* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 09th December, 2022

IN THE MATTER OF:

\+ **W.P.(C) 1793/2020 & CM APPL. 6242/2020**

ABHISHEK AGARWAL ..... Petitioner

Through: Mr. Gaurav Rana, Advocate

versus

UNION OF INDIA & ANR ..... Respondents

Through: Mr. Kirtiman Singh, CGSC with Ms.Manmeet Kaur Sareen, Advocate for UOI

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The instant Public Interest Litigation has been filed by one, Mr. Abhishek Kumar, a Lawyer, challenging the constitutional validity of Section 5 ('Impugned Section') of the New Delhi International Arbitration Centre Act, 2019 ('Act').

2. The Act was promulgated on 26.07.2019 and came into force from 02.03.2019. The Act envisages the creation of New Delhi International Arbitration Centre ('NDIAC/Centre'). The purpose of the Act is to create an independent and autonomous regime for institutionalised arbitration. The Act is also meant for revamping the pre-existing International Centre for Alternate Dispute Resolution and to utilise its infrastructure, and other facilitates.

3. The Impugned Section deals with the composition of members of the Centre, and their appointment. It reads as under: -

"5. The Centre shall consist of the following Members, namely: —

(a) a person, who has been a Judge of the Supreme Court or a Judge of a High Court or an eminent person, having special knowledge and experience in the conduct or administration of arbitration law or management, appointed by the Central Government in consultation with the Chief Justice of India-— Chairperson;

(b) two eminent persons having substantial knowledge and experience in institutional arbitration, both domestic and international, appointed by the Central Government—Full-time or Part-time Members;

(c) one representative of a recognised body of commerce and industry, chosen on rotational basis by the Central Government—Part-time Member;

(d) Secretary, Department of Legal Affairs Ministry of Law and Justice or his representative, not below the rank of the Joint Secretary—Member, ex officio

(e) one Financial Adviser nominated by the Department of Expenditure Ministry of Finance— Member, ex officio; and

(f) Chief Executive Officer—Member, ex officio."

4. Section 14 of the Act empowers the Centre to maintain a panel of accredited arbitrators, conciliators, and mediators. Section 28 of the Act lays down the procedure for the empanelment of such arbitrators, in the following manner: -

"14. The objects of the Centre shall be—

(a) to bring targeted reforms to develop itself as a flagship institution for conducting international and

domestic arbitration;

(b) to promote research and study, providing teaching and training, and organising conferences and seminars in arbitration, conciliation, mediation and other alternative dispute resolution matters;

(c) to provide facilities and administrative assistance for conciliation, mediation and arbitral proceedings;

(d) to maintain panels of accredited arbitrators, conciliators and mediators both at national and international level or specialists such as surveyors and investigators;

(e) to collaborate with other national and international institutions and organisations for ensuring credibility of the Centre as a specialised institution in arbitration and conciliation;

(f) to set-up facilities in India and abroad to promote the activities of the Centre;

(g) to lay down parameters for different modes of alternative dispute resolution mechanisms being adopted by the Centre; and

(i) such other objectives as it may deem fit with the approval of the Central Government.

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28. (1) ***The Centre shall, establish a Chamber of Arbitration which shall empanel the Arbitrators and also scrutinise the applications for admission in the panel of reputed arbitrators to maintain a permanent panel of arbitration.***

(2) The Chamber of Arbitration shall consist of experienced arbitration practitioners of repute, at

> *national and international level and persons having wide experience in the area of alternative dispute resolution and conciliation.*
>
> *(3)* ***The Centre shall by regulations lay down the criteria for admission to the panel of the cadre so as to maintain a pool of reputed arbitrators having expertise in international commercial arbitration and arbitration other than international commercial arbitration.***
>
> *(4) The Registrar to the Secretariat of the Centre shall act as the Member-Secretary to the Chamber of Arbitration."* (emphasis supplied)

5. In sum and substance, it is the case of the Petitioner that since the Centre is going to discharge functions of great judicial importance it must be insulated from political and other influences to ensure it is an independent and impartial body. The Petitioner states that the Centre predominantly consists of employees of Central Government. He, therefore, contends that such Members of the Centre cannot make a panel of Arbitrators, where one of the two litigants will be the Central Government itself. It is stated that if such Government representatives are be permitted to appoint their representatives as Arbitrators it will raise an apprehension of bias thereby vitiating the process. On the basis of this, the Petitioner has challenged Section 5 on the ground that it is violative of Section 12(3)(a) of the Arbitration and Conciliation Act, 1996 Act ('Arbitration Act'), which deals with the independence and impartiality of arbitrators.

6. *Per contra,* it has been argued on behalf of the Union that the Central Government has not earmarked any role for itself in running the panel of arbitrators, and the Government's role is mainly concerned with providing infrastructure and certain funds to the Centre. In support of this argument the

Union, in its counter, has placed reliance upon various provisions of the Act to highlight how the financial, and administrative independence of the Centre is ensured.

7. Heard the Counsel for the Petitioner and Respondents and perused the material on record.

8. An act promulgated by the Legislature cannot be declared unconstitutional lightly, as there exists a strong presumption of constitutionality in favour of it. This Court needs to be certain that the violation of constitutional provisions is so glaring that legislative competence does not stand. A legislation is typically challenged on two grounds: that the legislation violates fundamental rights and on the ground of legislative incompetence or that it is manifestly arbitrary.

9. In the present case, the Petitioner has sought to challenge Section 5 of the Act on the ground that it violates principle of judicial independence.

10. The Impugned Section deals with the composition of the Centre. It states that the members of the Centre would range from retired judges of the Supreme Court of India and High Courts to Secretary of the Department of Legal Affairs, Ministry of Law and Justice or even their representative. These members are supposed to fulfil various important tasks such as promoting alternate modes of dispute resolution, and pertinently, will maintain panels of accredited arbitrators. The creation, and maintenance of this Panel has been dealt with under Section 28 of the Act. Section 28 states that the Centre will establish a 'Chamber of Arbitration', consisting of experienced arbitration practitioners, which will empanel and scrutinise the applications for empanelment. Hence, it appears that the Centre is not responsible for the creation of the panel, it will only create the 'Chamber of Arbitration', which consists of reputed and well-established arbitrators

themselves. This insulates the panel from the influence of the members of the Centre, some of whom would have been nominated by the Central Government. Furthermore, even though the centre would lay down the criteria for empanelment by virtue of Section 28(3) of the Act, Section 32 categorically states that such rules would be placed before both houses of the parliament for 30 days for its approval or modification accordingly. This implies that even the criteria for empanelment would be subjected to legislative scrutiny and approval.

11. It is well settled that a mere apprehension that the Centre, which consists of majority of nominees of Government, will appoint such arbitrators who will have interest in Government which will result in bias and is not well found. A mere apprehension that the Act is capable of being misused is no ground to striking down the vires of the Act. It is now trite law that sweeping attacks made on the likelihood of misuse of a Statute, in the future, cannot possibly succeed. The occasion to complain only arises when such alleged misuse occurs. (Refer to:Indira Nehru Gandhi v. Raj Narain, **1975 Supp SCC 1**;Dr B.N. Khare v. State of Delhi, **AIR 1950 SC 211**; State of W.B. v. Anwar Ali Sarkar, **(1952) 1 SCC 1** ; R.K. Dalmia v. Justice Tendolkar**, AIR 1958 SC 538;** T.K. Musaliar v. Venkitachalam**, AIR 1956 SC 246**; Chitralekha v. State of Mysore**, AIR 1964 SC 1823**; M.R. Deka v. N.E.F. Rly**, AIR 1964 SC 600**].

12. In the present case, if such misuse is to arise in the future, the Arbitration Act, 1996 ensures there are remedies. Explanation to Section12(1)(b) of the Arbitration and Conciliation Act mandates an Arbitrator to disclose 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 the independence or impartiality of the Arbitrator. The Hon'ble Supreme Court in HRD Corpn. v. GAIL (India) Ltd**., (2018) 12 SCC 471,** expansively went through the provisions of the Section and Schedule and observed as under: -

> ***"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…*
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> *****
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> ***13.** Confining ourselves to ineligibility, it is important to note that the Law Commission by its 246th Report of August 2014 had this to say in relation to the amendments made to Section 12 and the insertion of the Fifth and Seventh Schedules:*
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> > *"59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of*

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

60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family

> *arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all other cases, the general rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1) and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator."* *(emphasis in original)*

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 dutyof 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…***
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> *****
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> ***20. However, to accede to Shri Divan's submission that because the grounds for challenge have been narrowed as aforesaid, we must construe the items in the Fifth and Seventh Schedules in the most expansive manner, so that the remotest likelihood of bias gets removed, is not an acceptable way of interpreting the Schedules.*** *As has been pointed out by us hereinabove, the items contained in the Schedules owe their origin to the IBA Guidelines, which are to be construed in the light of the general principles contained therein—that every arbitrator shall be impartial and independent of the parties at the time of accepting his/her appointment.* ***Doubts as to the above are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision. This test requires taking a broad commonsensical approach to the items stated in the Fifth and Seventh Schedules. This approach would, therefore, require a fair construction of the words used therein, neither tending to enlarge or restrict them unduly****. It is with these prefatory remarks that we proceed to deal with the arguments of both sides in construing the language of the Seventh Schedule.*

13. It appears that the Schedules deal with bias of all nature and magnitude and has in fact been modelled after the International Bar Association Guidelines. Furthermore, as laid down in HRD Corpn., the conditions in the Schedules are not to be read so expansively as to include

even the remotest likelihood of bias. In view of the mandate under the Act, the apprehension of the Petitioner is completely ill found.

14. A perusal of the scheme of the Act indicates that Section 18 of the Act provides for removal of members of the Centre. Under this Section, members of the Centre can only be removed if the Supreme Court, on a reference being made to it in this behalf by the Central Government, has reported that the Member, ought to be removed. This further ensures that the members of the Centre are insulated from the influence of the Central Government. The relevant Section reads as under: -

> *"18. (1) The Central Government may, remove a Member from his office if he—*
> *(2) Notwithstanding anything contained in sub-section (i), no Member shall be removed from his office on the grounds specified in clauses (d) and (e) of that sub-section unless the Supreme Court, on a reference being made to it in this behalf by the Central Government, has, on an inquiry, held by it in accordance with such procedure as may be prescribed in this behalf by the Supreme Court, reported that the Member, ought on such ground or grounds to be removed."*

15. The financial independence of the Centre is ensured under Section 25 of the Act, which allows the Centre to draw salaries and fulfil other financial obligations from the fund that Centre needs to maintain. This indicates that the Centre is not solely dependent on the Central Government for its functioning. The following Section reads as under: -

> *25. (1) The Centre shall maintain a Fund to which shall be credited—*
>
> *(a) all monies provided by the Central Government;*

> ***(b) all fees and other charges received during or in connection with the arbitration, conciliation, mediation or other proceedings;***
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> *(c) all monies received by the Centre for the facilities provided by it to the parties;*
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> *(d) all monies received by the Centre in the form of donations, grants, contributions and income from other sources; and the amount received from the investment income.*
>
> *(2) All monies credited to the Fund shall be deposited in such banks or invested in such manner as may be decided by the Centre.*
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> *xxx*
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> ***(5) The Fund shall be applied towards meeting the salary and other allowances of Members and the expenses of the Centre including expenses incurred in the exercise of its powers and discharge of its duties under this Act.*** (emphasis supplied)

16. In light of the foregoing, it is evident that the Act has inbuilt safeguards to ensure financial and administrative independence of the Centre.

17. Furthermore, the principles governing arbitral independence under the Arbitration Act have been delineated in Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd., **(2017) 4 SCC 665**. In this case, the Hon'ble Supreme Court adjudged the propriety of the State creating a panel of arbitrators for a proceeding it was a party to. While upholding the validity of such a panel, the Supreme Court held as under: -

> *"**30. Time has come to send positive signals to the international business community, in order to create***

> ***healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by DMRC. It, therefore, becomes imperative to have a much broad based panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broad based panel on the aforesaid lines, within a period of two months from today."*** (emphasis supplied)

18. In the present case, even if the State is one of the parties, the other party would have an entire broad-based panel to pick their arbitrator from, thus dispelling any apprehension of bias.

19. We cannot lose sight of the fact that there is an urgent need of a credible institutional arbitration centre in India, akin to other jurisdictions such as the Singapore International Arbitration Centre, Hong Kong International Arbitration Centre, and London Court of International Arbitration. These internationally renowned centres are also run with the involvement of their governments respectively. The '*High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India'*, presided over by Justice B. N. Srikrishna, which pointed deficiencies in the pre-existing institutional arbitration landscape and specifically stated the same could be remedied if the Government of India provided institutional backing to an institutional arbitration. Hence, the mere involvement and

support of the Government of India does not by itself raise apprehension of bias and impartiality. Furthermore, the Law Commission of India in its 246th Report, while pointing out the importance of institutional arbitration has also stated that recommended that the Government ought to provide land and funds for institutional arbitration to flourish in India. The following was stated:-

> *"5. Arbitration may be conducted ad hoc or under institutional procedures and rules. When parties choose to proceed with ad hoc arbitration, the parties have the choice of drafting their own rules and procedures which fit the needs of their dispute.* ***Institutional arbitration, on the other hand, is one in which a specialised institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of such institution.*** *Essentially, the contours and the procedures of the arbitral proceedings are determined by the institution designated by the parties.* ***Such institutions may also provide qualified arbitrators empanelled with the institution. Further, assistance is also usually available from the secretariat and professional staff of the institution. As a result of the structured procedure and administrative support provided by institutional arbitration, it provides distinct advantages, which are unavailable to parties opting for ad hoc arbitration.***
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> *6. The spread of institutional arbitration however, is minimal in India and has unfortunately not really kick-started. In this context, the Act is institutional arbitration agnostic — meaning thereby, it neither promotes nor discourages parties to consider institutional arbitration.* ***The changes suggested by the***

> ***Commission however, attempt to encourage the culture of institutional arbitration in India, which the Commission feels will go a long way to redress the institutional and systemic malaise that has seriously affected the growth of arbitration.***
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> *9. In order to further encourage and establish the culture of institutional arbitration in India, the Commission believes it is important for trade bodies and commerce chambers to start new arbitration centers with their own rules, which can be modeled on the rules of the more established centers.* ***The Government can also help by providing land and funds for establishment of new arbitration centers. It is important to start a dialogue between the legal community which is involved in the practice of arbitration, and the business community which comprise of the users of arbitration, in order that institutional arbitration takes wing. The Government may also consider formation of a specialised body, like an Arbitral Commission of India, which has representation from all the stakeholders of arbitration and which could be entrusted with the task of, inter alia, encouraging the spread of institutional arbitration in the country."*** (emphasis supplied)

20. In light of the scheme of the Act, it is evident that although the Government shall appoint certain members to the Centre, such members have very little to do with the panel of arbitrators. Such panel of arbitrators will be created by a 'Chamber of Arbitration', consisting of experienced arbitration practitioners, in accordance with regulations, which would have been accorded legislative assent as well. At this point, we may also mention that the retired judges of various High Courts and the Hon'ble Supreme Court are also supposed to be members of the Centre, which would further

lend credence to its impartiality. Due to this, it appears that the Petitioner has moved this Writ Petition on the basis of a simple apprehension or a suspicion of bias, which is ill-founded and without any basis.

21. The apprehension of the Petitioner for the independence of the arbitrators is misconceived. The Petitioner has failed to place on record any material to indicate that the panel of arbitrators would be tainted by bias, this Court does not find the Impugned Section unconstitutional, as being violative of either the basic structure or Section 12(3) of the Arbitration Act.

22. In light of this, the instant Writ Petition is dismissed, along with pending applications, if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

DECEMBER 09, 2022
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