

.IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.7337 of 2022

1. The Bihar State Electronics Development Corporation Limited through its Managing Director, registered office at Beltron Bhawan, Shastri Nagar, Patna.
2. The Managing Director, Bihar State Electronics Development Corporation Limited, Beltron Bhawan, Shastri Nagar, Patna.

... .. Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Department of Information and Technology, Government of Bihar, Patna.
2. The Principal Secretary, Department of Information and Technology, Government of Bihar, Patna.
3. M/s SREI Infrastructure Finance Limited, a company registered under the Company Act, 1956, having its registered office at Viswakarma 86C, Topisa Road (South) Kolkata, through its constituted attorney, Mr. Pradeep Roy, S/o Sri Jagdish Roy, resident of Flat No. 106A, Anandvatika Apartment, Nehru Nagar, Patna-800013, P.S.-Patliputra, District-Patna.
4. The Secretary, Honble Arbitration Tribunal headed by Honble Mr. Justice Jayanandan Singh (former High Court Judge), Sole Arbitrator, Flat No. 302, Amba Residency Apartment, East Boring Road, P.S.-Budha Colony, Patna-800001.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. P.K. Shahi, Sr. Adv. with Mr. Girijish Kumar, Adv. Mr. Vikash Kumar, Adv.
For the S.R.E.I.	:	Mr. Kunwar Shashank, Adv. Mr. Ankit Katriar, Adv.
For the State	:	Mr. Sunil Kr. Mandal SC-3 Mr. Arjun Prasad, AC to SC-3

CORAM: HONOURABLE MR. JUSTICE SANJEEV PRAKASH SHARMA

ORAL JUDGMENT

Date : 01-12-2022

1. The petitioners has preferred this writ petition under Article 226 and 227 of the Constitution with the prayer to set aside the order and judgement dated 26.04.2022 passed by the Learned District Judge, Patna whereby an application filed by the petitioners under-section 14 of the Arbitration Conciliation Act 1996 was rejected. Further prayer for allowing the application and declaring the mandate of the arbitrator to be terminated on the ground that he has become *de-jure* and *de-facto* unable to perform his functions effectively. The facts which are required



to be noticed are petitioner is a Government Company and is the respondent party in the arbitrary proceedings initiated by the respondent no. 3. vide order dated 28.06.2017, this Court appointed one Hon'ble Mr. Justice (Retd.) Jayanandan Singh as sole arbitrator under section 11 of the Act of 1996. An application under section 14 was preferred by the petitioner before the Arbitral Tribunal stating that they had lost the trust and confidence in the Arbitral Tribunal to get justice in impartial manner and that he had lost his mandate *de-jure* and *de-facto* to continue the arbitration proceedings. The same was considered by the Arbitrator and was rejected vide order dated 05.02.2022. The order was challenged by the petitioner before the Learned District Judge which was dismissed by the Learned District Judge vide his order dated 26.04.2022, upholding the order of the Arbitral Tribunal.

2. Learned counsel for the petitioner states that there was several circumstances which goes to show that the arbitrators mandate deserves to be terminated as he has become *de-jure* and *de-facto* unable to perform his functions.

3. Learned counsel submits that the sole arbitrator has acted in a manner which cannot be said to be fair and impartial. The request for reference of dispute was made by the claimant before this Court claiming an amount of Rs. 35.48 crores. However, after appointment of the arbitrator he submitted a claim of Rs. 188.28 crores. On 07.10.2017, the sole arbitrator directed to deposit a demand draft of Rs. 10 lakhs from both the parties which was not submitted on 07.10.2017, where after, last opportunity was given to deposit the amount as a first installment. The same was deposited after deducting T.D.S. on 16.01.2018 by the petitioner but the arbitrator directed the



petitioner to deposit the remaining 10,000 amount also. The petitioners contention of the fees required to be paid as per the sixth slab of the IV Schedule as added vide amendment of 2015 was not accepted by the sole arbitrator. A review application was filed which too was rejected by the arbitrator and a cost of Rs. 25,000 was further imposed on the petitioner along with second installment of fees failing which the statement of defence was to be rejected. The claimant on the other hand readily agreed to pay the high fees and made payment of Rs. 21 lakhs to the sole arbitrator.

4. It is submitted that the petitioner had an apprehension of the sole arbitrator being prejudiced against the petitioner as it directed for rejecting the statement of defence if the fees is not deposited. Although, there is no such provision available to him under the Act of 1996. Imposing of cost for non-payment of fees also could not have made.

5. The said proceedings were challenged by the petitioner by filing writ application before this Court bearing **CWJC No. 23934/2018**. The Court granted an interim protection and vide order dated 17.10.2019 issued notices to the Secretary of the sole arbitrator. However, the sole arbitrator who is a former Judge of this Court, chose to appear himself before the Court.

6. Although, there is bar contained in Article 220 of the Constitution for him to appear before the same Court where he has been a Judge and the case was therefore adjourned. Learned counsel contended that the same reflects the obsession of the arbitrator for the higher fees. Thereafter, another writ petition **CWJC No. 23934/2018** was filed before this Court seeking correct interpretation of the IV Schedule of the Act. The same was tagged along with **CWJC No. 14355/2019**. The writ



petitions were allowed and passed vide order dated 05.03.2020 and it was held that the fee fixation by the learned sole arbitrator was in breach of Schedule IV of the Act and was not sustainable in the eyes of law with further direction to deposit the fees in accordance with the IV Schedule of the Act. Notwithstanding this order, the learned arbitrator did not pass any order for re-fixation of his fees.

7. Thereafter, the petitioners moved a request case 32/2021 for appointment of a fresh arbitrator under 11(6) of the Act. It was stated that an application under section 14 had been moved before the Learned District Judge but the same was not heard due to lockdown. They also had moved another application before the sole arbitrator, wherein no order was passed. The request case was disposed off on 08.12.2021 with liberty to the petitioner to pursue the remedy first, before the learned arbitrator with further liberty to approach this Court, should the need arise on same and subsequent action.

8. Learned counsel submits that the observations made in the request case was sufficient for the sole arbitrator to recuse himself from the case, but the order has been passed otherwise. It is submitted further that the sole arbitrator has proceeded to treat the application moved by the petitioner under section 14 as that under section 13(2) of the Act.

9. Learned counsel has taken this Court to the order submitting that the sole arbitrator had proceeded to take a different view from the observations made by the Chief Justice in the request case. Learned counsel submits that in such circumstances where an arbitrator chooses to become a party to proceedings and even chose to contest applications in the High Court by personally appearing deserves to be declared as having lost his mandate



de-jure and *de-facto* and therefore the application ought to have been allowed. The learned district judge has failed to appreciate the submissions made by the petitioner.

10. Learned counsel submits further that an inherent bias on account of prejudice has been developed as against the petitioner who are non-claimants before the sole arbitrator. He submits that if one party to the dispute does not have faith or loses faith in the adjudicating authority, namely the sole arbitrator, it is a sufficient ground to hold that the concerned arbitrator has lost his mandate *de-jure* and *de-facto* and therefore a fresh arbitrator deserves to be appointed in his place.

11. Learned counsel has referred to the judgment passed by the Supreme Court in the case of **P.D. Dinkaran Vs. Judges Inquiry Committee & Ors.** reported in **2011 (8) SCC Pg 380** as under :

“61. In his separate opinion, Kirby, J. referred to the judgments of the House of Lords R. v. Gough as also R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No.2) and observed :

“It is a ‘fundamental rule’ of natural justice and an ‘abiding value of our legal system’ that every adjudicator must be free from bias. This same principle has been accepted in the international law of human rights, which supports the vigilant approach this Court has taken to the possibility that the ‘parties or public might entertain a reasonable apprehension’ that an adjudicator may not be impartial. Thus, Article 14.1 of the International Covenant on Civil and Political Rights, the starting point for consideration of the relevant requirements of international law, states:

‘All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent independent and impartial tribunal established by law.’

In Karttunen v. Finland, elaborating that article, the United



Nations Human Rights Committee concluded that 'impartiality' of a court:

'...implied that Judges must not harbour preconceptions about the matter put before them, and... they must not act in ways that promote the interests of one of the parties....A trial flawed by the participation of a Judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of Article 14.'

Appearance of Justice: The reason commonly given for adopting the comparatively strict approach that has found favour in this Court in recent years is that it mirrors the importance attached by the law not only to the actuality of justice (that is, whether the adjudicator had, in fact, prejudged issues in the case) but also the appearance of impartiality both to the parties and to the community. From the point of view of public policy, the practical foundation for a relatively strict approach lies in the obligation on an appellate court to defend the purity of the administration of justice and thereby to sustain the community's confidence in the system. In the words of Lord Denning, M.R. "justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'."

62. *In India, the courts have, by and large, applied the "real likelihood test" for deciding whether in particular decision of the judicial or quasi-judicial body is vitiated due to bias. In Manak Lal v. Dr. Prem Chand Singhvi it was observed: (AIR p. 429, para 4)*

"5... every member of a tribunal that [sits to] try issues in judicial or quasi-judicial proceedings must be able to act judicially; and it is of the essence of judicial decision and judicial administration that Judges should be able to act impartially, objectively and without any bias. In such cases the test is not whether in fact a bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that it is often said that justice must not only be done but must also appear to be done."

63. *In A.K. Kraipak v. Union of India the rule of bias was discussed in some detail in the context of selection for appointment to the Indian Forest Service. Although, Naqishbund who was a candidate for selection to*



the All-India Forest Service and was also a member of the Selection Board did not sit in the Selection Board at the time his name was considered but participated in its deliberations when the names of other candidates, who were his rivals were considered. Two important questions considered by the Court were whether the rules of natural justice were applicable in cases involving exercise of administrative power by the public authorities and whether the selection was vitiated due to bias. The Court answered both the questions in affirmative. While answering the second question, the Court noted that even though Naqishbund had not participated in the deliberations of the committee when his name was considered, but he was present when the claims of rivals were considered and observed: (SCC p. 270, para 15)

“15. ...At every stage of his participation in the deliberations of the Selection Board there was a conflict between his interest and duty. Under those circumstances it is difficult to believe that he could have been impartial. The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. ...In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct.”

12. He also relies on **2009 (4) SCC Page 523 Union of India vs. Singh Builders Syndicate** and judgment passed by the Rajasthan High Court in **Doshion Pvt. Ltd. Vs. Hindustan Zinc Ltd** in **2019 SCC Online 6** in support of his submissions.

13. Per contra, the respondent claimant has submitted that the reasons which has been brought forward in support of an application moved under section 14 cannot be sufficient ground for terminating the mandate of arbitrator in terms of the said section. The judgment passed before the Rajasthan High Court (supra) was in the facts of the said case where the arbitrator not only insisted on the payment of fees but on account of non-payment proceeded to pass an ex-parte award. The facts of the



present case are different and distinguishable.

13. Learned counsel submits that as per section 5 read with Section 12 of the Act of 1996, the petitioner waived its right to object to the appointment of arbitrator tribunal and acquiesced to the order passed by the High Court in appointing the sole arbitrator.

14. The learned counsel has taken this Court to the provisions of Section 12 and Section 13 of the Act to submit that the question of bias of sole arbitrator cannot be examined while deciding application under section 14 of the Act. The grounds which can be raised including that of bias and prejudice are those which are embodied in Section 12 of the Act and for the said purpose application was to be moved under-section 13.

15. Learned counsel submits that merely because the sole arbitrator is insisting on a higher fees and had joined issue with the petitioner, he cannot be said to have become incompetent *de-facto* or *de-jure* to conduct the arbitration. There is no disability which can be said to have been attached to the sole arbitrator solely on the ground of claiming fees. It is further submitted that after this Court had finalized the fee structure to be in accordance with the Schedule the only observations of the sole arbitrator was that the same is acceptable subject to the final adjudication by the Supreme Court in relation to the fees payable to an arbitrator which was at that time pending before the Supreme Court larger bench.

16. Learned counsel submits that the said issue stands already finalized by the Supreme Court. Learned counsel further submits that there has been no other instance which can be said to have been pointed out by the petitioner non-claimants apart from the question relating to the issue of fees which can be said



to create apprehension of prejudice and bias of the sole arbitrator. The sole arbitrator therefore, ought not be declared to have lost his mandate. It is stated that almost the entire evidence has been recorded and the case before the sole arbitrator is at the final stages and at the said stage, no order should be passed of terminating his mandate.

17. Learned counsel for the respondent claimant has relied on **2020 (17) SCC 626 National Highways Authority of India Vs. Gayatri Jhansi Roadways Ltd.** and judgment passed by Delhi High Court dated 31st July 2021 in **Delhi Tourism and Transportation Development Corporation (DTTDC) Vs. Swadeshi Civil Infrastructure Pvt. Ltd. 2021 SCC Online Del 3876** as well on **2022 SCC Online MAD 6121** reported in **ARBLR 104 of Madras High Court in Clarke Energy India Private Limited Vs. SAS EPC Solution Private Limited** in support of his contention.

18. I have considered the submissions. The issue required to be examined firstly is whether an application under section 14 filed by the petitioner the grounds raised relating to bias and prejudice of the arbitrator can be looked into for terminating the mandate of the arbitrator. In **Delhi Tourism and Transport Development Corporation (DTTDC) Vs. Swadeshi Civil Infrastructure (supra)**, Delhi High Court has noticed as under:

“28. In HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Ltd.: (2018) 12 SCC 471, the Supreme Court has authoritatively explained the said scheme of the A&C Act as under:

“12. 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.”

“29. It is clear from the above that save and except in conditions where an arbitrator is ineligible to act as such by virtue of Section 12(5) of the A&C Act, a challenge under Section 14 of the A&C Act would not be maintainable on the perceived doubts as to his independence and impartiality.

19. In order to adjudicate the said aspect it would be appropriate



to first refer to the provisions of the Act Section 5,12,13,14 and Section 29A of the Act deal with the issue involved and required to be noticed as under:

“5. Extent of judicial intervention.-

Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

12. Grounds for challenge.- [(1) *When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,-*

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

(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.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

[(5) Notwithstanding, any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes



having arisen between them, waive the applicability of this sub-section by an express agreement in writing.]

13. Challenge procedure.- (1) *Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.*

(2) *Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.*

(3) *Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.*

(4) *If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.*

(5) *Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.*

(6) *Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.*

14. Failure or impossibility to act.-(1) *[The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator; if]-*

(a) *he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and*

(b) *he withdraws from his office or the parties agree to the termination of his mandate.*

(2) *If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.*

(3) *If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of*



any ground referred to in this section or sub-section (3) of section 12.

[29A. Time limit for arbitral award.- [(1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23:

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavor may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23.]

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees or arbitrator(s) by not exceeding five per cent for each month of such delay.

[Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application.

Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.]

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are



substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavor shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.”

20. From the perusal of the aforesaid provisions, this Court finds that Section 12 lays down the grounds to challenge the appointment of an arbitrator and the grounds would include a bias of various forms.

21. Section 12 (1)(a) deals with his independence and impartiality which would necessarily mean a person who does not have bias, Section 12 (1)(b) deals with situation where he is unable to perform or is unable to complete the proceedings within the time framework on account of disability which may arise on account of one or other. Section 12(2) deals with the disclosures which the arbitrator may inform having arisen during the course of arbitration. The procedure of challenge is laid down under Section 13 which are subject to the parties having already agreed for a procedure other than laid down in Section 13. The challenge under Section 13 is made by a party by moving an application with regard to the appointment of the arbitrator on the grounds as mentioned under section 12 read with Schedule VII.



22.However, in my considered opinion Section 14 is independent of Section 13. It is not a challenge to the appointment of the arbitrator but is the challenge to the mandate of the arbitrator.

23.However, jointly considered opinion Section 14 is independent of Section 13. It is not a challenge to the appointment but is the challenge to the mandate of the arbitrator after the arbitration proceedings have already commenced. Thus, if he becomes *de-jure* or *de-facto* unable to perform his functions after the arbitration has already commenced, his mandate shall be terminated by Court. The application as held by the Apex Court is required to be filed in the Court as defined under section 2(e) of the Act of 1996.

24. In **2022 SCC Online SC 556 Swadesh Kumar**, the Supreme Court has held as under:

“31. Sections 14 and 15 provide for termination of the mandate of the arbitrator. Section 14 of the Act, 1996 provides that the mandate of the arbitrator shall terminate and he shall be substituted by another arbitrator in case of any eventuality mentioned in section 14(1)(a). As per subsection (2) of section 14, if a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, apply to the “court” to decide on the termination of the mandate. The expression “court” is defined under section 2(e) of the Act, 1996, which reads as under:-

“(e) “Court” means-

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial



arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;]”

25. On an application filed under Section 14 of the Act, this Court would therefore examine whether the arbitrator has acquired *de-jure* inability to perform functions or *de-facto* disability to perform function or not. The word “*de-jure*” as defined in Black’s Law Dictionary means “*de-jure* as an adjective would mean as a matter of law existing by right or according to law”. Thus if his *de jure* inability is to be seen all the disabilities as contained in the various provisions of the Act of 1996 would constitute *de jure* disabilities. Therefore, if the grounds mentioned in Section 12 are found to be existing during arbitration proceedings or the grounds as mentioned in the Schedule VII are existing on the grounds as mentioned in Section 29 are existing. An application can be filed claiming that the arbitrator has acquired a *de jure* inability that is inability in accordance with law that is the law as existing in the Act of 1996. Therefore, an application under section 14 of the Act of 1996 would be maintainable on the ground of allegation of prejudice or bias of the arbitrator which may have come into existence during the course of arbitration.

26. The question of existing bias for dis-allowing appointment of an arbitrator as a ground mentioned in Section 12(1)(a) will also be a ground to declare an arbitrator *de-jure* disabled if he develops or is shown to have developed during the course of arbitration proceedings a bias or prejudice against any of the parties. Of course, the same has to be tested at a much higher



pedestal.

27. A person may become *de-facto* disabled also during the course of proceedings if in fact some disability may have occurred resulting in the concerned arbitrator not being able to perform which may be on account of illness or absence or on account of any impairment. Such factual disabilities would also deny him to continue with the arbitration proceedings and an order can be issued to terminate his mandate.

28. In **Doshion Private Limited Vs. Hindustan Zinc Ltd.**, Rajasthan High Court has held as under:

“In view of the above discussion, it is apparent that as the fee determined by the arbitrator has been reduced to half and the manner in which the arbitral proceedings continued before the learned sole arbitrator, the petitioner will definitely have some doubt as to the conduct of the proceedings and the same would certainly lead to loss of confidence and as observed by Madras High Court in Madras Fertilizers Ltd. (supra), such an unpleasant situation is to be avoided in the best interest of the parties including the arbitrator.

Because of long drawn controversy in petitioner challenging the quantum of fees before the learned arbitrator, moving application before the Commercial Court, wherein, the determination of fees made by the learned arbitrator has been reversed and then again filing the present proceedings before this Court seeking termination of the mandate of the learned arbitrator, more importantly the learned arbitrator during the pendency of present petition before this Court, again closing evidence of the petitioner and fixing the matter for final arguments, taking the totality of above (14 of 14) [CW-6074/2018] facts and circumstances of the case, this Court is of the considered view that the learned arbitrator has been rendered de jure/de facto unable to perform his functions effectively warranting his mandate to be terminated under Section 14(1) of the Act and the determination made by the Commercial Court in this regard, therefore, cannot be sustained.”

29. Therefore, in my considered opinion, the view taken by the



Rajasthan High Court(supra) seems to be the correct interpretation of law and approach and ground of bias can be looked into for declaring the termination of mandate of an arbitrator on the ground of being *de jure* disabled to perform the view taken by the Delhi High Court in Delhi Tourism(supra) is in my opinion distinguishable. As it is not taken into consideration that the independence and impartiality of an arbitrator may arise during the course of an arbitration proceedings also and not only at the stage of appointment of arbitrator.

30. In the present facts of the case this Court finds that the arbitrator was appointed by the High Court in the year 2017, where after proceedings have continued and evidence has also been recorded from time to time. The orders were passed relating to payment of fees but that has not in any manner interfered with the arbitration proceedings to go on from time to time. It is not a case where the arbitrator has restrained the petitioners from putting up their defence or in any manner initiated any proceedings which may be said to create a perception of prejudice or bias as against the petitioner which is a State Government Organization. The insistence of a higher fees considering the claim and the work is a personal assessment of the arbitrator. However, as now the question stands already settled by the Apex Court as well as by this Court. The petitioners have not been able to bring before this Court any document to show any further action on part of the arbitrator or orders passed by him which reflect his averseness towards the petitioners. In National Highway Authority of India Vs Gayatri Jhansi Roadways Limited 2020 (17) SCC 626 (supra) the Supreme Court heard an appeal against the order passed by the



Delhi High Court whereby the mandate of the arbitrator was terminated on the ground that he had been demanding for a higher fees and therefore he had become *de-jure* unable to act any further in the proceedings. The Supreme Court set aside the order passed by the Delhi High Court in 2020 (17) SCC 626 and held as under:

“12. We may, however, indicate that the application that was filed before the High Court to remove the arbitrators stating that their mandate must terminate, is wholly disingenuous and would not lie for the simple reason that an arbitrator does not become de jure unable to perform his functions if, by an order passed by such arbitrator(s), all that they have done is to state that, in point of fact, the agreement does govern the arbitral fees to be charged, but that they were bound to follow the Delhi High Court in Gayatri Jhansi Roadways Limited case which clearly mandated that the Fourth Schedule and not the agreement would govern.

13. The arbitrators merely followed the law laid down by the Delhi High Court and cannot, on that count, be said to have done anything wrong so that their mandate may be terminated as if they have now become de jure unable to perform their functions. The learned Single Judge, in allowing the Section 14 application, therefore, was in error and we set aside the judgment of the learned Single Judge on this count.”

31. The term “bias” as defined in **Ranjeet Thakur Vs. Union of India 1987(4) SCC Page 611** under **Para 17** and **Para 20** has held under:

“17. As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, “Am I biased?”; but to look at the mind of the party before him.

*20. Frankfurter, J. in Public Utilities Commission of the District of Columbia v. Pollak said :
“The judicial process demands that a Judge move within*



the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole Judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating. Judges recuse themselves. They do not sit in judgment."

32. The question therefore would be whether the apprehension as pointed out by the petitioner of bias of the sole arbitrator can be said to be reasonable apprehension. The opinion of this Court considering the view as observed by the Apex Court in NHAJ (supra) solely on the basis of demanding of a higher fees bias cannot be inferred. The apprehension cannot be said to be reasonable. The fact of the sole arbitrator appearing before this Court cannot be treated as a ground to hold him biased and prejudiced against the parties to the arbitration proceedings. It is with respect to the question of determination of fees that he may have chosen to appear since notices were issued to him but there is nothing else on record to hold him to be biased.

33. The observations of this Court while deciding the request filed by the petitioner, are not to be taken as a finding of bias against the arbitrator and influence thereto, cannot be drawn. An opinion of the Court in an order the of the Court in the order is to be considered in relation to the proceedings of demanding of fees and not in relation to the main dispute before the sole arbitrator. It is the opinion of this Court (Hon'ble Chief Justice)



in relation to the proceedings of demanding of fees and not in relation to the main dispute before the sole arbitrator. The sole arbitrator would be deciding the arbitration proceedings on merits independent of the fees demanded by him. Non-payment of fees may be a ground to withhold the award but so far as the adjudication of award is concerned, there is no inkling or even iota or indication to hold the arbitrator having any prejudice. In these circumstances, this Court does not find any reason to accept the application.

34. A retired Judge of the High Court, may have an opinion that as per the provisions of the Act of 1996, the arbitrator has an authority to fix his own fees, however, that would not in any manner put him to a disability to decide an arbitration case allotted.

35. In view of above, this writ petition is found to be devoid of merits and is accordingly dismissed. It is now expected that the parties shall proceed and complete their pleadings expeditiously as the case has remained pending for quite a long time including the interim order passed by this Court. It is directed that the arbitration proceedings be completed and concluded earliest within a period of four months.

(Sanjeev Prakash Sharma, J)

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AFR/NAFR	AFR
CAV DATE	16.11.2022
Uploading Date	
Transmission Date	

