

**In the High Court at Calcutta
Civil Appellate Jurisdiction
Original Side**

**The Hon'ble Mr. Justice Sabyasachi Bhattacharyya
And
The Hon'ble Mr. Justice Supratim Bhattacharya**

A.P.O. No. 184 of 2023

In

AP No. 402 of 2020

IA No: GA 2 of 2023

C & E Limited and Others

Vs.

Feather Touch Limited and Others

With

A.P.O. No. 185 of 2023

In

AP No. 364 of 2020

IA No: GA 2 of 2023

C & E Limited and Others

Vs.

Gopal Das Bagri and Others

For the appellants : Mr. S. N. Mookherjee, Sr. Adv.,
Mr. Dhruvo Ghosh, Sr. Adv.,
Mr. Rajarshi Dutta,
Mr. Rahul Poddar,
Mr. Yash Singhi,
Mr. Ajeya Choudhury,
Mr. Arindam Halder,
Mr. Sarbesh Choudhury... Adv.

For the respondents : Mr. Dhruv Dewan,
Mr. Sandip Agarwal,
Mr. Abhishek Swaroop,
Mrs. Sulagna Mukherjee,
Mr. Tanay Agarwal,
Ms. Priyansha Agarwal,
Mr. Manav Sharma,
Mr. Bharath Krishna... Adv.

Heard on : 19.11.2025, 26.11.2025,
 03.12.2025, 10.12.2025,
 & 24.12.2025.
 Reserved on : 24.12.2025.
 Judgment on : 21.01.2026.

Sabyasachi Bhattacharyya, J.:-

1. The genesis of the present appeals under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”) is an award dated February 29, 2020 passed by a learned Senior Advocate of this Court in the capacity of Arbitrator, who was appointed by Court on consent, as recorded in the order dated August 1, 2014 passed in a suit between the parties bearing CS No. 344 of 2014.
2. AP No. 364 of 2020 was filed by one Gopal Das Bagri and AP No. 402 of 2020 by Feather Touch Limited, both award debtors, under Section 34 of the 1996 Act, challenging the said award. The said two applications appeared before the learned Single Judge along with two connected applications for enforcement of the award, bearing EC No. 145 of 2020 and EC No. 81 of 2022, and interlocutory applications filed therein.
3. The learned Single Judge took up both the applications under Section 34 for hearing on a preliminary issue as to whether the award was tainted by fraud, corruption and bias. By a judgment dated July 27, 2023, which is under challenge in the present appeals, the learned Single Judge held the preliminary issue against award holders, thereby

allowing the applications under Section 34 of the 1996 Act and setting aside the impugned award, coming to a finding that the same fell foul of the mandate under Section 12 of the 1996 Act, particularly Grounds 11, 15 and 20 of the Fifth Schedule and Ground 15 of the Seventh Schedule, read with Explanation 2 thereof.

4. The award debtors/applicants under Section 34 had initially challenged the jurisdiction of the learned Single Judge to take up the same on the ground that the learned Arbitrator (since deceased) was a Senior Advocate of this Court having considerable practice, which might sway the court in upholding his award. Such challenge was turned down by the learned Single Judge with a token cost of Rs. 11/-. The award debtors filed Transfer Petition (Civil) Nos. 1173-1174 of 2021, Transfer Petition (Civil) Nos. 1203-1204 of 2021 and Transfer Petition (Civil) Nos. 282-283 of 2021 for transfer of the Section 34 applications to some other High Court, which were dismissed by the Hon'ble Supreme Court *vide* order dated September 24, 2021. While dismissing the same, the Hon'ble Supreme Court held, *inter alia*, that even assuming that the learned Arbitrator was a very respected member of the Bar, it was sure that the High Court at Calcutta would examine the allegations of misconduct without being influenced by the alleged status of the learned Arbitrator. It was also observed that even assuming that five Hon'ble Judges of the Calcutta High Court had recused themselves, that was no ground to express an apprehension about the entire High Court at Calcutta, then consisting of more than 30 Judges, by

contending that the petitioners therein would not get justice from the said Court.

5. Immediately before the hearing of the present appeals were taken up by this Court, the Court made it clear to learned counsel for both sides that the learned Arbitrator was an eminent counsel of this Court and known to the Bench in such capacity; although none of the members of the Bench had any personal kinship with the Arbitrator, but since allegations of fraud and bias were made against the learned Arbitrator, the parties should express at the outset whether they had any objection to this Court taking up the matter. Upon such option being given, the appellants expressed through counsel that they had no objection in the matter being taken up by this Court; however, the respondents herein raised an objection on the ground that the learned Arbitrator commanded respect from the Judges of this Court in view of his standing at the bar at the relevant point of time.
6. By an order dated August 13, 2025, the then Bench taking up the appeal, which also included one of us (Sabyasachi Bhattacharyya, J.), turned down the challenge by a detailed order by relying on the earlier observations of the Hon'ble Supreme Court. Thereafter, the matter was heard on several days, culminating in the present judgment.
7. Learned senior counsel appearing for the appellants argues that the plinth of the challenge to the award was the appearance of the learned Arbitrator for a company by the name of M/s. SSSMIL, which was allegedly an affiliate of C & E Limited and Bulaki Das Bhaiya, since

deceased (for short, “BDB”), who were the respondents in the arbitral proceeding. However, M/s. SSSMIL is not and cannot be an affiliate of BDB, since an “affiliate” under the Fifth and Seventh Schedules of the 1996 Act must be restricted to corporate entities. The entries in the Fifth Schedule, along with the definition of “affiliate”, have been borrowed from the IBA Guidelines on Conflicts of Interest in International Arbitration (in brief, “the 2014 IBA Guidelines”), which was adopted on October 23, 2014. It was held in *HRD Corporation (Marcus Oil and Chemical Division). v. GAIL (India) Limited (formerly Gas Authority of India Limited)*, reported at (2018) 12 SCC 471 that justifiable doubts as to the independence and impartiality of the proposed Arbitrator requires adopting a broad, commonsensical approach, requiring a fair construction of the words used in the Fifth Schedule. However, the argument that the items in the Fifth and Seventh Schedules must be construed in the most expansive manner, so that the remotest likelihood of bias gets removed, was not an acceptable way of interpreting the Schedules.

8. It is argued by the appellants that the IBA Guidelines are revised every ten years, lastly on May 25, 2024 (2024 IBA Guidelines), which included within the definition of the term “affiliate” “an individual having a controlling influence on the party in the arbitration”, which is not merely clarificatory but in the nature of a subsequent updation incorporated by revision and amendment. Since such revised guidelines have not been adopted in the Indian statutory framework, it

is argued, there is no question of an individual having an 'affiliate' in terms of the definition of the said term in the 2024 IBA Guidelines.

9. Learned senior counsel for the appellants distinguishes judgments cited by the respondents in that regard and argues that, properly read, Explanation 2 of the Fifth Schedule contemplates that an affiliate must be a company in a group of companies and would include the parent company.
10. Learned senior counsel for the appellants cites Black Law's Dictionary (11th Edition) which defines "affiliate" as a corporation that is related to another corporation by shareholdings or other means of control, subsidiary, parent or sibling corporation.
11. Next relying on West's Legal Thesaurus/Dictionary, the appellants contend that "affiliate" means (when used as a noun), a branch, a company controlled by another company, division, sub-division, wing, subsidiary, unit, part, etc.
12. In *Cox & Kings Ltd. v. SAP India (P) Ltd.*, reported at (2024) 4 SCC 1, the definition of "group of companies" clearly supports the control by a parent company or a common entity over the other companies in the group – supporting the formulation of a solar system arrangement in the group of companies. In the present case, no parent company is identifiable to support a 'group of companies' arrangement.
13. Thus, it is reiterated that only a corporate entity can be an affiliate of another corporate entity, linked together by shareholding or a parent company, neither of which is applicable in the present case.

14. Secondly, learned senior counsel for the appellants argues that BDB does not have control over M/s. SSSMIL. The shareholding of the promoter and promoter group in M/s. SSSMIL is 35.42%, the remaining 64.58% shareholding being held by the public as M/s. SSSMIL is a public-listed company.
15. Out of 35.42%, individuals hold shares of 9.67% and body corporates, the remaining 25.75%.
16. Even out of the 25.75% shareholding by body corporates, 25.68% is held by B.G. Chemicals Private Ltd., in which BDB himself held 80 equity shares and the BDB HUF held 1900 equity shares out of its issued share capital of 10,000 equity shares.
17. Citing *ArcelorMittal India Private Limited v. Satish Kumar Gupta*, reported at (2019) 2 SCC 1, the appellants contend that positive control arises from a shareholding of above 50%, which confers a proactive power upon the shareholder.
18. In *Vodafone International Holdings BV v. Union of India and another*, reported at (2012) 6 SCC 613, it was held that control is a mixed question of law and fact, and must be determined from the voting power of the shareholders and the extent of influence that shareholders command in the management of the company.
19. In *Universal Cables Limited v. Arvind Kumar Newar and Ors.* (APO No. 89 of 2020) a Division Bench of this Court held that a controlling interest is an incidence of ownership of shares in a company, something which flows out of the holding of such shares. Hence, it is argued, it

would be incorrect to say that BDB exerted any control over the management in M/s. SSSMIL through his shareholding in B.G. Chemicals Private Ltd., which only has a shareholding of 25.75% in M/s. SSSMIL.

- 20.** Learned senior counsel for the appellants controverts the reliance of the respondents on the Achutan Report of the Take Over Regulations Advisory Committee dated July 29, 2010, in terms of which 25% shareholding by the promoter is enough for a deemed presumption of positive control. Rule 13 of the Competition (Criteria for Exemption of Combination) of Competition Rules has also been cited by the respondents to show that an affiliate is an enterprise having 10% or more of the shareholding or voting rights of the enterprise. The appellants argue that reliance on the said documents is misplaced, since the said provisions concern special legislations in the field of acquisition of shares of a target company and combinations to prevent appreciable adverse effects to competition in the relevant market, respectively.
- 21.** It is contended by the appellants that the Notification dated July 17, 2008 issued by the Petroleum and Natural Gas Regulatory Board, also relied on by the respondents, is also not relevant, as the definition of 'affiliate' therein is in a completely different context. Thus, it is argued that even if the 2024 IBA Guidelines were to be made applicable, it cannot be said that BDB has a controlling influence, let alone controlling interest, over M/s. SSSMIL, for which the learned Arbitrator

appeared on eleven occasions in an unrelated matter during a hiatus between the conclusion of the hearing in the arbitral proceeding and the delivery of the award.

- 22.** Learned senior counsel appearing for the appellants further submits that BDB was not an affiliate of M/s. SSSMIL, since an affiliate is to be considered *qua* a party to the arbitration agreement. The Entries of the Fifth and Seventh Schedules of the 1996 Act, it is contended, support such submission. Thus, it is submitted that it was not proper for the learned Single Judge to conclude that BDB, either as an individual or through his group of family members, would qualify as an affiliate. In fact, the question was wrongly formulated, as an individual can have no affiliate. Further, it is nobody's case that M/s. SSSMIL controls BDB or any of his family members are controlled by M/s. SSSMIL. Thus, BDB cannot be an affiliate of M/s. SSSMIL.
- 23.** It is also argued that C & E Limited and M/s. SSSMIL are not affiliates, since there is no cross-holding of shares between the two.
- 24.** The respondents seek to refer to factual documents in a bid to establish control of BDB and C & E Limited over M/s. SSSMIL and to demonstrate how the two companies operate within an alleged group of companies. However, it is argued, such ground has not been substantiated by the respondents.
- 25.** Learned senior counsel for the appellants then argues that Entry 2 of the Fifth and the Seventh Schedules cannot apply in any event since the Arbitrator did not currently represent an affiliate. 'Current

representation’ means a continuous engagement to act for a party or its affiliate, and not appearance in one matter. ‘Legal representation’ is not covered by Entry 2, as Entry 11 of the Fifth and Seventh Schedules of the 1996 Act relates to the same. It is submitted that ‘legal representation’ is confined to only a party and not its affiliate. As such, Entry 2 cannot cover a case of an arbitrator representing an affiliate in a litigation, which is already covered by Entry 11.

- 26.** Relying on *HRD Corporation (supra)*¹, the appellants contend that the term “currently represents” has to connote some degree of regularity. It was held in the said judgment that the term “currently” requires something more, which is an element of being connected in an advisory capacity with the party.
- 27.** Entry 8 of the Seventh Schedule is also not applicable, as the same deals with a scenario where the Arbitrator ‘regularly’ advised either the appointing party or an affiliate thereof, none of which applies here. Moreover, this Entry envisages a scenario where the appointment of the Arbitrator is made consensually by the parties. In the present case, however, the learned Arbitrator was appointed pursuant to an order of the Court.
- 28.** Again, Entry 15 of the Fifth and Seventh Schedules cannot apply, because it is nobody’s case that any advice or opinion had been given by the Arbitrator “in the dispute”.

¹ ***HRD Corporation (Marcus Oil and Chemical Division). v. GAIL (India) Limited (formerly Gas Authority of India Limited), reported at (2018) 12 SCC 471***

- 29.** Entry 20 of the Fifth Schedule is not attracted as it envisages a situation where the Arbitrator had previously advised an affiliate of a party making the appointment in an unrelated matter within the past three years but there is no ongoing relationship. The Arbitrator, in the present case, had no past relationship with the alleged affiliate (M/s. SSSMIL) to invoke the said Entry.
- 30.** The judgments cited by the respondents regarding the continuous duty of disclosure of the Arbitrator are also not applicable, since the impartiality of Arbitrators in a curated panel by public sector undertakings or in private-public contracts, as opposed to the present case, was considered in such cases.
- 31.** Moving on to his next contention, learned senior counsel for the appellants submits that several findings of the learned Single Judge in the impugned judgment under Section 34 of the 1996 Act are without any basis at all.
- 32.** By way of example, the learned Single Judge held that BDB has overall control and management of M/s. SSSMIL and that the Managers, Directors and employees are accustomed to act as per the sole wish and dictate of BDB. It was further held that BDB would have attended most of the conferences at the time of the appearance of the Arbitrator for M/s. SSSMIL in connection with APD No. 252 of 2015.
- 33.** All the above findings, it is submitted, are without any basis whatsoever.

- 34.** The learned Single Judge, after having held that he was hesitant to hold that M/s. SSSMIL is an affiliate of C & E, went on to observe that an individual, group of persons or a family in control and management of a company can qualify as an affiliate. Such finding, it is argued, is contrary to the statutory framework.
- 35.** Learned senior counsel appearing for the appellants next submits that the respondents cannot rely on documents which were not referred to or relied on upon by the learned Single Judge. A Convenience Compilation, comprised of 77 volumes of paper books, were filed before the learned Single Judge, as recorded in the order dated March 14, 2023. Extracts of some affidavits/petitions/evidence were furnished to establish that BDB controlled M/s. SSSMIL, formerly known as Chemcrown India Private Limited. These documents, however, were not part of the petitions under Section 34 of the 1996 Act. Thus, those cannot be looked into by this Court. Moreover, neither such affidavits/petitions nor the evidence was relied on by the respondents in the Section 34 petitions to constitute grounds of challenge to the award.
- 36.** Learned senior counsel relies on *Mica Export Promotion Council and Others v. G.C.L. Joneja & Ors.*, reported at 72 C.W.N. 117, for the proposition that parties cannot rely on materials which were not placed in the body of petitions or applications.
- 37.** Thus, it is argued that the Arbitrator's conduct does not fall foul of the mandate under Section 12 of the 1996 Act, read with Entries 2, 11, 15

and 20 of the Fifth Schedule and Entries 2, 8 and 15 of the Seventh Schedule, for which the appeals deserve to be allowed by setting aside the impugned judgments.

- 38.** Learned counsel appearing for the respondents in both the appeals, on the other hand, while controverting the contentions of the appellants, reiterates that the learned Arbitrator represented M/s. SSSMIL as counsel on as many as eleven occasions between June, 5, 2018 and July 19, 2018 in connection with APD No. 252 of 2015.
- 39.** The hearing in the arbitration proceedings stood concluded in the 124th sitting of the Arbitral Tribunal on December 9, 2017 and the award was reserved by the learned Arbitrator. On January 3, 2019, another sitting was held, where the learned Arbitrator apprised the parties that the draft award was ready and it would take a few days to do the proof-reading of the same as well as to make necessary corrections of typographical mistakes and he expected the final copy of the award to be ready very soon. However, the award was ultimately passed on February 29, 2020. In the interregnum, the appearances of the learned Arbitrator for M/s. SSSMIL took place.
- 40.** While highlighting the relation between M/s. SSSMIL with BDB and C & E Limited, learned counsel points out that admittedly M/s. SSSMIL (former name, “Chemcrown India Private Ltd.”) was incorporated by BDB in the year 1973 and he was an initial subscriber to the Memorandum and Articles of Association of the said company. BDB, simultaneously, was the promoter and largest shareholder of M/s.

SSSMIL, which was a listed company, through B.G. Chemicals Private Limited, which is a company of BDB. The shareholding pattern of M/s. SSSMIL reflects the promoter and promoter group holding 35.42% of the total paid-up capital, whereas the balance 64.58% is held by public. Out of such 35.42%, B.G. Chemicals Private Limited holds 25.68%. The balance promoter and promoter group shareholding, it is alleged, is held by around 105 individuals, who are all family members of BDB.

- 41.** Learned counsel for the respondents relies on Regulation 2(1)(e) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (for short, “the SEBI Takeover Code”), which defines “control” to include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert. Regulation 2(1)(q) thereof defines “persons acting in concert” and provides in Regulation 2(1)(q)(2)(iv) that promoters and members of the promoter group shall be deemed to be acting in concert, unless the contrary is established. Thus, a rebuttable presumption is created that a promoter and promoter group constitute one single block in exercising control over the affairs of a company.
- 42.** The report of the “Takeover Regulation Advisory Committee” under the Chairmanship of Mr. C. Achutan dated July 19, 2010 concluded that since a holding level of 25% permits the exercise of *de facto* control over a company, this could be fixed as the appropriate open offer trigger threshold in the Indian context. The Committee felt that 25%

shareholding would be an appropriate level at which a new incumbent shareholder could reasonably expect positive control in the current environment.

- 43.** Such recommendation was ultimately accepted and Regulation 3 of the SEBI Takeover Code provides 25% as the threshold at which an acquirer is required to make an open offer.
- 44.** Further arguing on the alleged nexus between the appellants and M/s. SSSMIL, learned counsel for the respondents submits that BDB's e-mail address is "bdbhaiya@cel.co.in", which is on the domain name of C & E Limited. In the shareholding structure of M/s. SSSMIL, individuals comprising the Bagri Group (respondents) were holding a nominal share capital in the public category up to Rs. 2 lakh only.
- 45.** From the MCA Master Data of M/s. SSSMIL, it is evident that Renu Bhatte, the daughter of BDB, and Mukund Bhatte, his son-in-law, were Directors of M/s. SSSMIL since February 14, 2018.
- 46.** Again, Mr. Rajiv Issar, an employee of C & E Limited, which is under the control of BDB and his family and where BDB was the Executive Chairman, was another Director of M/s. SSSMIL.
- 47.** Furthermore, the registered office of M/s. SSSMIL, that is, 95, Park Street, Kolkata, is the same as that of C & E Limited.
- 48.** Even the e-mail address of M/s. SSSMIL provided to the Ministry of Corporate Affairs used the domain name of C & E Limited, that is "@cel.co.in".

- 49.** One Mr. Arindam Halder, the legal head/law officer of C & E Limited, while appearing for the claimants in the arbitration, it is submitted, had instructed the learned Arbitrator on the M/s. SSSMIL in APD No. 252 of 2015, which indicates deep operational and structural inter-connectedness between the companies, evidencing the structure of “group of companies”. This is sought to be established by the respondents on the basis of a purported screenshot of the LinkedIn profile of Mr. Halder and the evidence of Mr. Vijay Kumar Bagri, the third witness of the claimant in the arbitration proceedings.
- 50.** BDB’s son Manoj Kumar Bhaiya, it is alleged, was the authorised signatory of M/s. SSSMIL in WPA No. 46471 of 2006 filed before the Madras High Court. He was also appointed as the CEO of C & E Limited on August 18, 2011.
- 51.** The appellants, in their pleadings, have also admitted that M/s. SSSMIL and C & E Limited were group companies and that BDB had overarching control over the affairs of M/s. SSSMIL. In support of such submission, learned counsel for the respondents relies on BDB’s reply to CP No. 180 of 2013 affirmed on January 17, 2014 and on Case No. C/12072 of 2012, filed by C & E Limited against two persons before the court of the Chief Metropolitan Magistrate at Calcutta in June, 2012, as well as the cross-examination of BDB before the learned Arbitrator on December 15, 2015.
- 52.** It is submitted that the general public, which holds around 64.58% shares of M/s. SSSMIL, can never be said to have or exercise any

control over the company, as opposed to the 35.42% shares owned by the promoter BDB and the promoter's group.

53. It is contended that the documents referred to above were filed along with the Section 34 applications before the learned Single Judge and, as such, ought to be taken into consideration by this Court as well, being a part of the records.
54. Those are not new materials but admitted documents, there being no controversy regarding the veracity of those. Given the nature of the objection to the arbitral award in the present case, there cannot be any bar, it is argued, for this Court to consider the said documents.
55. Learned counsel for the respondents also places reliance on the language of Section 34(2)(b) of the 1996 Act, where the expression "the court finds that" is used, as well as on *State of Chhattisgarh and another v. SAL Udyog Private Limited*, reported at (2022) 2 SCC 275, to argue that the court, acting on its own while deciding a petition under Section 34 of the 1996 Act, exercises powers which would also be available in an appeal preferred against a judgment passed under such provision, within the contemplation of Section 37 of the 1996 Act.
56. The above proposition laid down in *SAL Udyog Private Limited (supra)*² was followed by the Hon'ble Bombay High Court in a decision dated November 19, 2025 in the case of *Shri. Ravi Raghunath Khanjode & Ors. v. Harashiddh Corporation*.

² *State of Chhattisgarh and another v. SAL Udyog Private Limited*, reported at (2022) 2 SCC 275

- 57.** *Mica Export Promotion Council (supra)*³, relied on by the appellants, is not applicable, it is contended, since the same was rendered in relation to a suit in respect of the election of the committee members of Mica Export Promotion Council and a question of suppression of material facts was raised, which was sought to be met on the ground that there was no suppression since the documents were annexed to the petition. The court did not accept such defence and held that in the facts of that case it was not enough and the petitioners therein should have clearly stated these facts in the body of the petition. Such factual matrix, it is argued, is different from the present case.
- 58.** Moreover, in view of the expression “the court finds that” used in Section 34(2)(b) of the 1996 Act, which did not come up for consideration in *Mica Export Promotion Council (supra)*³, the decision is not relevant in the context.
- 59.** Learned counsel for the respondents next argues that it is common ground between the parties that if Entry 2, which is common to the Fifth and Seventh Schedules of the 1996 Act, applies, then the arbitral award dated February 29, 2020 would be in violation of Section 12(5) of the said Act and also in violation of the fundamental policy of Indian law under Explanation 1 of Section 34(2)(b)(ii) of the 1996 Act.
- 60.** Arguing on the interpretation of the Entries in the Fifth and Seventh Schedules of the 1996 Act, learned counsel argues that four principles

³ *Mica Export Promotion Council and Others v. G.C.L. Joneja & Ors.*, reported at 72 C.W.N. 117

have to be kept in mind while interpreting the various items in the said Schedules, which are as follows:

- (i) Entries should be construed in the light of General Standards contained in the IBA Guidelines;
- (ii) A broad commonsensical approach of the Entries has to be taken;
- (iii) Entries must be construed purposively keeping in mind the objective behind the amendment to the Arbitration Act;
- (iv) The construction of the Entries should be elastic and flexible.

61. Learned counsel relies on *HRD Corporation (supra)*⁴ and *ArcelorMittal India Private Limited (supra)*⁵, in support of the above contentions. It is contended that *HRD Corporation (supra)*⁴ was also referred with approval in *Central Organisation For Railway Electrification v. ECI SPIC SMO MCML (JV)*, reported at (2025) 4 SCC 641.

62. Entry 2 of the Fifth and Seventh Schedules of the 1996 Act, it is submitted, does not use the expression “counsel” or “legal representative”, although “counsel” is used in Entry 3. However, this is because the said expression is used in Entry 3 to denote the Arbitrator’s representation of the lawyer or the law firm which is acting as counsel for one of the parties. Entry 3 of the Seventh Schedule, therefore, does not cover cases where the Arbitrator is acting as counsel for one of the parties.

⁴ *HRD Corporation (Marcus Oil and Chemical Division). v. GAIL (India) Limited (formerly Gas Authority of India Limited)*, reported at (2018) 12 SCC 471

⁵ *ArcelorMittal India Private Limited v. Satish Kumar Gupta*, reported at (2019) 2 SCC 1

- 63.** In the same vein, the appellants' reliance on Entry 11 of the Seventh Schedule, which provides for a situation where the Arbitrator is a legal representative of an entity, that is, a party in the arbitration, to suggest that "legal representation" is outside the purview of Entry 2, also does not stand to reason. Entry 11, it is argued, deals with a situation where the Arbitration is the legal representative of an "entity", in the sense of being the Power of Attorney holder, a person nominated under a Board resolution or in any other way representative of a body corporate in the way body corporates appoint representatives for carriage of business operations.
- 64.** The expression "represents" in Entry 2, it is argued, is used in a broad sense to cover all manners of representation by an Arbitrator, including professional representations as counsel/legal advisor.
- 65.** If such professional representation is excluded from Entry 2, there will be no entry in either of the Schedules which would cover a case where an Arbitrator represents a party or its affiliate as a lawyer. Such a result of the appellants' contention cannot be countenanced generally, and more specifically in the light of Entry 20 of the Fifth Schedule, which covers a situation where the Arbitrator has served as counsel for one of the parties or an affiliate or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but does not have any ongoing relationship. It would be rather odd for the Arbitrator to be obliged to make a disclosure under Entry 20 of the Fifth Schedule in relation to

previous service as counsel, and yet to be completely at liberty to have an ongoing relationship with a party or its affiliate. Thus, it is argued, Entry 2 squarely covers the present case.

- 66.** The expression “currently” in Entry 2 as well as Entries 3, 7, 24 and 30 of the Seventh Schedule has been used to denote a point of time *in praesenti* and should be contradistinguished from the expression “previous”, occurring in Entries such as Entries 16 and 20, and/or the expression “past three years” occurring in Entries 20, 29, 31, etc. It, therefore, cannot be said that the expression “currently” only refers to a retained lawyer or standing counsel.
- 67.** Learned counsel for the respondents submits that it is undisputed that the learned Arbitrator had appeared on behalf of M/s. SSSMIL on eleven instances, which shows a regularity in professional representation by the Arbitrator on behalf of the said company.
- 68.** It is submitted that *HRD Corporation (supra)*⁶ was rendered in a different context, where there was a single instance of opinion being given by a retired Judge on a professional basis at arm’s length in advisory capacity.
- 69.** Learned counsel for the respondents next deals with the scope of the term “affiliate” used in Entry 2 of the Fifth and Seventh Schedules of the 1996 Act. Explanation 2 uses the expression “encompasses” (seen in contrast with the term “refers” in Explanation 1), thus, enlarging the

⁶ ***HRD Corporation (Marcus Oil and Chemical Division). v. GAIL (India) Limited (formerly Gas Authority of India Limited), reported at (2018) 12 SCC 471***

ambit of the expression “affiliate” by including certain Entries while preserving the otherwise ordinary, natural and popular meaning of the word “affiliate”. The expression “affiliate” is used 29 times in the Fifth Schedule and 9 times in the Seventh Schedule and it would be important to note that the same has been used *qua* the parties to the arbitration, whereas the expression “close family members” is used *qua* the Arbitrator personally.

- 70.** There is nothing in the IBA Guidelines or the 246th Law Commission’s report which recommends amendment to Section 12 of the Arbitration Act, to suggest that only companies were intended to be affiliates.
- 71.** As is clear from Entry 26 of the Fifth Schedule, it is not the way in which the term “affiliate” is sought to be understood by the Legislature, since the word “affiliated with” has been used therein between the Arbitrator and a partner of or another Arbitrator or any of the counsel in the same arbitration, that is, between individuals. Thus, close connection and association is synonymous with the expression “affiliated with” in Entry 26.
- 72.** An interpretation restricting the term “affiliate” to corporate entities would be undesirable, as it would severely constrict the nature of relationships which are sought to be subjected to disclosure/ineligibility under the Schedules. If such a construction was to be lent, it would be perfectly acceptable for an Arbitrator to represent or advice the immediate family members of an individual who happens to be a party to the dispute. Again, it would be alright for the

Arbitrator's Law Firm to have a significant commercial relationship with the close family members of an individual who happens to be a party to an arbitration, reading Entry 7 in the manner under discussion. The same problem would arise with a large number of other Entries in the Schedules where "affiliate" is used.

- 73.** Another problem which would arise is that persons in control of a company, such as Key Managerial Personnel (KMP), as referred to in Section 2(51) of the Companies Act, 2013, including majority shareholders, etc., would be left out of the loop, which again will create completely unintended consequences.
- 74.** A construction of the expression "affiliate" which dilutes the protection sought to be provided by the Schedules has to be eschewed in favour of a construction which promotes and takes forward the purpose sought to be achieved by the Schedules.
- 75.** Taking the court through several Entries of both the Schedules, learned counsel for the respondents seeks to reiterate the above proposition. It is argued that such manner of construction would be in keeping with the principle expounded in Paragraph No. 20 of *HRD Corporation (supra)*⁷ that a fair construction of the words used therein, neither tending to enlarge or restrict them undoubtedly, ought to be made.
- 76.** Referring next to the 2024 IBA Guidelines, learned counsel for the respondents contends that under the same, individuals having a

⁷ ***HRD Corporation (Marcus Oil and Chemical Division). v. GAIL (India) Limited (formerly Gas Authority of India Limited), reported at (2018) 12 SCC 471***

controlling influence on the party in the arbitration and/or any person or entity over which a party has a controlling influence have been included within the term “affiliate”. Such definition is to be seen in the light of General Standard 6(b) of the 2014 IBA Guidelines and the Explanation to the same, which would make it clear that a natural person having a controlling influence over a legal entity, being a party to an arbitration, is considered to bear the identity of such party. Therefore, non-party individuals, who have controlling influence on a party to the arbitration, were always within the contemplation of the 2014 IBA guidelines, even though the definition of the expression “affiliate” therein did not explicitly say so.

- 77.** As per *HRD Corporation (supra)*⁸, an unduly formalistic interpretation ought not to be lent to the provisions of the Schedules.
- 78.** In brief, it is argued that the expression “affiliate” can encompass individuals as well. In the present case, M/s. SSSMIL is an affiliate of BDB as also C & E Limited.
- 79.** It is further argued by the respondents that a company can be an ‘affiliate’ even where the party to an arbitration does not have control over it.
- 80.** Importing the Indian test of control into the meaning of “affiliate” is counterintuitive, since the Schedules to the 1996 Act have been borrowed from the IBA Guidelines, which are made in the context of

⁸ ***HRD Corporation (Marcus Oil and Chemical Division). v. GAIL (India) Limited (formerly Gas Authority of India Limited), reported at (2018) 12 SCC 471***

International Commercial Arbitration by arbitration practitioners and users who come from several jurisdictions, representing diverse legal cultures and a range of perspectives, which is stated in the 2014 IBA Guidelines itself.

- 81.** Where the expression “control” was intended, the draftsman specifically did so, as exemplified in Entries 5 and 9 of the Seventh Schedule, where such expression has been categorically used. Thus, by specific exclusion, Entry 2 does not require controlling interest to exist for attracting the term “affiliate”.
- 82.** Learned counsel for the respondents argues that C & E Limited and M/s. SSSMIL are also group companies as envisaged in *Cox & Kings Ltd. (supra)*⁹.
- 83.** The only reason why the expression “parent company” is specifically used in Explanation 2 to the Fifth and Seventh Schedules is because in ordinary parlance, a parent company is not referred to as an “affiliate” of its group companies.
- 84.** However, the choice of the word “group companies” is significant because it is intended to cover a much larger gamut of corporate entities than those which are merely subsidiaries of a parent corporation. The appellants’ arguments, it is contended, reduces the complex reality of corporate relationships by oversimplifying the same.
- 85.** Learned counsel for the respondents contends that the learned Arbitrator disregarded his own initial disclosure dated August 10, 2014,

⁹ *Cox & Kings Ltd. v. SAP India (P) Ltd.*, reported at (2024) 4 SCC 1

where he himself stated about his previous appearances for BDB and companies within his management and control. Thus, even as per the perception of the learned Arbitrator, M/s. SSSMIL, which was such a company, came within the purview of an 'affiliate' of BDB. The continuing appearances for the said entity, thus, had to be disclosed, since a continuous duty of disclosure is envisaged under Section 12 of the 1996 Act, as stressed by the Hon'ble Supreme Court in *Central Organisation for Railway Electrification (supra)*¹⁰.

- 86.** In *Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd.*, reported at 2017 SCC OnLine Del 7228, it has been highlighted that a violation of the disclosure requirement under the 1996 Act is a ground for setting aside an award under Section 34(2)(b)(ii) of the said Act.
- 87.** Moreover, the award, it is argued, is in contravention of the fundamental policy of Indian law and most basic notions of justice. The test as provided in General Standard 2(c) of the 2014 IBA Guidelines is highlighted in this regard. It is submitted that the said test carries forward the old line of Indian cases where the standard to recon bias is reasonable likelihood of bias. The test of a reasonable and fair-minded person is highlighted in this regard, for which *Vinod Bhaiyalal Jain v. Wadhwani Parmeshwari Cold Storage (P) Ltd.*, reported at (2020) 15 SCC 726 is relied on.

¹⁰ ***Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)*, reported at (2025) 4 SCC 641**

- 88.** In support of the real likelihood case, learned counsel also cites *A.K. Kraipak & Ors. v. Union of India & Ors.*, reported at (1969) 2 SCC 262 and *International Airports Authority of India v. K.D. Bali & Anr.*, reported at (1988) 2 SCC 360.
- 89.** It is lastly pointed out by learned counsel for the respondents that the learned Single Judge committed an obvious inadvertent error in paragraph No. 69 of the impugned judgment in recording that the “corruption and bias” grounds were given up. The other portions of the judgment would go on to show that the ground of “fraud and corruption” had been given up, and not “bias”. Thus, learned counsel for the respondents seeks the dismissal of the present appeals.

FINDINGS OF THE COURT

- 90.** Extensive, at times convoluted, arguments have been advanced by the parties in support of their respective cases. However, the crux of the matter boils down to the following core issues:
- (i) *Whether the impugned judgment is sustainable on the grounds cited by the learned Single Judge;*
 - (ii) *Whether the impugned judgment is perverse, being founded on inferences not supported by materials available before the Section 34 Court;*
 - (iii) *Whether this Court, under Section 37 of the 1996 Act, can look into additional materials not cited before the Section 34 Court;*

- (iv) *Whether this Court, under Section 37 of the 1996 Act, can examine independently grounds of setting aside the arbitral award not cited by the Section 34 Court; and*
- (v) *Whether the learned Arbitrator violated Entries 2 or 8 of the Fifth and Seventh Schedules of the 1996 Act.*

91. The above issues are discussed below:

(i) Whether the impugned judgment is sustainable on the grounds cited by the learned Single Judge

- 92.** The learned Single Judge summed up his conclusions in Paragraph No. 107 of the impugned judgment. In the said paragraph, it was held that the actions of the learned Arbitrator fell foul of the mandate under Section 12 of the 1996 Act, particularly Grounds 11, 15, and 20 of the Fifth Schedule and Ground 15 of the Seventh Schedule, read with Explanation 2 thereof.
- 93.** Whereas the Fifth Schedule contains more Entries than the Seventh Schedule, all the grounds set forth in the Seventh Schedule also find place in the Fifth Schedule and the language of the respective Entries in both are identical to that extent.
- 94.** Entry 11 in both the Schedules contemplates a bar when the Arbitrator is a legal representative of an entity that is a party in the arbitration. However, it is the case of none of the parties that the learned Arbitrator appeared for any of the parties to the arbitration during the continuance of the arbitral proceeding. Conspicuously, the term

“affiliate” is missing in the said Entry. Thus, the legal representation in the Entry is restricted only to “a party” in the arbitration. Since M/s. SSSMIL, for which the learned Arbitrator appeared, is not a party to the proceeding, Entry 11 is automatically excluded.

- 95.** Entry 15 provides for a situation where the Arbitrator has given legal advice or provided expert opinion on the dispute to a party or an affiliate of one of the parties.
- 96.** The appearances of the learned Arbitrator, which are set forth as the ground of challenge by the respondents, was not in connection with the present dispute at all but in a completely different proceeding where none of the present parties were impleaded. Thus, the expression “on the dispute”, as used in Entry 15, is not satisfied in the present case.
- 97.** Insofar as Entry 20 is concerned, the same refers to previous services of the Arbitrator. To come within the purview of the same, the Arbitrator had to serve as counsel within the “past three years” for one of the parties or an affiliate thereof or had to previously advise or been consulted by the party or an affiliate making the appointment in an unrelated matter, but where the Arbitrator and the party or the affiliate of the party “have no ongoing relationship”.
- 98.** Thus, three different scenarios are contemplated in Entry 20. First, the Arbitrator had served as counsel within the past three years for a party or its affiliate; secondly, he/she had previously advised or been consulted by the party or an affiliate making the appointment in an

unrelated matter and thirdly, that the Arbitrator and the party or its affiliate do have any ongoing relationship.

99. Insofar as the previous appearances of the Arbitrator as counsel for one of the parties, namely BDB and his companies, is concerned, the said fact was clearly disclosed in the initial disclosure of the Arbitrator, despite which both parties consented to his appointment. Thus, the said ground cannot be cited anew to vitiate his appointment.

100. In the present case, none of the parties appointed the Arbitrator, thus, taking the facts of the case outside the ambit of the second scenario as well. Both parties had agreed in a pending suit between them to the reference of the dispute to arbitration, upon which it is the Court which appointed the learned Arbitrator. Thus, no question of previous advice to or consultation with the “appointing party” or its affiliate arises.

101. Moreover, the umbrella provision governing both the first and second scenarios, that is, the Arbitrator and the party or its affiliate have no ongoing relationship, is also not attracted in the present case, since the very premise of the challenge to the Arbitrator’s mandate is that the learned Arbitrator had an ongoing relationship with M/s. SSSMIL.

102. In view of the above, none of the criteria stipulated in Entry 20 are also applicable to the present case.

103. Hence, all the Entries cited by the learned Single Judge in the impugned judgment for holding the learned Arbitrator to be ineligible or there being a reasonable apprehension of bias fall flat.

104.The learned Single Judge also referred in general to Section 12, but qualified such reference with the expression “in particular”, restricting such reference to the mentioned Entries of the Fifth and Seventh Schedules.

105.In any event, the Fifth Schedule acquires relevance in the context of Section 12(1)(a), Explanation 1 in the present case. For a proper adjudication of the matter, Section 12 of the 1996 Act is set out in its entirety hereinbelow:

“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.”

106. Thus, where a person is approached in connection with his possible appointment as an Arbitrator, such person is to disclose any circumstances such as contemplated in Clause (a) of sub-section (1) of Section 12 which is likely to give rise to justifiable doubt as to his independence or impartiality.

107. Clause (b), pertaining the ability of the Arbitrator to devote sufficient time to the arbitration, is not applicable in the present case at all.

108. Explanation 1 to Section 12(1) provides 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, thus, tying up the Fifth Schedule exclusively to Section 12(1) of the 1996 Act.

109. Under Section 12(2), the liability of such disclosure is continuous, from the time of appointment of the learned Arbitrator throughout the arbitral proceedings. Thus, in the facts of the present case, there was a continuous liability of the learned Arbitrator to disclose his appearance for any party or its affiliate, even if in a different proceeding, within the contemplation of the Fifth Schedule, if at all.

110. On the other hand, the Seventh Schedule is to be read in the context of sub-section (5) of Section 12 which provides that 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, which can be subsequently waived by an express agreement in writing.

111. The marked difference between sub-sections (1) and (5) of Section 12 is that whereas the former provides for situations which are likely to give rise to justifiable doubts as to the independence or impartiality of the Arbitrator, saddling the Arbitrator with a continuous liability under sub-section (2) of Section 12 to disclose to the parties in writing such circumstances, thereby permeating throughout the arbitral proceedings till the award is passed, sub-section (5) is a threshold bar, which hits at the very eligibility of the Arbitrator to be so appointed.

112. Thus, Section 12(5), read in conjunction with the Seventh Schedule, operates at the threshold level of appointment of the Arbitrator. The placement of sub-section (2) after sub-section (1) and its language, which casts a liability of disclosure on the Arbitrator only in respect of circumstances referred to in sub-section (1) and not sub-section (5), clearly shows that, as opposed to Section 12(1), read with the Fifth Schedule, Section 12(5) read with the Seventh Schedule only debar an Arbitrator at the appointment stage and not thereafter. Thus, the Entries in the Seventh Schedule, read in the light of sub-section (5) of

Section 12, cannot operate beyond the appointment of the Arbitrator and/or continue throughout the arbitration proceeding till the award. Thus, by necessary implication, sub-section (5), read with the Seventh Schedule, can at best invalidate the appointment of the Arbitrator at that stage and cannot be a subsequent ground for vitiating the award.

113.In the present case, the learned Arbitrator categorically disclosed his links with BDB and his companies at the stage of his appointment, despite which such appointment was accepted and none of the parties raised objection to the same. Hence, the Seventh Schedule cannot be a guiding factor in vitiating the award on the ground of subsequent appearances by the learned Arbitrator, during the arbitral proceedings, for M/s SSSMIL.

114.Thus, it is only the Fifth Schedule which, in the light of sub-sections (1) and (2) of Section 12, acquires relevance for considering whether the award was vitiated by justifiable doubts as to the independence or impartiality of the Arbitrator on the grounds set forth in the Fifth Schedule, regarding which the learned Arbitrator had a continuous liability to disclose in writing any circumstances coming within the ambit of the same throughout the arbitration proceeding. Accordingly, this Court confines its examination only to the Fifth Schedule.

115.Even otherwise, the language of the Entries in the Seventh Schedule is identical with the corresponding Entries in the Fifth Schedule. Hence, consideration of one would automatically amount to consideration of the other.

116. Going by the above discussions, we find that the impugned judgment is not sustainable, since none of the Entries of the Fifth Schedule, read with Section 12(1) of the 1996 Act (or for that matter the Seventh Schedule), which were cited by the learned Single Judge, fits the allegations against the learned Arbitrator in the present case.

117. This issue, thus, is held in the negative.

(ii) Whether the impugned judgment is perverse, being founded on inferences not supported by materials available before the Section 34 Court

118. From the impugned judgment, several premises for the final conclusion of the learned Single Judge are reflected. For example, in Paragraph No. 49 of the said judgment, the learned Single Judge held outright that from the shareholding pattern of M/s. B.G. Chemicals Private Ltd., that is, 27-odd percentage shareholding in M/s. SSSMIL and the other holders of the said entity, it could be inferred that BDB had overall control and management of M/s. SSSMIL and M/s. C & E Limited. However, there is no preceding reason or discussion in the impugned judgment to back up such findings or any examination of the inter-relation between the companies-in-question and BDB to substantiate the finding as to such control. More importantly, the learned Single Judge went on to hold that it can also be inferred that the Managers, Directors and employees are accustomed to acting as per the “sole wish

and dictate” of BDB, which is also not borne out by the records, nor any reason therefor was attributed by the learned Single Judge.

119. Again, in Paragraph No. 50 of the impugned judgment, it was observed that BDB was personally present in most of the sittings in the arbitration and it could, therefore, not be difficult to believe that he “must have personally attended most of the conferences” with the learned Arbitrator at the time of his appearances in connection with APD No. 252 of 2015 between January and December, 2018.

120. With utmost respect, the above observations are without any material basis whatsoever, being not substantiated by any material and or preceding advertence to facts by the learned Single Judge.

121. Again, in Paragraph No. 54 of the impugned judgment, the learned Single Judge held that BDB and his family members, directly or indirectly, do control and manage M/s. SSSMIL and M/s. C & E Limited and “the latter two companies function as per the wishes and dictates of” BDB. The above findings are also not borne out by any reasoning or materials.

122. In view of the above findings being patently perverse, being not supported by evidence and falling in the realm of conjecture, the same could not form the basis for reaching the conclusion that a reasonable apprehension of bias was raised against the learned Arbitrator.

123. Thus, the impugned judgment is perverse, being founded on inferences not supported by the materials available or discussed by the learned Single Judge.

(iii) Whether this Court, under Section 37 of the 1996 Act, can look into additional materials not cited before the Section 34 Court

124.The 1996 Act, like most other appellate hierarchies, provides for a pyramidal structure of challenge, tapering off as it goes upwards.

125.Section 5 of the 1996 Act precludes judicial intervention except as provided for in Part-I of the said Act, pertaining to domestic arbitrations. Thus, unlike the general powers of a civil appellate court, the contours of interference under Section 34 of the 1996 Act are to be strictly construed, being confined within the limits of the said provision.

126.An appeal under Section 37 against a judgment passed under Section 34 derives colour from the parameters of Section 34. In fact, the scope of interference under Section 37, being an appellate court, is stricter than the Section 34 Court itself.

127.There is nothing in the 1996 Act comparable to the provisions of Order XLI Rule 27 of the Code of Civil Procedure, which is available in a regular civil appeal, in order to permit the production of additional evidence in a Section 37 Appeal under the 1996 Act. Furthermore, Order XLI Rule 33 of the Code of Civil Procedure lends wings to the appellate court in a regular civil suit to travel beyond the contours of the specific challenge before it and explore whether further or other decrees can be granted, even in cases there is no challenge to a particular portion or component of the decree impugned therein.

However, such luxury is not available to an appellate court under Section 37 of the 1996 Act. Hence, the scope of an appeal under Section 37 is extremely limited and cannot accommodate the consideration of further and new documents which were not specifically available before the Section 34 Court, unless there is some completely new development subsequent to the disposal of a Section 34 application which hits at the root of the matter, in which case there might be a restricted power of the Section 37 Court to consider the same.

128.Hence, completely new materials, which could be obtained during pendency of the Section 34 application but were not furnished before the court taking up the challenge under Section 34, cannot be permitted to be produced before the Section 37 court for the first time.

129.A question which arises consequentially is whether documents which were not specifically referred to in the Section 34 applications but were produced before the Section 34 Court can be looked into under Section 37. The answer to that is, in our opinion, in the positive. It is well-settled that proof need not be pleaded and if the rudiments of pleadings to support evidence are there, the court is duty-bound to look into the materials produced in support of such pleadings. Hence, there is no reason as to why documents which were produced before the Section 34 Court and thus were available for consideration by the said Court, although not specifically mentioned in the Section 34 applications, cannot be looked into by the Section 37 Court.

130.Such proposition holds true particularly in the facts of the present case, where the challenge under Section 34 of the 1996 Act was on the basis of acts of the learned Arbitrator which came to the knowledge of the award debtors only after the passing of the award.

131.The reliance of the appellants on *Mica Export Promotion Council (supra)*¹¹ is not quite apt in the context of the present case. In the said case, the court was considering whether the suppression of material facts from the court was *bona fide*. In such context, it was held that the petitioners should have clearly stated the relevant facts in the body of the petition and should have offered their explanation with regard to the same if they had any to offer. Thus, the facts of the said case were different from the case at hand and the said report cannot be an apt precedent for the present consideration.

132.As opposed thereto, the documents relied on by the present respondents were produced in support of their contentions before the Section 34 Court and were available for consideration by the said court. No useful purpose would be subserved insofar as the present respondents are concerned in withholding such documents or not mentioning them specifically in the pleadings, since such documents could only enure to their benefit. Thus, the context of *Mica Export Promotion Council (supra)*¹¹ is not applicable in the present case at all. Although it is well-settled that there cannot be any proof beyond

¹¹ *Mica Export Promotion Council and Others v. G.C.L. Joneja & Ors., reported at 72 C.W.N. 117*

pleadings, in the present case, the rigours of the Code of Civil Procedure are not applicable *per se* to an arbitral proceeding or a proceeding in connection therewith. In fact, it was the duty of the Section 34 Court to look into the materials produced before it in the backdrop of the allegation that the present respondents, the challengers in the Section 34 applications, only came to know about the alleged offending acts of the learned Arbitrator after the passing of the award. Hence, for all practical purposes, the Section 34 Court was the original court taking up the said issues and it was the incumbent duty of the said court to look into the same. Thus, the said court had power to look into the documents produced before it to ascertain whether the yardsticks of the Fifth and Seventh Schedules were met.

133. The language of sub-sections (2) and (2A) of Section 34 of the 1996 Act make it abundantly clear that if the court finds, in an application under Section 34, the infraction of any of the Entries in the said Schedules, there might be an interference on the ground of patent illegality or contravention of the public policy of law in India and/or basic principles of morality and justice. The expression “if the court finds” confers wide powers on the court itself to look into the materials placed before it, without being unnecessarily fettered by the restrictions of the pleadings of the parties.

134. The powers available to the Section 34 Court are, in any event, applicable to the court taking up an appeal under Section 37 from the judgment passed under Section 34 of the 1996 Act. Such proposition is

strengthened by the observations made by the Hon'ble Supreme Court in *SAL Udyog Private Limited (supra)*¹², as followed by a learned Single Judge of the Bombay High Court in the matter of *Shri. Ravi Raghunath Khanjode (supra)*¹³.

135.A careful examination of the above go on to show that although the court, under Section 34 and under Section 37 (in an appeal from a Section 34 judgment) can look into the materials produced before the Section 34 Court, additional materials not before the Section 34 Court cannot, for the first time, be considered by the Section 37 Court at all.

(iv) Whether this Court, under Section 37 of the 1996 Act, can examine independently grounds of setting aside the arbitral award not cited by the Section 34 Court

136.As discussed while deciding Issue No. (iii) above, in terms of the ratio of *SAL Udyog Private Limited (supra)*¹³, followed by different High Courts, the Section 34 Court and, consequentially, the appellate court in an appeal under Section 37 against a Section 34 judgment, are not fettered by the restrictions of the pleadings and can, by themselves, look into all materials produced before the Section 34 Court.

137.In view of the expression “the court finds” as used in sub-sections (2)(b) and (2A) of Section 34 of the 1996 Act, the Section 34 Court as well as the Section 37 Court can independently examine whether the grounds

¹² ***State of Chhattisgarh and another v. SAL Udyog Private Limited, reported at (2022) 2 SCC 275***

¹³ ***Shri. Ravi Raghunath Khanjode & Ors. v. Harashiddh Corporation***

stipulated in law for setting aside an arbitral award, even if not cited by the Section 34 Court, can be looked into.

138.In view of the above, this Court can, sitting in judgment over the decision of the Section 34 Court, independently consider as to whether the tests laid down in the relevant Entries under the Fifth and Seventh Schedules as well as Section 12 of the 1996 Act are met in the present case, to ascertain whether justifiable doubts as to the independence and integrity of the learned Arbitrator were raised.

(v) *Whether the learned Arbitrator violated Entries 2 or 8 of the Fifth and Seventh Schedules of the 1996 Act*

139.This issue comprehensively covers the merits of the case and can be sub-divided into several sub-issues, which we proceed to deal with hereinbelow:

(a) HRD Corporation (supra) principle

140.The Two-Judge Bench decision in *HRD Corporation (supra)*¹⁴ is the guiding light for interpretation of the Fifth and Seventh Schedules of the 1996 Act. Paragraph No. 20 of the said judgment is set forth hereinbelow for the sake of convenience:

“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

¹⁴ ***HRD Corporation (Marcus Oil and Chemical Division). v. GAIL (India) Limited (formerly Gas Authority of India Limited), reported at (2018) 12 SCC 471***

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.”

141.The Hon’ble Supreme Court, in the above judgment, laid stress on the “reasonable third person” test. Such reasonable third person, however, has to have knowledge of the relevant facts and circumstances to assess whether there was a likelihood of the Arbitrator being influenced by extraneous factors other than the merits of the case in reaching his/her decision.

142.The contours of such test are defined to incorporate a “broad commonsensical approach” to the items stated in the Fifth and Seventh Schedules. It was further stressed by the Hon’ble Supreme Court that this approach would require “a fair construction of the words used therein, neither tending to enlarge or restrict them unduly”. The Hon’ble Supreme Court recognized in Paragraph No. 14 of the said report the fact that the enumeration of grounds given in the Fifth and Seventh Schedules of the 1996 Act, as amended with effect from 2015, have been taken from the IBA Guidelines, particularly from the Red and Orange Lists thereof.

143.The said judgment of the Hon'ble Supreme Court was delivered on August 31, 2017, when the 2014 IBA Guidelines were in force. It is relevant to note that the Fifth and Seventh Schedules were incorporated by the 2015 Amendment to the 1996 Act, which was notified on November 12, 2018, with retrospective effect from October 23, 2015. By bodily lifting provisions from the 2014 IBA Guidelines, the Legislature resorted to the doctrine of "legislation by incorporation", thereby incorporating portions of the then existing 2014 IBA Guidelines, to the extent as chosen by the Legislature, into and as a part of the 1996 Act. Once incorporated, as opposed to "legislation by reference", the said provisions became a part of the statute and derived force therefrom.

144.In legislation by incorporation, as opposed to legislation by reference, the incorporated portion of a piece of legislation/guidelines becomes a part of the incorporating statute. On the other hand, in case of legislation by reference, the incorporating statute merely refers to the other statute and, as a result, if the other statute is subsequently amended or undergoes a change or is repealed, the same would affect the incorporating statute.

145.However, in the present case, since the relevant provisions of the 2014 IBA Guidelines were made a part of the 1996 Act, the subsequent changes to the 2014 Guidelines or amendments thereto could not have any effect on the Fifth and Seventh Schedules, which had already become a part of the 1996 Statute and derived force therefrom.

146.In such view of the matter, construed in proper context, it is the 2014 Guidelines which was prevalent at the time when the amendment with effect from October 23, 2015 took place and the judgment in *HRD Corporation (supra)*¹⁵ was delivered, which is germane for the present consideration. The subsequent amendments to the IBA Guidelines in the year 2024 do not have any material bearing whatsoever in construing the Fifth and Seventh Schedules. Hence, the reference of the respondents to the 2024 IBA Guidelines is completely misplaced.

147.In such backdrop, the court has to adopt a fair construction of the words used in the Fifth and Seventh Schedules, neither tending to enlarge nor restrict them unduly, in the light of the general principles contained in the then-existing 2014 IBA Guidelines.

(b) Whether Seventh Schedule of the 1996 Act is applicable

148.As discussed above, Section 12(5) of the 1996 Act provides that any person whose relationship with the parties or counsel or the subject-matter of dispute falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an Arbitrator. Again, the Seventh Schedule refers to Section 12(5) as its source. In view of the language employed in sub-section (5) of Section 12, the Entries in the Seventh Schedule pertain only to the eligibility at the

¹⁵ ***HRD Corporation (Marcus Oil and Chemical Division). v. GAIL (India) Limited (formerly Gas Authority of India Limited), reported at (2018) 12 SCC 471***

juncture of appointment of an Arbitrator and not thereafter. Hence, the Seventh Schedule is not germane in the present context at all.

149.As opposed thereto, the Fifth Schedule refers to Section 12(1). Complementarily, Explanation 1 to Section 12(1) also provides 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.

150.Section 12 (1)(a) speaks about circumstances which are likely to give rise to justifiable doubts as to the independence or impartiality of an Arbitrator which are mandatorily to be disclosed at the time of his appointment.

151.Sub-section (2) of Section 12 extends the time of such disclosure throughout the arbitral proceedings by referring specifically to the circumstances referred to in sub-section (1), unless the parties have already been informed of the circumstances of the Arbitrator.

152.Thus, the requirement of continuous disclosure as envisaged in Section 12 (2), throughout the arbitral proceedings, pertains only to the circumstances relating to justifiable doubts as to the impartiality/independence of the Arbitrator, as specified in Section 12, sub-Section (1), read with the Fifth Schedule, of the 1996 Act and not to the threshold ineligibility of appointment as Arbitrator as stipulated in Section 12 (5), read with the Seventh Schedule.

153.Hence, it is the Fifth Schedule which is to be looked into in the present case, and not the Seventh Schedule. In any event, since the relevant

Entries are identical in both the Schedules, such distinction does not make much of a difference insofar as the present consideration is concerned.

(c) Entry 2 of the Fifth Schedule of the 1996 Act

154.Both the parties have laid pivotal stress on Entry 2 in their arguments.

155.Entry 2 of the Fifth Schedule provides that the Arbitrator currently represents or advises one of the parties or the affiliate of one of the parties and comes under the head “Arbitrator’s relationship with the parties or counsel”.

156.There are two aspects of consideration here – the connotation of the expression “currently represents” and the term “affiliate”. The term “advises” is not germane as such, since the allegations of the respondents primarily concerns the appearance of the learned Arbitrator for M/s. SSSMIL on eleven occasions during the pendency of the arbitral proceedings, and not any advice given by him to the said company.

157.Insofar as the expression “currently represents” is concerned, the appellants have placed reliance on *HRD Corporation (supra)*¹⁶. However, the context of the said case was entirely different, where a single instance of legal advice in an unrelated matter was cited as a ground of ineligibility of the Arbitrator, which was turned down by the Hon’ble

¹⁶ ***HRD Corporation (Marcus Oil and Chemical Division). v. GAIL (India) Limited (formerly Gas Authority of India Limited), reported at (2018) 12 SCC 471***

Supreme Court by observing that such single instance could not be construed as the services of the learned Arbitrator as a regular advisor or a person who currently advises a party to the arbitration. In such context, it was held that the element of being connected in an advisory capacity with a party is to be looked into. Hence, *HRD Corporation (supra)*¹⁷ is not squarely applicable in the facts of the present case.

158. The allegation in the instant case is that the learned Arbitrator had appeared as counsel for M/s. SSSMIL in an unrelated proceeding during the arbitration proceeding. The expression “currently represents” has two facets – ‘currently’ and ‘represents’, both of which have a flavour of the present continuous tense.

159. Borrowing the principles of Order III of the Code of Civil Procedure, a person can act as a representative of a party before a court of law if given a Power of Attorney to do so or a Vakalatnama as an Advocate on Record. An Arbitral Tribunal is a judicial forum for all practical purposes and, as such, the same principle should be applied for construction of the term “representation”.

160. A counsel, as opposed to an Advocate on Record, is engaged for specific, discrete and isolated appearances, on each such occasion. It may very well be that a particular counsel of preference is engaged for appearing for a party on several occasions. However, neither does a counsel, as opposed to an Advocate on Record, have the liability to mandatorily appear on each and every occasion on behalf of a party, nor does a party to a litigation have the duty to engage a particular counsel on

every occasion when the matter is taken up for hearing. It may perchance happen that a particular preferred counsel is engaged for appearing on several occasions, consecutive or otherwise, while in some other cases, there may be an off-and-on engagement, to appear for important hearings or on particular occasions. Thus, there is no mutual liability or relationship between a party and its counsel to engage or act for each other respectively in a case on a continuous basis. The very nature of the engagement of a counsel has, thus, an element of independence on behalf of both the counsel and the party and a counsel or a party may choose not to represent or engage, as applicable, each other continuously. Hence, the expression “currently represents” is not strictly applicable to a counsel-party relationship.

161. The matter would be otherwise in respect of an Advocate on Record, who has the continuous liability, unless a change is given, to act on behalf of the party who empowers him to so appear by executing a Vakalatnama. The party also cannot appear through other advocates unless a ‘No Objection’ is specifically given or obtained from its Advocate on Record or engaged law firm. Hence, the expression “currently represents”, as used in Entry 2 of the Fifth Schedule, is strictly not applicable to a counsel, irrespective of the number of occasions on which such counsel was engaged in a particular matter during a particular period.

162. Moreover, unless the same counsel is consistently engaged over a period of time to appear for a particular party in all or most of its

litigations, no element of regularity can be attributed to such representation.

163.The argument of the appellants that Entry 2 does not take within its fold “legal” representation, however, cannot be accepted, since the expression “represents or advises” has been kept by the Legislature deliberately wide enough to encompass relationships of all natures, be it representation or advice in the field of law or otherwise.

164.Yet, in view of the above discussions, the expression “currently represents” could not be said to be applicable to the learned Arbitrator in the present case, who was engaged in the capacity of counsel to represent M/s. SSSMIL in a particular case during the relevant period.

165.Moving on to the next component, it is to be ascertained whether M/s. SSSMIL was an “affiliate” of any of the parties to the arbitration within the contemplation of Explanation 2 to the Fifth Schedule of the 1996 Act.

166.Elaborate arguments have been extended by both parties on the said question. However, certain arguments can be eliminated at the threshold. Reliance of the respondents on *S. Sundaram Pillai and Others v. V.R. Pattabiraman and Others*, reported at (1985) 1 SCC 591 is not apt in the context of the case. In the said case, the Supreme Court laid down the proposition that the Explanation is merely to incorporate an instance of the main provision and cannot negate rights conferred by the main provision. Explanation 2 of the Fifth Schedule does not do anything of that sort and in no way negates the effect of the main

Entries to the Fifth Schedule where the term “affiliate” has been used; rather, it elaborates and illustrates the applicability of the term “affiliate” as used in the relevant Entries of the Fifth Schedule. Thus, the *S. Sundaram Pillai*¹⁷ proposition is not applicable at all in the facts of the present case.

167. The respondents seek to rely on several documents in a bid to explain the expression “affiliate”, which however, have no direct bearing on the present consideration. For example, the Achutan Report of the Takeover Regulations Advisory Committee operates in an entirely different field than the present one, in respect of corporate takeovers within the contemplation of the SEBI Guidelines. The context and perspective of the term ‘affiliate’ in a special delegated legislation in the specific context of acquisition of shares of a target company has no manner of bearing in interpreting the provisions of the 1996 Act, where the expression is used merely to establish a nexus between the Arbitrator and one of the parties.

168. As held in *HRD Corporation (supra)*¹⁸, an unnecessarily expansive construction cannot be attributed to the provisions of the Fifth Schedule, even going by the 2014 IBA Guidelines.

169. Again, Rule 13 of the Competition Rules operates in a completely different field, in respect of the effects of competition in the market.

¹⁷ *S. Sundaram Pillai and Others v. V.R. Pattabiraman and Others, reported at (1985) 1 SCC 591*

¹⁸ *HRD Corporation (Marcus Oil and Chemical Division). v. GAIL (India) Limited (formerly Gas Authority of India Limited), reported at (2018) 12 SCC 471*

The definition of “affiliate” in such specific and limited context cannot be equated with the normal connotation of the term ‘affiliate’ in corporate law, insofar as the eligibility of an Arbitrator is concerned. The same ratio applies to the Notification dated July 17, 2008 issued by the Petroleum and Natural Gas Regulatory Board, which operates in its own sphere and cannot be imported to a completely unrelated consideration than that under the 1996 Act.

170. Rather, in construing the said provision, the “Group of Companies” doctrine, as laid down in *Cox & Kings Ltd. (supra)*¹⁹, also relied on by the respondents, is required to be looked into. Certain paragraphs of the said judgment are of utmost importance in understanding the concept laid down therein. The said paragraphs are set out hereinbelow:

“87. *The phenomenon of group companies is the modern reality of economic life and business organisation. Group companies are a set of separate firms linked together in formal or informal structures under the control of a parent company. The group companies can be defined in the Indian context as*

“an agglomeration of privately held and publicly traded firms operating in different lines of business, each of which is incorporated as a separate legal entity, but which are collectively under the entrepreneurial, financial, and strategic control of a common authority, typically a family, and are linked by trust-based relationships forged around a similar persona, ethnicity, or community.” [Jayati Sarkar, “Business Groups in India” in Asli Coplan, Takashi Hikino & James Lincoln (Eds.), The Oxford Handbook of Business Groups (2010) 299]

A group company involving the parent and subsidiary companies is created for myriad purposes such as limiting the liability of the parent corporation, facilitating international trade, entering into business ventures with investors, establishing domestic corporate residence, and avoiding tax liability.

¹⁹ **Cox & Kings Ltd. v. SAP India (P) Ltd., reported at (2024) 4 SCC 1**

90. *The separateness of corporate personality will be ignored by courts in exceptional situations where a company is used as a means by the members and shareholders to carry out fraud or evade tax liabilities. If the Court, on the basis of factual evidence, determines that the company was acting as an agent of the members or shareholders, it will ignore the separate personality of the company to attribute liability to the individuals. In Telco Ltd. v. State of Bihar [Telco Ltd. v. State of Bihar, 1964 SCC OnLine SC 111 : (1964) 6 SCR 885] , the issue before a Constitution Bench of this Court was whether a company could be treated as a citizen for the purposes of maintaining a writ petition under Article 32 of the Constitution. The Company urged that the corporate veil should be lifted to treat the petition as one filed by the shareholders. This Court held that the veil of a corporation can be lifted where fraud is intended to be prevented or trading with an enemy is sought to be defeated.*

92. *The application of the doctrine of lifting the corporate veil rests on the overriding considerations of justice and equity. [DDA v. Skipper Construction Co. (P) Ltd., (1996) 4 SCC 622] Often, the Courts pierce the corporate veil when maintaining the separateness of corporate personality is found opposed to justice, convenience, and public interests. [Kapila Hingorani (1) v. State of Bihar, (2003) 6 SCC 1 : 2004 SCC (L&S) 586] In Balwant Rai Saluja v. Air India Ltd. [Balwant Rai Saluja v. Air India Ltd., (2014) 9 SCC 407 : (2014) 2 SCC (L&S) 804] , this Court cautioned that the principle of piercing the corporate veil should be applied in a restrictive manner and only in scenarios where it is evident that the subsidiary company was a mere camouflage deliberately created by the holding company for the purpose of avoiding liability. It was further observed that the intent of piercing the corporate veil must be such that would seek to remedy a wrong done by the holding company. In the context of arbitration, the principle of piercing the corporate veil has been sparingly used because it disregards the intention of the parties by emphasising on the overriding considerations of good faith and equity to bind the non-signatories to an arbitration agreement.*

93. *Moreover, since the companies in a group have separate legal personality, the presence of common shareholders or Directors cannot lead to the conclusion that the subsidiary company will be bound by the acts of the holding company. The statements or representations made by promoters or Directors in their personal capacity would not bind a company. Similarly, the mere fact that the two companies have common shareholders or a common Board of Directors will not constitute a sufficient ground to conclude that they are a single economic entity. The single economic entity or the single economic unit theory imposes general enterprise liability on the corporate group. In D.H.N. Food*

Distributors Ltd. v. Tower Hamlets London Borough Council [D.H.N. Food Distributors Ltd. v. Tower Hamlets London Borough Council, (1976) 1 WLR 852 (2) (CA)] , Lord Denning held that a group of three companies should be treated as a single economic entity on the basis of two factors : first, the parent company owned all the shares of the subsidiary companies to the extent that it controlled every movement of the given subsidiary companies; and second, all the three companies in the group virtually acted as partners and could not be treated separately. Thus, the determination of whether two or more companies constitute a single economic entity depends upon the concerted efforts of the companies to act in pursuance of a common endeavour or enterprise.”

171.The Group of Companies doctrine was propounded and explained in the said judgment while considering whether non-signatories to an arbitration agreement can, under certain circumstances, be brought within the fold of arbitration between the signatories. The Hon'ble Supreme Court, in Paragraph No. 87, categorically laid down that the phenomenon of group companies is a modern reality of economic life and that group companies are a set of separate firms linked together in formal or informal structures *under the control of a parent company (emphasis supplied)*. Companies under the strategic control of a common authority, typically a family, were taken into consideration. At the same time, involvement of parent and subsidiary companies or a parent corporation was highlighted in the said report. In fact, the Hon'ble Supreme Court, in Paragraph No. 91 of the decision, took note of situations where a holding company completely dominates the affairs of the subsidiary company to the extent of misusing its control, to avoid or conceal the liability.

172.In Paragraph No. 92, again, it was observed that the intent of piercing the corporate veil must be such that would seek to remedy a wrong

done by the holding company. Under the normal company jurisprudence, only in cases of fraud or manifest evasion of tax liabilities, the doctrine of piercing of corporate veil is used. However, the Hon'ble Supreme Court cautioned that in the context of arbitration, the said principle has been sparingly used because it disregards the intention of the parties by emphasising on the overriding considerations of good faith and equity to bind the non-signatories to an arbitration agreement. It was highlighted that, as opposed to the doctrine of alter-ego or piercing the corporate veil, which operates in the sphere of misuse of control to avoid or conceal liability, the Group of Companies doctrine would be deployed to test the intention of parties by emphasising on considerations of good faith and equity.

173.Read in such context, an affiliate has to be the part of a “solar system” revolving around the parent/holding company, as rightly argued by the appellants in the present case, there being a parent company or a holding company under which there are subsidiary companies which are sibling companies *inter se*.

174.Such an interpretation is also in consonance with Explanation 2 to the Fifth Schedule of the 1996 Act, which provides that the term “affiliate” encompasses all companies in one group of companies including the parent company.

175.Although the expression “encompasses” has been used in Explanation 2, it is a sufficient indicator as to the meaning intended to be lent to the term “affiliate” in the relevant Entries of the said Schedule. The use of

the expression “encompasses” is only to highlight that not only all companies in a group of companies are covered by affiliate but that the parent company is also included. Such choice of language has been deliberately used since, in general, the parent company itself is sometimes excluded in the common perception from the group of companies which are subsidiaries thereto. The expression “encompasses”, although indicating under normal circumstances that the definition is inclusive, such inclusivity simultaneously indicates that the expression is intended to be applied only to corporate entities. Otherwise, there would be no need for the Legislature to provide for Explanations 1 and 2 separately. Explanation 1 defines the term “close family member” and refers to biological individuals or natural entities. On the other hand, Explanation 2 defines “affiliate”, which refers to corporate entities. The segregation of Explanations 1 and 2 is also an indicator of the intention of the Legislature to refer respectively to natural persons and corporate entities in the said two Explanations.

176. There would be no necessity for the Legislature to use the term “affiliate” if it was intended to be used for natural entities, in which case the term “family member” or “close family member” could very well be used. The expression “close family member” and “close family relationship” has, in fact, been used in several entries of the Fifth Schedule and the Seventh Schedule where it refers to biological entities, where the intention of the Legislature was to refer to natural persons. As opposed thereto, the expression “affiliate” has been used only with

reference to corporate entities. Nothing prevented the Legislature, in its wisdom, to use the expression “affiliate or family members”, if it intended to do so in Entry 2 as well. Having deliberately not done so, it is clear that only corporate entities were sought to be covered by the umbrella term “affiliate”.

177. Even otherwise, if applied to natural persons or biological entities, the term “affiliate”, as derived from its etymological root, refers to a filial relationship only and cannot refer to a cross-relation between a natural person and a corporate entity. Thus, the interpretation sought to be lent to the term “affiliate” by the present respondents is not tenable in the eye of law.

178. If the term “affiliate” is construed to apply in the context of natural persons too, it would not only go against the grain of Explanation 2 to the Fifth Schedule, but would then throw open a wide variety of possible relationships between individuals, without any governing parameter being provided in the Statute. Since the Legislative intent, as evident from Explanation 1 of the Fifth Schedule and the Entries where the expression “close family relation” has been deployed, is to specifically use such term within the limits defined by Explanation 1 where natural persons are concerned, the interpretation sought to be lent to “affiliate” in respect of natural persons would defy such intention. In that event, a Pandora’s Box would be cracked open, permitting the expression “affiliate” to be applied to an infinite range of

relations of the parties to an arbitration proceeding, without there being any legislative boundary or parameter to restrict it.

179.Hence, the term “affiliate” has to be used in respect of corporate entities only. Furthermore, since Explanation 2 of the Fifth Schedule contemplates a “solar system” structure (borrowing from the expression as used by learned senior counsel for the appellants), where there is a parent/holding company having sibling companies under it, an element of ‘control’ exerted by the parent company over the group companies is also required to be established to bring a corporate party within the fold of “affiliate”, as envisaged in Entry 2 of the Fifth Schedule.

180.As such, we now proceed to assess whether such element of ‘control’ has been established in the present case.

(d) Control

181.It has been argued by the appellants that for an entity to be an “affiliate” of a party to the arbitration, there has to be an element of control exerted by such party on its affiliate. Such view is supported by the definition of the term “affiliate” as given in Explanation 2 to the Fifth Schedule.

182.Thus, the next aspect which is required to be considered is the meaning of “control”, as construed generally in Indian company jurisprudence.

183.As explained in *ArcelorMittal India Private Limited (supra)*²⁰ as well as *Vodafone International Holdings BV (supra)*²¹ and referred to in the unreported judgment of this Court in *Universal Cables Limited (supra)*²², the control over a company is the direct fall-out of the shareholding of a person or entity in a company and is tied up inextricably with the shareholding and the incidents of shareholding.

184.The respondents in the instant case have not produced any document to show cross-holdings among C & E Limited and M/s. SSSMIL. Even going by the admitted position in the present case, the shareholding of the so-called promoter group of BDB in M/s. SSSMIL comes to about 35.42%, which is much less than 50%. The argument of the respondents that the remaining 64.58% shareholding, being held by the public, cannot be said to confer any control on the other shareholders, cannot be accepted. It can very well be that the public in general is an unorganised body of persons. However, fact remains that even if the promoter and promoter group of M/s. SSSMIL wanted to have positive control over the decisions of the said company, the mere shareholding of 35.42% would not confer such power on the said group.

185.Even otherwise, individuals in the promoter group have a shareholding of only 9.67% and the remaining 25.75% is held by body corporates. Among the body corporates, 25.68% is held by B.G. Chemicals Private

²⁰ ***ArcelorMittal India Private Limited v. Satish Kumar Gupta, reported at (2019) 2 SCC 1***

²¹ ***Vodafone International Holdings BV v. Union of India and another, reported at (2012) 6 SCC 613***

²² ***Universal Cables Limited v. Arvind Kumar Newar and Ors. (APO No. 89 of 2020)***

Limited, where BDB himself has only 80 equity shares and his HUF holds 1900 equity shares out of the total issued share capital of 10,000. Thus, even in the capacity of shareholders, it cannot be said that BDB had unfettered and pervasive control over B.G. Chemicals Private Limited. The tertiary relationship, thus, between BDB and M/s. SSSMIL, for which the learned Arbitrator appeared, is extremely remote and in the absence of any positive proof of the cross-shareholdings between the said companies, or between M/s. C & E Limited, the other party to the arbitration proceeding, and M/s. SSSMIL to such an extent to vest absolute controlling power on BDB or M/s. C & E Limited, it cannot, by any stretch of imagination, be held that M/s. SSSMIL was an affiliate of M/s. C & E Limited or BDB or vice versa.

186. In fact, the context in which *Cox & Kings Ltd. (supra)*²³ laid down the proposition of Group of Companies was that a non-signatory to an arbitration agreement, under certain circumstances, by application of such doctrine, can be construed to be a party to the arbitration. However, in the present case, no proof comes forth before any of the forums that the cross-holdings of shares between BDB, M/s. C& E Limited and M/s. SSSMIL was of such a nature that the group of companies doctrine would be applicable and M/s. SSSMIL would be elevated to the platform of a party to the arbitration proceeding even without being a signatory to the arbitration clause. Hence, *per se*, the

²³ ***Cox & Kings Ltd. v. SAP India (P) Ltd., reported at (2024) 4 SCC 1***

*Cox & Kings Ltd. (supra)*²³ principle cannot come to the aid of the respondents at all.

187.In the light of the above discussions, this Court is of the firm opinion that the respondents have failed to prove the criteria set out in Entry 2 of the Fifth Schedule to be applicable to the present case merely in view of the appearance on certain occasions by the learned Arbitrator as counsel of M/s. SSSMIL during the present arbitral proceedings.

188.For the sake of completion, even though the respondents have not argued specifically the applicability of Entry 8 of the Fifth Schedule, for the ends of justice, this Court chooses to look into the said aspect of the matter as well.

189.However, the said Entry is also not attracted in the present case, since it is the case of neither party that the learned Arbitrator advised the appointing party or an affiliate. First, there was no “appointing party” in the present case, as the appointment was by the court. Secondly, appearance as counsel does not tantamount to “advising” a party or its affiliate. Thirdly, the question of regularity of any such “advice” does not arise at all, having not been pleaded by the respondents at any stage.

190.Thus, this issue is held in favour of the appellants and against the respondents.

CONCLUSION

191. There cannot be any manner of doubt that an Arbitrator has the continuous duty to disclose any circumstances which might create justifiable doubts to his independence and integrity throughout the arbitral proceedings. Such duty is cast by Section 12 (2) and has been reaffirmed in *Central Organisation For Railway Electrification (supra)*²⁴. However, in view of our finding that none of the Entries in the Fifth Schedule, read with Section 12 (1) of the 1996 Act, are attracted in the instant case, such duty did not arise at all insofar of the learned Arbitrator in the present case is concerned.

192. Before parting with the matter, another facet of the same is required to be adverted to.

193. During arguments, learned counsel for the respondents insinuates that the standard of fairness of the Arbitrator has to be such that it eliminates any reasonable apprehension of bias. The learned Single Judge also proceeded on the premise that Justice must not only be done but must be manifestly seen to have been done. Yet, we have to draw a line of distinction in that regard between the standards to be applied to an Arbitrator and those applicable to courts of law.

194. In respect of the latter, the Bangalore Principles of Judicial Conduct is generally taken to be the touchstone of judicial independence and integrity. Yet, such strict yardsticks cannot be made applicable in

²⁴ ***Central Organisation For Railway Electrification v. ECI SPIC SMO MCML (JV)*, reported at (2025) 4 SCC 641**

respect of Arbitrators, for the simple reason that the premise of the Alternative Dispute Resolution mode of arbitration is party autonomy. The parties to an arbitration agreement are free to choose any person whomsoever as their chosen arbiter. Thus, arbitrators may come from a wide pool of people, from varied walks of life. By the very nature of such choice, arbitrators are generally chosen from the specific field of knowledge pertaining to the disputes involved and, as such, have current and/or past professional engagements in the very domain of expertise involved in such disputes, as opposed to Judges in courts of law, who are expected by and large to abstain not only from public life and to refrain from expressing their opinions in public about subject-matters which are or might come before them for adjudication, but also to avoid having involvements which may give rise to conflicting interests in the adjudicatory process. After all, judges are supposed to be exemplary in conduct, both in and out of the court, rising above any shadow of doubt regarding their integrity.

195. However, if such strict restrictions are imposed on arbitrators, who are otherwise largely chosen from a pool of professionals having prior or current engagements in the specific domain of expertise involved in the dispute, the very core of party autonomy would be frustrated, since then the range of choice of arbitrators will get severely restricted to persons having little or no practice in the field, which will in turn give a premium to incompetent persons having little experience in the domain being left to be appointed as arbitrators. This would be counter-

productive to the very purpose of the 1996 Act, which is to give a fillip to Alternative Dispute Resolution in order to make India a hub of international arbitration and mediation.

196. Viewed from such perspective, while assessing whether circumstances exist to raise justifiable doubts as to the independence/impartiality of an arbitrator, it would be profitable to stick to the specific grounds and guidelines provided in the Fifth and Seventh Schedules of the 1996 Act and not enlarge the scope of Section 12, sub-Sections (1) and (5) by leaving it to the personal perspectives of the Courts dealing with proceedings under Sections 34 and 37 of the said Act, as to what relations would come within the term ‘affiliate’, if used with regard to a natural person, as the statute does not provide any parameter in that regard. In fact, in *HRD Corporation (supra)*²⁵, the Hon’ble Supreme Court encouraged a commonsensical approach, requiring a fair construction of the words used in the Fifth Schedule, turning down the argument that the items in the Fifth and Seventh Schedules must be construed in the most expansive manner so that the “remotest likelihood of bias” gets removed and holding that the same was not an acceptable way of interpreting the Schedules.

197. Such view is also in consonance with the mandate of least judicial interference (in the present context, under Section 34 of the 1996 Act),

²⁵ ***HRD Corporation (Marcus Oil and Chemical Division). v. GAIL (India) Limited (formerly Gas Authority of India Limited), reported at (2018) 12 SCC 471***

except where statutorily provided for, as incorporated in Section 5 of the 1996 Act.

198.In the light of the above observations, this Court comes to the conclusion that the learned Single Judge committed a perversity and erred in law in allowing the applications under Section 34 of the 1996 Act, thereby setting aside the arbitral award dated February 29, 2020.

199.Accordingly, APO No. 184 of 2023 and APO No. 185 of 2023 are allowed on contest, thereby setting aside the impugned judgment allowing AP No. 364 of 2020 and AP No. 402 of 2020 and dismissing EC No. 145 of 2020 and EC No. 81 of 2020.

200.The preliminary issue is, thus, decided in favour of the present appellants, turning down the challenge to the arbitral award on the ground of fraud/corruption/bias of the learned Arbitrator. The two applications under Section 34 of the Arbitration and Conciliation Act, 1996, bearing APO No. 184 of 2023 and APO No. 185 of 2023 shall now be heard by the learned Single Judge having determination for adjudication on merits on the other grounds, if any, on which challenge has been preferred to the arbitral award.

201.Consequential to the setting aside of the judgments impugned in the present appeals, EC No. 145 of 2020 and EC No.81 of 2020 are hereby revived and it will be open to the award holders to proceed with the said applications for enforcement of the arbitral award before the appropriate Bench having determination. It will also be open to the

award debtors to seek appropriate orders of stay of the award before the court taking up the enforcement applications.

202. Accordingly, two applications, bearing GA 2 of 2023, filed in connection with both the appeals, stand disposed of as well.

203. There will be no order as to costs.

204. Urgent certified copies, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Supratim Bhattacharya, J.)

Later

After the above judgment is passed, a stay of the same for four weeks is prayed for on behalf of the award debtors. However, since we have already granted liberty to the award debtors to approach the Executing Court for seeking such stay, the prayer for stay is refused.

(Supratim Bhattacharya, J.)

(Sabyasachi Bhattacharyya, J.)