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

% *Date of Judgment: 8th May, 2019*

+ **FAO(OS) (COMM) 250/2018**
M/S BGN CABLE NETWORK

..... Appellant

Through: Mr.Amiet Andley and Mr.Arun
Kumar Sharma, Advocates

versus

MANIK SINGLA

..... Respondent

Through

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J. (ORAL)

CM APPL.46032/2018

1. Exemption allowed, subject to all just exceptions.
2. Application stands disposed of.

FAO(OS) (COMM) 250/2018 & CM APPL. 46031/2018

3. Appellant is aggrieved by the order dated 19.9.2018 passed by the learned Single Judge of this court in a petition filed by the appellant herein, under Sections 14 and 15 of the Arbitration & Conciliation Act, 1996, seeking termination of the mandate of the arbitrator and appointment of a substitute arbitrator. Petition filed by the petitioner was rejected by the learned Single Judge by impugned order dated 19.9.2018.
4. Mr.Andley, learned counsel for the appellant submits that on appointment of the sole arbitrator the appellant learnt about the existing relationship between one of the counsel appearing for the respondent / claimant and the arbitrator. Accordingly, the appellant

filed an application under Section 13 of the Arbitration & Conciliation Act, 1996 (for short 'the Act') before the learned Arbitrator, which was rejected by the order dated 11.8.2018.

5. Mr.Andley, learned counsel for the appellant submits that in the application filed under Section 13 of the Act a specific averment was made that there is long standing and subsisting relationship between the counsel for the claimant and the arbitrator, and they had been appearing together in matters before the Supreme Court of India. Reference was made to the Special Leave to Appeal No.10133/2017. Identical submission has been made by counsel for the appellant before us as well.
6. Mr.Andley, learned counsel for the appellant has also drawn attention of this court to copies of the orders dated 3.7.2017, 28.7.2017 and 4.10.2017, wherein appearance of the counsel for the claimant and the arbitrator has been marked.
7. Mr.Andley, also submits that in view of the long standing relationship between the counsel for the claimant and the arbitrator being established, the mandate of the arbitrator should be terminated and another arbitrator should be appointed.
8. Having heard the learned counsel for the appellant, in our view two questions arise for our consideration. Firstly, is the arbitrator disqualified from adjudicating the disputes between the parties on account of the fact that he has a long subsisting relationship with the counsel for the claimant; and secondly whether the Single Judge was right in rejecting the petition filed by the appellant under Sections 14 and 15 of the Act, as the remedy available to the appellant would be at

the stage of filing objections under Section 34 of the Act.

9. As far as the first issue is concerned, the averments made in the application under Section 13 of the Act are required to be noticed, which are as under:

“7. That therefore, upon the declaration made by the learned Arbitral Tribunal and thereafter upon inquiry, it has been ascertained that there is a longstanding and subsisting relationship between the counsel for the claimant and the learned arbitral Tribunal who are appearing together in matters before the Hon’ble Supreme Court of India. i.e.:

(1) Special leave to Appeal No.10133 of 2017 titled ‘Haji Ali Dargah Trust vs. Sahayak, A Socio Legal and Education forum & Ors., order dated 3.7.2017; 28.7.2016 and 4.10.2017.’”

10. It is the case of the appellant that based on the three orders where the appearance of both the arbitrator and the counsel for the claimant has been recorded it would establish a long standing and subsisting relationship. We are, however, not persuaded with this submission so made, as both the arbitrator and the counsel for the claimant have appeared on three separate dates in the same matter; and there is nothing further on record to show that either they belong to the same Chamber, same Law firm or are partners or have any long standing or subsisting relationship. Section 13 is to be read along with the Vth Schedule in paragraph 26, which is reproduced below:

“26. The arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration.”

11. In the absence of any other documents on record, merely because the two [the arbitrator and the counsel for the claimant] had appeared in

one matter on three separate dates of hearing before Supreme Court, *prima facie* we are unable to convince ourselves that paragraph 26 of the Vth Schedule would apply.

12. As regards the second question, we find no infirmity in the view taken by the learned Single Judge, wherein he has held that the appellant would have its remedy against the Arbitral Award, if passed against it, also on the ground of alleged bias. This view of the learned Single Judge is based on the judgment of the Apex Court in ***HRD Corporation (Marcus Oil and Chemical Division) Vs. Gail (India) Ltd.***, (2018) 12 SCC 471. The Apex Court has held that if the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the Arbitrator, then it must continue the proceedings under Section 13(4) and make an award and only after the Award is made, then the party can challenge the appointment of the Arbitrator in accordance with Section 34 of the Arbitration and Conciliation Act. The relevant portion of the same is reproduced below:

“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.”

13. The Supreme Court further affirmed the decision in the case of ***Bharat Broadband and Network Limited Vs. United Telecoms Limited*** reported at (2019)5 SCC755, wherein the court has categorically held

that the challenge to the appointment of the arbitrator can be made under the provision of Section 13, together with the time-limit laid down in Section 13(2). As per the Act, the Arbitral Tribunal has been vested with the power to first decide on the said challenge, and if it is not successful, the Tribunal shall continue with the proceedings and make an award. It is only post the award that the party challenging such appointment may make an application for setting aside the award in accordance with Section 34 of the Act.

14. We thus find that the learned Single Judge has rightly relied on the said judgment of the Apex Court and given liberty to the appellant to challenge the Award under Section 34 of the Act, if the need so arises. no merit in the appeal and the same is dismissed.
15. Thus, we find no merit in the appeal and the same is dismissed. However, we make it clear that the observations made by us in this appeal would not stand in the way of the appellant, should he take this objection at the time of filing objections under Section 34 of the Arbitration & Conciliation Act, at a later stage.
16. The appeal and all the pending applications are accordingly dismissed.

G.S. SISTANI, J

JYOTI SINGH, J

MAY 08, 2019/ssn