

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO.244 OF 2024

Dipl.-Ingenieure Rainer &
Oliver PULS GmbH (Germany)

...Petitioner

Versus

Force Motors Limited (India) & Anr.

...Respondents

Mr. Rajiv Kumar, Senior Advocate a/w Ms. Sneha Phene, Mr. J. Kapadia, Mr. Keshav K. Tripathi, Mr. Suman J. Khaitan, Mr. Vikas Kumar, Mr. Satymev Sabarn, & Ms. Surabhi Chhabra i/b Little & Co., for the Petitioner.

Mr. Mustafa Doctor, Senior Advocate a/w Mr. Shrenik Gandhi & Ms. Aishwaryajeeta Tawde i/b. Kanga & Co., for the Respondent No.1.

CORAM: MADHAV J. JAMDAR, J.
DATED: JANUARY 10, 2025

JUDGMENT:

1. Heard Mr. Rajiv Kumar, learned Senior Counsel for the Petitioner and Mr. Mustafa Doctor, learned Senior Counsel for the Respondent No.1.

I] RELIEFS SOUGHT IN COMMERCIAL ARBITRATION PETITION:

2. The Petitioner i.e. Original Respondent in the Arbitration Proceeding bearing IGCCAC Case No.1/22 has by the present Commercial Arbitration Petition filed under Sections 14 and 15 of the *Arbitration and Conciliation Act, 1996* (“**said Act**”) *inter alia* sought the following prayers :-

“(a) this Hon’ble Court passed appropriate orders and directions

*ordering that **mandate of Mr. R.A. Shah – Ld Arbitrator in IGCCAC Case No.001/2022 be terminated** forthwith or on on such terms and conditions as this Hon’ble Court may deem fit and proper; and*

- (b) this Hon’ble Court be pleased to appoint a substitute arbitrator under Section 15 of the Act in the arbitration between the Petitioner and Respondent No.1 on such terms as this Hon’ble Court may deem fit and proper; and*
- (c) this Hon’ble Court be pleased to direct removal of Respondent No.2 from the arbitral proceedings with direction to Respondent No.2 to refund all amounts paid by the Petitioner to Respondent No.2 and substitute another reputed arbitral institution in place of Respondent No.2 to administer and manage the arbitral proceedings for adjudication of the disputes and differences between the Petitioner and the Respondent No.1;*

OR

in the alternative allow conversion of the present arbitral proceedings into ad hoc arbitral proceedings;”

(Emphasis added)

II] FACTUAL MATRIX:

3. Both the learned Senior Counsel have raised various contentions. Before setting out the contentions raised by learned Senior Counsel and consideration of the same, it is necessary to set out certain factual aspects.

- i.** On 1st May 2019, a Technology Transfer Agreement (“**TTA**”) was executed between the Petitioner and Respondent No.1. The said Agreement *inter alia* concerns purchase of a special technology for electrification of vehicles. The said Agreement contains an arbitration Clause appointing the Respondent No.2 - Indo-

German Chambers of Commerce (“IGCC”) as the Institution for conducting the arbitration. The said arbitration clause reads as under :-

“18) ARTICLE 18. APPLICABLE LAW AND COMPETENT JURISDICTION

Any dispute, difference or claim arising out of, or in relation to this contract, including the construction, validity, performance or breach thereof, shall be referred to the Indo-German Chamber of Commerce Mumbai, for resolution in accordance with the Rules of Arbitration of the Chamber (arbitration rules), then in force. The award (decision) of the arbitral tribunal constituted under the arbitration rules, shall be final and binding on the parties hereto.

The contract is governed by the laws of India.”

The arbitration Clause provides for arbitration under the Rules of the Respondent No.2 – IGCC.

- ii. On 8th February 2022, Respondent No.1 made the reference to arbitration.
- iii. On 19th May 2022, Respondent No.1 nominated Mr. R. A. Shah as an Arbitrator.
- iv. On 19th May 2022, Mr. R. A. Shah furnished a declaration under the provisions of Section 12(1)(b) r/w the Sixth Schedule of the said Act (Page Nos.352 – 355). The relevant portion of the declaration furnished by Mr. R. A. Shah, reads as under :-

Prior experience (including : ***Please see the Profile forwarded experience with Arbitrations) separately.***

Number of ongoing : None.
Arbitrations

Circumstances disclosing any : ***I have no financial, business, past or present relationship professional or other kind of with or interest in any of the relation, either in the past or Parties or in relation to the present, in relation to the subject-matter in dispute, subject matter of dispute whether financial, business, between Force Motors Limited, professional or other kind, Pune, the Claimant, and Dipl-Ingenieure Rainer & Oliver PULS GmbH, Germany, the which is likely to give rise to Respondent, or interest of any justifiable doubts as to your of these Parties in relation to independence or impartiality the subject matter.***
(List Out)

Circumstances which are : None
likely to affect your ability to
devote sufficient time to the
Arbitration and in particular
your ability to finish the
entire Arbitration within
twelve months (List Out)

The relevant part of said Profile is as follows :-

“Mr. R. A. Shah is also a Member of Managing Committees of various Commerce & Industry Associations such as Bombay Chamber of Commerce & Industry and Indo-German Chamber of Commerce. He is the Chairman/Director of various public listed companies and Chairman/member of Audit Committees. He has served on several renowned public listed companies engaged in the field of pharmaceuticals, chemicals and fertilizers, textiles, real estate, FMCG, etc, for more than three decades and in case of few others for over half a century. Mr. Shah has acted as Counsel and Arbitrator in international arbitration proceedings.”

(Emphasis added)

- v. Clause 7 of the Indo-German Chamber of Commerce Arbitration Centre - Rules for Arbitration (“**Indo-German Arbitration Rules**”) titled as “Qualifications of Arbitrators” also provides that disclosure has to be given by the Arbitrator. Accordingly, Mr. R. A. Shah, learned Arbitrator has submitted the declaration as per the provisions of Clause 7 of the Indo-German Arbitration Rules. The said declaration dated 19th May 2022 furnished as per Clause 7 of the Indo-German Arbitration Rules is as under :-

- “1) *There are no circumstances, which may create doubt and/or give rise to justifiable doubts, about my impartiality or independence, in respect of the arbitral proceedings initiated by and between Force Motors Limited, Pune, as the Claimant and Dipl-Ingenieure Rainer & Oliver PULS GmbH, as the Respondent.*
- 2) *I confirm that I have not been appointed as an arbitrator by any of the Parties or their affiliates, within the last three years.*
- 3) *I confirm that I have not been appointed as a counsel, for representing, advising or represented or advised any of the above Parties to the said arbitral proceedings in respect of any dispute (including an unrelated dispute).*
- 4) *I further confirm that, I have no direct or indirect interest in the dispute between the above referred Parties.”*

(Emphasis added)

- vi. On 20th May 2022, the Petitioner nominated Senior Advocate Mr. Ciccu Mukhopadhaya as its Nominee Arbitrator.

- vii.** By letter dated 14th November 2022, Mr. R. A. Shah communicated the Petitioner and Respondent No.1 that there was no consensus in respect of the appointment of the Presiding Arbitrator.
- viii.** On 5th January 2023, the Supreme Court appointed Mr. Justice L. Nageswara Rao, Former Judge of the Supreme Court as Presiding Arbitrator.
- ix.** On 13th February 2023, the Arbitral Tribunal held its first hearing and passed a procedural Order for filing pleadings.
- x.** On 8th May 2023, the Respondent No.1 filed its Statement of Claim.
- xi.** It is the case of the Petitioner that thereafter the Petitioner contacted a Lawyer for drafting/preparing the Statement of Defence. At that time, in or about mid-July 2023, the Petitioner learnt of the association between Mr. R. A. Shah, Mr. Firodia and Ms. Sonia Parshar.
- xii.** On 27th July 2023, the Petitioner filed an Application in the said matter of Arbitration between the Respondent as claimant and the Petitioner as Respondent under Section 16 read with Sections 12(3)(a), 13 and 18 of the said Act. In the said Application in Paragraph No.17 contentions are raised that Mr. R. A. Shah, learned Arbitrator has not made complete disclosure and certain

material facts which the Petitioner has come to know which give rise to grave likelihood of bias and partiality. The relevant part of said Application is in Paragraph Nos. 17 and 18, which read as under :-

*“17. It is stated that **recently during the past week** while internally preparing with its team in Germany for briefing the Indian lawyers for drafting the Statement of Defense and the Counter Claim, **the Respondent noticed, for the first time, certain material facts which give rise to grave likelihood of bias and partiality, including:***

- (i) the fact that **Dr. Abhaykumar N. Firodia, the Promoter and Chairman of the board of directors of the Claimant, (who is also the signatory to the TTA on behalf of the Claimant and played an active role in negotiation of the TTA and is a key witness to the present proceedings), has been a member of the Committee of IGCC since 1995, and has also served as President of IGCC;***
- (ii) **Mr. R.A. Shah, Ld. Arbitrator nominated by the Claimant, has also been a member of the Committee of IGCC since 1993 (although the Respondent was informed about Mr. R.A. Shah being a member, the fact that he shared that position with Dr. Abhaykumar N. Firodia was never disclosed to the Respondent);***
- (iii) **Both Dr. Abhaykumar N. Firodia, the Promoter and Chairman of the board of directors of the Claimant, and Mr. R.A. Shah, Learned Arbitrator, are even presently members of the Committee of IGCC for the year 2022-23;***
- (iv) **Ms. Sonia Prashar, Deputy Director General of IGCC, who was a member of the Governing Body of***

IGCC and had been actively involved in the present arbitration proceedings till September 2022, has been appointed as Additional Director in the Board of Directors of the Claimant Company in September 2022;

- (v) Ms. Sonia Prashar continues to be Deputy Director General of IGCC, while also being Director in the Claimant company.*

*The copy of Master Data of IGCC as available on the website of Ministry of Corporate Affairs, which shows the members of IGCC's Committee, is annexed hereto and marked as **Exhibit RD-2**.*

- 18. It is submitted that the above facts, which are in themselves sufficient to cause justifiable apprehension of bias and fear of partiality and denial of equality in the minds of a foreign company situated in Europe, further add to the anxiety and apprehension of the Respondent of being treated unfairly when coupled with the circumstances mentioned above, including the following:*

- (i) The fact that Dr. Abhaykumar N. Firodia has been President of IGCC in the past and has been since many years (and continues to be) a member of the Committee of IGCC, which Committee is responsible for overall management and operation of IGCC, was never disclosed to the Respondent, neither by the Claimant nor by IGCC itself, even when the Respondent communicated its reservation against having IGCC as the Arbitral Institution;*
- (ii) The above fact was not even disclosed by Dr. Udo Götschel from IGCC Germany, who was deputed by Dr. Abhaykumar N. Firodia to visit the office of the Respondent at Karlsruhe and persuade Mr. Rainer Puls to accept the nomination of IGCC as the Arbitral Institution by assuring utmost professionalism and impartiality;*

- (iii) *In hindsight, the control that Dr. Abhaykumar N. Firodia enjoys over IGCC is apparent from the fact that he, in his anxiety to ensure that IGCC is appointed as the Arbitral Institution, deputed an official of IGCC Germany to visit, convince and persuade the Respondent into accepting it as the Arbitral Institution, perhaps deliberately, knowing that he will be able to enjoy certain privileges and control;*
- (iv) *That although the fact of the Learned Arbitrator-Mr. R.A. Shah, being a member of the IGCC's Committee was disclosed in his Declaration supplied to the Respondent, the Respondent was never informed that the Learned Arbitrator shared that position alongside with Dr. Abhaykumar N. Firodia, the Chairman and Promoter of the Claimant, which position he has been sharing with Dr. Abhaykumar N. Firodia for many years;*
- (v) *That Dr. Abhaykumar N. Firodia, who is not only the Chairman and Promoter of the Claimant, but is also the signatory to the TTA and was extensively involved in the negotiations and communications between the Claimant and the Respondent, and will therefore be a key and crucial witness both for the Respondent and the Claimant, and will also be required to be cross-examined;*
- (vi) *Respondent respectfully submits, without making any personal imputations, that it cannot be ruled out that the Learned Arbitrator- Mr. R.A. Shah, who has been in the same Committee of IGCC alongwith Dr. Abhaykumar N. Firodia, Chairman and Promoter of the Claimant, and having strong social familiarity with him for so many years, might have a subconscious friendly bias in favour of the Claimant herein;*
- (vii) *That Ms. Sonia Prashar, who was a part of three member Governing Body of IGCC (which body*

exercises substantial powers over administration of the arbitral proceedings, including power to receive communications, assist communication between arbitrators, receive draft Award and suggest modifications to the same much before it is shared with the parties, consider applications for objection to appointment of arbitrator, direct interim stay/suspension of arbitral proceedings, etc.), has been appointed as Additional Director by the Claimant company itself in September 2022, which gives rise to strong apprehension that talks of her appointment with Claimant was underway even during the period while she was serving as member of Governing Body and was handling the instant arbitral proceedings on behalf of IGCC.

(viii) Ms. Sonia Prashar, although no longer a member of the Governing Body of IGCC, is still a Deputy Director General of IGCC while being Additional Director in the Claimant company. It is submitted that by virtue of the above, Ms. Sonia Prashar will not only be privy to the internal communications and records of the Claimant company and be a part of the board meetings and other committee meetings of the Claimant company, but will also be privy to internal documents and communications of IGCC, while also exercising a degree of authority over the other officials of IGCC, which is a patent, glaring, and unacceptable conflict of interest, more so in international commercial arbitration;

(ix) That the control and privilege that Dr. Abhaykumar N. Firodia, Chairman and Promoter of Claimant, enjoys over IGCC is also evident from the fact that although the communication by the Learned Nominee Arbitrators- Mr. Ciccu Mukhopadhyay and Mr. R.A. Shah that they are unable to decide upon the Presiding Arbitrator was sent on 14.11.2022, the Claimant was able to file its Petition under Section 11 of the Arbitration and Conciliation Act 1996 (running into more than 600 pages) before the Hon'ble Supreme Court for appointment of

Presiding Arbitrator on 15.11.2022, i.e. immediately on the very next day. The above is evidence that the Claimant, by virtue of the control and power it enjoys over IGCC, had prior knowledge of the internal communications and deliberations between the Learned Nominee Arbitrators.”

(Emphasis added)

- xiii.** In the above facts and circumstances, the Petitioner filed as noted hereinabove Application dated 27th July 2023 under Section 16 read with Sections 12(3)(a), 13 and 18 of the said Act before the learned Arbitral Tribunal *inter alia* seeking following reliefs :-

*“In the circumstances, it is, therefore, most respectfully prayed that **the Learned Arbitrator, Mr. R. A. Shah, may be pleased to rescue himself from the present arbitral proceedings in the facts and circumstances of the case.***

It is further prayed that this Hon’ble Tribunal may graciously be pleased to:

- (a) allow the present application and **remove IGCC from the arbitral proceedings with direction to IGCC to refund all amounts paid by the Respondent to IGCC and substitute another reputed arbitral institution in place of IGCC to administer and manage the arbitral proceedings for adjudication of the disputes and differences between the Respondent and the Claimant;***

OR

in the alternative allow conversion of the present arbitral proceedings into ad hoc arbitral proceedings; ”

(Emphasis added)

- xiv.** The learned Arbitral Tribunal by Order dated 13th January 2024 dismissed the said Application filed by the Petitioner. The relevant

discussion is to be found in Paragraph Nos.7 to 16, which reads as under :-

“7. Two issues have been raised by the Respondent in this application. The first relates to the recusal of Mr. R.A. Shah as the Arbitrator and the second pertains to removal of IGCC as the arbitral institution. The Claimant submitted that the application is barred by limitation as it has not been filed within the time prescribed under Section 13 (2) of the Act. The Claimant argued that the averments made in the application relating to the date of knowledge of the circumstances giving rise to the justifiability as to the independence or impartiality of the Arbitrator are vague. No explanation has been given as to why no inquiry was made by the Respondent to find out about the circumstances which gave rise to the impartiality of the said Arbitrator at an earlier point of time.

8. The Respondent contended that information relating to Ms. Sonia Prashar being a Deputy Director General of the IGCC and an Additional Director in the Claimant-Company came to its notice during internal meetings a week prior to the filing of the application. The Respondent probed further to find that Dr. Abhaykumar N. Firodia and Mr. R.A. Shah, learned Arbitrator have been colleagues as Members of the Committee of IGCC for a very long period. Steps were taken immediately thereafter for filing an application seeking recusal of Mr. R.A. Shah, learned Arbitrator well within the time prescribed in Section 13 (2) of the Act.

9. Section 13 (2) provides that a challenge to an Arbitrator shall be made within 15 days after the party becoming aware of the constitution of the Arbitral Tribunal or after becoming aware of any circumstances referred to in Section 12 (3) of the Act. According to Section 12 (3) of the Act, an Arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his independence or impartiality. Explanation 1 to Section 12 (1) refers to the grounds stated in the Fifth Schedule to guide in determining whether circumstances exist which give rise to the justifiable doubts as to the independence or

impartiality of an Arbitrator. The point for determination is whether the application filed by the Respondent is within the period of limitation.

10. As referred to above, a challenge to an Arbitrator shall be made within 15 days after becoming aware of the constitution of a Tribunal or becoming aware of any circumstances referred to in Sub-section 3 of Section 12. The word 'shall' in the provision makes it clear that the period prescribed in Section 13 (2) is mandatory. Normally, the word 'shall' ought to be considered mandatory, though, it is for the Court/Tribunal to ascertain the object of the provision of law in question and context in which it is made. The purpose with which an outer limit of 15 days has been fixed for filing a challenge to an Arbitrator is to ensure that there is no delay in the arbitral proceedings and any challenge to an Arbitrator requires to be decided at the earliest possible opportunity.

11. It is relevant to take note of a few dates before proceeding further to determine whether the application filed by the Respondent is within the time prescribed by Section 13 (2) of the act. Mr. R.A. Shah, learned Arbitrator enclosed his bio-data to his declaration of impartiality under Section 12 of the Act on 19.05.2022. This Tribunal was constituted after the appointment of the Presiding Arbitrator by the Supreme Court of India on 05.01.2023. According to the procedural time table, the Claimant had to file its Statement of Claim before 08.05.2023. In fact, the Statement of Claim was filed on 08.05.2023. The Respondent was given time to file its Statement of Defence and counter claim before 31.07.2023.

12. A challenge to an Arbitrator shall be made within 15 days after a party becomes aware of the constitution of the Arbitral Tribunal. A party also has an opportunity to challenge the Arbitrator within 15 days after becoming aware of any circumstances referred to in Section 12 (3) of the Act. The Respondent relies upon the second part of Section 13 (2) to contend that it became aware of such circumstances a week prior to 29.07.2023 which is the date of the filing of this application. It contends that the application was filed within 15 days from the date of knowledge as the Respondent learnt about the

circumstances giving rise to justifiable doubts as to the impartiality of the Arbitrator only a week prior to the filing of the present application.

13. The Tribunal finds that this explanation is not acceptable, Mr. R.A. Shah, learned Arbitrator filed his declaration under Section 12 on 19.05.2022. The Respondent should have been vigilant in making inquiries about any doubts regarding the impartiality of Mr. R.A. Shah, learned Arbitrator immediately after his declaration from which information relating to his continuance as Member of the Committee of IGCC was available to the Respondent. The Respondent has not shown due diligence in making such inquiry, especially in view of the averments made by the Respondent in the application that it was persuaded by Dr. Abhaykumar N. Firodia to accept that the arbitration would be conducted in accordance with the Rules of the IGCC. The Respondent is relying upon documents filed along with the application to show that Dr. Abhaykumar N. Firodia is a Member of the Committee of IGCC and Ms. Sonia Prashar is the Deputy Director General of IGCC and Additional Director of the Claimant-Company which are in public domain. However, what is material is that the Application gives no explanation as to why suddenly the enquiries into the office bearer and member of the Committee were carried out at the time of drafting of the Statement of Defence and why similar enquiries were not made earlier when the disclosure was made by Mr. Shah. From the above, it is clear that Respondent had constructive knowledge of the circumstances giving rise to justifiable doubts regarding the impartiality of Mr. R.A. Shah, learned Arbitrator.

14. According to Gary B. Born in International Commercial Arbitration, Third Edition, objection to an Arbitrator's independence and impartiality should be raised promptly after the arbitrator's nomination, alternatively, after a party learns of the basis for the challenge. In some cases, determining when a party actually knew of the circumstances giving rise to the challenge may be difficult. It is therefore necessary that if the Application is at a later stage (not immediately after a disclosure), there is a reasonable explanation as to the circumstances in which the knowledge is stated to arise and why it was not known

earlier. That is absent in the present case.

15. Under the circumstances, the explanation given by the Respondent about its awareness of the circumstances giving rise to justifiable doubts regarding the independence of Mr. R.A. Shah, learned Arbitrator for the first time only a week prior to the application being filed on 29.07.2023 is not convincing.

16. For the foregoing reasons, the application is barred by limitation. It is not necessary to express any opinion on the other points argued by both sides.”

(Emphasis added)

Thus, the learned Arbitral Tribunal has inter alia held as follows :-

- (a) No explanation has been given as to why no inquiry was made by the Petitioner to find out about the circumstances which gave rise to the impartiality of the said Arbitrator at an earlier point of time.
- (b) Mr. R. A. Shah, learned Arbitrator enclosed his profile to his declaration of impartiality under Section 12 of the said Act on 19th May 2023 and in the said profile it is disclosed that Mr. R. A. Shah is a Member of Managing Committees of various Commerce & Industry Associations such as Bombay Chamber of Commerce & Industry and Indo-German Chamber of Commerce.
- (c) The Petitioner should have been vigilant in making

inquiries about any doubts regarding the impartiality of Mr. R. A. Shah, learned Arbitrator immediately after his declaration from which information regarding to his continuance as Member of the Committee of IGCC was available to the Petitioner.

- (d) The Petitioner has not shown due diligence in making such inquiry. The Application gives no explanation as to why suddenly the enquiries into the office-bearer and Member of the Committee were carried out at the time of drafting of the statement of defence and why similar inquiries were not made earlier when the disclosure was made by Mr. Shah, learned Arbitrator.
- (e) Thus, the Petitioner had constructive knowledge of the circumstances giving rise to justifiable doubts regarding the impartiality of Mr. R. A. Shah, learned Arbitrator. In view of above reasons, the learned Arbitral Tribunal *inter alia* came to the conclusion that the Application is *inter alia* barred by limitation and therefore dismissed the Application.

- xv. The present Commercial Arbitration Petition seeking the reliefs as set out herein above is filed in April 2024.

III] SUBMISSIONS OF MR. RAJIV KUMAR, LEARNED SENIOR COUNSEL FOR THE PETITIONER:

4. Mr. Rajiv Kumar, learned Senior Counsel for the Petitioner *inter alia* raised the following contentions :-

- i. Mr. R. A. Shah, the learned Arbitrator was nominated by Respondent No.1. The Managing Director of the Respondent No.1 - Mr. Abhaykumar Firodia, was a Member of the Managing Committee of the Respondent No.2 since 1995 and also had served as a President of the Respondent No.2 in the past. The learned Arbitrator did not make a disclosure that he has been and continues to be a Member of the Managing Committee of the Respondent No.2 since 1993, and as such, he has a close relationship with Mr. Firodia. The learned Arbitrator did not disclose that all material and relevant times he has also been a Member of the Advisory Council of the Respondent No.2. This disclosure was not made by the learned Arbitrator.
- ii. Learned Senior Counsel pointed out Section 12 read with the Fifth Schedule, Sixth Schedule and Seventh Schedule of the said Act. Learned Senior Counsel submitted that Section 12 requires a full and complete disclosure of all facts and events likely to give rise to justifiable doubts as to the arbitrator's independence and impartiality.
- iii. Learned Senior Counsel submitted that reading of Section 12(1) clearly shows that the same is widely worded by use of the words

“direct or indirect” and requires relationships of all types to be disclosed, as is clear from the use of the words “whether financial, business, professional or other kind”. Learned Counsel submitted that the words “any circumstances” mean “all circumstances” and it is the bounden duty of the Arbitrator to disclose all the circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

- iv.** Learned Senior Counsel submitted that the disclosure as contemplated under Section 12(1) is in accordance with the Sixth Schedule of the said Act. The Fifth and the Seventh Schedules give illustrations of circumstances likely to give rise to justifiable doubts as to his independence and impartiality.
- v.** Learned Senior Counsel pointed out the declaration given by Mr. R. A. Shah, learned Arbitrator at Exhibit D (Page No.146). It is submitted that, in the said declaration, Mr. R. A. Shah, learned Arbitrator, nominated by Respondent No.1, did not disclose the following very important aspects :-

 - i.** Mr. Firodia, the Chairman/Managing Director of Respondent No.1 was a Member of the Committee of the Respondent No.2 since 1995.
 - ii.** Mr. R. A. Shah, learned Arbitrator was a Member of the Committee of the Respondent No.2 since 1993 and therefore

associated with and was well-acquainted with Mr. Firodia since the year 1995.

- iii.** The learned Arbitrator was a Member of the Advisory Council of the Respondent No.2.
- iv.** The learned Arbitrator continues to hold the said Office of Committee Member and Member of the Advisory Council of the Respondent No.2 even after his appointment as Arbitrator.
- v.** Learned Senior Counsel submitted that the circumstances which ought to have been disclosed fell within Items 1, 8, 14 and 33 of the Fifth Schedule as also Items 1, 8 and 14 of the Seventh Schedule.
- vi.** Learned Senior Counsel submitted that Mr. R. A. Shah, learned Arbitrator should have disclosed business relationship with Mr. Firodia of the Respondent No.1, inasmuch as it is the business of the Respondent No.2 to facilitate arbitration. Learned Senior Counsel further submitted that as a Member of the Advisory Council, Mr. R. A. Shah regularly advises the Appointing Authority i.e. Respondent No.2. He further submitted that Mr. R. A. Shah, learned Arbitrator held a position as a Member of the Managing Committee and also Advisory Council of the

Respondent No.2. The requirement of disclosure under Section 12(1) as per the Sixth Schedule format is a mandatory requirement and is not optional.

- vii.** Learned Senior Counsel relied on the decision of a Division Bench of the Delhi High Court in *Ram Kumar v. Shriram Transport Finance Co. Ltd.*¹. By relying on the said decision, he submitted that it is not for the parties to ascertain circumstances that may give rise to justifiable doubts as to independence / impartiality of the Arbitrator and it is for the arbitrator to mandatorily disclose such circumstances.
- viii.** Learned Senior Counsel pointed out various requirement of Section 12 and submitted that the disclosure as set out herein above should have been made part of the disclosure executed by Mr. R. A. Shah, learned Arbitrator. He submits that non-disclosure defeats the object of a fair and transparent trial and violates the procedure of Section 12. Learned Senior Counsel submits that there can be no valid arbitration without complying with the requirement of Section 12.
- ix.** Learned Senior Counsel also raised certain contention regarding Ms. Sonia Prasher who was acting as Deputy Director General of Respondent No.2 and Member of the

1 2022 SCC OnLine Del 4268

Governing Body and was involved with the present arbitration proceedings in that capacity with the Respondent No.2. She has been appointed as an Additional Director of Respondent No.1 on 28th September 2022 i.e. 4 months after the constitution of the Arbitral Tribunal. Thus, she holds an Office as a Director along with Mr. Firodia on the Board of Respondent No.1. Such an appointment creates direct conflict of interest in the present matter. He submits that her present capacity as Additional Director of Respondent No.1 and in her earlier capacity as the Deputy Director General of Respondent No.2 are in conflict with each other. He submitted that appointment of Ms. Sonia Prashar on the Board of Respondent No.1 ought to have been disclosed. By email dated 28th September 2022 the Governing Body of the Respondent No.2 informed the parties that Ms. Prashar would no longer be a Member of such body. The fact that she had been appointed as an Additional Director in the Respondent No.1 was not informed to the Petitioner either by the Respondent No.1 or Respondent No.2. It is his submission that thus the entire arbitration would be controlled by Respondent No.1 through its Chairman Mr. Firodia and Ms. Prashar was consciously

suppressed.

- x.** It is the submission of learned Senior Counsel that thus the conduct of the Respondents and arbitrator cast serious doubt and suspicion on the independence and impartiality of the Arbitrator and the Respondent No.2 raises justifiable apprehension of bias on the part of the Arbitrator and the Respondent No.2.
- xi.** Learned Senior Counsel submits that on 30th May 2022, Mr. R. A. Shah got himself empaneled as an Arbitrator on the panel of Arbitrators. As an Arbitrator on the panel of Arbitrators of the Respondent No.2 who also held Office as a Committee Member and Member of the Advisory Council reveals a position of conflict of interest held by Mr. R. A. Shah. It is his submission that combination of holding Offices of Respondent No.2 and acting as an Arbitrator compromises his ability to give unbiased and fair decisions.
- xii.** He submits that in this matter the claim made by the Respondent No.1 is of about Rs.140 Crores and the Counter-Claim made by the Petitioner is about Rs.2,000 Crores and therefore all these factors assume more importance. He submitted that the Arbitral Tribunal has not considered any fact relating to the impartiality and independence of Mr. R.

A. Shah, learned Arbitrator.

- xiii.** Learned Senior Counsel further submitted that Section 12 of the said Act is a complete Code to ensure a fair, transparent and just trial. Learned Senior Counsel submitted that it is not for the parties to ascertain circumstances that may give rise to justifiable doubts as to independence / impartiality of the Arbitrator. It is for the arbitrator to mandatorily disclose such circumstances. Such requirement of disclosure is not optional. He relied on the decisions in *Ram Kumar* (supra) and *Rashtriya Ispat Nigam Ltd. v. Space Tech Equipments and Structurals Private Limited* ² to substantiate the said contention.
- xiv.** Learned Senior Counsel by relying on *Rashtriya Ispat Nigam Ltd.* (supra) submitted that when no order on merits was passed by the Arbitral Tribunal in an Application filed under Section 12 read with Section 13 of the said Act, an Application under Section 14 would be maintainable. If the Tribunal acts in a biased manner, it is de jure incapacitated/unable to perform its function under Section 14 of the said Act. He also relied on the decision of the Supreme Court in *HRD Corpn. v. GAIL (India) Ltd.* ³ to

² 2020 SCC OnLine AP 147

³ (2018) 12 SCC 471

substantiate the said contention. He relied on the decision of Delhi High Court in *Alcove Industries Ltd. v. Oriental Structural Engineers Ltd.*⁴ and submitted that if a lacuna is found in the arbitration proceedings, such as, a justifiable apprehension of bias of an arbitrator it would be best to see that the law as contained in Section 14 would be given effect to. He submitted that if the arbitral proceedings which ought to be interdicted are allowed to continue and culminate into an Award that would rather be a wasteful expense of time and resources.

- xv.** By relying on the said decision in *Alcove Industries Ltd.* (supra) learned Senior Counsel submitted that it is well-settled that an Arbitrator with regard to whom there is a reasonable apprehension of bias renders himself de jure unable to perform his functions. The perceived impartiality and independence of the Arbitrator lies at the core of his mandate. He relied on the decision of Delhi High Court in *Larsen & Toubro Ltd. v. Public Works Department*⁵ and submitted that the disablement of an arbitration under Section 14(1)(a) takes within its fold not only ineligibility criteria prescribed under the Seventh Schedule but also

4 2007 SCC OnLine Del 1709

5 2020 SCC OnLine Del 33

those aspects which although do not fall within the ambit set out in the Seventh Schedule but lend support to the plea that the appointee arbitrator would be anything but impartial and/or independent. He also relied on the decision of the Supreme Court in *State of Gujarat v. R.A. Mehta*⁶ and submitted that actual proof of prejudice is not necessary. What is relevant is the reasonableness of the apprehension in this regard in the mind of a party. He submitted that in case such apprehension exists, the trial/judgment/order would stand vitiated for want of impartiality and such judgment / order becomes a nullity and the trial becomes coram non judice. He also relied on the decision of the Supreme Court in *HRD Corporation* (supra) and submitted that if the requisite disclosure made by the arbitrator is lacking, the parties would be put at a disadvantage since such information is often within the personal knowledge of the arbitrator only. He also submitted that doubts as to independence and impartiality of an arbitrator are justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in

⁶ (2013) 3 SCC 1

reaching his or her decision.

xvi. He also relied on the decision of the Supreme Court in *Lombardi Engg. Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd.*⁷ and submitted that independence and impartiality are the hallmarks of arbitration. He also relied on the decision of the Supreme Court in the case of *Union of India v. Sanjay Jethi*⁸, wherein it has been held by the Supreme Court that a reasonable possibility of bias is enough to impugn an action. He relied on the decision of the Delhi High Court in the case of *FLFL Travel Retail Lucknow (P) Ltd. v. Airports Authority of India*⁹ and submitted that complete and comprehensive disclosure is necessary to ensure informed consent for submission of disputes to a private tribunal. This is of significance as the very legitimacy of arbitration is founded upon the principles of party autonomy and consensual submission to the jurisdiction of the arbitral tribunal. He reiterated the requirement of disclosure is mandatory and it is not for the parties to find out. Learned Senior Counsel therefore submitted that the reliefs sought in the Commercial Arbitration Petition be granted.

IV] SUBMISSIONS OF MR. MUSTAFA DOCTOR, LEARNED SENIOR

⁷ (2024) 4 SCC 341

⁸ (2013) 16 SCC 116

⁹ 2024 SCC OnLine Del 7080

COUNSEL ON BEHALF OF THE RESPONDENT NO.1:

5. Mr. Mustafa Doctor, learned Senior Counsel for the Respondent No.1 raised following contentions :-

- i. Learned Senior Counsel submitted that the present Petition is in substance and effect a challenge to the Order dated 13th January 2024 of the Arbitral Tribunal and therefore the Petition is ex-facie misconceived and not maintainable. He submitted that provisions of Sections 14 and 15 has been wrongly invoked. He submitted the contention of the Petitioner that the disclosure made by the learned Arbitrator Mr. R. A. Shah was incomplete in any manner is completely false, incorrect and misconceived. However, he submitted that this is a matter which falls entirely within the scope of Section 13(6) of the Act and therefore within the scope of the jurisdiction of the Arbitral Tribunal. He submitted that the provisions of Sections 14 and 15 of the Act have been wrongly invoked. He submitted that Section 14 of the Act is applicable only if the mandate of an Arbitrator terminates inter alia on account of his having become “*de jure*” or “*de facto*” unable to perform his functions. He submitted that Section 14 read with Section 15 will apply only if the Petitioner makes out a case that the mandate of the Arbitrator in question has been terminated and there is a jurisdictional requirement to invoke the provisions

of Sections 14 and 15 of the Act. He submitted that in this case, no case is made out of the mandate of Mr. R. A. Shah, having been terminated on account of his having become either de jure or de facto unable to act on account or of having incurred any other disability either under the provisions of Sections 14 and 15 or under Section 12(5) of the said Act read with the Seventh Schedule thereof. Learned Senior Counsel therefore submitted that in the absence of the said jurisdictional requirement the Petitioner has *ex-facie* failed to cross the jurisdictional hurdle to make out a case. He therefore submitted that the prayers in the Petition *ex-facie* fall outside and beyond the scope of the jurisdiction of the Court.

- ii. He pointed out the contentions raised in Paragraph No.18(iv) [Page No.167] and Paragraph No.33 [Page No.180] of the Application filed under the provisions of Sections 12(3)(a) and 13 of the Act. He submitted that thus the Petitioner was at all material time aware of the fact that Mr. Shah was a Member of the Managing Committee of the Respondent No.2. He submitted that statement in the Application filed before the Arbitral Tribunal made to the effect that recently the Petitioner noticed for the first time certain material facts which give rise to grave bias and partiality just to overcome the objection regarding

limitation. He submitted that the Application has admittedly made more than 15 days after the constitution of the Arbitral Tribunal and therefore the burden was on the Petitioner to show that the Application was made within 15 days of the Petitioners becoming aware of any circumstances referred to in Section 12(3) of the Act. He submitted that the Petitioner is only relying on certain averments in that behalf. Learned Senior Counsel submitted that the Hon'ble Arbitral Tribunal by giving cogent reasons has recorded the conclusion that the Application made by the Petitioner was barred by limitation. He submitted that thus as per the mandate of law as provided under Sections 13(4) and 13(5) of the Act, the Arbitral Tribunal must continue the arbitral proceedings and make an arbitral award. Learned Senior Counsel submitted that when such an award is made the party challenging the appointment of the arbitrator can make an application for setting aside such an arbitral award in accordance with Section 34 of the said Act. This mandate of law the Petitioner is seeking to circumvent by filing the present Petition. He submitted that the present Petition is nothing but an appeal against the Order dated 13th January 2024 passed by the learned Arbitral Tribunal in the guise of an application under the provisions of Sections 14 and 15 of the Act. Learned Senior

Counsel submitted that the Petitioners are seeking judicial intervention by this Court in a manner not envisaged under the Act.

- iii. Learned Senior Counsel pointed out Section 12 of the Act and submitted that the ground stated in the Fifth Schedule of the Act is a guide for arriving at a conclusion that there might be justifiable doubts as to the independence or impartiality of an Arbitrator. The challenge to the appointment of an Arbitrator in such a case is governed by the provisions of Section 12(3) read with Section 13 of the Act and is to be made before the Arbitral Tribunal. He submitted that Arbitral Tribunal is vested with the exclusive jurisdiction to decide any challenge relating to the Fifth Schedule and/or arising under the provisions of Section 12(3) of the Act.
- iv. He pointed out Section 12(5) read with the Seventh Schedule of the Act and submitted that the persons who are ex-facie ineligible to act as an Arbitrator are covered by the said provisions. He submitted that it is for the substitution of this category of persons that an application may be made under Sections 14 or 15 of the Act. He pointed out the decision of the Supreme Court in the case of *HRD Corporation* (supra) which has been re-affirmed in the case of *Chennai Metro Rail Ltd. v. Transtonnelstroy Afcons*

(JV) ¹⁰. By relying on these decisions, he submitted that the Supreme Court has noted that 2016 Amendment to the Act has created a dichotomy between persons who become ineligible to be appointed as an Arbitrator and the persons against whom doubt exists as to their independence or impartiality. The Supreme Court has held that only cases where an Arbitrator becomes ineligible, the same fall under the provisions of Section 14(1)(a) of the Act and that in all other cases the Application is required to be made before the Arbitral Tribunal and if such an application is rejected, the law mandates that the Arbitral Tribunal must continue the arbitral proceedings and make an Award. He submitted that it is only after such an award is made that a party seeking setting aside the arbitral award in accordance with Section 34 of the Act can challenge the appointment of the arbitrator. He submitted that in view of the settled legal position the Supreme Court in the case of *HRD Corporation* (supra), refused to go into the challenge against two of the Arbitrators under the Fifth Schedule in the facts of that case.

- v. He submitted that the case put up by the Petitioner clearly shows that the Petitioner has sought to assail the appointment of Mr. R. A. Shah on the ground that justifiable doubt exists as to his

¹⁰ (2024) 6 SCC 211

independence or impartiality which is covered under Section 12(3) of the Act read with the Fifth Schedule and that no case of ineligibility to act or of Mr. Shah's mandate having come to an end i.e. under Section 12(5) read with the Seventh Schedule, has even been attempted to be made out against Mr. R. A. Shah.

- vi. Learned Senior Counsel submitted that in the light of the law laid down by the Supreme Court in *HRD Corporation* (supra) and *Chennai Metro* (supra), the present Petition is ex-facie not maintainable.
- vii. Learned Senior Counsel submitted that filing of the present Petition is misconceived attempt on the part of the Petitioner to delay the arbitration by in effect impugning the Order dated 13rd January 2024 passed by the learned Arbitral Tribunal which is statutorily impermissible at this stage of the proceedings. Learned Senior Counsel submitted that this Petition is in fact in the nature of Appeal against the Order dated 13th January 2024 of the learned Arbitral Tribunal in the guise of an Application under Sections 14 and 15 of the Act, rejecting the Petitioner's Application under Sections 12(3)(a) and 13 of the Act. He submitted that the same is statutorily impermissible at this stage of the proceedings.
- viii. He submitted that nothing has been brought on record to show

that Mr. Shah's mandate as an Arbitrator, has come to an end or that he has become either de facto and/or de jure unable to act which is the mandatorily jurisdictional prerequisite of an application under Sections 14 and 15 of the Act. Learned Senior Counsel submitted that the points raised in the Petition are concerning assailing Order passed by the learned Arbitral Tribunal and no case is made out to show that the mandate of Mr. R. A. Shah, learned Arbitrator has come to an end.

- ix.** He submitted that it has not been disclosed that the Petitioner - Company is in liquidation. The Petition has been affirmed by Mr. Rainer Puls, purporting to be a Director of the Petitioner - Company without disclosing that the Petitioner - Company is in liquidation since 31st October 2023 and that he has been appointed as a liquidator of the Petitioner - Company and no longer acts as a Director. It is submitted that it has not been pointed out that the Petitioner - Company is in process of the liquidation. Learned Senior Counsel, however, fairly submitted that in view of the opinions filed by the respective foreign experts conversant with the German Law in relation to the liquidation / dissolution of the Petitioner, they agreed that the Petitioner - Company could continue to file legal proceedings till such time as its name was removed from the commercial register. The expert

appointed by Respondent No.1 opined that the Petition could not have been affirmed by Mr. Rainer Puls in the capacity as Director as he had ceased to hold that position after 31st August 2023 and thereafter the Petitioner - Company could only be represented by its liquidator. He submitted that as per the experts opinion under the German Law, the liquidator must sign in a way that it indicates that the company is in liquidation. It is submitted that thus the Petitioners have deliberately made false and misleading statements in the Petition by suppressing the fact that the Petitioner's Company was in liquidation and have therefore come to this Court with unclean hands. It is submitted that the Petition is ex-facie not maintainable.

- x.** Learned Senior Counsel again reiterated that any question with regard to the adequacy of the disclosure made by Mr. R. A. Shah falls within the exclusive domain and jurisdiction of the Arbitral Tribunal as per the provisions of Sections 12(3)(a) and 13 of the Act. Learned Senior Counsel submitted that the fact that Mr. Shah had made a disclosure to the effect that he was a Member of the Committee has never disputed by the Petitioner. The same clearly falls from the averments made in Paragraph Nos.18(iv) and 33 made before the Arbitration Tribunal. It is submitted that the declaration made by Mr. R. A. Shah, learned Arbitrator is

complete in all respects. It is submitted that Mr. Shah, at all relevant times, made a disclosure with respect to him being on the Managing Committee of the Respondent No.2. Learned Senior Counsel also relied on the decision of the Delhi High Court in ***Ram Kumar*** (supra), and more particularly on Paragraph No.23 of the same and submitted that the adequate disclosure is made.

- xi.** Learned Senior Counsel further submitted that the Managing Committee of the Respondent No.2 consists of 27 people and generally four to five times a year, meetings of the Managing Committee takes place. He submitted that the fact that Mr. Shah and Dr. Firodia both served on this Committee, cannot be a ground to create justifiable doubts as to the independence and impartiality of Mr. R. A. Shah and therefore the said disclosure was not necessary. He submitted that the Respondent No.1 had made a specific statement to the effect that Dr. Firodia and Mr. Shah have no connection or relationship with one another and that neither Mr. Shah nor the firm of which he is a partner had rendered any legal advice or services to Respondent No.1 or to Dr. Firodia.
- xii.** Learned Senior Counsel submitted that thus none of the tests as laid down in the provisions of Section 12 read with the Fifth and

the Seventh Schedule of the Act are therefore applicable to the facts and circumstances of the present case.

- xiii.** He submitted that although the arguments were raised on behalf of the Petitioner that the disclosures are not made in terms of the provisions of Entry 33 of the Fifth Schedule and Entry 1, 2 and 8 of the Fifth Schedule, however, the necessary disclosure has been made. He relied on the statement made by the Petitioner in Paragraph Nos.18(iv) and 33 of the Application made before the Arbitral Tribunal (Page Nos.167 and 180 of the Petition), wherein it is specifically stated that Mr. R. A. Shah had disclosed that he was a Member of the Respondent No.2 - Managing Committee. Learned Senior Counsel further submitted that if the Petitioner is relying on either Entry 8 or 33 of the Fifth Schedule in the Application made by the Petitioner under the provisions of Sections 12(3)(a) and 13 would ex-facie be barred by limitation under the first part of Section 13(2) as the Petitioner was aware right from the time when he made the disclosure that Mr. R. A. Shah is a Member of the Managing Committee of the Respondent No.2. As far as the contention raised by the Petitioner that Entry 1 and Entry 2 of the Seventh Schedule are attracted, it is submitted that no case is made out in the Petition that a business relationship exists between Mr. R. A. Shah and Respondent No.1.

Learned Senior Counsel submitted that Mr. R. A. Shah and Dr. Firodia are on the Board of Respondent No.2, cannot be business relationship and the same is only professional relationship and therefore Entry No.1 would not be applicable to the facts and circumstances of the present case. He submitted that the Supreme Court in the case of *HRD Corporation* (supra) had considered and interpreted Entry No.1 of the Seventh Schedule and held that a business relationship as considered in Entry No.1 cannot be equated to a professional relationship. He relied on Paragraph No.21 of the said decision. He submitted that it is very clear that the Respondent No.2 is not an affiliate of Respondent No.1 and accordingly Entry No.2 of the Seventh Schedule would not be applicable.

- xiv.** He submitted that an Application seeking recusal or removal of an Arbitrator made under Section 12(3)(a) read with Section 13 or under Sections 14 and 15 has a direct bearing on the reputation of the Arbitrator in question. He submitted that in the present case the Arbitrator in question i.e. Mr. R. A. Shah is a senior and reputed solicitor. He submitted that for an application of this nature to be made on vague and unsubstantiated grounds with vague reference to some wholly irrelevant Entries in the Fifth Schedule and the Seventh Schedule, have no application to

the facts and circumstances of the present case and is grossly unfair to the concerned learned Arbitrator. He submitted that every ground of challenge is restricted to the provisions of the Fifth Schedule and the Seventh Schedule of the Act and relied on the decision of the Supreme Court in *Chennai Metro* (supra), more particularly on Paragraph Nos.40 and 41 of the same.

- xv. He submitted that the Petitioner is not entitled to treat the present proceedings as an Appeal against the Order dated 13th January 2024. He submitted that an Application under Section 13 of the Act is required to be made before the Arbitral Tribunal. Section 13(2) of the Act provides that such an application is required to be made within 15 days after constitution of the Arbitral Tribunal or after becoming aware of any circumstances referred to in Section 13(2). He submitted that admittedly no application has been made within 15 days after constitution of the Arbitral Tribunal and therefore the Application which has been filed is barred by limitation. He submitted that if it is the case of the Petitioner that after becoming aware of any circumstances referred to in Section 13(2), then the Arbitral Tribunal had to be satisfied that the averments relating to discovery of material facts was truthful and factually correct in order to ascertain if the Application was filed within the period of

limitation. He pointed out Paragraph No.17 of the Application filed by the Petitioner before the learned Arbitral Tribunal. He submitted that as the learned Arbitral Tribunal has found that the Application filed is after the period of limitation, the jurisdictional facts is found to be absent and therefore the present Petition be not entertained. Learned Senior Counsel submitted that very vague pleas are made in Paragraph No.17 regarding the jurisdictional fact and although in the reply contention regarding the same has been raised no further particulars were furnished even in Affidavit in Rejoinder by the Petitioner. He submitted that the learned Arbitral Tribunal has decided the question of limitation as the learned Arbitral Tribunal has found that the Application is barred by limitation. Therefore, the determination of the facts and pleadings with respect to this aspect squarely fall within the jurisdiction of the Arbitral Tribunal. He therefore submitted that the finding of learned Arbitral Tribunal is wholly within its jurisdiction.

- xvi.** He submitted that as per the provisions of Section 13(4) of the Act, the Arbitral Tribunal is mandated to continue with the arbitral proceedings if a challenge made under Section 13(2) of the Act is not successful. He submitted that any challenge to this impugned Order can only be now made at the stage of the

proceedings under Section 34 of the Act if and when the final Award is impugned. He therefore submitted that in view of the statutory scheme of the said Act the present Petition in which the said Order dated 13th January 2024 is indirectly challenged ought not to be countenanced and therefore the Petition be not entertained.

xvii. He pointed out Section 12 of the Act. He submitted that under Section 12 two categories are created; the first that are referable to the Fifth Schedule i.e. where “justifiable doubts” may exist, and the second those that are referable to the Seventh Schedule where, the Arbitrator is ex-facie becomes ineligible to act. He submitted that the question with respect to whether or not there are justifiable doubts as to the independence or impartiality of an Arbitrator is required to be decided by the Arbitral Tribunal itself and the decision of the Arbitral Tribunal is final and binding on the parties and can only be assailed under the provisions of Section 34 of the Act if the Arbitral Tribunal comes to the conclusion that no case for justifiable doubts is made out.

xviii. He submitted that if the ineligibility of an Arbitrator as contemplated under Section 12(5) of the Act would make him de jure unable to perform his functions then the same can be addressed by an application under Sections 14 and 15 of the Act.

He submitted that although the Act does not use the word “bias”, however, from the provision of Section 12 to the effect that “justifiable doubts as to his independence or impartiality” is nothing but an apprehension of bias and would therefore fall under the provisions of Section 12(3) of the Act to be addressed by the procedure mandated under Section 13 of the Act. On the other hand, an Arbitrator who is ineligible to act under the provisions of Section 12(5) of the Act would effectively be deemed to be biased and therefore de jure unable to perform his duties. He submitted that in the facts of the present case, no case is made out of bias or of any likelihood of bias against Mr. R. A. Shah. He submitted that at the most the Petitioner has apprehension of bias. He submitted that therefore the provisions of Section 14 ex-facie would not be applicable. Learned Senior Counsel relied on Paragraph Nos.30 and 31 of the decision of *Chennai Metro* (supra). He relied on the decision of the Supreme Court in the case of *Sanjay Jethi* (supra) and submitted that the words used in Section 12(3)(a) of the Act are “justifiable doubts” and not mere doubts. He submitted that it is not that every suspicion held by the party that must reach to the conclusion that the arbitrator in the proceedings is biased.

xix. Learned Senior Counsel relied on the decision of this Court in *Oil*

*and Natural Gas Corporation Limited v. Sumitomo Heavy Industries Ltd.*¹¹ and held that the umpire being from the same chamber as one of the Counsel was not required to be disclosed as this does not impair the independence and there is no question of bias in such a case. He relied on the decision in *Sanjay Jethi* (supra), which is a case relating to the Armed Forces Tribunal, where the question was with regard to the members having an interest in the proceedings. He submitted that it is not even the Petitioner's case that Mr. Shah has any interest in the proceedings. He again relied on the Fifth and the Seventh Schedules and on the decision of the Supreme Court in *Chennai Metro* (supra) and submitted that these Schedules have to be the basis on which a determination in this regard is to be made under the Act. He submitted that none of the tests laid down by the Supreme Court are at all applicable to the facts of the present case. He pointed out Paragraph Nos.41 to 45 and 51 of the decision in *Chennai Metro* (supra). He submitted that in the factual position involved in the decision of the Delhi High Court in *Ram Kumar*¹², the Court came to the conclusion that no disclosure was made as was required to be made in accordance with the Entry 22 of the Fifth Schedule (Paragraph No.19) and

11 1999 SCC OnLine Bom 741

12 2022 SCC OnLine Del 4268

accordingly the arbitral proceedings and the impugned Award was vitiated. However, in the present case, disclosure as was required to be made regarding the Fifth Schedule or the Seventh Schedule was made. Learned Senior Counsel submitted that the present case is not a challenge under Section 34 of the Act but under Sections 14 and 15 of the Act. He therefore submitted that the said decision in the case of *Ram Kumar* (supra) will have no application to the present case. He submitted that, in the present case, as specific finding has been recorded by the learned Arbitral Tribunal that the Application is barred by limitation and therefore the same is not at all maintainable, it was not necessary to consider the same on merits. He therefore submitted that reliance on the decision of *Rashtriya Ispat Nitam Ltd.* (supra) is not at all necessary and in any case the same is irrelevant.

xx. He submitted that it is not the case of the Petitioner before the Arbitral Tribunal that Mr. R. A. Shah had become either de jure or de facto unable to act as an Arbitrator and therefore the question of non disposal of the said Application on merits is completely irrelevant. He submitted that when a clear case of bias is made out, then only the Court would be entitled to interfere, otherwise it would be left it to be adjudicated at the stage of Section 34.

xxi. Learned Senior Counsel placed reliance on the decision of the

Delhi High Court in *National Highways Authority of India v. K. K. Sarin*¹³. He submitted that in that case the Petition under Section 14 was entertained as the Court has come to the conclusion that the Arbitrator had acted in a biased manner. He submitted that, in the present case, no case is made out of bias and at the highest the case of the Petitioner is of apprehension of bias. He therefore submitted that the Application under Section 14 be not entertained.

xxii. Learned Senior Counsel submitted that as far as reliance of the Petitioner on the case of *Alcov Industries* (supra), the said decision of the Delhi High Court is dated 28th December 2000 i.e. prior to 2016 Amendment and also prior to the decisions of the Supreme Court in *HRD Corporation* (supra) and *Chennai Metro* (supra), and therefore the same is no longer good law. He submitted that even in the case of *Larsen & Toubro Ltd.* (supra), the Court after coming to the conclusion that under provisions of Section 14(1)(a), the Arbitrator would become de jure unable to perform his functions then only held that the Court has jurisdiction under Section 14. He relied on Paragraph No.19 as well as Paragraph Nos.23.5 to 24 of the said decision.

xxiii. He submitted that the decisions relied on by the Petitioner in *State of Gujarat v. R.A. Mehta* (supra), *Lombardi Engg. Ltd.*

¹³ 2009 CJ (Del) 463 : 2009 SCC OnLine Del 750

(supra) and *Union of India v. Sanjay Jethi* (supra) distinguish between apprehension of bias and actual bias and/or real likelihood of bias. He submitted that for the application of these decisions the Arbitral Tribunal must come to a finding that there is actual bias and / or real likelihood of bias. He pointed out Paragraph No.18 of the Application filed before the Tribunal (Page No.165 of the Petition), wherein the contention raised by the Petitioner is that the facts are sufficient to cause “justifiable apprehension of bias”. He submitted that now the stand of the Petitioner has changed and now it is his contention that “the doubt about impartiality and independence” of Mr. R. A. Shah goes to the root of the matter and therefore the Arbitral Tribunal becomes ineligible under Section 14(1)(a) and becomes de jure unable to perform his functions.

xxiv. Learned Senior Counsel submits that reliance of the Petitioner on *FLFL Travel* (supra) is completely irrelevant. Learned Senior Counsel submitted that the said decision was passed in a proceeding under Section 34 of the Act. He submitted that in the said decision of *FLFL Travel* (supra) in Paragraph No.9 it is specifically observed that “the applicability of Section 12 is guided by the Fifth and the Seventh Schedules of the Act” and has made a reference to Entry Nos.22 and 24 of the Fifth

Schedule to the said Act to arrive at his findings regarding non-disclosure. He submitted that in the facts of the present case the Petition has been filed without reference to any provision of the Fifth Schedule or the Seventh Schedule of the Act. Learned Senior Counsel submitted that the issue that was decided by the Delhi High Court in *FLFL Travel* (supra) is in relation to Section 12(2) of the Act read with the Fifth Schedule and not in relation to Sections 14 and 15 of the Act read with the Seventh Schedule. He submitted that in any case the same supports the case of the Respondent No.1 to the effect that with respect to the insufficiency of a disclosure under Section 12 read with the Fifth Schedule having been rejected by the learned Arbitral Tribunal under Section 13(2) of the Act, the same can only be assailed under the provisions of Section 34. He therefore submitted that no case has been made out which calls for any interference with the arbitral process.

- xxv.** He submitted that without prejudice to these submissions as per the provisions of Section 15 of the Act where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable for the appointment of the Arbitrator being replaced and in case if this Court comes to the conclusion that the mandate of Mr. R. A. Shah terminates,

then considering Rule 8.5 of the IGCC Arbitration Rules which are applicable to the appointment of Mr. R. A. Shah would apply and Respondent No.1 would have right to appoint its nominee Arbitrator. He therefore submitted that the Petition be dismissed.

V] POINTS FOR DETERMINATION:

6. Thus, on the basis of the contentions raised by Mr. Rajiv Kumar, learned Senior Counsel for the Petitioner and Mr. Mustafa Doctor, learned Senior Counsel for the Respondent No.1, following points arise for determination:

- I. Nature and extent of disclosure required under Section 12 read with Schedule 5 and Schedule 7 of the Arbitration Act and the remedies available to the parties in case of non-adequate disclosure.
- II. The extent of disclosure / non-disclosure in this case.
- III. Effect of Order dated 13th January 2024 passed by the learned Arbitral Tribunal in Application under Section 13(2) of the Arbitration Act.
- IV. The maintainability of the present Petition filed under Sections 14 and 15 of the Arbitration Act in view of the Order dated 13th January 2024 passed by the learned Arbitral Tribunal.
- V. The relief to which the Petitioner is entitled in this Petition

filed under Sections 14 and 15 of the Arbitration Act.

VI] **FIRST POINT:**

Nature and extent of disclosure required under Section 12 read with Schedule 5 and Schedule 7 of the Arbitration Act and the remedies available to the parties in case of non-adequate disclosure.

7. The very important point which requires determination in this Petition, particularly to determine other points framed above, is nature and extent of disclosure required under Section 12 read with the Fifth, Sixth and the Seventh Schedules. This is a very important point as on the basis of the same it will be required to be analysed whether Mr. R. A. Shah, learned Arbitrator has made the requisite disclosure.

8. In the context of this point, the important Sections are Sections 12, 13 and 14 and the important Schedules are the Fifth, Sixth and the Seventh Schedules. The same are reproduced herein below for ready reference:-

Sections 12, 13 and 14 of the Arbitration And Conciliation Act, 1996

“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.

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.]

(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.”

The Fifth, Sixth and Seventh Schedules of the Arbitration And Conciliation Act, 1996

**“THE FIFTH SCHEDULE
[See Section 12(1)(b)]**

The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators:

ARBITRATOR’S RELATIONSHIP WITH THE PARTIES OR COUNSEL

- 1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.**
- 2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.**
- 3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.**
- 4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.**
- 5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.**
- 6. The arbitrator’s law firm had a previous but terminated**

involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

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.

11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

RELATIONSHIP OF THE ARBITRATOR TO THE DISPUTE

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

ARBITRATOR'S DIRECT OR INDIRECT INTEREST IN

THE DISPUTE

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

PREVIOUS SERVICES FOR ONE OF THE PARTIES OR OTHER INVOLVEMENT IN THE CASE

20. The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.

21. The arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter.

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.

23. The arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.

24. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.

RELATIONSHIP BETWEEN AN ARBITRATOR AND

ANOTHER ARBITRATOR OR COUNSEL

25. The arbitrator and another arbitrator are lawyers in the same law firm.

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.

27. A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties or an affiliate of one of the parties.

28. A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.

29. The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.

RELATIONSHIP BETWEEN ARBITRATOR AND PARTY AND OTHERS INVOLVED IN THE ARBITRATION

30. The arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties.

31. The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner.

OTHER CIRCUMSTANCES

32. The arbitrator holds shares, either directly or indirectly, which by reason of number or denomination constitute a material holding in one of the parties or an affiliate of one of the parties that is publicly listed.

33. The arbitrator holds a position in an arbitration institution with appointing authority over the dispute.

34. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an

affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

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.

Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.

THE SIXTH SCHEDULE [See section 12(1)(b)]

Name	:
Contact Details	:
Prior Experience (including Experience with arbitrations)	:
Number of on-going arbitrations	:
Circumstances disclosing 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 your independence or impartiality (list out)	:
Circumstances which are likely to affect your ability to devote sufficient time to the arbitration and in particular your ability to finish the entire arbitration within twelve months (list out)	:

(Emphasis added)

THE SEVENTH SCHEDULE [See section 12(5)]

ARBITRATOR’S RELATIONSHIP WITH THE PARTIES OR

COUNSEL

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.
2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.
3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.
4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.
5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.
6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.
7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.
8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.
9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.
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.
11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

RELATIONSHIP OF THE ARBITRATOR TO THE DISPUTE

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

ARBITRATOR'S DIRECT OR INDIRECT INTEREST IN THE DISPUTE

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

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.

Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration,

such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently, to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.”

(Emphasis added)

9. Mr. Rajiv Kumar, learned Senior Counsel and Mr. Mustafa Doctor, learned Senior Counsel both have heavily relied on the decision of the Supreme Court in ***HRD Corporation*** (supra). Mr. Rajiv Kumar, learned Senior Counsel has relied on Paragraph Nos.11 and 12 and Mr. Mustafa Doctor, learned Senior Counsel has relied on Paragraph Nos.10, 11, 12, 20 and 21 of the said decision. In Paragraph No.10, Sections 12, 13 and 14 are set out. In Paragraph No.11, the Fifth, Sixth and the Seventh Schedules have been set out. Thus, the said Paragraphs are not required to be reproduced. The relevant Paragraphs on which the reliance is placed by both the learned Senior Counsel are Paragraph Nos.12, 20 and 21. Apart from the same, certain other Paragraphs are also relevant. Thus, the relevant Paragraphs are Paragraph Nos.12, 13, 16, 17, 20 and 21. The said Paragraphs of ***HRD Corporation*** (supra) are reproduced herein below for ready reference:-

“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.

13. Confining ourselves to ineligibility, it is important to note that the Law Commission by its 246th Report of August 2014 had this to say in relation to the amendments made to Section 12 and the insertion of the Fifth and Seventh Schedules:

“59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any

relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the red and orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a “guide” to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed Section 12(5) of the Act and the Fifth Schedule which incorporates the categories from the red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed Explanation to Section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the red and orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the red list of the IBA Guidelines).

60. *The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective “justifiable doubts” regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all other cases, the general rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1) and in which context the High Court or the designate is to have “due regard” to*

the contents of such disclosure in appointing the arbitrator.” ”

(Emphasis added)

“16. In Voestalpine Schienen GmbH v. DMRC Ltd. [Voestalpine Schienen GmbH v. DMRC Ltd., (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , in the context of a Section 11 application made under the Act, this Court had occasion to delve into the independence and impartiality of arbitrators and the Guidelines that are laid down in the Fifth and Seventh Schedules. This Court stated : (SCC pp. 687-89, paras 20-23 & 25)

“20. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in Hashwani v. Jivraj [Hashwani v. Jivraj, (2011) 1 WLR 1872 : 2011 UKSC 40] in the following words : (WLR p. 1889, para 45)

‘45. ... the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the

provision of personal services, they were not personal services under the direction of the parties.'

21. Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in *Consorts Ury* [(Fouchard, Gaillard, Goldman on International Commercial Arbitration 562 (Emmanuel Gaillard & John Savage, Eds., 1999) (quoting Cour de cassation [Cass.] [Supreme Court for judicial matters] *Consorts Ury v. S.A. des Galeries Lafayette*, Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France)).], underlined that:

'an independent mind is indispensable in the exercise of judicial power; whatever the source of that power may be, and it is one of the essential qualities of an arbitrator.'

22. *Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings.*

23. *It also cannot be denied that the Seventh Schedule is based on IBA Guidelines which are clearly regarded as a representation of international based practices and are based on statutes, case law and juristic opinion from a cross-section on jurisdiction. It is so mentioned in the Guidelines itself.*

24.

25. *Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence and impartiality. The amended provision is enacted to identify the "circumstances" which give rise to "justifiable doubts" about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which would attract the provisions of sub-section (5) of Section*

12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empanelled by the respondent are not covered by any of the items in the said list.”

17. It will be noticed that Items 1 to 19 of the Fifth Schedule are identical with the aforesaid items in the Seventh Schedule. The only reason that these items also appear in the Fifth Schedule is for purposes of disclosure by the arbitrator, as unless the proposed arbitrator discloses in writing his involvement in terms of Items 1 to 34 of the Fifth Schedule, such disclosure would be lacking, in which case the parties would be put at a disadvantage as such information is often within the personal knowledge of the arbitrator only. It is for this reason that it appears that Items 1 to 19 also appear in the Fifth Schedule.”

“20. However, to accede to Shri Divan's submission that because the grounds for challenge have been narrowed as aforesaid, we must construe the items in the Fifth and Seventh Schedules in the most expansive manner, so that the remotest likelihood of bias gets removed, is not an acceptable way of interpreting the Schedules. As has been pointed out by us hereinabove, the items contained in the Schedules owe their origin to the IBA Guidelines, which are to be construed in the light of the general principles contained therein—that every arbitrator shall be impartial and independent of the parties at the time of accepting his/her appointment. Doubts as to the above are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the

arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision. This test requires taking a broad commonsensical approach to the items stated in the Fifth and Seventh Schedules. This approach would, therefore, require a fair construction of the words used therein, neither tending to enlarge or restrict them unduly. It is with these prefatory remarks that we proceed to deal with the arguments of both sides in construing the language of the Seventh Schedule.

21. *Coming to the challenge in the present case, Justice Lahoti's appointment is challenged on the ground that the arbitrator has been an advisor to GAIL in another unconnected matter and, therefore, Justice Lahoti should be removed. In his disclosure statement made on 24-11-2016, Lahoti, J. had said:*

“That on a legal issue between GAIL and another public sector undertaking, an opinion was given by me to GAIL, in the year 2014, but it has no concern with respect to the present matter. I am an arbitrator in a pending matter between M/s Pioneer Power Ltd. and GAIL (India) Limited.””

(Emphasis added)

10. Reliance is also placed by both the learned Senior Counsel on the decision of **Ram Kumar** (supra) which is decided by the Division Bench of the Delhi High Court. The relevant Paragraphs are Paragraph Nos.19 and 22 to 24. The same are reproduced herein below :

“19. *In terms of Explanation 1 to Section 12(1) of the A&C Act - the grounds as stated in the Fifth Schedule of the A&C Act - the learned Sole Arbitrator was required to be guided by the grounds as stated in the Fifth Schedule of the A&C Act. Entry 22 of the Fifth Schedule of the A&C Act specifically provides circumstances where an arbitrator has, within the past three years, been appointed as an arbitrator on more than two occasions by either of the parties or their affiliates.*

This Court is unable to accept that such a disclosure is not mandatory and is merely at the discretion of the arbitrator. The onus for disclosing the number of matters in which the learned Sole Arbitrator had been appointed as such, at the instance of the respondent, rested with the learned Sole Arbitrator. The assumption that the burden to ascertain the circumstances that may give rise to justifiable doubts as to the independence and impartiality of the arbitrators is on the parties, is erroneous; this disclosure is necessarily required to be made by the person approached in connection with his appointment as an arbitrator.

22. *It is necessary to note that the language of Section 12(1) of the A&C Act does not leave it at the discretion of any person, approached in connection with being appointed as an arbitrator, to make the necessary disclosures. The use of the words “he shall disclose” in Section 12(1) of the A&C Act makes it mandatory for the person who is approached in connection with his possible appointment as an arbitrator, to make a disclosure of all circumstances that may give rise to justifiable doubts as to his independence and impartiality.*

23. *In terms of Explanation 2 to Section 12(1) of the A&C Act, such disclosure is to be made in the form specified in the Sixth Schedule of the A&C Act. It may be sufficient compliance of the Explanation if the necessary particulars, as required to be disclosed in the Sixth Schedule, are disclosed but the disclosure is not in the format as provided. However, it would be erroneous to assume that the requirement of making a disclosure is not mandatory.*

24. *This Court is of the view that the requirement of making a disclosure is a necessary safeguard for ensuring the integrity and efficacy of an arbitration as an alternate dispute resolution mechanism and is not optional.”*

(Emphasis supplied)

11. Both the learned Senior Counsel also relied on the decision of the Andhra Pradesh High Court in *Rashtriya Ispat Nigam Ltd.* (supra). The important Paragraphs are Paragraph Nos.31 to 37, 39, 47, 48, 51, 55

and 56, which are reproduced herein below :-

“31. In, “UNION OF INDIA v. SANJAY JETHI” it was held that the fundamental facet of the principle of the natural justice is that even in case of the quasi judicial proceedings, the authority empowered to decide a dispute between the contesting parties has to be free from bias. When free from bias is mentioned, it means there should be absence of conscious or unconscious prejudice to either of the parties as held in Gullappalli Nageswara Rao v. State of A.P.

32. In “Manak Lal v. Prem Chand Singhvi”, the Court has stated thus:

“... It is well settled that every member of a tribunal that is called upon to try issues in judicial or quasi-judicial proceedings must be able to act judicially; and it is of the essence of judicial decisions 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.”

33. In “Halsbury's Laws of England”, it has been observed as under:

“... The test for bias is whether a reasonable intelligent man, fully appraised of all the circumstances, would feel a serious apprehension of bias”.

34. In “Transport Deptt. v. Munuswamy Mudaliar”, while dealing with the concept of bias as a part of natural justice, the Court observed as, ... “A predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias. There must be reasonable apprehension of that predisposition. The reasonable apprehension must be based on cogent materials”. Needless to say, personal bias is one of the limbs of bias, namely, pecuniary bias, personal bias and official bias.

35. In R.A. Mehta case, it was further observed as under:

“In the event that actual proof of prejudice is available, the same will naturally made the case of a party much stronger, but the availability of such proof is not a necessary precondition, for what is relevant, is actually the reasonableness of the apprehension in this regard in the mind of such party. In case such apprehension exists the trial/judgment/order, etc. Would stand vitiated for want of impartiality and such judgment/order becomes a nullity. The trial becomes coram non judice”.

36. Similar such views came to be expressed by the Apex Court in, “Chandra Kumar Chopra v. Union of India”, wherein it was held as under:

“... mere suspicion or apprehension is not good enough to entertain a plea of bias. It cannot be a facet of one's imagination. It must be in accord with the prudence of a reasonable man. The circumstances brought on record would show that it can create an impression in the mind of a reasonable man that there is real likelihood of bias. It is not to be forgotten that in a democratic polity, justice in its conceptual eventuality and inherent quintessentiality forms the bedrock of good governance. In a democratic system that is governed by the rule of law, fairness of action, propriety, reasonability, institutional impeccability and non-biased justice delivery system constitute the pillars on which its survival remains in continuum”.

37. From the Judgments referred to above, it is very clear that even the quasi judicial authorities or members of a Tribunal should try judicially and act judicially. Ultimately, the test is 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. Bias is a facet of law, which forms part of principles of natural justice. Therefore, it is a fundamental requirement of law that the principles of natural justice be complied with as it is an integral part of the justice delivery system of this country. ”

“39. The question now is, whether the Petitioners were justified in making an application under section 14 of the Act, when the arbitrary tribunal failed to pass an order on merits in the petition filed under section 12 and 13 of the Act? One another question, which requires to be noted, is whether the provisions of the 1996 Act or the provisions of 2015 Act will

be applicable to the case on hand?”

“47. Section 14 of the Act, 1996 postulates failure or impossibility to act--, the mandate of an arbitrator shall be terminated 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. The meaning of the word de jure was explained by the Division Bench of the High Court of judicate at Hyderabad for the State of Telangana and for the State of Andhra Pradesh in “Gurcharan Singh Sahney v. Harpreet Singh Chabbra” as under:

“The Court does not terminate the mandate of an arbitrator. It stands terminated on the happening of anyone of the events referred to in Section 14(1), and the Court only declares it. (Ram Chandra Rungta v. Ram Swarup Rungta). Use of the word “or” between the kinds of eventualities in Section 14(1)(a) show that they are disjunctive. The mandate of the arbitrator would terminate by the occurrence of anyone of the events prescribed in sub-clause (a) which is either (i) his becoming de jure or de facto unable to perform his functions or; (ii) for other reasons, he fails to act without delay. (Priknit Retails23). While deciding a petition under Section 14(2) of the Act, all that the Court does is to declare whether termination of the mandate of the arbitrator ipso jure has taken place or not. To that extent, the order of the Court under Section 14(2) of the Act is merely declaratory, and is not in the nature of a mandatory or perpetual injunction restraining a person from acting as an arbitrator. A declaration that the mandate of the arbitrator stands terminated does not amount to his removal by the Court. (Alcove Industries Ltd. v. Oriental Structural Engineers Ltd.)”

48. The High Court at Hyderabad also observed as under:

“The first limb of Section 14(a) of the Act stipulates that the mandate of arbitrator shall terminate if he becomes dejure or defacto unable to perform his functions. As per P. Ramanatha Aiyar's Advanced Law Lexicon, Volume 2, page 1215 defines “de facto” to mean, in fact; actually; frequently used in contradistinction to de jure meaning rightful, legitimate, lawful; antithetical to de jure; de facto signifies a thing actually done; that is done in deed; actual;

existing in fact; having effect even though not formally or legally recognized; and by virtue of existence, rather than any legal right. (OPBK Construction Pvt. Ltd. 11). The word “de jure” has been defined in Black's Law Dictionary 5th Edition as descriptive of a condition in which there has been total compliance with all requirements of law, of right; legitimate; lawful; by right and just title. Ramanath Iyer - The Law Lexicon defines the word “de jure” - as of right; by law; legitimate; lawful; by right and just title. By use of the word become, section 14(1)(a) has been made applicable only to a situation arising after the arbitrator has been appointed to resolve the dispute between the parties. The word unable means incapable, ineffective, useless. Section 14(1)(a) is attracted only when an arbitrator becomes incapable, either in law or in fact, of performing his functions.”

51. In HRD Corporation's case (supra) while referring to Section 12(5) read with 7th schedule held that if arbitrator is ineligible, falling under any of the categories specified in the schedule, he becomes ineligible to act as an arbitrator and as such an application under Section 14(1)(a) to be made as he became de jure unable to perform, instead of moving an application under Section 13. In the instant case, as observed by us earlier, the appointment of the arbitrator was prior to the amendment, hence an application was made for termination of mandate of the Arbitrator under Section 12(3) read with Section 13(2), which was disallowed on the ground that the arbitral tribunal cannot decide the said issue. As one of the Member has already made up his mind by preparing a note running into 33 pages (as good as award) moved an application under Section 14 before the Court, which was not entertained on technicalities. It was observed that once an application is made under Section 13, the petitioner has no other option except to challenge the mandate of the arbitrator after award is passed. It is no doubt true that an application under Section 13 was made, but the same was not decided on merit and it was disallowed on the ground that it cannot decide the same. Things would have been different had an order been passed rejecting the request on merits, holding that there is nothing wrong in arbitrator proceeding with the matter. Having regard to the fact situation, the application under Section 14 seeking termination of the mandate has to be treated as independent application, de hors the one made

under Section 12 read with Section 13(2) of the Act. Further, a reading of the judgment of the Apex Court in HRD Corporation's case makes it clear that if a challenge made under Section 13 is unsuccessful and the arbitral tribunal decides that there are no justifiable doubts as to independence or impartiality of the tribunal, the arbitral proceedings shall continue and make an award. But, if there is a doubt about impartiality and independence and as the same goes to the root of the matter, the arbitral tribunal become ineligible under Section 14(1)(a) and he becomes de jure unable to perform his functions and it is not necessary to go to the Tribunal under Section 13. Taking a cue from the above and applying the ratio laid therein to the case on hand and as no order on merits was passed, when an application was moved before the Tribunal under Section 13, the argument of the learned counsel for the respondent that petitioner has to wait till an award is passed to challenge the mandate of the arbitrator may not be correct."

"55. At this stage, it would be apt to refer to the judgment of Delhi High Court in "National Highways Authority of India v. K.K. Sarin", wherein it has been held as under:

"I have already in Sharma Enterprises v. National Buiding Constructions Corporation Ltd. held that section 5 of the 1940 Act as interpreted in Panchu Gopal Bose (supra) finds place in the form of section 14 of the 1996 Act. There can be no other interpretation of the power given to the court to terminate the mandate of the arbitrator when the arbitrator de jure is unable to perform this function. The de jure impossibility can be nothing but impossibility in law. Bias vitiates the entire judicial/arbitration process and renders the entire proceedings nugatory. Reference in this regard may also be made to State of West Bengal v. Shivananda Pathak, 1988 1 SCR 811 cited by the ASG, though in a different context, holding that all judicial functionaries have necessarily to decide a case with an unbiased mind; an essential requirement of a judicial adjudication is that judge is impartial and neutral and in a position to apply his mind objectively - If he is predisposed or suffers from prejudices or has a biased mind he disqualifies himself from acting as a Judge. This equally applies to arbitrators, as statutorily provided in sections 12 and 13. In my opinion, if the arbitrator is biased, he is de jure unable to perform his functions within the meaning of

section 14. Thus, if the court without any detailed enquiry is able to reach a conclusion of arbitrator for the reason of bias is unable to perform his functions, the court is empowered to, without requiring the parties to inspite of so finding go through lengthy costly arbitration, hold that the mandate of arbitrator stands terminated. However, the said power under section 14 has to be exercised sparingly with great caution and on the same parameters as laid down by Apex Court in SBP & Company v. Patel Engineering Limited, (2005) 8 SCC 618 in relation to section 11(6). Only when from the facts there is no doubt that a clear case of bias is made out, would the court be entitled to interfere. Else it would be best to leave it to be adjudicated at the stage of Section 34”.

56. Facts in the said case are identical to the case on hand. In the instant case, application under Sections 12 and 13 of the Act was moved, but the issue raised was not decided on merits holding that Tribunal cannot go into the said issue. Thereafter, an application was moved before the Court under Section 14 of the Act. The de jure impossibility in our view, and as held in the judgments referred to above would be “impossibility in law” or “incapable either in law or on facts”. The word de jure as defined in Black's Law Dictionary is descriptive of a condition in which there has been total compliance with all the requirements of law. It is also well established that bias vitiates the entire proceedings including arbitral proceedings making it nugatory. The objective of the judicial or quasi judicial proceedings is to render justice or decide a case with an unbiased mind and be impartial. This principal of one getting disqualified if he is biased or suffers from prejudices, applies to all adjudicating authorities and arbitrators are no exception. Therefore, our view that if the arbitrator acts in a biased manner, he is de jure incapacitated/unable to perform his function under Section 14 of Act gets support from the view expressed in National Highways Authority of India's case. We are also aware that such a power is to be exercised sparingly and with caution. As the material on record amply establish that the fourth respondent acted in a biased manner, we feel that in the facts of the case the petitioners were justified in invoking Section 14 of the Act seeking termination of the Arbitrator.”

(Emphasis supplied)

12. Although Mr. Rajiv Kumar, learned Senior Counsel has also relied on the decision of *Alcove Industries Ltd.* (supra) and more particularly on Paragraph Nos.26, 30 and 31, it is the submission of Mr. Mustafa Doctor, learned Senior Counsel that the said decision has been decided before the 2016 Amendment and also before the decision of the Supreme Court in *HRD Corporation* (supra) and therefore the same is not relevant. The relevant Paragraphs of the said decision i.e. Paragraph Nos.30 and 31 are reproduced herein below:-

“30. It is often said that haste makes waste. The object of the Act is not merely to see that, good or bad, an arbitral award comes into existence at the earliest. The object is to see that the proceedings come to a finality without the intervention of the Court, unless such intervention by the Court is warranted in a given case and the same is permitted by the law. It would serve no purpose, and would rather be a wasteful expense of time and resources, if the arbitral proceedings which ought to be interdicted are allowed to continue and culminate into an award, which would not stand scrutiny in the eyes of law. A stitch in time saves nine. Therefore, if a lacuna is found in the arbitral proceedings, such as, a justifiable apprehension of bias of an Arbitrator, it would be best to see that the law (as contained in Section 14 of the Act) is given effect to with promptitude and a declaration made of the event that has, in law, already taken place i.e. the termination of the mandate of the Arbitrator and, if the facts of the case so warrant, to substitute or facilitate the substitution of another independent Arbitrator so that the proceedings can be held in a legal and sustainable manner.

31. Those who are opposed to any kind of intervention by the Court during the pendency of the arbitral proceedings, even when the same, and to the extent the same is expressly permitted by the law, fail to see that timely interference by the court in deserving cases leads to saving of time rather than its

wastage, between the point in time that the arbitration proceedings commence and up till the time when the arbitral award becomes enforceable as a decree of the Court. An award does not become enforceable till the objections thereto under Section 34 of the Act are dismissed, if preferred. Even if the stage for holding an enquiry with regard to the termination of mandate of an Arbitrator is postponed to the post award stage i.e. under Section 34 of the Act, that enquiry, in any event, would have to be undertaken and would consume the same amount of time, effort and expense, and lead to the same result, as a petition under Section 14 of the Act would take, if is entertained during the pendency of the arbitral proceedings. Therefore, to my mind it would not adversely impact the amount of time it takes to bring the arbitral award to fruition. On the other hand, timely surgery could remove the malingent and fatal lacunas in the arbitral proceedings and set them on the right course to produce an award bereft of such infirmities. After all, this enquiry would have to be taken once, whether it is under Section 14 or section 34 of the Act. If it is undertaken under Section 14 and it fails, the said finding would obviously bind the parties and the objecting party would be precluded from raising the same all over again on the same facts and circumstances.”

13. Both the learned Senior Counsel have also pointed out the decision of the learned Single Judge of the Delhi High Court in **Larsen & Toubro Ltd.** (supra). Mr. Rajiv Kumar, learned Senior Counsel has relied on Paragraph Nos.19, 21, 23 and 28.3 of the said decision, whereas Mr. Mustafa Doctor, learned Senior Counsel has relied on Paragraph Nos.24 and 28.3 of the same. The relevant discussion is found in Paragraph Nos.23 and 28.3 which are reproduced herein below for ready reference:-

“23. In my view, the answer to this issue lies in a bare reading of the provisions of Sections 12 and 13 of the 1996 Act. Section 12(1) makes it incumbent upon the person who

is approached for being appointed as an arbitrator to disclose in writing any circumstances which would give rise to justifiable doubts as to his independence or impartiality and whether such circumstances would affect his ability to devote sufficient time to arbitration to complete the entire arbitral proceedings within the prescribed time limit. The person concerned with regard to the first aspect is to bear in mind the provisions of the 5th Schedule while ascertaining for himself as to whether his appointment could give rise to justifiable doubts as regards his independence or impartiality to act as an arbitrator.

23.1. Once the person concerned makes such an assessment, he is required to make a disclosure to that effect in the form specified in the 6th Schedule. The grounds for challenging the appointment of the arbitrator are prescribed in Section 12(3). The two grounds available are those prescribed in clause (a) and (b) of subsection (3) of Section 12, that is, whether circumstances exist which could give rise to justifiable doubts as to his independence or impartiality or he does not possess the requisite qualifications agreed to by the parties.

23.2. Subsection (4) of Section 12 gives a right even to a party who may have appointed or participated in the appointment of the arbitrator to challenge his appointment if he can demonstrate that he became aware of the grounds of the challenge after the appointment was made.

*23.3. The procedure for laying a challenge to the appointment of the arbitrator as per Section 13(1) can either be that which is agreed upon by the parties subject to the caveat provided in subsection (4) of Section 12 or **can be mounted before the arbitrator in terms of Section 13(2) by lodging a written statement of reasons for challenge with the arbitrator within fifteen days of acquiring knowledge of the Constitution of the arbitral tribunal or of the circumstances referred to in Section 12(3).***

23.4. In such circumstances, the arbitrator is obliged to decide the challenge made to his appointment unless he withdraws from his office or the opposite party agrees to the challenge (See Section 13(3) of the 1996 Act).

23.5. However, Section 13(4) provides that if the challenge

is repelled, then, the arbitral proceedings should continue and the concerned tribunal should accordingly render an award.

23.6. In such circumstances, leeway is given to the aggrieved party whose challenge is repelled to raise grounds available for challenging the appointment of the arbitrator in terms of Section 13(5) under Section 34 once an award is rendered in the matter.

28.3. Since the appointment procedure is inherently tilted in favour of the PWD, which does not allow for the appointment of an independent and impartial arbitrator, in my opinion, the provisions of Section 14(1)(a) of the 1996 Act would get attracted. In my view, the disablement of an arbitrator under clause (a) of subsection (1) of Section 14 takes within its fold not only the ineligibility criteria prescribed under the 7th Schedule but also those aspects which although do not fall within the ambit of the entries set out in 7th Schedule but lend support to the plea, as in this case, that the appointee-arbitrator would be anything but impartial and/or independent.”

14. Mr. Mustafa Doctor, learned Senior Counsel submitted that the decision of the Supreme Court in **HRD Corporation** (supra) deals with the 2016 Amendment and specifically sets out in Paragraph No.12 the manner in which the Application of such a nature is required to be considered. It is his submission that the nature and objection raised by the Petitioner cannot be considered by this Court particularly as the learned Arbitrator has decided the objection.

15. It is required to be noted that the decision of **HRD Corporation** (supra) makes it clear that dichotomy is made by the 2016 Amendment of the said Act between a person who becomes ineligible to be appointed as Arbitrator and the person about whom justifiable doubts

exist as to his/her independence or impartiality. If a person is ineligible to be appointed as Arbitrator, the said ineligibility goes to the root of the appointment. It is held in ***HRD Corporation*** (supra) that Section 12(5) read with the Seventh Schedule to the said Act 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 a person becomes ineligible to act as Arbitrator, he then becomes ineligible under Section 14(1)(a) and becomes de jure unable to perform his functions in as much as, in law, he is regarded as “ineligible”. It has been held that in such a situation it is not necessary to go to the Arbitral Tribunal under Section 13. As such if a person lacks inherent jurisdiction in such a case an Application can be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on the Act. In this context, it is also relevant to note the observations in the decision of ***Larsen & Toubro Ltd.*** (supra) to the effect that the disablement of an arbitrator under clause (a) of subsection (1) of Section 14 takes within its fold not only the ineligibility criteria prescribed under the Seventh Schedule but also those aspects which although do not fall within the ambit of the entries set out in Seventh Schedule but lend support to the plea, as in this case, that the appointee-arbitrator would be anything but impartial and/or independent.

16. The decision of ***HRD Corporation*** (supra) further specifies that if

the grounds which are raised are as set out in the Fifth Schedule 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 by the Arbitral Tribunal under Section 13. The decision of *HRD Corporation* (supra) further held that if a challenge before the Arbitral Tribunal 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. 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.

17. Thus, it is necessary to see in the light of above legal provisions and the decisions of the Supreme Court and various High Courts, nature and extent of disclosure required under Section 12 read with Schedule 5 and Schedule 7 of the said Act and the remedies available to the parties in case of non-adequate disclosure.

18. The principles which emerge from the above provisions and the decisions with respect to the nature and the extent of disclosure are as follows:-

i. The nature of disclosure is to be made in accordance with the Sixth Schedule, which is set out herein above. It is important to note

that the Sixth Schedule makes reference to Section 12. Section 12(1)(a) specifies that a person when approached in connection with his possible appointment as an Arbitrator he shall disclose in writing existence of any circumstances 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. Explanation 1 specifies that the grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an Arbitrator. Explanation 2 to Section 12 specifies that the disclosure shall be made by such person in the form specified in the Sixth Schedule.

ii. Thus, Section 12(a) contemplates that existence of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute has to be disclosed. Such interest in any of the parties or in the subject matter in dispute contemplates financial, business, professional or other kind. Thus, it is very clear that the disclosure as contemplated under Section 12(1)(a) is not only concerning financial, business or professional relations but the same is of any “other kind”. What is significant to note is the term “other kind” used in Section 12(1)(a). The term “other kind” contemplates the

relationship or interest of any kind which is apart from financial relationship, business relationship or professional relationship. Section 12(1) specifically contemplates that when a person is approached in connection with his possible appointment as an Arbitrator, he shall disclose in writing any circumstances i.e. all the circumstances.

iii. Thus, the nature of disclosure as contemplated under Section 12(1)(a) read with Section 12(5) is all the circumstances 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 the persons who are falling under any category specified in the Seventh Schedule shall be ineligible to be appointed as an Arbitrator.

iv. Section 12(5) read with the Seventh Schedule makes it clear that if any person whose relationship with the parties falls under any of the categories specified in the Seventh Schedule, he become ineligible to act as Arbitrator.

v. In this context, it is relevant to note the decision of ***Ram Kumar*** (supra). The Paragraph Nos.19, 22, 23 and 24 of the same are very relevant and are already set out herein above. In ***Ram Kumar*** (supra), it has been held that the requirement of making disclosure is a necessary

safeguard for ensuring the integrity and efficacy of an arbitration as an alternate dispute resolution mechanism and the same is not optional. What has been held that the assumption that burden to ascertain the existence of the circumstances that may give rise to justifiable doubts as to the independence or impartiality of the Arbitrators is on the parties is erroneous and the disclosure is necessarily required to be made by the persons approached in connection with his appointment as an Arbitrator. It has been further held that Section 12(1) of the Act does not leave it at the discretion of the person approached in connection with his possible appointment as Arbitrator to make the necessary disclosure. It has been held that Section 12(1) specifies that “he shall disclose”. Thus, it is mandatory for the person who is approached in connection with his possible appointment as Arbitrator to make the disclosure of all circumstances that may give rise to justifiable doubts as to his independence or impartiality. It has been held that the requirement of making disclosure is a mandatory requirement.

vi. In the case of *Rashtriya Ispat* (supra), it has been held that the test is 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. The test for bias is whether a reasonable, intelligent man, fully appraised of all the circumstances, would feel a serious apprehension of bias. Bias as a facet of law forms

part of the principles of natural justice. Therefore, it is a fundamental requirement of law that the principles of natural justice be complied with as it is an integral part of the justice delivery system of this Country.

vii. In *Larsen & Toubro* (supra), a learned Single Judge of the Delhi High Court held that bare reading of the provisions of Sections 12 and 13 and particularly Section 12(1) makes it incumbent upon the person who is approached for being appointed as an arbitrator to disclose in writing any circumstances which would give rise to justifiable doubts as to his independence or impartiality. The person concerned while making disclosure has to keep in mind the requirement of the Fifth Schedule as well as the Seventh Schedule.

viii. However, it must also be noted that as set out in Section 12 that the grounds stated in the Fifth and the Seventh Schedules shall guide the person proposed to be appointed as Arbitrator in determining the nature of disclosure contemplated under Section 12(1)(a) i.e. 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. The very important words in Section 12 are “justifiable doubts as to his independence or impartiality”. It is very significant to

note that the mandatory duty has been entrusted to the person who has been approached in connection with his possible appointment as an Arbitrator to disclose any of the factors which are likely to give rise to justifiable doubts as to his independence or impartiality. It is very clear that these factors are even apart from the financial, business or professional relationship. Section 12(1)(a) clearly specifies disclosure of all the circumstances concerning relationship or interest in any of the parties of any kind. Section 12(1)(a) is very clear that existence of either direct or indirect interest in any of the parties is also required to be disclosed which is likely to give rise to justifiable doubts as to his independence or impartiality. Thus, what is contemplated is disclosure of all the circumstances.

ix. It is also very significant to note that Section 12 contemplates that the assessment of the person who is approached in connection with his possible appointment as an Arbitrator to assess himself in relation to the factors which are set out in Section 12(1) and has to give complete disclosure, Section 12 makes it very clear that the burden is on the person who is likely to be appointed as Arbitrator to give complete disclosure and which is a mandatory duty cast on such a person. Such person has no discretion to give such information as he thinks necessary.

x. The concept of independence or impartiality are totally different. As far as the impartiality is concerned, all factors which are directly or

indirectly to give rise to justifiable doubts as to the impartiality are required to be disclosed. As already noted the same is the mandatory duty on such a person and it is very clear that the burden to ascertain and disclose the circumstances that may give rise to justifiable doubts as to the independence and the impartiality of the Arbitrator is not on the parties to the arbitration proceedings. The same is mandatory duty of the person who is likely to be appointed as Arbitrator.

19. Thus, after ascertaining the nature and extent of disclosure required under Section 12 read with the Schedule Five and Schedule Seventh of the said Act, it is necessary to see the remedies available to the person coming with the case that there is no full disclosure and justifiable doubts exist as to the independence or impartiality of the appointed Arbitrator.

20. The Supreme Court in the case of *HRD Corporation* (supra) has held that after the 2016 Amendment Act, a dichotomy is made by the 2016 Amendment Act between persons who become “ineligible” to be appointed as arbitrators, and persons about whom “justifiable doubts” exist as to their independence or impartiality. The distinction between these two class of persons i.e. persons who become “ineligible” to be appointed as arbitrators, and persons about whom “justifiable doubts” exist as to their independence or impartiality and remedies in that behalf is explained in *HRD Corporation* (supra) as follows:

i. 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.

ii. As opposed to above, 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.

iii. The above position as held in *HRD Corporation* (supra) is further explained in the decision of *Larsen & Toubro Ltd.* (supra), wherein it is held that the disablement of an arbitrator under clause (a) of subsection (1) of Section 14 takes within its fold not only the ineligibility criteria prescribed under the Seventh Schedule but also those aspects which although do not fall within the ambit of the entries set out in Seventh Schedule but lend support to the plea, that the appointee-arbitrator would be anything but impartial and/or independent.

21. Thus, as discussed herein above, the proposed Arbitrator has to disclose as contemplated under Section 12(1)(a) read with Section 12(5) all the circumstances 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. As noted herein above, disablement of an arbitrator under clause (a) of subsection (1) of Section 14 takes within its fold not only the ineligibility criteria prescribed under the Seventh Schedule but also those aspects which although do not fall within the ambit of the entries set out in Seventh

Schedule but lend support to the plea, that the appointee-arbitrator would be anything but impartial and/or independent.

SECOND POINT :

The extent of disclosure / non-disclosure in this case.

22. Thus, in view of the nature and the extent of disclosure as contemplated under Section 12, it is necessary to consider the disclosure / non-disclosure made by Mr. R. A. Shah, learned Arbitrator in this particular case.

23. The second point which is to be considered by this Court is the extent of disclosure / non-disclosure in this case. The disclosure made by Mr. R. A. Shah, learned Arbitrator is annexed to the Petition on Page Nos.146 to 149 and the same is also annexed to the Affidavit-in-Reply from Page Nos.518 to 521. The same is reproduced herein below:-

518

R. A. SHAH

21, PANORAMA, 203, WALKESHWAR ROAD, MALABAR HILL, MUMBAI - 400006

Date May 19, 2022

The Governing Body
Indo-German Chamber of Commerce,
Maker Tower E, 1st Floor,
Cuffe Parade,
Mumbai - 400 005

I, Rajendra Shah, son of Mr. Ambalal Shah, Enrolment Number MAH/142/1952/1002061, refer to Clause 7 of the Indo-German Chamber of Commerce Arbitration Centre - Rules for Arbitration, (hereinafter the 'Arbitration Rules' for brevity), titled as 'Qualifications of Arbitrators'.

My Profile is forwarded separately.

As per the provisions of Clause 7 of the Arbitration Rules, I state that -

- 1) There are no circumstances, which may create doubt and/or give rise to justifiable doubts, about my impartiality or independence, in respect of the arbitral proceedings initiated by and between Force Motors Limited, Pune, as the Claimant and Dipl-Ingenieure Rainer & Oliver PULS GmbH, Germany, as the Respondent.
- 2) I confirm that I have not been appointed as an arbitrator by any of the Parties or their affiliates, within the last three years.
- 3) I confirm that I have not been appointed as a counsel, for representing, advising or represented or advised any of the above Parties to the said



Page 1 of 2

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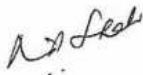
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arbitral proceedings in respect of any dispute (including an unrelated dispute).

- 4) I further confirm that, I have no direct or indirect interest in the dispute between the above referred Parties.

This communication/confirmation is issued as per the provisions of Clause 7 of the Arbitration Rules.

Declaration in the Sixth Schedule to the Arbitration and Conciliation Act, 1996 also attached.


Y (Rajendra Ambalal Shah)



Page 2 of 2

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R. A. SHAH

21, PANORAMA, 203, WALKESHWAR ROAD, MALABAR HILL, MUMBAI - 400006

The Arbitration and Conciliation Act, 1996

The Sixth Schedule

[See section 12(1)(b)]

Name : Mr. Rajendra Shah,
Son of Mr. Ambalal Shah.

Contact Details : e-mail ID : cbrashah@gmail.com
Telephone Number : 022-22668000
Mobile Number : 9821052210
Postal Address : 21, Panorama, 203
Walkeshwar Road, Malabar Hill, Mumbai -
400006

Prior experience (including experience with Arbitrations) : Please see the Profile forwarded separately.

Number of ongoing Arbitrations : None.

Circumstances disclosing 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 your independence or impartiality (List Out) : I have no financial, business, professional or other kind of relation, either in the past or present, in relation to the subject matter of dispute between Force Motors Limited, Pune, the Claimant, and Dipl-Ingenieure Rainer & Oliver PULS GmbH, Germany, the Respondent, or interest of any of these Parties in relation to the subject matter.

Circumstances which are likely to affect your ability to devote sufficient time to the Arbitration and in particular your ability to finish the entire Arbitration within twelve months (List Out) : None

Signature : *R. A. Shah*
Name : Rajendra Ambalal Shah.
Date : May 19, 2022



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PROFILE OF MR. R. A. SHAH

Mr. R. A. Shah is one of the senior most partners of M/s. Crawford Bayley & Co., a reputed firm of Advocates & Solicitors. He is considered as one of India's best known Solicitors in Corporate Law. Mr. R. A. Shah completed his L.L.B. from Government Law College in 1952 and became a Solicitor in 1955. Mr. Shah joined M/s. Crawford Bayley & Co., Solicitors & Advocates, in November 1955 as Solicitor Advocate and was inducted as Partner in June 1959 and is presently the Managing Partner of M/s. Crawford Bayley & Co. He specializes in broad spectrum of Corporate Laws in general with special focus on Foreign Investments, Intellectual Property Rights, Mergers & Acquisitions, Anti-Trust and Competition Law.

Mr. R. A. Shah is also a Member of Managing Committees of various Commerce & Industry Associations such as Bombay Chamber of Commerce & Industry and Indo-German Chamber of Commerce. He is the Chairman/Director of various public listed companies and Chairman/member of Audit Committees. He has served on several renowned public listed companies engaged in the field of pharmaceuticals, chemicals and fertilizers, textiles, real estate, FMCG, etc., for more than three decades and in case of few others for over half a century. Mr. Shah has acted as Counsel and Arbitrator in international arbitration proceedings.

With several years of experience, Mr. Shah has been a keen observer of the evolution of a broad spectrum of laws and regulatory changes. Recognized for his in-depth understanding of the field of law and business awareness, he is often called upon to devise litigation and arbitration strategies and counseling on extensive matters involving prominent business houses and organizations.

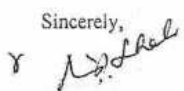


TRUE - COPY
KANGA & CO.,

[Signature]
Partner.

24. In this behalf, it is also required to note the letter of Mr. R. A. Shah, learned Arbitrator dated 30th May 2022 addressed to the Governing Body, Indo – German Chamber of Commerce, and the

disclosure given by him on 30th May 2022. The said letter is on Page Nos.544 and 545 of the Affidavit-in-Reply and the same is as under :-

544
R. A. SHAH 21, PANORAMA, 203, WALKESHWAR ROAD, MALABAR HILL, MUMBAI - 400006
Date: 30 May, 2022
To The Governing Body Indo-German Chamber of Commerce, Maker Tower E, 1st Floor, Cuffe Parade, Mumbai - 400 005
Reference: IGCCAC Case No. 001/2022
<i>Arbitration under the Rules of Arbitration of the Indo-German Chamber of Commerce between:</i>
<u>Force Motors Limited ...Claimant</u>
and
<u>Dipl-Ingenieure Rainer & Oliver PULS GmbH ...Respondent</u>
<u>Subject: Consent for addition of name to the Panel of Arbitrators and for acting as Arbitrator in the above Arbitral Proceedings.</u>
Sir/Madam,
I, Rajendra Ambalal Shah, son of Mr. Ambalal Shah, residing at 21, Panorama, 203, Walkeshwar Road, Malabar Hill, Mumbai - 400 006, hereby consent to act as arbitrator in the arbitral proceedings at Reference above. For this purpose, I also consent to addition of my name to the Panel of Arbitrators of the Indo-German Chamber of Commerce pursuant to Rule 6.5 of the Rules of Arbitration of the Indo-German Chamber of Commerce.
Sincerely,  Rajendra Ambalal Shah


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545

R. A. SHAH

21, PANORAMA, 203, WALKESHWAR ROAD, MALABAR HILL, MUMBAI - 400006

Date: 30 May, 2022

To
The Governing Body
Indo-German Chamber of Commerce,
Maker Tower E, 1st Floor,
Cuffe Parade,
Mumbai - 400 005

Reference: IGCCAC Case No. 001/2022

Arbitration under the Rules of Arbitration of the Indo-German Chamber of Commerce between:

Force Motors Limited ...Claimant

and

Dipl-Ingenieure Rainer & Oliver PULS GmbH ...Respondent

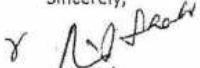
Subject: Undertaking pursuant to Rule 7.3 of the Rules of Arbitration of the Indo-German Chamber of Commerce

Sir/Madam,

I, Rajendra Ambalal Shah, son of Mr. Ambalal Shah, residing at 21, Panorama, 203, Walkeshwar Road, Malabar Hill, Mumbai - 400 006, state as follows:

1. I submit this undertaking in addition to my declarations as per Rule 7 of the Rules of the Rules of Arbitration of the Indo-German Chamber of Commerce (dated 19 May 2022). The said declarations be read part and parcel to the below undertaking.
2. I undertake that in the event of any circumstance that may arise during the course of the arbitral proceedings at Reference, which may give rise to justifiable doubts as to my impartiality or independence in respect of the said arbitral proceedings, I shall immediately disclose the same to the Parties, to the other arbitrators and to the Governing Body.

Sincerely,


Rajendra Ambalal Shah

TRUE - COPY
KANGA & CO.,


Partner.



25. In view of the above disclosures made by Mr. R. A. Shah, learned Arbitrator, it is the submission of Mr. Rajiv Kumar, learned Senior Counsel for the Petitioner that what is not disclosed by Mr. R. A. Shah, learned Arbitrator is that he was a Member of the Managing Committee of Respondent No.2 since 1993 and shared that position with Mr. Firodia, the Chairman / Managing Director of the Respondent No.1, who was a Member of the Managing Committee of the Respondent No.2 since 1995. It was not also disclosed that Mr. Firodia and Mr. R. A. Shah have been meeting approximately 4 to 5 times a year as members of the Committee of the Respondent No.2. Thus, it is his submission that, as a result, there is social familiarity between Mr. Firodia and Mr. R. A. Shah. It is his submission that even Mr. Firodia had never disclosed his long-standing association with Respondent No.2 to the Petitioner, when he strongly recommended the selection of Respondent No.2 as the Arbitral Institution. It is his submission that, even today, relying on the Affidavit filed by Mr. Firodia, the Chairman/Managing Director of the Respondent No.1, both Mr. R. A. Shah and Mr. Firodia continued to be the Members of the Committee of Respondent No.1. He submits that Mr. R. A. Shah is a Member of Advisory Council of the Respondent No.2 and the said fact has not been disclosed and till date Mr. R. A. Shah continues to be on the Advisory Council of the Respondent No.2. Thus, it is his submission that as this fact has been suppressed by both Mr. R.

A. Shah and Mr. Firodia, it is clear that Mr. Firodia and Mr. R. A. Shah have a relationship in respect of the business of Respondent No.2. It is further submitted that being on the Advisory Council of Respondent No.2, Mr. R. A. Shah is obviously acting as an advisor to the Respondent No.2 and therefore Mr. R. A. Shah is deemed to be in close association with members of Respondent No.2, concerning the business affairs of Respondent No.2. It is the submission of the learned Senior Counsel that the same brings Mr. R. A. Shah, learned Arbitrator in close proximity with Mr. Firodia, the Chairman and the Managing Director of the Respondent No.2 with whom he has enjoyed the position as a member since the year 1993/1995 i.e. almost for three decades. It is his further submission that as such Member of the Advisory Board, Mr. R. A. Shah has a controlling influence in matters concerning the Respondent No.2 as well as its members. As a Member of the Advisory Council, it goes without saying that Mr. R. A. Shah regularly advises the appointing party i.e. the Respondent No.2. He submits that all emails concerning arbitration proceedings have been addressed by the Governing Body and therefore the Governing Body plays a vital role in the arbitration. He submits that as per the Rules of Respondent No.2, the Governing Body has powers stipulated in Rule 3. As per the Rules of Arbitration of the Respondent No.2, the appointment of arbitrators is to be made under Rule 6 from the list of arbitrators. The Rules contemplate

appointment from the list of arbitrators empanelled with the Respondent No.2. Rule 8 provides for constitution of the Arbitral Tribunal. The Governing Body of Respondent No.2 takes necessary steps to have the Arbitral Tribunal constituted for adjudication of the disputes as per Rule 8.1. Rule 8.4 provides for constitution of the Arbitral Tribunal by the Governing Body.

26. It is the submission of Mr. Rajiv Kumar, learned Senior Counsel that on 30th May 2022, Mr. R. A. Shah got himself empanelled as an Arbitrator on the panel of arbitrators who also held Office as a Committee Member and Member of the Advisory Council reveals a position of conflict of interest held by Mr. R. A. Shah. It is his submission that this combination of holding Offices of Respondent No.2 and acting as an arbitrator compromises Mr. R. A. Shah's ability to give unbiased and fair decisions.

27. On the other hand, it is the submission of Mr. Mustafa Doctor, learned Senior Counsel for the Respondent No.1 that the contention raised by the Petitioner is that the appointment of Mr. R. A. Shah has been assailed on the ground that justifiable doubt exists as to his independence or impartiality i.e. under Section 12(3) of the Act read with the Fifth Schedule and that no case of ineligibility to act or of Mr. Shah's mandate having come to an end i.e. under Section 12(5) read with the Seventh Schedule, has even been attempted to be made out

against Mr. R. A. Shah. Learned Senior Counsel has mainly relied on the decision of *HRD Corporation* (supra). On the basis of the said decision, it is his submission that the 2016 Amendment to the Act has created a dichotomy between the persons who become “ineligible” to be appointed as an Arbitrator and person against whom “justifiable doubts” exist as to their independence or impartiality. It is his submission that the Supreme Court, in the said decision, has held that it is only cases where an Arbitrator becomes ineligible, which fall under the provisions of Section 14(1)(a) of the Act and that in all other cases the application is required to be made before the Arbitral Tribunal and if such an application is rejected, the law mandates that the Arbitral Tribunal must continue the arbitral proceedings and make an award. It is only after such award is made that a party may make an application for setting aside the arbitral award in accordance with Section 34 of the Act.

28. It is the submission of Mr. Mustafa Doctor, learned Senior Counsel that the disclosure contemplated under the provisions of the said Act is made. He submits that the disclosure which according to the Petitioner has not been made is not required to be made. In any case, it is the submission of Mr. Mustafa Doctor, learned Senior Counsel that, in any event, the said matter entirely falls within the scope of Section 13(6) of the said Act and therefore within the scope of jurisdiction of the Arbitral

Tribunal.

29. It is also submission of Mr. Mustafa Doctor, learned Senior Counsel that the declaration made by Mr. R. A. Shah, learned Arbitrator is complete in all respects. Mr. Shah while making the declaration and disclosure is required to be guided by the Fifth Schedule and the Seventh Schedule of the Act. By relying on the decision of *Chennai Metro* (supra), it is submitted by Mr. Mustafa Doctor, learned Senior Counsel that Mr. Shah had at all relevant times made a disclosure with respect to his being on the Managing Committee of the Respondent No.2. This fact was known to the Petitioner at all relevant times contrary to the arguments now sought to be put forth by them. It is his submission that averment made in Paragraph No.18(iv) and 33 of the application filed before the Hon'ble Tribunal, clearly shows the said knowledge. Mr. Mustafa Doctor, learned Senior Counsel pointed out Paragraph No.2.6.3 of the Respondent No.1's Affidavit-in-Reply to the Petitioner's Application filed before the learned Arbitral Tribunal and submitted that the Managing Committee of the Respondent No.2 consists of 27 people who meet four to five times a year. The fact that Mr. Shah and Mr. Firodia both serve on this Committee cannot by itself be a ground to create justifiable doubts as to the independence and impartiality of Mr. R. A. Shah and was therefore not required to be disclosed. He also pointed out the statement made by the Respondent

No.1 to the effect that Mr. Firodia and Mr. Shah have no connection or relationship with one another and that neither Mr. Shah nor the firm of which he is a partner i.e. Crawford Bayley & Co. have even been engaged by Dr. Firodia or the Respondent No.2 to render any legal advice or services to Respondent No.2. It is his submission that therefore none of the tests as laid down in Section 12 read with the Fifth and the Seventh Schedules to the Act are applicable to the facts and circumstances of the present case. It is his further submission that Mr. R. A. Shah had disclosed that he was a Member of the Respondent No.2's Managing Committee.

30. As noted herein above, the requirement of making disclosure as a necessary safeguard for ensuring the integrity and efficacy of an arbitration as an alternate dispute resolution mechanism is mandatory and the same is not optional. It is also settled legal position that the burden to ascertain that circumstances that may give rise to justifiable doubts as to the independence or impartiality of the Arbitrators is on the parties is erroneous and the disclosure is necessarily required to be made by the persons approached in connection with his appointment as an Arbitrator. It is settled legal position that Section 12(1) of the Act does not leave it at the discretion of any person approached in connection with being appointed as Arbitrator to make the necessary disclosures. It has been held that Section 12(1) specifies that "he shall

disclose”. Thus, it is mandatory for the person who is approached in connection with his possible appointment as Arbitrator to make a disclosure of all circumstances that may give rise to justifiable doubts as to his independence or impartiality. Thus, the requirement of making disclosure is a mandatory requirement.

31. As noted earlier, the very important words in Section 12 are “justifiable doubts as to his independence or impartiality”. Thus, it is the mandatory duty of the person who has been approached in connection with his possible appointment as an Arbitrator to disclose any of the factors which are likely to give rise to justifiable doubts as to his independence or impartiality. As already noted herein above, Section 12(1)(a) specifies the factors that financial, business, professional or other kind which is likely to give rise to justifiable doubt as to his independence or impartiality. The words “other kind” clearly shows that what is contemplated is the disclosure of financial, business, professional or combination of the same or relationship or interest of any other kind is required to be disclosed.

32. In this particular case, admitted position is as follows :-

- i.** Mr. Firodia is the Managing Director of the Respondent No.1.
- ii.** Mr. Firodia and Mr. R. A. Shah, learned Arbitrator both are the Members of the Committee of the Respondent No.2 – Indo - German Chamber of Commerce (IGCC) since 1993/1995.

Thus, they are associated with each other for last about 30 years.

- iii.** Mr. R. A. Shah is the Member of the Advisory Council of the Respondent No.2.
- iv.** It is undisputed that Mr. R. A. Shah is the Member of the Respondent No.2 since 1993 and Mr. Firodia is the Member of the Respondent No.2 since 1995. Thus, for almost about 30 years they are associated with each other in their capacity as Members of the Respondent No.2.
- v.** It has also come on record that meetings of Members of the Respondent No.2 are held approximately four to five time a year.

Thus, there is substance in the contention raised by Mr. Rajiv Kumar, learned Senior Counsel that as a result there is social familiarity between Mr. Firodia and Mr. R. A. Shah. It is required to be noted that the said relationship is since 1995.

33. With the above background of the matter, if the disclosure of Mr. R. A. Shah (Page No.146) is seen, he has disclosed that he has no financial, business, professional or other kind of relationship either in the past or present in relation to the subject matter of the dispute between the Petitioner and Respondent No.1 or interest of any kind with these parties in relation to the subject matter. To the said

disclosure, a Profile of Mr. R. A. Shah has been annexed. In the said Profile, it is disclosed that he is the Member of the Managing Committee of various Commerce & Industry Associations such as Indo - German Chamber of Commerce i.e. the Respondent No.2. However, very significant disclosure that Mr. Firodia is also a Member of the said Indo – German Chamber of Commerce since 1995 is not disclosed. It is significant to note that there are only 27 members of the Respondent No.2.

34. It is also significant to note that Respondent No.2 is the arbitral institution with which both, Mr. R. A. Shah i.e. the learned Arbitrator and Mr. Firodia, the Managing Director of Respondent No.1 are associated with as Member for last 30 years. Thus, in the facts and circumstances, it has to be held that the disclosure made by Mr. R. A. Shah, the learned Arbitrator is not a complete disclosure.

35. Mr. Mustafa Doctor, learned Senior Counsel has submitted that, as noted herein above, this relationship between Mr. R. A. Shah and Mr. Firodia is not at all relevant and therefore not required to be disclosed and non – disclosure of the same has no effect on the independence or impartiality of Mr. R. A. Shah to act as an Arbitrator. However, it is required to be noted that as per Section 12 it is the complete responsibility of the person who has been approached in connection with his possible appointment as an Arbitrator to disclose any of the

factors which are likely to give rise to justifiable doubts as to his independence or impartiality. Mr. R. A. Shah has disclosed that he is a Member of the Managing Committee of the Respondent No.2. However, admittedly, he has not disclosed that Dr. Firodia i.e. the Managing Director of the Respondent No.1 is also a Member of the Respondent No.2 and both of them are working together as a Member of the Respondent No.2 for last about 30 years. The association of Mr. R. A. Shah, learned Arbitrator and Mr. Firodia, the Managing Director of Respondent No.1 for a period of 30 years is a very long association and therefore it cannot be said that the said factor is irrelevant factor and should not have been disclosed. It cannot be said that non-disclosure of the same is totally irrelevant.

36. It is also an admitted position that the Respondent No.2 conducts institutional arbitration proceedings under its Indo – German Chamber of Commerce Arbitration Center as per its Rules of Arbitration and the present arbitration proceedings are being conducted under the said Rules. Admittedly, Mr. R. A. Shah is the member of the Governing Body. The powers and duties of the Governing Body are specified in Rule 3 of the Rules of Arbitration of the Indo – German Chamber of Commerce (“**Indo-German Rules**”), which reads as under :-

“3. Powers and Duties of the Governing Body:

3.1. The Governing Body shall:

3.1.1. receive all communications addressed to IGCCAC,

Governing Body and the Arbitral Tribunals;

- 3.1.2. *liaise, coordinate and facilitate communication between the Governing Body and the Arbitral Tribunals;*
- 3.1.3. *communicate the decisions and directions of the Governing body and the Arbitral Tribunals to the Parties;*
- 3.1.4. *communicate with the Parties on administration of the arbitration proceedings;*
- 3.1.5. *receive payment of fees and deposits;*
- 3.1.6. *maintain such other books or memoranda and maintain such other records as the Governing Body may from time to time require.*
- 3.2. *The Governing Body may delegate to any officer of the Governing Body such of the functions and administrative duties of the Governing Body as are deemed proper and necessary from time to time. However, it is clarified that any delegation of powers shall not affect the procedure to file correspondences which shall, at all times, be addressed to the Chamber.*
- 3.3. *The Governing Body shall make necessary arrangements for the service of an interpreter upon the request of one or more of the Parties and the costs thereof shall form part of the costs of arbitration as mentioned in the Schedule.”*

(Emphasis added)

37. Thus, it is clear that very important powers concerning Indo-German Chamber of Commerce have been assigned to the Governing Body including receiving payment of fees and deposits. It is also an admitted position that both, Dr. Firodia, Managing Director of the Respondent No.1 and Mr. R. A. Shah, learned Arbitrator are the Members of the Governing Body of Respondent No.2 – IGCCAC. It is an admitted position that Mr. R. A. Shah is a Member since 29th October

1993 (Page No.150) and Mr. Abhaykumar Navalmal Firodia is a Member since 2nd February 1995 (Page No.150) and they continues to be the Members of the Respondent No.2 till date. There are only 29 Members of the Respondent No.2 as per the Company Master Data which is annexed at Page Nos.150 and 151. Both of them are amongst the oldest Members. The analysis of the information as available on the Company Master Data on the website of Company Registrars (Pages 150-151) shows as follows :-

Sr. No.	Joining Year	Number of Directors/Members Joined
1	1993	1
2	1995	1
3	1996	1
4	1998	1
5	2001	1
6	2004	1
7	2007	1
8	2011	1
9	2013	1
10	2014	4
11	2015	1
12	2016	2
13	2019	3
14	2020	5
15	2021	5

38. Thus, it is clear that there were very few Members in 1993/1995.

Till the year 2000 there were only 4 members, till the year 2007 there were only 7 members, till the year 2013 there were only 9 members. Thus, it is clear that the association between Mr. R. A. Shah and Dr. Firodia is very old and close. In any case, the same should have been disclosed in the disclosure. Thus, it has to be held that Mr. R. A. Shah, learned Arbitrator failed to disclose very important and significant aspects. The fact that Mr. R. A. Shah being Member with Dr. Abhaykumar Firodia, Chairman and the Managing Director of the Respondent No.1 since 1995 with Respondent No.2 has not been disclosed. It has not been disclosed that they are the Members of the Governing Body of the Respondent No.2.

39. Thus, the above factual aspects clearly show that Mr. R. A. Shah, learned Arbitrator failed to disclose all the circumstances, the existence either direct or indirect of any past or present relationship with or interest in any of the parties, whether financial, business, professional or other kind which is likely to give rise to justifiable doubts as to his independence or impartiality.

THIRD POINT:

Effect of Order dated 13th January 2024 passed by the learned Arbitral Tribunal in Application under Section 13(2) of the Arbitration Act.

FOURTH POINT:

The maintainability of the present Petition filed under Sections 14 and

15 of the Arbitration Act in view of the Order dated 13th January 2024 passed by the learned Arbitral Tribunal.

FIFTH POINT:

The relief to which the Petitioner is entitled in this Petition filed under Sections 14 and 15 of the Arbitration Act.

40. In view of the above findings it has to be decided what is effect of Order passed by the learned Arbitral Tribunal in Application under Section 13(2) of the said Act on the maintainability of the present Commercial Arbitration Petition, particularly in view of submission of Mr. Mustafa Doctor, learned Senior Counsel that the Application is required to be made before the Arbitral Tribunal in cases which are not falling under the provisions of Section 14(1)(a) of the Act and if such an application is rejected, the law mandates that the Arbitral Tribunal must continue the arbitral proceedings and make an Award. It is only after such award is made that a party can file proceedings for setting aside the arbitral award in accordance with Section 34 of the Act. Mr. Mustafa Doctor, learned Senior Counsel has mainly relied on the decision in the case of *HRD Corporation* (supra) to substantiate the said contention.

41. In *HRD Corporation* (supra), it has been held that the 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”. It is further held that 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. In such a situation, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. It is further held that if challenge to the appointment of Arbitrator is under the grounds stated in the Fifth Schedule, 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 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.

42. While examining this case on the touchstone of the above principles it is required to be noted as set out herein above, Mr. R. A. Shah, learned Arbitrator has failed to make very significant disclosures. In this background, it is significant to note that it is the submission of Mr. Rajiv Kumar, learned Senior Counsel that the circumstances which Mr. R. A. Shah, learned Arbitrator should have disclosed, are covered by items 1, 8 and 14 of the Seventh Schedule. It is his submission that the same are also covered by items 1, 8, 14 and 33 of the Fifth Schedule. As the first 19 items in the Seventh Schedule are identical to the 19 items in the Fifth Schedule, item Nos.1, 8 and 14 of the Seventh Schedule are relevant and the same read as under:-

- “1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.*
- 8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.*
- 14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.”*

43. As discussed herein above, it is well established that there is long relationship between Mr. Firodiya, the Managing Director of the

Respondent No.1 and Mr. R. A. Shah, learned Arbitrator of past about 30 years. In the present case, admittedly, both of them are the Members of the Respondent No.2 together since 1995. It is also admitted position that the Respondent No.2 receives payment of fees and deposits and appoints Arbitrators and constitutes the Arbitral Tribunal. If the appointment of Arbitrator is challenged, the Governing Body of the Respondent No.2 takes decision and the decision of the Governing Body is final. In this background, Rule 24 and 25 of the Indo-German Rules are very relevant. Rule 24 is regarding fees and deposits. Rule 25 is regarding the Costs of the Arbitration. The said Rules 24 and 25 are reproduced herein below :-

“24. Fees and Deposits

- 24.1. The Tribunal's fees and IGCCAC's fees shall be ascertained in accordance with the Schedule of Fees at the time of commencement of the arbitration.**
- 24.2. The Governing Body shall fix the advances on costs of the arbitration. Unless the Governing Body directs otherwise, 50% of such advances shall be payable by the Claimant and the remaining 50% of such advances shall be payable by the Respondent. The Governing Body may fix separate advances on costs for claims and counterclaims.**
- 24.3. Where the amount of the claim or the counterclaim is not quantifiable at the time when the payment of fees is due, a provisional estimate of the costs of the arbitration shall be made by the Governing Body. Such estimate may be based on the nature of the controversy and the circumstances of the case. This may be adjusted in light of such information as may subsequently become available.**

- 24.4. *The Governing Body may from time to time direct Parties to make further advances towards costs of the arbitration incurred or to be incurred on behalf of or for the benefit of the Parties.*
- 24.5. *In the event the Tribunal appoints an expert witness as mentioned in clause 19.4, the fees and ancillary costs of such expert witness shall be borne by the Parties in the manner determined by the Tribunal.*
- 24.6. *If a Party fails to pay the fees or make the advances or deposits directed, the Governing Body may, after consultation with the Tribunal and the Parties, direct the Tribunal to suspend work and set a time limit on the expiry of which the relevant claims or counterclaims shall be considered as withdrawn without prejudice to the Party reintroducing the same claims or counterclaims in another proceeding.*
- 24.7. *Parties are jointly and severally liable for the costs of the arbitration. Any Party is free to pay the whole of the advances or deposits on costs of the arbitration in respect of the claim or the counterclaim should the other Party fail to pay its share. The Tribunal or the Governing Body or the Governing Body may suspend its work, in whole or in part, should the advances or deposits directed under this Rule remain either wholly or in part unpaid.*
- 24.8. *If the arbitration is settled or disposed of without a hearing, the costs of arbitration shall be finally determined by the Governing Body. The Governing Body shall have regard to all the circumstances of the case, including the stage of proceedings at which the arbitration is settled or disposed of. In the event that the costs of arbitration determined are less than the deposits made, there shall be a refund in such proportions as the Parties may agree, or failing an agreement, in the same proportions as the deposits were made.*
- 24.9. *All advances shall be made to and held by IGCCAC. No interest shall accrue on any deposits made to IGCCAC.*

25. Costs of the Arbitration

- 25.1. *The Tribunal shall specify in the Award, the total amount of the costs of the arbitration. Unless the Parties have*

agreed otherwise, the Tribunal has the authority to order in the Award that the unsuccessful Party shall pay the costs of the successful Party. The Tribunal may make a different order for reasons recorded in writing in the Award.

25.2. The term “costs of arbitration” shall include:

25.2.1. The fees and expenses of the Tribunal and witnesses;

25.2.2. IGCCAC administrative fees and expenses; and

25.2.3. Costs of expert advice and other assistance required by the Tribunal from time to time.

25.3. The Tribunal must follow the principles of equity and natural justice in determining the costs to be imposed on the parties.”

(Emphasis added)

44. Thus, cumulative effect of these provisions clearly shows that the association of Mr. R. A. Shah, learned Arbitrator and Mr. Firodia, Managing Director of Respondent No.1 is covered by the term financial, business, professional or other kind of relationship as provided in Section 12(1)(a) and is also covered by Clause No.1, Clause No.8 and Clause No.14 of Seventh Schedule. As noted herein above, there is non-disclosure of very significant aspects and as held in *HRD Corporation* (supra) that a person becomes ineligible and de jure to perform his functions as Arbitrator only in cases covered under Section 12(5), then also Mr. R. A. Shah, learned Arbitrator becomes ineligible and de jure to perform his functions and the case is covered by Section 14(1)(a) of the said Act and therefore the present Petition filed under Sections 14 and

15 of the said Act is maintainable and deserves to be allowed.

45. Assuming that the present case is not covered under clause Nos. 1, 8 and 14 of the Seventh Schedule, as submitted by Mr. Mustafa Doctor, learned Senior Counsel, the same will be covered by the legal position as held in *Larsen & Toubro Ltd.* (supra), wherein it is held that the disablement of an arbitrator under clause (a) of subsection (1) of Section 14 takes within its fold not only the ineligibility criteria prescribed under the Seventh Schedule but also those aspects which although do not fall within the ambit of the entries set out in Seventh Schedule but lend support to the plea, that the appointee-arbitrator would be anything but impartial and/or independent. Thus, by taking into consideration the facts and circumstances, it has to be held that Mr. R. A. Shah, learned Arbitrator becomes ineligible and de jure to perform his functions and the case is covered by Section 14(1)(a) of the said Act and therefore the present Petition filed under Sections 14 and 15 of the said Act is maintainable and deserves to be allowed.

46. Mr. Mustafa Doctor, learned Senior Counsel as noted herein above by relying on the decision *HRD Corporation* (supra) submitted that the present case will be at the most covered by the Fifth Schedule, without prejudice to his contention that the disclosure as pointed out by the Petitioner is not at all relevant. Learned Senior Counsel therefore submitted it is the Arbitral Tribunal which will decide challenge to the

appointment of the Arbitrator under Section 13 and if 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 and 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. Learned Senior Counsel submits that in fact application under Section 13 of the said Act has been filed and the same is rejected.

47. This Court has already held that as Mr. R. A. Shah, learned Arbitrator has failed to disclose with respect to the important aspects and in fact he becomes de jure unable to perform his functions. It has been held that the relationship between Mr. R. A. Shah and Dr. Firodia, Managing Director of the Respondent No.1 will fall under Items Nos.1, 8 and 14 of the Seventh Schedule and therefore he becomes de jure unable to perform his functions.

48. In the above background of the matter, it is relevant to note the observations in the impugned Order dated 13th January 2024 of the Arbitral Tribunal. The relevant portion is in Paragraph Nos.13, 14, 15 and 16, which reads as under :-

“13. The Tribunal finds that this explanation is not

acceptable. Mr. R.A. Shah, learned Arbitrator filed his declaration under Section 12 on 19.05.2022. The Respondent should have been vigilant in making inquiries about any doubts regarding the impartiality of Mr. R.A. Shah, learned Arbitrator immediately after his declaration from which information relating to his continuance as Member of the Committee of IGCC was available to the Respondent. The Respondent has not shown due diligence in making such inquiry, especially in view of the averments made by the Respondent in the application that it was persuaded by Dr. Abhaykumar N. Firodia to accept that the arbitration would be conducted in accordance with the Rules of the IGCC. The Respondent is relying upon documents filed along with the application to show that Dr. Abhaykumar N. Firodia is a Member of the Committee of IGCC and Ms. Sonia Prashar is the Deputy Director General of IGCC and Additional Director of the Claimant-Company which are in public domain. However, what is material is that **the Application gives no explanation as to why suddenly the enquiries into the office bearer and member of the Committee were carried out at the time of drafting of the Statement of Defence and why similar enquiries were not made earlier when the disclosure was made by Mr. Shah. From the above, it is clear that Respondent had constructive knowledge of the circumstances giving rise to justifiable doubts regarding the impartiality of Mr. R.A. Shah, learned Arbitrator.**

14. According to Gary B. Born in International Commercial Arbitration, Third Edition, objection to an Arbitrator's independence and impartiality should be raised promptly after the arbitrator's nomination, **alternatively, after a party learns of the basis for the challenge.** In some cases, determining when a party actually knew of the circumstances giving rise to the challenge may be difficult. It is therefore necessary that if **the Application is at a later stage (not immediately after a disclosure), there is a reasonable explanation as to the circumstances in which the knowledge is stated to arise and why it was not known earlier. That is**

absent in the present case.

15. Under the circumstances, the explanation given by the Respondent about its awareness of the circumstances giving rise to justifiable doubts regarding the independence of Mr. R.A. Shah, learned Arbitrator for the first time only a week prior to the application being filed on 29.07.2023 is not convincing.

*16. For the foregoing reasons, **the application is barred by limitation.** It is not necessary to express any opinion on the other points argued by both sides.”*

(Emphasis added)

49. It is made very clear that this Arbitration Petition is filed under Sections 14 and 15 of the said Act and the Order dated 13th January 2024 passed by the Arbitral Tribunal is not under challenge. However, Mr. Mustafa Doctor, learned Senior Counsel raised the contentions that as the Arbitral Tribunal has decided the objection only recourse for the Petitioner is to take objection in Section 34 proceedings and therefore to consider these contentions raised by learned Senior Counsel, the observations are made with respect to the Order passed by the learned Arbitral Tribunal. What the learned Arbitral Tribunal has held that the Respondent should have been vigilant in making inquiries about any doubts regarding the impartiality of Mr. R. A. Shah, learned Arbitrator immediately after his declaration from which information relating to his

continuance as Member of the Committee of IGCC was available to the Respondent and that the Respondent has not shown due diligence in making such inquiry. However, the said approach and the reasoning of the learned Arbitral Tribunal is contrary to the Division Bench Judgment of the Delhi High Court in the case of ***Ram Kumar*** (supra). It has been held in the said decision that the assumption that the burden to ascertain the circumstances that may give rise to justifiable doubts as to the independence and impartiality of the arbitrators is on the parties, is erroneous. The disclosure is necessarily required to be made by the person approached in connection with his appointment as an arbitrator and it is mandatory for the person who is approached in connection with his possible appointment as an arbitrator, to make a disclosure of all circumstances that may give rise to justifiable doubts as to his independence and impartiality and it would be erroneous to assume that the requirement of making a disclosure is not mandatory. In the said decision, it has been held that the requirement of making a disclosure is a necessary safeguard for ensuring the integrity and efficacy of an arbitration as an alternate dispute resolution mechanism and is not optional.

50. Thus, it is the complete responsibility of the person who has been approached for being appointed as Arbitrator to make disclosure and

the disclosure should be a complete disclosure. The burden is not on the parties to the arbitration proceedings to find out on the basis of partial disclosure, if any ground exist which gives rise to justifiable doubt as to the independence and impartiality of the person approached to be appointed as Arbitrator.

51. In any case, the learned Arbitral Tribunal has passed the Order on the ground that the Application is barred by limitation. Once it is held that the Application is barred by limitation, the Arbitral Tribunal has no jurisdiction to deal with the said Application. It is clear that the learned Arbitral Tribunal has not decided the Application on merits and therefore also the same is not an impediment to this Court to consider and decide the present Application filed under Sections 14 and 15 of the said Act.

52. However, it is expressly clarified that observation as regards the order dated 13th January 2024 are made as Mr. Mustafa Doctor, learned Senior Counsel has made submissions concerning the same. It is also clarified that this Court has already held that the appointment of Mr. R. A. Shah is covered by the Seventh Schedule and in any case he has become de jure unable to perform his functions. Thus, for the above reasons, the present Petition filed under Sections 14 and 15 of the said Act is maintainable.

53. Mr. Rajiv Kumar, learned Senior Counsel has also raised certain

other contentions regarding Ms. Sonia Prashar acting at one point of time as Deputy Director General of Respondent No.2 and Member of the Governing Body of the Respondent No.2 and she has been appointed as an Additional Director of Respondent No.1 on 28th September 2022 i.e. 4 months after the constitution of the Arbitral Tribunal. It is his submission that in view of the same and as Mr. R. A. Shah, learned Arbitrator is closely associated with Respondent No.2, Respondent No.2 be removed by substituting another reputed arbitral institution in place of Respondent No.2 to administer and manage arbitral proceedings for adjudication in the dispute and differences between the Petitioner and the Respondent No.1. However, I have already held that Mr. R. A. Shah has become de jure unable to perform his functions and therefore ineligible to act as the Arbitrator. By exercising power under Section 14 of the said Act as I am terminating the mandate of Mr. R. A. Shah, learned Arbitrator to act as Arbitrator, it is not necessary to substitute in place of the Respondent No.2 another arbitration institution. Therefore, the said prayer is rejected.

54. It is required to be noted that Mr. R. A. Shah, learned Arbitrator is not made party to the present Petition. However, Mr. Rajiv Kumar, learned Senior Counsel submitted that as Mr. R. A. Shah is working as Solicitor since 1955 and Managing Partner of a reputed firm of Advocates and Solicitors, to avoid embarrassment, he has not been

impleaded as party. It is also required to be noted that Mr. Mustafa Doctor, learned Senior Counsel has not raised any objection concerning the same.

55. For the above discussion, the Commercial Arbitration Petition is allowed in terms of prayer clause (a).

56. As far as prayer clause (b) as Rule 8.5.2 of the IGCC Arbitration Rules, which were applicable to the appointment of Mr. R. A. Shah, would apply and Respondent No.1 would have a right to appoint its nominee Arbitrator. The Respondent No.1 to take appropriate steps to appoint its nominee Arbitrator.

57. Accordingly, the Commercial Arbitration Petition is disposed of in above terms with no order as to costs.

58. This order was dictated in Open Court on earlier dates and completed today.

59. As I am conducting the Court at least for 2-2^{1/2} hours almost every day after regular Court hours, leaving the Chamber after correcting/signing daily orders at least up to 10:30 p.m.-11:30 p.m. on almost all the Court working days and reading the case papers at my residence up to 02:00 a.m., reading the case papers in the morning at least for one hour and also attending the Chamber on almost all Saturdays/Sundays/Holidays for completing pending work, uploading of this order is delayed.

60. This Court places on record its appreciation for the assistance rendered by Mr. Rajiv Kumar, learned Senior Counsel and Mr. Mustafa Doctor, learned Senior Counsel respectively appearing for the Petitioner and Respondent No.1.

[MADHAV J. JAMDAR, J.]

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