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

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Date of Decision: 24th December, 2019

+ O.M.P. (T) (COMM.) 90/2019

ASHOKA KRAFT PAPER MILLS LLP

..... Petitioner

Through: Mr.Madan Gera, Ms.Pushti Gupta and
Mr.Prateek Gupta, Advocates

versus

RAJ KUMAR AGGARWAL & ANR.

..... Respondents

Through: Mr. Sanjay Agnihotri, Mr. Rakesh
Kumar and Mr. Akash Kumar,
Advocates.

JUDGEMENT

1. The petitioner is seeking termination of the mandate of the Arbitrator appointed by this Court vide order dated 12th April, 2019 and for substitution by appointment of a new Arbitrator in his place. The notice has not yet been issued in this petition. However, this Court has extensively heard both the parties on the maintainability of the petition as well as on merits.

2. The petitioner is a Limited Liability Partnership Firm constituted by LLP Agreement dated 04th May, 2013 between the respondents and five others. The five partners of the petitioner removed the respondents from the firm in the meeting dated 23rd March, 2018 on the various grounds inter-alia that the respondents expressed their intention to retire; they were paid all their deposits and initial contribution; and the respondents lodged various complaints to banks for stoppage of account whereupon the banks stopped/

blocked the accounts.

3. The respondents filed O.M.P(I)(COMM.) 450/2018 under Section 9 of the Arbitration and Conciliation Act in which this Court, vide order dated 12th April, 2019, appointed S. K. Tandon, Retired Additional District Judge as a sole Arbitrator to adjudicate the disputes between the parties. This Court further directed that the petition filed under Section 9 of the Arbitration and Conciliation Act be treated as an application under Section 17 of the Arbitration and Conciliation Act and the same to be considered expeditiously by the Arbitrator.

4. The respondents filed the statement of claim on 03rd May, 2019 before the learned Arbitrator in which they sought recovery of Rs.4,91,30,550/- along with interest @18% per annum; declaration of the minutes of the meeting dated 23rd March, 2018 as null and void; and recovery of shares in the profits for the financial years 2015-16, 2016-17 and 2017-18. The respondent filed the reply dated 22nd May, 2019 to the statement of claim.

5. Vide order dated 19th July, 2019, the learned Arbitrator stayed the operation of minutes of the meeting dated 23rd March, 2018 whereby the respondents were expelled from the LLP on the grounds that the respondents were designated partners; all the decisions/resolutions relating to the management and affairs of the LLP were to be decided by majority vote of all the partners; the respondents were expelled on 23rd March, 2018 i.e. before the expiry of the five years of the LLP agreement dated 04th May, 2013 whereas as per Clause 30 of the LLP agreement stipulates that none of the parties were entitled to part with LLP unless mutually agreed upon in writing and the petitioner failed to produce any document before the Tribunal to show that the respondents had mutually agreed upon in writing

to part with/retire from the LLP; and the acts of the petitioner to expel the respondents from LLP were in violation of Clause 30 of the LLP agreement. The learned Arbitrator further observed that the Clause 6 (II) and (V) of the LLP Agreement required a meeting of the firm to be called but no meeting was called and no agenda was circulated to the respondent who had right to participate in the meeting dated 23rd March, 2019 and therefore, the expulsion of the respondents from the LLP was in violation of Clause 6 (II) and (V) of the LLP Agreement.

6. The respondents filed another application under Section 17 of the Arbitration and Conciliation Act before the learned Arbitrator for the stay of the meeting called by the other partners of the petitioner firm on 06th August, 2019 which was taken up for hearing on 05th August, 2019 and notice was issued to the other partners of the petitioner for 05th August, 2019 at 07:00 PM. There was no appearance on behalf of the petitioner at 07:00 PM whereupon the learned Arbitrator waited up to 08:00 PM and then proceeded to hear the application. After hearing the application, the learned Arbitrator restrained the petitioner partners from holding the meeting on 06th August, 2019.

7. On 06th August, 2019, the learned Arbitrator framed the following issues and listed the case for recording of the claimants evidence on 31st August, 2019:

- “(i) Whether the Claimants are entitled for an Award of Rs.4,91,30,550/- as prayed in prayer clause (i) of Statement of Claim? OPC*
- (ii) Whether the Claimants are entitled for the relief as prayed in prayer clause (ii) of Statement of Claim? OPC*
- (iii) Whether the Claimants are entitled for an Award of share of profits of the financial years 2015-16, 2016-17*

and 2017-18 and continuing months/years as prayed in prayer clause (iii) of Statement of Claim? OPC
(iv) Whether Claimants are entitled for interest as prayed? OPC
(v) Relief.”

8. The petitioner filed another application under Section 16(3) read with Section 12 of the Arbitration and Conciliation Act which was taken up on 31st August, 2019 when the case was listed for recording of evidence of the witness but the learned counsel for the petitioner refused to argue the application on the ground that an appeal against the orders dated 19th July, 2019 and 05th August, 2019 had been filed and the petitioner would await for the outcome of the appeal before the High Court whereupon the learned Arbitrator adjourned the proceedings for recording of the evidence on 14th September, 2019.

9. On 14th September, 2019, the petitioner sought adjournment whereupon the proceedings were adjourned to 25th September, 2019 and 28th September, 2019 for recording of the evidence.

10. On 24th September, 2019, the petitioner moved another application seeking an adjournment of the arbitral proceedings till the disposal of ARB.A.(COMM.) 25/2019 whereupon the proceedings were adjourned to 25th September, 2019 and 28th September, 2019.

11. On 25th September, 2019, the respondent tendered his evidence by way of an affidavit. There was no appearance on behalf of the petitioner. The learned Arbitrator waited up till 6:30 PM and passed a detailed order, which is reproduced hereunder:

“I would like to mention here that on 30.08.2019, the matter was adjourned for Claimant’s evidence for 14.09.2019 at 4 PM. On the aforesaid date, on the basis of

an Application moved by Mr. Prateek Gupta, Adv., on behalf of the Respondent's Counsel, for adjournment of the proceedings on the ground of personal engagement of the Respondent's, Counsel, the matter was further adjourned for Claimant's evidence for 25.09.2019 at 6 to 8 pm and on 28.09.2019 to 2:30 pm to 7 pm.

However, on 24.09.2019, Mr. M.K. Pandey, Counsel for Respondent sent an Application along with Order of the Hon'ble High Court dated 16.09.2019 through Mr. Prateek Gupta, Adv. for adjournment of the proceedings on the ground that as the Hon'ble High Court have referred the matter for mediation, therefore, tell the decision of the Appeal pending before the Hon'ble High Court, arbitration proceedings should be adjourned. After going through the Application moved by the Ld. Counsel for the Respondent as well as going through the order of the Hon'ble High Court dated 16.09.2019, by observing that as Hon'ble High Court has only stayed the operation of the Orders is dated 19.07.2019 and 05.08.2019 and not stayed the arbitral proceedings pending before the undersigned, the request for adjournment of the proceedings were rejected.

Today, at 4.02 pm, Dr. M.K. Pandey, Ld. Counsel for the Respondent sent a "whatsapp" message requesting for the adjournment of the proceedings as the matter had been referred to the mediation. Reply to the aforesaid message was sent to the Respondent's Counsel by observing "in the absence of any stay by the Hon'ble High Court the proceedings will be recorded" and Ld. Counsel for the Respondents was advised to be present at the time of hearing.

The aforesaid communication was sent to the Respondent's Counsel keeping in mind para 9 of the Order dated 16.09.2019 of the Hon'ble High Court wherein Hon'ble High Court has observed that "it is clarified that the parties shall complete the pleadings notwithstanding reference of this matter to mediation".

However, at 4.51 pm. Ld. Counsel for the Respondent again requested requesting not to proceed with the

arbitration proceedings. Response to the above message was also sent requesting Ld. Counsel for the Respondent to attend the proceedings and make his submissions.

Inspite of the Order dated 24.09.2019 of this Tribunal on the Application for adjournment moved by the Counsel of the Respondent, as well as response to the whatsapp messages sent to the Respondent's Counsel, Counsel for the Respondent has not cared to attend today's proceedings.

After coming to know the aforesaid facts, Ld. Counsel for the Claimant submitted that Respondent had also moved an Application for stay of the present arbitral proceedings vide I.A. 12783 of 2019; that on the date of hearing of the aforesaid application i.e. on 16.09.2019, Ld. Counsel for the Respondent had not pressed the said Application and the said application was disposed of by the Hon'ble High Court. He therefore, submitted that in view of the specific observation of the Hon'ble High Court in para 9 of its order dated 16.09.2019, the proceedings should continue and the statement of CW1, who is present be recorded.

Accordingly, examination-in- chief of CW1 recorded. After concluding the examination-in- chief of CW1, Ld. Counsel for the Claimant submitted that as neither the Respondents is not their Counsel have turned up, therefore, the respondent should be proceeded ex-parte and the right to cross-examine the witness be closed.

In the interest of justice and in order to decide the case on merits, the matter is adjourned for the date already fixed.....”

(Emphasis supplied)

12. On 28th September, 2019, the learned counsel petitioner moved an application seeking adjournment on the ground of urgent family engagement. It was further mentioned in the aforesaid application that the venue of the proceedings should be a neutral venue and not the residence of the learned Arbitrator and further that the petitioner's application under Section 16(3) of the Arbitration and Conciliation Act be heard first. The

learned arbitrator observed that the conduct of the learned counsel for the petitioner was to delay the proceedings and circumvent the recording of the evidence. Despite making the above observations, the learned Arbitrator, in the interest of justice, gave one more opportunity to the petitioner to cross-examine respondent no.1 at a neutral venue i.e. Neeti Bhagh Club. The order dated 28th September, 2019 is reproduced hereunder:

“CWI Mr. Raj Kumar Aggarwal is present for his cross-examination However, Mr. Prateek Gupta, Adv., for Dr. M.K. Pandey, Ld. Counsel for the Respondents has moved an unsigned Application for Shri M.K. Pandey, Counsel for the Respondents, requesting for the adjournment of the proceedings on the ground that due to some urgent family engagement he would not be able to attend today’s proceedings.

It is further mentioned in the aforesaid Application that the venue of the proceedings should be neutral and not at the residence of this Tribunal and further the arguments on his Application under Section 16 of The Arbitration and Conciliation Act, 1996 be also heard first.

Copy of the aforesaid Application given to Shri Rakesh Kumar, Counsel for the Claimants. He strongly opposes the adjournment of the proceedings on the ground that the Application moved by Shri M.K. Pandey, Ld. Counsel for the Respondents has no value in the eyes of law as the same has not been signed by him. Ld. Counsel for the Claimant further submits that the Ld. Counsel for the Respondents is seeking adjournment of the proceedings for last three dates. Further, had the Ld. Counsel for the Respondents any personal difficulty to attend today’s proceedings, he should have moved an Application in advance with prior intimation to this Tribunal as well as to the office of Ld. Counsel for the Claimant, but the Ld. Counsel for the Respondents did not do so. Ld. Counsel for the Claimant therefore, submits that the adjournment should not be granted and the matter should be proceeded further according to law.

Shri Prateek Gupta, Adv. for Shri M.K. Pandey submits that the Respondents may kindly be not proceeded ex-parte as the wife of Mr. M.K. Pandey, Adv. is unwell and he has to attend his wife.

Heard.

In this case, the issues were framed on 06.08.2019 and the matter was adjourned to 31.08.2019 for Claimant's evidence. However, on 21.08.2019, an Application was moved on behalf of the Respondents under Section 16(3) of The Arbitration and Conciliation Act, 1996 praying therein that this Tribunal should rescue from this proceedings for the reasons mentioned therein.

On 28.08.2019, Ld. Counsel for the Claimant had also filed one evidence by way of Affidavit.

On 31.08.2019 CWI Shri Raj Kumar Aggarwal was present. However, the Ld. Counsel for the Respondents objected to recording of the evidence of CWI on the ground that his Application under Section 16(3) read with Section 12 of The Arbitration and Conciliation Act, 1996 should be heard and decided first. Accordingly CWI was discharged and the Ld. Counsel for the Respondents was directed to lead his arguments on his Application under Section 16(3) read with Section 12 of The Arbitration and Conciliation Act, 1996.

But, Ld. Counsel for the Respondents did not argue the aforesaid Application on the pretext that as he has already filed an Appeal against the Orders dated 19.07.2019 as well as against the Orders dated 05.08.2019 before the Hon'ble High Court, therefore he would like to await the outcome of the Appeal. Ld. Counsel for the Respondent further submitted that this Tribunal should not proceed with recording of the evidence till the outcome of the Appeal.

The aforesaid request of not recording the evidence was strongly objected by Ld. Counsel for the Claimant by submitting that the said request was made with the sole motive of misusing the proceedings before the Hon'ble High Court.

As under the mandate of Section 29A of The Arbitration and Conciliation Act, 1996, the time limit has been fixed for

pronouncement of the Award within a period of 12 months from the date the arbitral tribunal enters upon the reference, therefore, the request of Ld. Counsel for the Respondents for not recording of the evidence of CW1 was turned down and the matter was fixed for recording Claimant's evidence on 14.09.2019.

On 14.09.2019 Ld. Counsel for the Respondents did not turn up. On the other hand, Shri Prateek Gupta, Adv. moved an Application signed by Shri M.K. Pandey, Ld Counsel for the Respondents, for adjournment of the proceedings on the ground that due to some urgent personal engagement he would not be able to attend the proceedings. It was further requested in the aforesaid Application that the arbitral proceedings be held preferably at Delhi High Court premises or other neutral venue.

The aforesaid request of the Ld. Counsel for the Respondents was allowed and the matter was fixed for Claimant's evidence for 25.09.2019 at 6 pm, and, on 28.09.2019 at 2.30 pm. As far as the request of Shri M.K. Pandey, Adv. for recording of the proceedings at neutral venue, liberty was given to Shri M.K. Pandey, Ld. Counsel for the Respondents to select the venue of his choice and in the alternative, at 244, Bank Enclave, Near Laxmi Nagar, New Delhi.

Shri M.K. Pandey, Ld. Counsel for the Respondents did not bother to select the venue of his choice. On the other hand, on 24.09.2019 he moved an Application for adjournment of the proceedings stating therein that against the Orders dated 05.08.2019 and 19.07.2019, he has moved an Appeal; that as vide Orders dated 16.09.2019 Hon'ble High Court has directed the parties to appear before the Mediation and Conciliation Centre, therefore, the matter be adjourned till the pendency of the Appeal before the Hon'ble High Court. As, vide the said Orders dated 16.09.2019, Hon'ble High Court had not stayed the arbitral proceedings; that as, on other hand, in para 9 of its order Hon'ble High Court had clearly stated that **"it is clarified that the parties shall complete the pleadings notwithstanding reference of this**

matter to mediation", therefore, the aforesaid request made by Shri M.K. Pandey, Ld. Counsel for the Respondents was rejected and the matter was fixed for the date already fixed i.e. 25.09.2019 for recording Claimant's evidence.

On the date of hearing i.e. 25.09.2019, at 4.02 pm, Dr. M.K. Pandey, Ld. Counsel for the Respondents sent a "whatsapp" message requesting for the adjournment of the proceedings as the matter had been referred to the mediation. Reply to the aforesaid message was sent to the Respondent's Counsel by observing "in the absence of any stay by the Hon'ble High Court the proceedings will be recorded" and Ld. Counsel for the Respondents was advised to be present at the time of hearing.

The aforesaid communication was sent to the Respondent's Counsel keeping in mind para 9 of the Order dated 16.09.2019 of the Hon'ble High Court wherein Hon'ble High Court has observed that "it is clarified that the parties shall complete the pleadings notwithstanding reference of this matter to mediation".

However, at 4.51 pm., again, Ld. Counsel for the Respondents, sent a whatsapp message requesting not to proceed with the arbitration proceedings. Response to the above message was also sent requesting Ld. Counsel for the Respondents to attend the proceedings and make his submissions at the time of hearing. However, Ld. Counsel for the Respondent did not care to attend the proceedings.

Accordingly, by noting down the aforesaid conduct of Ld. Counsel for the Respondents, the statement of CW1, who was present, was recorded. Although Ld. Counsel for the Claimant submitted that for non-appearance of Ld. Counsel for the Respondents,, Respondents should be proceeded ex-parte, still, in the interest of justice and in order to decide the case on merits, copy of the proceedings as well as of the evidence of CW1, which was recorded, was sent to the Ld. Counsel for the Respondents by giving opportunity to cross-examine the witness today i.e. 28.09.2019 to 2.30 pm. by observing that in case the Ld. Counsel for the Respondents shall not cross-examine the witness, the Respondents shall

be proceeded ex-parte and the matter shall be proceeded further in accordance with law.

Inspite of above communication, today, Ld. Counsel for the Respondents has not turned up. In the unsigned Application moved by Ld. Counsel for the Respondents, it is not at all mentioned as to what is the urgent family engagement of the Ld. Counsel for the Respondent. Otherwise also the unsigned Application of the Ld. Counsel for the Respondents has no sanctity.

The aforesaid conduct of the Ld. Counsel for the Respondents shows that the sole and only motive of the Respondent is to delay the proceedings and circumvent the recording of the evidence as well as to make the mockery of the proceedings.

However, taking into consideration of the submissions of Mr. Prateek Gupta that the wife of Shri M.K. Pandey, is sick and that is why he has not been able to come [although there is no such mention in the aforesaid Application moved today], in the interest of justice and in order to decide the case on merits, I am inclined to give one more opportunity to the Respondents to cross-examine CW1 on 05.10.2019 at 2 pm. at Neeti Bagh Club, subject to payment of costs of Rs.50,000/- [which includes diet money and travelling expenses of CW1 who has come to attend the proceedings on three days as well as adjournment costs] which shall be a condition precedent for the prosecution of the defence of the Respondents i.e. the cross-examination of CW1 and also subject to the payment of Rs.15,000/- towards the secretarial expenses of three hearings and further subject to the condition that if, on the aforesaid date, the Ld. Counsel for the Respondents shall not come and cross-examine the witness, the right of the Respondents to cross-examine the witness shall be closed.

So far as the request of Ld. Counsel for the Respondents for hearing the arguments on the Application under Section 16 of the Arbitration and Conciliation Act, 1996 is concerned, in view of the submissions made by the Ld. Counsel for the Respondents on 31.08.2019 that he would not like to argue

the aforesaid Application; that, on the other hand, he would like to await the outcome of the Appeal before the Hon'ble High Court, the arguments on the aforesaid Application would be heard after the outcome of the Appeal.

It is also pertinent to mention here that the Ld. Counsel for the Claimant has informed that the mediation proceedings between the parties have failed on 26.09.2019.

Copy of today's proceedings given to the both the parties."

(Emphasis Supplied)

13. On 05th October, 2019, the petitioner filed two applications for recall of the order dated 28th September, 2019. The learned Arbitrator found no ground to recall of the order dated 28th September, 2019 including imposition of the cost whereupon the petitioner paid the cost imposed and partly cross-examined respondent no.1 and the case was adjourned for remaining cross-examination on 30th October, 2019.

14. On 30th October, 2019, the petitioner again sought adjournment on the ground that petitioner had filed two applications, one in ARB.A. (COMM.) 25 of 2019 and second, in disposed of O.M.P. (I) (COMM.) 450 of 2019 and, a petition was being filed under Section 12 to 16 of the Arbitration and Conciliation Act. The learned Arbitrator declined to adjourn on the aforesaid ground. However, the main counsel for the petitioner Mr. Anil Gupta, Adv. was not present to conduct the cross-examination, the proceedings were consequently adjourned to 13th November, 2019.

15. Learned counsel for the petitioner urged at the time of the hearing that the learned Arbitrator is acting in a biased and partial manner and is conducting the proceedings with undue haste; imposing heavy costs and making the payment of cost as condition precedent, threatening to proceed *ex-parte*; to close the right of the petitioner to cross-examine the witness and

therefore, the Arbitrator has become *de jure* and *de facto* unable to perform his functions. It was submitted that the learned Arbitrator passed the order dated 19th July, 2019 under Section 17 of the Arbitration and Conciliation Act without recording or dealing with the submissions of the petitioner. It was further submitted that the respondents filed an application on 05th August, 2019 for stay of the meeting scheduled to be held on 06th August, 2019 in which the learned Arbitrator passed a restraint order on 05th August, 2019 without affording a reasonable opportunity to the petitioner. It was submitted that the petitioner has lost confidence in the Arbitral Tribunal as the learned Arbitrator is conducting the proceedings in a biased manner and therefore, the petitioner filed an application under Section 16 of the Arbitration and Conciliation Act seeking his recusal from the arbitration. It was further submitted that on 25th September, 2019, a request for adjournment was made on the ground that the parties were mediating before Delhi High Court Mediation and Conciliation Centre but the learned Arbitrator did not adjourn the matter and examined the respondents. On 28th September, 2019, the learned Arbitrator again declined the request for adjournment and imposed cost of Rs.50,000/- on the petitioner and Rs.15,000/- towards the secretarial expenses of three hearings and further observed that the right to cross-examine shall be closed if the witness was not examined on the next date. The petitioner filed an application for waiver of the cost which was dismissed by a non-speaking order. It was further submitted that the learned Arbitrator orally observed that the petitioner would not get anything from him.

16. Learned counsel for the respondents urged at the time of the hearing that the learned Arbitrator was conducting the proceedings fairly. It was

submitted that the petitioner is deliberately delaying the arbitration proceedings and has raised false accusations of bias. It is submitted that the petitioner is time and again seeking adjournments on one pretext or the other with a view to delay and defeat the arbitration proceedings. Without prejudice, it was submitted that the petition was not maintainable and liable to be dismissed. Reliance was placed on ***Progressive Career Academy Pvt. Ltd. v. FITT JEE Ltd.***, 180 (2011) DLT 714 and ***Shri Pinaki Das Gupta v. Publicis (India) Communications***, 115 (2004) DLT 345. In ***Progressive Career Academy Pvt. Ltd.*** (*supra*), the removal of the Arbitrator was sought on the ground that he was biased. The Division Bench of this Court held that the Arbitration and Conciliation Act does not postulate judicial interference in the ongoing arbitration proceedings on the ground of bias or impartiality till the award was published. The Division Bench examined the entire law on the subject as well as the conflicting judgments. The relevant portion for the said judgment is reproduced hereunder:

“1. The question in this bunch of Appeals concerns the legal proprietary of judicial directions for the removal of an arbitrator even before the publishing of an Award. Several judgments of our esteemed Single Benches have been cited before us, a perusal of which manifests the existence of a polarity of opinion. On one side of the watershed is the view that assertions as to the de jure or de facto incompetence of the Arbitral Tribunal must immediately be addressed by the Court, and in deserving cases remedied, whilst on the other side is the contrary view that the statutorily provided procedure postulates an immediate remonstrance but a deferred assailment of the Award, inter alia on this ground, by way of an invocation of Section 34 of the Arbitration & Conciliation Act, 1996 (A&C Act for short).

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16. On a reading of Section 13(5), the legislative intent becomes amply clear that Parliament did not want to clothe the Courts with the

power to annul an Arbitral Tribunal on the ground of bias at an intermediate stage. The Act enjoins the immediate articulation of a challenge to the authority of an arbitrator on the ground of bias before the Tribunal itself, and thereafter ordains that the adjudication of this challenge must be raised as an objection under Section 34 of the Act...

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22. Having arrived at the conclusion that curial interference is not possible at the pre-Award stage on the allegations of bias or impartiality of the Arbitral Tribunal on the one hand, and our understanding that the Appeals are not maintainable on the other hand, is any further relief to be granted? We think it expedient to abjure from passing any further orders for several reasons including – firstly, the reality that arbitration proceedings would inevitably have already come to an end in those instances where the arbitrator had been removed by orders of the Court, and secondly the availability of redress under Article 136 of the Constitution of India. All pending applications stand disposed of. 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.”

(Emphasis Supplied)

17. Learned counsel for the petitioner urged at the time of the hearing that the petition was maintainable and the petitioner can seek the removal of the arbitrator on the ground of bias. Reliance was placed on **V.K. Dewan & Company v. Delhi Jal Board**, (2010) 15 SCC 717, **State of Arunachal Pradesh v. Subhash Projects & Marketing Ltd.**, 2007 (1) Arb.LR 564 (Gauhati) (DB), **West Haryana Highways v. NHAI**, 2017 (4) Arb.LR 86 (Delhi), **OPBK Construction v. Punjab Small Indus**, 2008 (3) Arb.LR 189 (P&H) and **S.K.F. India Ltd. v. M.G.P. Associates**, 2009 (4) Arb.LR 534 (Madras).

Findings

18. Two questions arise for consideration in this matter. First, whether the petition for removal of the arbitrator at the pre-award stage is maintainable and second, whether the petitioner has made out a case of bias for removal of the arbitrator.

19. Even though this Court is of the *prima facie* opinion that the present petition in the present form is not maintainable, this Court has considered the present petition on merits i.e. on the issue of bias.

20. The record reveals that the learned Arbitrator is proceeding with the matter expeditiously whereas the petitioner has been repeatedly seeking adjournments one after another, without any reasonable justification. After the framing of issues on 06th August, 2019, the petitioner sought adjournments on various dates such as 31st August, 2019, 14th September, 2019, 25th September, 2019, 28th September, 2019 and 30th October, 2019. The petitioner also raised objection to the venue of the arbitration proceedings.

21. Section 29A(1) provides for conclusion of domestic arbitration within one year from the date of completion of pleadings, which is extendable upto six months with the consent of the parties. Therefore, expeditious conclusion of arbitration proceedings hardly needs to be emphasized. Hence, there is no infirmity in the learned Arbitrator expeditiously proceeding with the matter.

22. The learned Arbitrator has passed two interim orders dated 19th July, 2019 and 05th August, 2019 and the petitioner appears to have formed a view that the Arbitrator may finally decide the matter against them. The interim orders passed by the learned Arbitrator were on the basis of the material at that stage. The final outcome of the arbitration proceedings would depend

upon the evidence to be led by both the parties. Every adverse order passed against a litigant is injurious to the losing party but that does not give him the right to attack the adverse order by attributing a bias.

23. In *Commissioner of Income Tax v. M.H. Patel*, 2017 SCC OnLine Bom 8881, the Division Bench of Bombay High Court extensively examined the law relating to the allegations of bias made by the litigants. The Division Bench examined the relevant judgments in this regard. The Division Bench held that the increasing trend of seeking recusal has to be deprecated, discouraged and must be nipped in the bud. Relevant portion of the said judgment is reproduced hereunder:

“1. When this Income Tax Appeal as also the Criminal Writ Petition was on our Board on 4th September, 2017, and on prior dates, the respondent – party-in-person raised a specific objection. That objection is as follows.

2. He submits that he has no faith in the impartiality or integrity of one of us (S.C. Dharmadhikari, J.) and he has specifically requested the Hon'ble The Chief Justice to assign this matter to a Bench, other than the one presided over by Justice S.C. Dharmadhikari. He would, therefore, submit that this written objection being on record, at least one of us should recuse himself from hearing the cases any further.

*3. We have perused the written note put on record by the respondent appearing in person. We have very sympathetically and patiently heard him even on his objection that the Bench presided over by one of us should not take up the matter. It is unfortunate that we have to pass an order and when a party-in-person or any other litigant insists on a recusal and in this manner. In the case of **Subrata Roy Sahara vs. Union of India & Ors. reported in AIR 2014 SC 3241**, the Hon'ble Supreme Court of India speaking through Justice J.S. Khehar has held, after approving the view taken by the High Court of Delhi, that a party cannot insist on a Judge recusing himself. This is a new trend emerging when Judges are challenged in the manner that has been repeatedly noted by the Hon'ble Supreme Court.*

A mere inconvenient question or a query and which is raised during the course of appreciation and appraisal of the legal and factual issues in a matter at hand and particularly in the nature of appeal should not result in a litigant being taken aback or, if taken aback, responding in this manner. His Lordship held as under :-

“9. But Mr. C.A. Sundaram, another Senior Counsel representing the petitioner, distanced himself from the above submissions. He informed the Court, “... I am not invoking the doctrine of bias, as has been alleged ...” We are of the view, that a genuine plea of bias alone, could have caused us to withdraw from the matter, and require it to be heard by some other Bench. Detailed submissions on the allegations constituting bias, were addressed well after proceedings had gone on for a few weeks, the same have been dealt with separately (under heading VIII, “Whether the impugned order dated 4.3.2014, is vitiated on account of bias?”). Based on the submissions advanced by learned counsel, we could not persuade ourselves in accepting the prayer for recusal.

10. We have recorded the above narration, lest we are accused of not correctly depicting the submissions, as they were canvassed before us. In our understanding, the oath of our office, required us to go ahead with the hearing. And not to be overawed by such submissions. In our view, not hearing the matter, would constitute an act in breach of our oath of office, which mandates us to perform the duties of our office, to the best of our ability, without fear or favour, affection or ill will. This is certainly not the first time, when solicitation for recusal has been sought by learned counsel. Such a recorded peremptory prayer, was made by Mr. R.K. Anand, an eminent Senior Advocate, before the High Court of Delhi, seeking the recusal of Mr. Justice Manmohan Sarin from hearing his personal case. Mr. Justice Manmohan Sarin while declining the request made by Mr. R.K. Anand, observed as under:

"The path of recusal is very often a convenient and a soft option. This is especially so since a Judge really has no vested interest in doing a particular matter. However, the oath of office taken under Article 219 of the Constitution of India enjoins the Judge to duly and faithfully and to the best of his

knowledge and judgment, perform the duties of office without fear or favour, affection or ill will while upholding the constitution and the laws. In a case, where unfounded and motivated allegations of bias are sought to be made with a view of forum hunting / Bench preference or brow-beating the Court, then, succumbing to such a pressure would tantamount to not fulfilling the oath of office."

The above determination of the High Court of Delhi was assailed before this Court in R.K. Anand v. Delhi High Court, (2009) 8 SCC 106 : 2009 AIR SCW 6876). The determination of the High Court whereby Mr. Justice Manmohan Sarin declined to withdraw from the hearing of the case came to be upheld, with the following observations:

"The above passage, in our view, correctly sums up what should be the Court's response in the face of a request for recusal made with the intent to intimidate the court or to get better of an 'inconvenient' judge or to obfuscate the issues or to cause obstruction and delay the proceedings or in any other way frustrate or obstruct the course of justice."

(Emphasis is ours)

11. In fact, the observations of the High Court of Delhi and those of this Court reflected, exactly how it felt, when learned counsel addressed the Court, at the commencement of the hearing. If it was learned counsel's posturing antics, aimed at bench-hunting or bench-hopping (or should we say, bench-avoiding), we would not allow that. Affronts, jibes and carefully and consciously planned snubs could not deter us, from discharging our onerous responsibility. We could at any time, during the course of hearing, walk out and make way, for another Bench to decide the matter, if ever we felt that, that would be the righteous course to follow. Whether or not, it would be better for another Bench to hear this case, will emerge from the conclusions, we will draw, in the course of the present determination.

... ..

14. One of the reasons for retaining the instant petition for hearing with ourselves was, that we had heard eminent Senior Counsel engaged by the two companies exclusively for over

three weeks during the summer vacation of 2012. We had been taken through thousands of pages of pleadings. We had the occasion to watch the demeanour and defences adopted by the two companies and the contemnors from time to time, from close quarters. Writing the judgment, had occupied the entire remaining period of the summer vacation of 2012, as also, about two months of further time. The judgment dated 31.8.2012 runs into 269 printed pages. Both of us had rendered separate judgments, concurring with one another, on each aspect of the matter. During the course of writing the judgment, we had the occasion to minutely examine numerous communications, exchanged between the rival parties. That too had resulted in a different kind of understanding, about the controversy. For any other Bench to understand the nuances of the controversy determined through our order dated 31.8.2012, would require prolonged hearing of the matter. Months of time, just in the same manner as we had taken while passing the order dated 31.8.2012, would have to be spent again. Possibly the submissions made by the learned counsel seeking our recusal, was consciously aimed at the above objective. Was this the reason for the theatrics, of some of the learned Senior Counsel? Difficult to say for sure. But deep within, don't we all understand? It was also for the sake of saving precious time of this Court, that we decided to bear the brunt and the rhetoric, of some of the learned Senior Counsel representing the petitioner. We are therefore satisfied, that it would not be better, for another Bench to hear this case.

II Must judicial orders be obeyed at all costs?

Can a judicial order be disregarded, if the person concerned feels, that the order is wholly illegal and void?"

- 4. The Hon'ble Supreme Court of India has clarified that when a Judge takes oath of office and in terms, prescribed by the constitution, implicit in that is there is no ill will, much less any enmity and when a Judge is supposed to decide a case impartially, he has to be strict. Such strictness is demanded by the very office to which a person is appointed as a Judge. Eventually, it is a constitutional office and the institution of judiciary is above all. The law is applicable to all, rich or poor, men or women. Thus, to all citizens cutting across their*

religion, caste, creed, race and sex. Therefore, it is the constitution and the laws, which a Judge is obliged to uphold and while upholding them, he has to invite the wrath of litigants and advocates frequently.

5. **The trend, which is now increasing, of Judges being called upon to recuse themselves, therefore, has to be deprecated and discouraged. It must be nipped in the bud.** His Lordship the Hon'ble Mr. Justice Khehar once again pronounced in The Recusal order in NJAC case Supreme Court Advocates-on-Record Association and another vs. Union of India Writ Petition (Civil) No.13 of 2015, decided on October 16, 2015, that :-

“... .. A Judge may recuse at his own, from a case entrusted to him by the Chief Justice. That would be a matter of his own choosing. But recusal at the asking of a litigating party, unless justified, must never be acceded to. For that would give the impression, of the Judge had been scared out of the case, just by the force of the objection. A Judge before he assumes his office, takes an oath to discharge his duties without fear or favour. He would breach his oath of office, if he accepts a prayer for recusal, unless justified. It is my duty to discharge my responsibility with absolute earnestness and sincerity. It is my duty to abide by my oath of office, to uphold the Constitution and the laws. My decision to continue to be part of the Bench, flows from the oath which I took, at the time of my elevation to this Court.”

6. A view has already been taken by our Court also and in a reported decision in the case of Ganesh Ramkisan Bairagi vs. Parwatabai Tukaram Appa Landge & Ors. reported in 2016 (4) ABR 699, Hon'ble Mr. Justice R.K. Deshpande had this to observe and hold :-

“14. Again, at this stage, Shri. V. V. Bhangde, the learned counsel for the appellant/defendant No. 2, submits that the office be given direction not to list the matters in which he is appearing for any of the parties before this Court. In other words, he submits that I should recuse from taking up the matters wherein Shri. V. V. Bhangde is appearing for any of the parties. The submission shocks my conscience, particularly when it suddenly came from a regular practitioner from this

Court, who was being looked at as an experienced and responsible officer of the Court. The entire arguments in this matter went on smoothly, patiently and with interest. After conclusion of the arguments, both the learned counsel were asked as to whether they intend to make any additional submissions, and thereafter the dictation commenced as per the usual practice. I need not delve upon any further and I refrain from making any comments against Shri. V. V. Bhangde. However, the increasing trend need to be commented upon; so as to caution the lawyers and the litigants about the consequences of it, which can be avoided.

15. A lawyer has his own choice of appearing before the Court presided over by a particular Judge to conduct the matter. If his matter is listed before the Court where he does not want to appear, he is at liberty return such matter and/or fees to his client and can ask him to engage some other lawyer or he may refuse to accept the matter if he has not already filed his vakalatnama. A judge may also recuse himself from taking up the matters of the lawyers with whom he is closely related or where his conscience does not permit him to take up the matters of some lawyers. In these situations, there may not be any problem either with a Judge or a lawyer, but where the Court passed an order against a particular lawyer not to appear in his Court, it takes a colour of penalty or punishment to such a lawyer, which may result in taking some disciplinary action against him by the Bar Council of India or of State, which issued him a Stand of Practice. Such a stage by a Court may be construed of black-listing of a lawyer. Seldom, such event occurs, and the Courts also normally avoid it.

16. A tendency has started growing amongst lawyers to dictate a Judge to recuse from taking up his matters when the decision goes against his client or his wavelength does not match with the Judge or he does not find comfort in conducting the matter or for some such reasons. This is an insult personally to a Judge. Such reactions are normally experienced when the lawyers take heavy fees from their clients with an assurance to bring the result of the cases in their favour or to impress upon the clients sitting in the court room during the

course of hearing, the boldness which he possesses to browbeat the Court. If a lawyer exercises his choice of not conducting the matter, he loses his client and fees, which he does not want to do. If a Judge accedes to such demand of a lawyer for recusal, the effect is threefold (i) the confidence of a lawyer to browbeat the Court is boosted (ii) a lawyer gets rid of the Court where he finds discomfort in conducting the matter, and (iii) it creates an additional source of income for him, from the other lawyers and the litigants, who do not want their matters listed or dealt with by such a Judge. This promotes the practice of Bench hunting. No system of justice can tolerate such practice by a lawyer and the same is required to be curbed and deprecated.

17. Recently, in the judgment, which I have delivered in Civil Revision Application No. 26 of 2016 on 6-6-2016 (Satish Mahadeorao Uke v. The Registrar, High Court of Bombay, Bench at Nagpur, Nagpur). I have observed in para 25 thereof as under:

“25. A Judge may recuse at his own choice from a case entrusted to him by the Chief Justice and it would be a matter of his own choosing. But recusal at the asking of the litigating party, unless justified, must never be acceded to. This is what the Apex Court has held recently in NJAC case instituted by the Supreme Court Advocates on Record Association and Another v. Union of India, reported in 2015 (11) SCALE 1 : (2015 AIR SCW 5457). The question of recusal is normally decided by a Judge on the basis of his personal or private interest in the subject-matter of the litigation, his intimacy with the party/parties to a lis before him, his perception about conflict of interest in taking up the matter, and his own conscience. Such decision does not depend upon the dictates of lawyers or litigants.”

18. Recusal to take the matters to be conducted by some lawyers, is a matter of Judge's own choosing and it cannot be at the dictates of the lawyers. What a Judge has to see is that he performs his duty of deciding the matters before him without fear or favour, affection or ill will. He has to keep in mind the principle that the justice should not only be done, but it must appear to have been done. The decision of recusal to take the

matters of lawyers, depends upon the Judge's personal relations or intimacy with such lawyers, and his own conscience to decide a case by observing the oath which he has taken while occupying the position as a Judge. Ultimately, a Judge is also a human being and the Judges come from different strata of the Society, having their own views, ideas, angle or perception, based on the varied individual experience in life, which may or may not match with each others or with some lawyers or litigants. However, this cannot be a reason to avoid conducting the matters listed before such a Judge or the Judges. Once the constitutional authority of a Judge or the Judges to adjudicate the matters is accepted, it cannot be lowered down by asking him or them to recuse to hear and decide the matter.

19. To prevent a Judge or the Judges from performing his or their duties in this fashion causes distraction of attention in the judicial proceedings, which amounts to interference in the course of justice. Merely because a lawyer, litigant or public at large feels that the approach adopted or a decision is wrong, the authority or the force of the decision does not get eroded. A wrong decision in the matter is equally enforceable like a correct decision. If the Constitution and the laws provide a remedy to get such decision corrected in a higher forum, such a remedy can be availed. Even a wrong decision becomes final, binding and enforceable like a correct decision, if there is no remedy available. The lawyers, litigants or public at large cannot run away from such decision and they have to be cautioned about the authority of the Courts.

7. We respectfully concur with the views expressed by the learned single Judge of this Court as they accord with the principle laid down by the Hon'ble Supreme Court.

8 We have noted from the record that this is not the first time the respondent has made such a request. The respondent was also a party litigant before the Income Tax Appellate Tribunal at Mumbai. With great pain and anguish the Tribunal has held that the respondent made an application and in which allegations were made of lack of faith and trust even in Members of the Tribunal. Some of them had to recuse themselves from the proceedings. The proceedings, therefore, dragged endlessly. Sometimes we must remind ourselves that such

ploy or tactics are adopted by litigants so as to delay the obvious. If the delay is to their benefit, then, they can go to any extent so as not to invite an adverse order or anything contrary to their interest. It is that perception which is entertained by the litigants and that is how for a favourable verdict, they resort to every tactic in the book or even impermissible in law or unknown to fairness, equity and justice. The Hon'ble Supreme Court has referred to them extensively in the foregoing paragraphs which we have reproduced from the judgment.

9. In such circumstances we do not think that the litigant who is appearing in person before us can be given an opportunity to dictate to the Court and to any judicial officer as to who should be the Judge / presiding Judge to whom his cases should be assigned and who should preside over any Division Bench. It is the prerogative of the Hon'ble the Chief Justice and it is he/she who decides how the judicial work should be assigned. Once the Chief Justice assigns judicial work to a Bench, then, it is not unless there is a power exercised otherwise, open to a litigant to call upon the Judges to recuse themselves from judicial work in this manner.

10. Pertinently, the respondent party-in-person has not stated anything by which one can conclude that there is a reasonable apprehension of bias and prejudice. This party-in-person has had no occasion in the past to argue any of the cases in person before one of us (S.C. Dharmadhikari, J.). Yet, he makes a request and as above. This has, therefore, taken us by surprise. The allegations of bias and apprehension of injustice having no basis, but vague and general statements being made in the application, all the more we are disinclined to grant the request. The request for recusal is, therefore, refused.”

(Emphasis Supplied)

24. This Court respectfully concurs with the views expressed by the Division Bench of the Bombay High Court. As noted by the Division Bench of the Bombay High Court, there is a tendency to seek recusal from the matter when the wavelength does not match with the Judge/Arbitrator or the litigant does not find comfort in conducting the matter or for some such reasons. This is an insult personally to a Judge/Arbitrator. Such acts amount

to interference in the justice delivery system. If the litigants are given right to seek removal of the Arbitrator on these grounds, it would erode the confidence of common man in justice delivery system. No system can tolerate such practice and same has to be curbed and deprecated.

25. Having gone through the record of the arbitration proceedings, this Court is satisfied that the allegations of bias by the petitioner are unfounded. None of the aspersions casted by the counsel for the petitioner justify the allegations of bias. The prayer for removal of the Arbitrator is rejected.

26. The petitioner is dismissed.

**J.R. MIDHA
(JUDGE)**

DECEMBER 24, 2019

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