

**IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE**

Present:

The Hon'ble Justice Shekhar B. Saraf

AP 574 OF 2022

MANIKANKANA SAHA

VS

LEELA DEVI KASERA

For the Petitioner:

Mr. Pradip Kumar Tarafder, Adv.

Mr. Sambuddha Dutta, Adv.

Mr. Subir Pal, Adv.

For the Respondent:

Mr. Tanmoy Sett, Adv.

Ms. Ankita Agrahari, Adv.

Ms. Barnali Bhowmik, Adv.

Ms. Noelle Banerjee, Adv.

Ms. Nairanjana Ghosh, Adv.

Last heard on: February 24, 2023

Judgment on : February 28, 2023

Shekhar B. Saraf, J.:

1. The present application has been filed by Manikankana Saha, sole proprietress of 'M/s Quality Foods' (hereinafter referred to as the

‘petitioner’), under Section 14(2) read with Section 14(1)(a) and with Sections 12(1)(a) & 12(5) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as ‘the Act’).

2. The petitioner seeks, inter alia, termination of the mandate of the named arbitrator Mr. Rajesh Lihala, on the ground that he is *de jure* and/or *de facto* unable to perform his functions.
3. The parties had entered into two agreements, viz., Leave & License Agreement and Service Agreement dated September 01, 2018, for the premises at 6, Russell Street, Kolkata – 700072 which is owned by the respondent/licensor Leela Devi Kasera, sole proprietress of ‘M/s Govindam’.
4. In the year 2021, disputes arose between the parties due to non-payment of monthly licence fees. Resultantly, the respondent herein invoked arbitration as per clauses 20 and 10 of the respective agreements and referred the matter to Mr. Rajesh Lihala, the named arbitrator in the aforesaid clauses.
5. Before the arbitral tribunal, the petitioner herein filed an application under Section 16 of the Act challenging its competence on the ground that there is no valid, enforceable arbitration agreement between the parties. Subsequently, a Section 17 application was filed by the petitioner herein for interim measures wherein the petitioner noted

certain developments which gave rise to doubts about the arbitrator's impartiality. Finally, on July 29, 2022, an application was filed by the petitioner under Section 13 read with Section 12(3) challenging the appointment on the grounds that there are justifiable doubts as to the impartiality of the arbitrator and as on date, the same is pending consideration by the arbitrator.

6. It is the petitioner's case that the arbitrator and his wife are directors in a registered private limited company wherein the nephew of the respondent is also a director. In addition to this, it has been contended that the arbitrator is occupying an office in a building owned by the brother of the respondent at Premises No. 11, Crooked Lane, Kolkata 700069. As such, the arbitrator is hit by entry no. 10 of Schedule VII of the Act, and therefore, he is *dejure ineligible* to adjudicate the disputes between the parties.
7. I have heard the counsel appearing on behalf of the respective parties, and perused the materials on record.
8. The position of law on termination of arbitrator's mandate and substituting him with another arbitrator is well settled. Before proceeding to discuss the relevant case laws on this proposition, it would be prudent on my part to reproduce the relevant provisions of the Act below –

Section 12. Grounds for challenge

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(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.

THE SEVENTH SCHEDULE

Arbitrator's relationship with the parties or counsel

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10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

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Explanation 1.—The term “close family member” refers to a spouse, sibling, child, parent or life partner.

Explanation 2.—The term “affiliate” encompasses all companies in one group of companies including the parent company.

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9. The Supreme Court in ***Bharat Broadband Network Ltd. –v- United Telecoms Ltd.*** reported in **(2019) 5 SCC 755** had discussed the scheme of Sections 12, 13 and 14 of the Act, and held that the Court can decide upon an arbitrator's mandate only when it falls within any

of the categories mentioned in Section 12(5) read with Schedule VII of the Act. The relevant paragraphs have been reproduced below:-

“14. From a conspectus of the above decisions, it is clear that Section 12(1), as substituted by the Arbitration and Conciliation (Amendment) Act, 2015 [“Amendment Act, 2015”], makes it clear that when a person is approached in connection with his possible appointment as an arbitrator, it is his duty to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality. The disclosure is to be made in the form specified in the Sixth Schedule, and the grounds stated in the Fifth Schedule are to serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Once this is done, the appointment of the arbitrator may be challenged on the ground that justifiable doubts have arisen under sub-section (3) of Section 12 subject to the caveat entered by subsection (4) of Section 12. The challenge procedure is then set out in Section 13, together with the time limit laid down in Section 13(2). What is important to note is that the arbitral tribunal must first decide on the said challenge, and if it is not successful, the tribunal shall continue the proceedings and make an award. It is only post award that the party challenging the appointment of an arbitrator may make an application for setting aside such an award in accordance with Section 34 of the Act.

17. The scheme of Sections 12, 13, and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes “ineligible” to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case, i.e., a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e., de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section

14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act.....”

10. Similarly, the Delhi High Court in ***Union of India –v- Reliance Industries Limited and Ors*** reported in **2022 SCC Online Del 4310** held that only in cases where the arbitrator is hit by Section 12(5) read with Schedule VII of the Act and becomes *de jure ineligible*, can the Court exercise its power under Section 14 and terminate the mandate of the arbitrator. I have reproduced the relevant portions below :-

“30. On a conjoint reading of Sections 12, 13 and 14 of the Act, the Court is of the considered opinion that it is the disqualifications set out in the Seventh Schedule alone which can be recognised as being the de jure disqualifications under the Act. De jure, as is well settled, would mean something stipulated or prescribed by law or according to law. It would thus include disqualifications which would automatically render an arbitrator ineligible to be either appointed or to continue. These disqualifications would inevitably result in the termination of mandate.

31. Bias as distinct from the above, would be an issue which would have to axiomatically be established in fact. An allegation of bias would have to be alleged and proven. Viewed in that light, it is manifest that it would clearly fall outside the pale of a de jure disqualification. The view taken by the Court stands fortified from a reading of Section 12(3) of the Act which mandates a party

establishing that "circumstances exist" giving rise to a justifiable doubt with respect to the independence or impartiality of an arbitrator.

32. The Court for the following additional reasons finds itself unable to countenance the submission that a bias allegation would fall within the ambit of Section 14(1)(a) of the Act. As has been noticed above, the subject of bias and justifiable doubt is specifically dealt with in Section 12. If the Court were to accord an interpretation upon Sections 12 and 14 and treat such an allegation as falling within an overlap of the aforesaid provisions, it would not only be contrary to well settled rules of interpretation but would also clearly violate the evident scheme and intent of the Legislature.

33. A Section 12(3) challenge is guided by the provisions of Section 13. Sub-sections (4) and (5) thereof provide for the consequences which would ensue once such a challenge fails. They mandate that in such an eventuality, the proceedings before the Arbitral Tribunal would have to be continued and terminate only once an award is rendered. They perceive of the party challenging the mandate of an arbitrator to await the making of an award and only then assailing the same in accordance with Section 34. The provision does not contemplate a curial challenge being raised or pursued at the intermediate stage. Recognising the right to raise such a challenge at the interim stage by recourse to Section 14(1)(a) would clearly be contrary to the evident legislative intent and resolve to debar such a recourse.

34. The expression *de jure* as occurring in Section 14 would necessarily have to be construed as conditions which are recognized and so ordained by law. The subject of bias and justifiable doubts is clearly one which is specifically provisioned for in Section 12. Once that subject stands taken note of by the legislature in the said provision, it would be tenuous to hold an allegation of bias as being one which would be triable in a Section 14 proceeding also. Sections 12 and 13 when read together thus appear to constitute a complete and an independent code for the purposes of trial of such an allegation. They clearly mandate and oblige the Arbitral Tribunal to examine whether circumstances exist that give rise to justifiable doubts. The factual enquiry which would necessarily have to be undertaken in connection with the aforesaid clearly appears to be controlled and governed by Sections 12 and 13 exclusively. Once the aforesaid issue stands governed by the aforementioned two provisions, it would be incorrect to recognize an identical enquiry

being undertaken by the court under Section 14. This would not only fall foul of the principles enunciated in HRD Corporation and Bharat Broadband, it would also appear to be contrary to the legislative intent enshrined in sub-sections (3), (4) and (5) of Section 13.”

11. Having outlined my jurisdiction to adjudicate the present application, I now proceed to examine the petitioner’s contention that the arbitrator herein is covered by entry 10 of Schedule VII of the Act. There are three ingredients in the aforesaid entry which are required to be fulfilled to establish an arbitrator’s ineligibility, viz., close family member, significant financial interest and one of the parties or an affiliate of such parties.
12. The first two criteria above are met by virtue of the arbitrator and his wife being directors in ‘Vindya Apartments Private Limited’ wherein one Rahul Kajaria, nephew of the respondent herein is also a director. I do not have any doubt in my mind that arbitrator and his wife enjoys financial relation with Mr. Kajaria.
13. However, to complete the ineligibility trinity as provided in entry 10 of Schedule VII, Mr. Kajaria must be established as an ‘affiliate’ of the respondent. Explanation 2 to Schedule VII states that the term ‘affiliate’ encompasses all companies in one group of companies including the parent company. There is nothing on record to establish that ‘Vindya Apartments Private Limited’ is an affiliate of ‘M/s Govindam’ or has any connection, commercial or otherwise, with the respondent’s firm.

14. In view of the aforesaid findings, I hold that the concerned named arbitrator or his close family member does not fall within entry 10 of Schedule VII. Consequently, the arbitrator does not suffer from *dejure ineligibility* and this Court cannot proceed with terminating the mandate of the aforesaid arbitrator, and substituting it with another arbitrator.
15. For the reasons discussed above, AP 574/2022 is dismissed. There shall be no order as to costs.
16. An urgent photostat-certified copy of this order, if applied for, should be made available to the parties upon compliance with requisite formalities.

(Shekhar B. Saraf, J.)