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

+ ARB.P. 721/2019 & IAs. 15620/2019 and 15621/2019

**SANTOSHI BARRIER FILM INDIA PRIVATE
LIMITED**

..... Petitioner

Through: Mr. Ashutosh Kumar, Mr. Rony
Oommen John and Mr. Piyush
Swami, Advs.

versus

HERO FINCORP LIMITED & ORS.

..... Respondents

Through: Mr. Vishal Khattar and Ms. Shreya
Aggarwal, Advs. for R1.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

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08.11.2019

IA. 15621/2019 (for exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

ARB.P. 721/2019

This petition has been filed by the petitioner under Section 11 (6) of the Arbitration and Conciliation Act, 1996 for appointment of a Sole Arbitrator.

In substance, the challenge in this petition to the appointment of the Arbitrator is primarily on the ground that 20 matters have already been referred to him by the respondent no.1. In support, learned counsel for the petitioner has relied upon Clause 22 of Vth Schedule to the Arbitration and Conciliation Act, 1996 which reads as under:

“22. The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.”

The position of law is well settled in terms of the Judgment of the Supreme Court in the case of ***HDR Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Limited (Formerly Gas Authority of India Ltd.) Civil Appeal NO. 11126 of 2017***, Para 13 thereof reads as under:

“13. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become “ineligible” to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes “ineligible” to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as “ineligible”. In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator’s independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the

arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal."

In view of the aforesaid position of law, petitioner shall be within its right to challenge the appointment, if in the eventuality a petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996. It goes without saying, if such a plea is raised, the same shall be considered in accordance with law.

The petition stands disposed of.

IA. 15620/2019 (for Stay)

Dismissed as infructuous.

V. KAMESWAR RAO, J

NOVEMBER 08, 2019/jg