

Between vs The Managing Director on 8 September, 2022

Author: Sandeep Sharma

Bench: Sandeep Sharma

REPORTABLE

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

ON THE 8TH DAY OF SEPTEMBER 2022

BEFORE

HON'BLE MR. JUSTICE SANDEEP SHARMA

ARBITRATION CASE NOS. 68-69 OF 2018

1. ARBITRATION CASE NO. 68 OF 2018

Between: -

M/S R.B. ENTERPRISES

OFFICE: 4064, NAYA BAZAR, NEW DELHI-110 006
THROUGH ITS POWER OF ATTORNEY HOLDER
SH. SHARAD AGGARWAL

PETITIONER

(BY MR. J.S. BHOGAL SENIOR ADVOCATE WITH

MS. SEEMA K. GULERIA, ADVOCATE)

AND

THE MANAGING DIRECTOR
H.P. STATE CIVIL SUPPLIES CORPORATION LTD.,

SDA COMPLEX, KASUMPTI, SHIMLA

RESPONDENT

(BY MR. TARUN K. SHARMA, ADVOCATE)

2. ARBITRATION CASE NO. 69 OF 2018

Between: -

M/S R.B. ENTERPRISES
OFFICE: 4064, NAYA BAZAR, NEW DELHI-110 006
THROUGH ITS POWER OF ATTORNEY HOLDER

SH. SHARAD AGGARWAL

PETITIONER

(BY MR. J.S. BHOGAL SENIOR ADVOCATE WITH
MS. SEEMA K. GULERIA, ADVOCATE)

AND

THE MANAGING DIRECTOR
H.P. STATE CIVIL SUPPLIES CORPORATION LTD.,
SDA COMPLEX, KASUMPTI, SHIMLA

RESPONDENT

(BY MR. TARUN K. SHARMA, ADVOCATE)

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Whether approved for reporting: .

These petitions coming on for hearing this day, the court delivered the following:

JUDGMENT

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Since common questions of law and facts are involved in these petitions, these were heard together and are being disposed of vide this common judgment.

2. By way of instant petitions filed under S. 34 of Arbitration and Conciliation Act, challenge has been laid to awards dated 4.5.2018 passed by learned Arbitrator (available at Pp. 56-63 of Arb. Case No. 68 of 2018 and at Pp. 55-64 of Arb. Case No. 69 of 2018).

3. For having bird's eye view, undisputed facts, which may be relevant for the adjudication of the cases at hand, are that the petitioner, which is a sole proprietorship concern, entered into two agreements on 21.6.2016 and 29.6.2016, with respondent-Himachal Pradesh State Civil Supplies Corporation Ltd. (hereinafter, 'respondent Corporation') after being declared lowest bidder for supply of edible pulses (Annexure R-3) annexed with the replies filed by the respondent Corporation to both the cases. Pursuant to aforesaid agreements arrived inter se petitioner and the respondent, petitioner supplied pulses but subsequently, respondent Corporation alleged that the pulses supplied by the petitioner concern were of sub-standard quality and as such, some amount payable to the petitioner was deducted from its bills qua both the agreements. On account of deduction of amount from the bills, dispute arose inter se parties and as such, petitioner, while invoking Clause 19 of the agreements, (available at page-103 and 98 onwards of Arb. Cases Nos. 68 and 69 of 2018, respectively), referred the matter to arbitrator, who was named in the arbitration clause itself i.e. Principal Secretary, Food, Civil Supplies and .

Consumer Affairs to the Government of Himachal Pradesh, who after having entered into reference, vide two separate awards, both dated 4.5.2018, rejected the claim of the petitioner concern. Being aggrieved and dissatisfied with the awards passed by learned Arbitrator, petitioner has approached this court by filing two separate objection petitions/arbitration cases i.e. Arb. Case Nos. 68 and 69 of 2018, seeking quashment of the awards dated 4.5.2018.

4. Mr. J.S. Bhogal, learned senior counsel duly assisted by Ms. Seema K. Guleria, Advocate, representing the petitioner in both the cases, while fairly admitting the factum with regard to petitioner concern having filed claims before Arbitrator named in the agreement, contended that though in terms of arbitration clause, Principal Secretary (Food, Civil Supplies and Consumer Affairs) to the Government of Himachal Pradesh, was named Arbitrator but in view of his having direct interest in the matter, on account of his being Chairman of the respondent Corporation, he was ineligible to be appointed as an arbitrator in terms of provisions of S.12(5) read with Sixth Schedule I of the Arbitration and Conciliation Act. Mr. Bhogal, learned senior counsel further submitted that before entering upon references, arbitrator appointed in terms of Clause 19 of the agreement, was under obligation to make a declaration under as provided under S. 12(1) read with Sixth Schedule, of the Act that he does not have any interest in the dispute. Lastly, Mr. Bhogal, learned senior counsel submitted that it is not in dispute that the entire supply in terms of purchase orders issued by respondent Corporation was made within the time .

stipulated in the agreement and after having received the entire consignment, no objection, if any, ever came to be raised with regard to quality of the pulses. He submitted that admittedly, in the case at hand, the respondent Corporation though drew samples of pulses but even thereafter sold the

entire consignment to the general public without incurring any loss and as such, as of today, there is nothing to co-relate samples sent for examination with the actual consignment sent by the proprietorship concern.

5. Mr. Tarun K. Sharma, Advocate appearing for the respondent Corporation, while refuting aforesaid contention made by learned senior counsel for the petitioner argued that once the petitioner concern subjected itself to the jurisdiction of the named arbitrator, it is estopped at this stage from challenging nomination /appointment of arbitrator on the ground that he had an interest in the litigation. Mr. Sharma, though admitted that learned Arbitrator before entering upon references did not make declaration as required under S.12(1) of the Act, but submitted that repeatedly after having received consignment, notices were issued to the petitioner with regard to sub-standard quality of the pulses. Lastly, Mr. Sharma, while inviting attention of this court to S.13 of the Arbitration and Conciliation Act stated that challenge, if any to the appointment of arbitrator could be laid under aforesaid provision of law and once awards stand passed, wherein the petitioner concern itself participated, it is estopped from raising question with regard to competence of the person named as arbitrator in the agreement.

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6. I have heard learned counsel for the parties and perused material available on record vis-à-vis reasoning assigned in the awards impugned in the present proceedings.

7. Primarily challenge to awards has been laid on two grounds (1) award passed by learned Arbitrator is vitiated on account of the fact that the learned Arbitrator being an interested party was not competent to pass awards in terms of section 12(5) read with Seventh Schedule of the Arbitration and Conciliation Act (2), award passed by learned Arbitrator is against statutory provisions of Food Safety and Standards Act and (3) the learned arbitrator failed to make declaration in terms of S.12(1) of the Act.

8. Before ascertaining correctness and genuineness of the afore rival submissions of learned counsel for the parties, it would be apt to take note of Section 12 of the Arbitration and Conciliation Act, which provides as under:

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.

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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."

9. Careful perusal of Section 12 (1) clearly envisages that person appointed as an arbitrator shall disclose in writing 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. Admittedly, in the case at hand, arbitrator who made the impugned Awards was Chairman of Himachal Pradesh State Civil Supplies Corporation Ltd., which was one of the parties to the dispute. No doubt, petitioner concern itself invoked arbitration clause and submitted its claims before the learned Arbitrator i.e. Principal Secretary (Food, Civil Supplies and Consumer Affairs), but as has stated herein above, Arbitrator was under obligation to make declaration in

writing as per Section 12, that he has no direct relationship or interest with any of parties or in subject-matter in dispute.

10. In the instant case, though, learned Arbitrator i.e. Principal Secretary (Food, Civil Supplies and Consumer Affairs) had direct interest being Chairman of the respondent-Corporation, but he, without making declaration in terms of S. 12 (1) entered into references and passed awards on the basis of material adduced on record by respective parties.

11. Though, this court having taken note of aforesaid omission on the part of learned Arbitrator, need not adjudicate the matter further and impugned Awards can be quashed on this sole ground, but careful perusal of S.12(5) if read in its entirety, clearly reveals that the arbitrator, who passed impugned Awards, was otherwise ineligible to be appointed as an arbitrator. Section 12 (5) clearly provides that person having direct or indirect relationship with the dispute or party to the dispute cannot be appointed as an arbitrator.

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12. At this stage, it would be apt to take note of Seventh Schedule which is reproduced herein below:

**The Seventh Schedule [Section 12 (5)] - Grounds for Removal of Arbitrators
Arbitrator's relationship with the parties or counsel**

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.
2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.
3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.
4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.
5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.
6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.
7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

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

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

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

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

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

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

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

Relationship of the arbitrator to the dispute .

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

16. The arbitrator has previous involvement in the case.

Arbitrator's direct or indirect interest in the dispute

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

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

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

Explanation 1.--The term "close family member" refers to a spouse, sibling, child, parent or life partner.

Explanation 2.--The term "affiliate" encompasses all companies in one group of companies including the parent company.

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

13. As per item No. 12 of Seventh Schedule, if the person proposed to be appointed as an arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties, he/she is not eligible to be appointed as an Arbitrator. Since in the case at hand, it is not in dispute that the named arbitrator being Principal Secretary (Food, Civil Supplies and Consumer Affairs) was holding charge of the post of Chairman of the respondent corporation, he otherwise could not take up arbitration proceedings, inter se petitioner concern and the respondent but yet he proceeded to pass awards, which is impermissible.

14. Now the question which remains to be adjudicated at this stage, is "whether the petitioner after having subjected itself to the jurisdiction of the named arbitrator can raise objection with regard to .

eligibility of arbitrator in terms of Clause 12(5) of the Act.

15. Though learned counsel for the respondent argued that the petitioner is estopped from raising objection with regard to eligibility of arbitrator at this stage, on account of its having subjected itself to the jurisdiction of learned Arbitrator but as has been noticed herein above, when very appointment of arbitrator is illegal, he otherwise could not enter upon reference and as such, awards passed by him are of no consequence. Very purpose of making declaration as provided under S. 12(1) of the Act is to ensure that person having direct or indirect relation with the parties or dispute in question is not appointed as an arbitrator. If Section 12 (1) is read in conjunction with S.12(5), a person having no direct/indirect relation with the party or dispute can be appointed as an arbitrator and such person is under obligation to make declaration that he/she is not having direct or indirect relation with parties to the dispute or with the dispute, meaning thereby arbitrator though may be named in the agreement, but he is under obligation to give declaration before entering upon reference in terms of S. 12(1).

16. Here is a case, where arbitrator named in agreement had direct relation with the respondent Corporation as such, was ineligible to be appointed as an arbitrator in terms of Section 12(5) but, besides being ineligible, he without making declaration in terms of Section 12 (1) proceeded to pass awards, which stand vitiated on account of omission in not filing declaration in terms of S.12(1) of the Act.

17. Provisions of named arbitrator in the arbitration clause .

contained in the agreement cannot override the provisions contained under the statute i.e. S.12 which specifically deals with the eligibility of person to be appointed as an arbitrator. Reliance is placed upon decision of Hon'ble Apex Court in HRD Corporation (Marcus Oil and Chemical Division) v.

GAIL (India) Limited (2018) 12 SCC 471, wherein, it has been held:

"11. Under Section 12, it is clear that when a person is approached in connection with his possible appointment as an arbitrator, he has to make a disclosure in writing, in which he must state the existence of any direct or indirect present or past relationship or interest in any of the parties or in relation to the subject matter in dispute, which is likely to give justifiable doubts as to his independence or impartiality. He is also to disclose whether he can devote sufficient time to the arbitration, in particular to be able to complete the entire arbitration within a period of 12 months. Such disclosure is to be made in a form specified in the Sixth Schedule, grounds stated in the Fifth Schedule being a guide in determining whether such circumstances exist. Unlike the scheme contained in the IBA Guidelines, where there is a non-waivable Red List, parties may, subsequent to disputes having arisen between them, waive the applicability of the items contained in the Seventh Schedule by an express agreement in writing. The Fifth, Sixth and Seventh Schedules are important for determination of the present disputes, and are set out with the corresponding provisions of the IBA Guidelines hereunder:

"THE FIFTH SCHEDULE [See section 12 (1)(b)] The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators:

Fifth schedule Corresponding provision in the IBA Guidelines .

1. the arbitrator is an employee, (non-waivable red list) consultant, advisor or has any
1.1. there is an identity between a party and other past or present business the arbitrator or the arbitrator is a legal relationship with a party representative or employee of an entity that is a party in the arbitration.

2. The arbitrator currently (Waivable Red List) represents or advises one of 2.3.1. The arbitrator currently represents or the parties or an affiliate of one advises one of the parties, or an affiliate of of the parties. one of the parties.

3. The arbitrator currently (Waivable Red List) represents the lawyer or law 2.3.2. The arbitrator currently represents or firm acting as counsel for one of advises the lawyer or law firm acting as the parties r counsel for one of the parties.

4. the arbitrator is a lawyer in (Waivable Red List) the same law firm which is 2.3.3. The arbitrator is a lawyer in the same representing one of the parties. law firm as the counsel to one of the parties.

5. The arbitrator is a manager, (Waivable Red List) director or part of the 2.3.4. The arbitrator is a manager, director or management, or has a similar member of the supervisory board, or has a controlling influence, in an controlling influence in an affiliate of one of affiliate of one of the parties if the parties, if the affiliate is directly involved the affiliate is directly involved in the matters in dispute in the arbitration.

in the matters in dispute in the arbitration.

6. The arbitrator's law firm had (waivable Red List) a previous but terminated 2.3.5. the arbitrator's law firm had a previous involvement in the case without but terminated involvement in the case the arbitrator being involved without the arbitrator being involved himself himself or herself. or herself.

7. The arbitrator's law firm (waivable Red List) currently has a significant 2.3.6. The arbitrator's law firm currently has a commercial relationship with significant commercial relationship with one one of the parties or an affiliate of the parties or an affiliate of one of the of one of the parties. parties.

8. The arbitrator regularly (waivable Red List) advises the appointing party or 2.3.7. The arbitrator regularly advises the an affiliate of the appointing appointing party or an affiliate of the party even through neither the appointing party even through neither the arbitrator nor his or her firm arbitrator nor his or her firm derives a .

derives a significant financial significant financial income therefrom income therefrom.

9. The arbitrator has a close (waivable Red List) family relationship with one of 2.3.8. The arbitrator has a close family the parties and in the case of relationship with one of the parties, or with a companies with the persons, in manager, director or member of the the management and supervisory board, or any person having a controlling the company. controlling influence in one of the parties, or an affiliate of one of the parties, or with a counsel representing a party.

10.A close family member of (waivable Red List) the arbitrator has a significant 2.3.9. A close family member of the arbitrator financial interest in one of the has a significant financial or personal interest parties or an affiliate of one of in one of the parties, or an affiliate of one of the parties. the parties.

11. The arbitrator is a legal (Non-waivable Red List) representative of an entity that 1.1. There is an identity between a party and is a party in the arbitration. the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration.

12. The arbitrator is a manager, (Non-waivable Red List) director or part of the 1.2. The arbitrator is a manager, director or management, or has a similar part of the management, or has a similar controlling influence in one of controlling influence on one of the parties or the parties. an entity that has a direct economic interest in the award to be rendered in the arbitration.

13. The arbitrator has a (Non-waivable Red List) significant financial interest in 1.3. The arbitrator has a significant financial one of the parties or the or personal interest in one of the parties, or outcome of the case. the outcome of the case.

14. The arbitrator regularly (Non-waivable Red List) advises the appointing party or 1.4. The arbitrator regularly advises the an affiliate of the appointing appointing party or an affiliate of the party, and the arbitrator or his appointing party, and the arbitrator or his or or her firm derives a significant her firm derives a significant financial income financial income therefrom. therefrom.

15. The arbitrator has given (waivable Red List) legal advice or provided an 2.1.1. The arbitrator has given legal advice or expert opinion on the dispute to provided an expert opinion, on the dispute to a party or an affiliate of one of a party or an affiliate of one of the parties.

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the parties.

16. The arbitrator has previous (waivable Red List) involvement in the case. 2.1.2. The arbitrator had a prior involvement in the dispute.

17. The arbitrator holds shares, (waivable Red List) either directly or indirectly, in 2.2.1. The arbitrator holds shares, either one of the parties or an affiliate directly or indirectly, in one of the parties or of one of the parties, that is an affiliate of one of the parties, this party or privately held. an affiliate being privately held.

18. A close family member of (waivable Red List) the arbitrator has a significant 2.2.2. A close family member of the arbitrator financial interest in the outcome has a significant financial interest in the of the dispute. outcome of the dispute.

19. The arbitrator or a close (waivable Red List) family member of the arbitrator 2.2.3. The arbitrator, or a close family has a close relationship with a member of the arbitrator, has a close third party who may be liable to relationship with a non-party who may be recourse on the part of the liable to recourse on the part of the unsuccessful party in the unsuccessful party in the dispute. dispute.

20. The arbitrator has within the (Orange List) past three years served as 3.1.1. The arbitrator has, within the past three counsel for one of the parties or years, served as counsel for one of the an affiliate of one of the parties parties, or an affiliate of one of the parties, or or has previously advised or has previously advised or been consulted by been consulted by the party or the party or an affiliate of the party, making an affiliate of the party making the appointment in an unrelated matter, but the appointment of an unrelated the arbitrator and the party or the affiliate of matter, but the arbitrator and the party, have no ongoing relationship.

the party or the affiliate of the
party have no ongoing
relationship.

21. The arbitrator has within the (Orange List)

past three years served as 3.1.2. The arbitrator has within the past three counsel against one of the years served as counsel against one of the parties or an affiliate of one of parties or an affiliate of one of the parties in the parties in an unrelated an unrelated matter. matter.

22. The arbitrator has within the (Orange List) past three years been 3.1.3. The arbitrator has within the past three .

appointed as arbitrator on two years been appointed as arbitrator on two or or more occasions by one of more occasions by one of the parties or an the parties or an affiliate of one affiliate of one of the parties of the parties.

23. The arbitrator's law firm has (Orange List) within the past three years 3.1.4. The arbitrator's law firm has within the acted for one of the parties or past three years acted for one of the parties an affiliate of one of the parties or an affiliate of one of the parties in an in an unrelated matter without unrelated matter without the involvement of the involvement of the the arbitrator arbitrator.

24. The arbitrator currently (Orange List) serves, or has served within the 3.1.5. The arbitrator currently serves, or has past three years, as arbitrator in served within the past three years, as another arbitration on a related arbitrator in another arbitration on a related issue involving one of the issue involving one of the parties or an parties or an affiliate of one of affiliate of one of the parties. the parties.

25. The arbitrator and another (Orange List) arbitrator are lawyers in the 3.3.1. The arbitrator and another arbitrator same law firm. are lawyers in the same law firm.

26. The arbitrator was within (Orange List) the past three years a partner 3.3.3. The arbitrator was within the past three of, or otherwise affiliated with, years a partner of, or otherwise affiliated with, another arbitrator or any of the another arbitrator or any of the counsel in the counsel in the same arbitration. same arbitration

27. A Lawyer in the arbitrator's (Orange List) law firm is an arbitrator in 3.3.4. A Lawyer in the arbitrator's law firm is another dispute involving the an arbitrator in another dispute involving the same party or parties or an same party or parties or an affiliate of one of affiliate of one of the parties. the parties.

28. A close family member of (Orange List) the arbitrator is a partner or 3.3.5. A close family member of the arbitrator employee of the law firm is a partner or employee of the law firm representing one of the parties, representing one of the parties, but is not but is not assisting with the assisting with the dispute. dispute.

29. The arbitrator has within the (Orange List) past three years received more 3.3.8. The arbitrator has within the past three than three appointments by the years been appointed on more than three .

same counsel or the same law

occasions by the same counsel, or th

firm.

law firm.

30. The arbitrator's law firm is

(Orange List)

currently acting adverse to one 3.4.1. The arbitrator's law firm is currently of the parties or an affiliate of acting adverse to one of the parties or an one of the parties. affiliate of one of the parties.

31. The arbitrator had been (Orange List) associated within the past three 3.4.2. The arbitrator has been associated years with a party or an affiliate with a party or an affiliate of one of the of one of the parties in a parties, in a professional capacity, such as a professional capacity, such as a former employee or partner. former employee or partner.

32. The arbitrator holds shares, (Orange List) either directly or indirectly, 3.5.1 The arbitrator holds shares, either which by reason of number or directly or indirectly, which by reason of denomination constitute a number or denomination constitute a material material holding in one of the holding in one of the parties or an affiliate of parties or an affiliate of one of one of the parties that Is publicly listed.

the parties that Is publicly listed.

33. The arbitrator holds a (Orange List) position in an arbitration 3.5.3. The arbitrator holds a position with the institution with appointing appointing authority with respect to the authority over the dispute. dispute.

34. The arbitrator is a manager, (Orange List) director or part of the 3.5.4. The arbitrator is a manager, director or management, or has a similar part of the management, or has a similar controlling influence, in an controlling influence, in an affiliate of one of affiliate of one of the parties, the parties, where the affiliate is not directly where the affiliate is not directly involved in the matters in dispute in the involved in the matters in arbitration.

dispute in the arbitration.

Explanation 1. - The term Footnote 3. - throughout the Application 'close family member' refers to Lists, the term "close family member" refers a spouse, sibling, child, parent to a : spouse, sibling, child, parent or life or life partner. partner, in addition to any other family member with whom a close relationship exists.

Explanation 2. - The term Footnote 4. Throughout the Application Lists, "affiliate" encompasses all the term "affiliate" encompasses all companies in one group of companies in a group of companies, .

companies including the parent including eh parent company.

company.

Explanation 3.--For the Footnote 5.--It may be practice in certain removal of doubts, it is clarified types of arbitration, such as maritime, sports that it may be the practice in or commodities arbitration, to draw arbitrators certain specific kinds of from a smaller or specialized pool of arbitration, such as maritime or individuals. If in such fields, it is the custom commodities arbitration, to draw and practice for parties to frequently appoint arbitrators from an small, the same arbitrator in different cases, no specialized pool. If in such disclosure of this fact is required, where all fields, it is the custom and parties in the arbitration should be familiar practice for parties frequently to with such custom and practice."

appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.

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

Contact details:

Prior experience (including experience with arbitrations):

Number of ongoing arbitrations:

Circumstances disclosing any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to your independence or impartiality (list out):

Circumstances which are likely to affect your ability to devote sufficient time to the arbitration and in particular your ability to finish the entire arbitration within twelve months (list out):"

"THE SEVENTH SCHEDULE [See section 12 (5)] Arbitrator's relationship with the parties or counsel

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

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.
11. The arbitrator is a legal representative of an entity that is a party in the arbitration.
12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.
13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.
14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.
16. The arbitrator has previous involvement in the case. Arbitrator's direct or indirect interest in the dispute.
17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.
18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.
19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.--The term "close family member" refers to a spouse, sibling, child, parent or life partner. Explanation 2.--The term "affiliate" encompasses all companies in one group of companies including the parent company.

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Explanation 3.--For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is

a relevant fact to be taken into account while applying the rules set out above."

12.. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become "ineligible" to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal.

18. Though in judgment supra, Hon'ble Apex Court was dealing .

with IBA Guidelines, but it has specifically dealt with Seventh Schedule of Arbitration and Conciliation Act vis-à-vis Fifth Schedule of IBA Guidelines.

In the said judgment, Hon'ble Apex Court has held that though condition of eligibility of being appointed as an arbitrator can be waived of in certain cases, but in few circumstances, such condition cannot be waived being in Non-waivable Red List. Clause 12 of 7th schedule has been held to be in the "Non-waivable Red List." Seventh Schedule deals with the person who cannot be appointed as an arbitrator

19. Since in the case at hand, learned Arbitrator who passed impugned Awards, falls in Item No. 12 of Seventh Schedule of the Act, he could not have been appointed as an arbitrator in any eventuality and such condition cannot be waived.

20. Arbitrator appointed in violation of provisions contained in S. 12 read with Seventh Schedule of the Act, shall be deemed to have no jurisdiction to pass award and such award if any passed by

him/her shall be considered to be passed without jurisdiction.

21. Reliance is placed upon decision of Hon'ble Apex Court in *Bharat Broadband Network Limited v. United Telecoms Limited*, (2019) SCC 755, wherein, it has been held as under:

12. In *HRD Corporation v. GAIL (India) Ltd.*, (2018) 12 SCC 471, this Court, after setting out the amendments made in Section 12 and the Fifth, Sixth, and Seventh Schedules to the Act, held as follows:

"12. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become "ineligible" to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root .

of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1) (a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal.

" xxx xxx xxx "14. The enumeration of grounds given in the Fifth and Seventh Schedules have been taken from the IBA Guidelines, particularly from the Red and Orange Lists thereof. The aforesaid guidelines consist of three lists. The Red List,

consisting of non-waivable and waivable guidelines, covers situations which are "more serious" and "serious", the "more serious" objections being non-waivable. The Orange List, on the other hand, is a list of situations that may give rise to doubts as to the arbitrator's impartiality or independence, as a consequence of which the arbitrator has a duty to disclose such situations. The Green List is a list of situations where no actual conflict of interest exists from an objective point of view, as a result of which the arbitrator has no duty of disclosure. These Guidelines were first introduced in the year 2004 and have thereafter been amended, after seeing the experience of arbitration worldwide. In Part 1 thereof, general standards regarding impartiality, independence and disclosure are set out.

" xxx xxx xxx "17. It will be noticed that Items 1 to 19 of the Fifth Schedule are identical with the aforesaid items in the Seventh Schedule. The only reason that these items also appear in the Fifth Schedule is for purposes of disclosure by the arbitrator, as unless the proposed arbitrator discloses in writing his involvement in terms of Items 1 to 34 of the Fifth Schedule, such disclosure would be lacking, in which .

case the parties would be put at a disadvantage as such information is often within the personal knowledge of the arbitrator only. It is for this reason that it appears that Items 1 to 19 also appear in the Fifth Schedule."

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

22. Since this court is of definite view that the arbitrator, who passed impugned Awards, was ineligible to pass the same and the impugned awards passed by him are vitiated, there is no occasion for this court to go into other pleas/questions raised by the learned counsel for the parties.

23. Consequently in view of detailed discussion held above and the law taken note, these objections are allowed and impugned awards, dated 4.5.2018 passed by the learned Arbitrator (as annexed in both the petitions) are quashed and set aside.

(Sandeep Sharma), .

Judge

September 8, 2022

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