power Company** (5 supra), **TRF Limited** (6 supra) and **Walter Bau AG** (7 supra).

57. The appointment of Sri Uma Kanth Sharma as the sole arbitrator by the respondent is *ex facie* invalid and such a *fait accompli* by the respondent does not debar the jurisdiction of this Court under Section 11(6) of the Act. In the instant case it is warranted also because the respondent, who ought to have appointed an independent and impartial arbitrator, in exercise of the power conferred on it under Clause 10.7 (h) of the loan agreement, not only did not do so, but it is blatantly defending such *ex facie* illegal appointment, though it is hit by Section 12(3)(a) of the Act.

Point (d)

58. Consequently, the appointment by the respondent of Sri Uma Kanth Sharma as arbitrator to adjudicate the disputes between the applicants and the respondent arising out of the Loan Agreement

relating to the Loan Account bearing No.HE387555, is set aside; all proceedings carried out by the arbitrator including the award passed by him on 22-4-2016 are declared to be of no legal consequence and unenforceable.

59. In exercise of the power conferred on this Court under Section 11(6) of the Act, I hereby nominate Sri V.V.Raghavan, Retired District Judge, No.302, Legends Residency, Street No.2, Shantinagar, Masab Tank, Hyderabad – 28 as the sole arbitrator to adjudicate the dispute between the parties arising out of the Loan Agreement dt.30-3-2008 relating to the Loan Account bearing No.HE387555.

60. The Arbitration Application is allowed accordingly. No costs.

61. As a sequel, miscellaneous petitions pending if any in this Arbitration Application, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 14.08.2019

Note :- L.R. Copy to be marked.

B/o.
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