

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 31.05.2022

+ **O.M.P. (T) (COMM.) 119/2021**

HIMANSHU SHEKHAR

..... Petitioner

versus

PRABHAT SHEKHAR

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr P. Nagesh, Senior Advocate with Mr
Rajeev Ahuja and Mr Akshay Sharma,
Advocates.

For the Respondent : Mr Sandeep Sethi, Senior Advocate with Mr
Ravi Prakash and Mr Atif Samim,
Advocates.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Sections 14(2) and 15 of the Arbitration & Conciliation Act, 1996 (hereafter the '**A&C Act**'), *inter alia*, praying that the mandate of the Sole Arbitrator – Mr. Subhash Chandra Batra (hereafter the '**Arbitrator**') be terminated and an independent arbitrator be appointed in his place.

2. The petitioner claims that the Arbitrator is ineligible to act as an arbitrator by virtue of Section 12(5) of the A&C Act. He is related to the parties and they have not entered into any agreement waiving their

right to waive the ineligibility, in terms of the proviso to Section 12(5) of the A&C Act.

3. In addition to the above, the petitioner also avers that the manner in which the Arbitrator has conducted the proceedings, indicates his bias. In particular, it is contended that the Arbitrator has passed orders granting interim relief without any application to the aforesaid effect. It is further submitted that the Arbitrator has also passed orders against the persons, who are not signatories to the Arbitration Agreement or to the arbitral proceedings.

4. It is well settled that Sections 12 and 13 of the A&C Act provide for the mechanism regarding challenge to the appointment of an arbitrator. A party challenging the appointment of an arbitrator would necessarily have to confine itself to that scheme. In terms of Section 13(1) of the A&C Act, the parties are required to follow the procedure, as agreed, for challenging an arbitrator. Section 13(2) of the A&C Act provides that failing any such procedure, the party who intends to challenge an arbitrator is required to file a written statement setting out the reasons for such a challenge within a period of fifteen days of becoming aware of the constitution of the arbitral tribunal or the circumstances as is referred to in Section 12(3) of the A&C Act. If the arbitrator does not withdraw from the proceedings, the arbitral tribunal is required to decide the challenge. If the challenge is not sustained, the arbitral tribunal is required to proceed and make an award. The party challenging an arbitrator does not have any recourse to courts prior to the arbitral tribunal rendering the award. Section 13(5) of the A&C Act

makes it clear that in such a case, the party challenging an arbitrator can make an application for setting aside the award, in accordance with Section 34 of the A&C Act.

5. In *Progressive Career Academy Pvt. Ltd. v. FIIT Jee Ltd.*¹, a Division Bench of this Court has held as under:

“16. On a reading of Section 13(5), the legislative intent becomes amply clear that Parliament did not want to clothe the Courts with the power to annul an Arbitral Tribunal on the ground of bias at an intermediate stage. The Act enjoins the immediate articulation of a challenge to the authority of an arbitrator on the ground of bias before the Tribunal itself, and thereafter ordains that the adjudication of this challenge must be raised as an objection under Section 34 of the Act. Courts have to give full expression and efficacy to the words of the Parliament especially where they are unambiguous and unequivocal....”

6. The Arbitration & Conciliation (Amendment) Act, 2015 substantially amended the A&C Act including Section 12 of the A&C Act. The extent of disclosure, as required under Section 12(1) of the A&C Act, was significantly expanded. Sub-section (5) of Section 12 of the A&C Act was introduced. In conjunction with such amendments, the Fifth, Sixth and Seventh Schedules were inserted to the A&C Act.

7. An arbitrator approached in connection with his appointment is required to make a disclosure in terms of the Sixth Schedule of the A&C Act. The Fifth Schedule of the A&C Act indicates the circumstances,

¹ (2011) 180 DLT 714

which may give rise to justifiable doubts as to the independence and impartiality of an arbitrator. It serves as a guide for an arbitrator to make the necessary disclosure. Sub-section (5) of Section 12 of the A&C Act provides for ineligibility of a person to be appointed as an arbitrator and the Seventh Schedule of the A&C Act provides a non-exhaustive list of circumstances that would render a person ineligible to be appointed as an arbitrator.

8. This Court had considered the scheme of the amendment to Sections 12 and 14 of the A&C Act in *HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited*² and found that Section 12(5) of the A&C Act stands on a separate footing than the scheme to challenge an arbitrator under Section 12(3) of the A&C Act. The Court held that a person, who is ineligible to be appointed as an arbitrator, would *ipso jure* not have the mandate to perform such functions. He would lack the inherent jurisdiction to act as an arbitrator. In such a case, it was not necessary for the party challenging the appointment to follow the procedure under Section 13 of the A&C Act; it was open to seek recourse to Section 14 of the A&C Act. The said view was upheld by the Supreme Court in *HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited*³.

9. During the course of the proceedings, Mr. P. Nagesh, learned senior counsel appearing for the petitioner, conceded that the present petition would not be maintainable insofar as the petitioner's

² (2017) SCC OnLine Del 8034

³ (2018) 12 SCC 471

apprehension regarding the Arbitrator's impartiality is concerned. He confined the present petition to seek relief solely on the ground that by virtue of Section 12(5) of the A&C Act, the Arbitrator was ineligible to act as an arbitrator; therefore, his mandate is required to be terminated. He contended that the Arbitrator has *close family relationship* with the parties, which is one of the circumstances as listed in the Seventh Schedule to the A&C Act.

10. Mr. Sethi, learned senior counsel appearing for the respondent, countered the aforesaid submissions and contended that none of the circumstances as set out in the Seventh Schedule to the A&C Act were attracted and therefore, the Arbitrator was not ineligible under Section 12(5) of the A&C Act. He further contended that, in any event, the parties had entered into an agreement in writing after the disputes had arisen and therefore, by virtue of proviso to Section 12(5) of the A&C Act, the ground of ineligibility, if any, stood waived.

11. At this stage, it would be relevant to briefly refer to the factual context in which the controversy arises.

11.1 The petitioner and respondent are brothers and are, *inter alia*, engaged in carrying on the family business of manufacturing and dealing in jewellery ornaments. They carry on the business under an incorporated entity, Manohar Lal Sarraf & Sons Jewellers Pvt. Ltd. (hereafter the '**Company**'), and other entities. The petitioner as well as the respondent hold 33.3% shares in the Company. The remaining 33.3% shares are held by the elder brother of the parties – Sh. Sudhir

Singhal. It is stated that he is involved in the family business as well and is a Director of the Company.

11.2 The eldest brother of the parties, Sh. Vivek Shekhar, does not hold any shares in the Company. During the course of the proceedings, it was contended (and not disputed by any party) that Sh. Vivek Shekhar is neither involved in the family business nor in the disputes between the parties.

11.3 Certain disputes have arisen between the parties in connection with the family business. It appears that Sh. Sudhir Singhal is also involved in the said disputes. Admittedly, he is also involved in the family business and is an equal shareholder in the Company. The parties had endeavored to resolve their disputes amicably but were unsuccessful.

11.4 In the aforesaid context, the parties contemplated referring the disputes to arbitration.

11.5 The respondent has produced certain e-mails (including the e-mail dated 03.06.2021) sent by the petitioner to the respondent and marked to several other persons, which indicates that the parties had also discussed the names of persons, one of whom could be appointed as an arbitrator to resolve the disputes between the parties.

11.6 The respondent had also produced an e-mail dated 18.06.2021 sent by the petitioner to the Arbitrator requesting him to accept the appointment as an arbitrator.

11.7 The parties entered into an agreement dated 04.10.2021 to refer the disputes to arbitration (the Arbitration Agreement). On the same date, that is on 04.10.2021, the Arbitrator made a declaration and accepted his appointment as an arbitrator. The agreement dated 04.10.2021 is set out below:

“REFERENCE TO ARBITRATION
(TRUE TYPED COPY)

An Understanding has emerged between Himanshu Shekhar S/o Late Sh. Chandra Prakash R/O G-31 Green Park Main, Green Park, South West Delhi, Delhi 110016 and Sh. Prabhat and Sh. Prabhat Shekhar S/o Late Sh. Chandra Prakash R/o Defence Colony, New Delhi regarding appointment of a Sole Arbitrator for resolution of their business disputes on this 4th day of Oct, 2021 and both of them have accordingly reproduced the said understanding into writing and also express their mutual consent for this purpose.

Whereas disputes have arisen between the aforesaid parties in connection with the affairs of their business to which they have not been able to settle mutually, and

Whereas the parties have agreed to refer the said disputes for arbitration of sole arbitrator whose Award shall be final and binding on them, and

Whereas, both the parties acknowledge the fact that the accounts of their business have to be properly scrutinized, and settled between them for which they agree to appoint Sh Subhash Chandra Batra B.Sc. LL.B. LL.M. a practising Advocate and who has also experience of Judicial Service for more than 35 years besides serving as a Member of Indian Legal Service (Deptt. of Legal Affairs, Govt. of India) and is also a member of the Indian Council of Arbitration.

Sh. Subhash Chandra Batra is equally related to both the parties as their real niece Ms. Swati D/o Sh. Vivek Shekhar is his daughter-in-law and we repose our complete trust in him.

The abovementioned Parties also express their consent to the stipulations which are being described hereunder:

A. All the disputes relating to the claims of the parties are referred for final determination and award of the Arbitrator and the proceedings of Arbitration shall normally be conducted at F-114, J.S. Arcade, Sector-18, Noida but the proceedings can also be conducted by the Arbitrator at Gopal Das Tower, Barakhamba Road, New Delhi.

B. That the Arbitrator may take into his possession the books and documents of the business of the parties.

C. That the Arbitrator shall record and keep the minutes of the proceedings of arbitration and take notes of evidence of such witnesses as may be produced by any of the parties or which the Arbitrator shall deem fit to examine and such evidence shall be taken on oath.

D. The Arbitrator shall be entitled to appoint or obtain the services of an accountant or munim or such other persons who may be well-versed in examining accounts of the business of the parties to the satisfaction of Arbitrator.

E. For the purpose of final determination of the disputes aforesaid, the Arbitrator may take such evidence and make such enquiries, as he deems proper. He may proceed ex parte in case any party fails to attend before him after reasonable notice.

F. The provisions of the Arbitration & Conciliation Act, 1996, (as amended) so far as applicable, shall apply to this arbitration.

G. Both the parties hereto agree that they would co-operate and lead evidence before the Arbitrator and will refrain themselves from adopting delaying tactics.

H. The parties hereto agree that this reference to arbitration would not be revoked by death of either party or for any cause.

I. The award of the Arbitrator shall be binding on the parties, their heirs, executors and legal representatives.

J. The cost of this reference shall be in the discretion of the Arbitrator and fee shall be payable to the Arbitrator by the parties as specified in the Arbitration Act.

K. The Arbitrator shall be empowered to implead any person as party to the arbitration proceeding whosoever is deemed as a necessary party by him.

The parties have signed this Reference in presence of the above-named Sh. Subhash Chandra Batra.”

[emphasis supplied]

11.8 The Arbitrator had made a declaration, *inter alia*, declaring as under:

DECLARATION

I, Subhash Chandra Batra Advocate (Former Distt. & Session Judge) hereby accept the request of Sh. Himanshu Shekhar and Sh. Prabhat Shekhar to act as Arbitrator for giving Award of their dispute.

I, have experience of about 45 years of Judicial service and Legal practise in different fields of law besides performing as Arbitrator.

While serving as Chief Legal Advisor Noida Authority (On deputation) and even now functioning as Presiding

Arbitrator in the matter of “M/S E.L. Educate Ltd. And M/S India can Education Pvt. Ltd.

I am also a member of Indian Council of Arbitration.

I am identically related to both the parties, as admitted to them and there does not exist any ground as contained to the FIFTH SCHEDULE of the Arbitration Act, or the like which could rise to justifiable doubts as to my independence or impartiality.

I do not have any interest in relation to the subject matter in dispute and also there does not appear any circumstance which may affect my ability to devote sufficient time to the arbitration and in particular my ability to finish the entire arbitration within the statutory period.”

11.9 The petitioner filed an application dated 25.10.2021, under Section 16 read with Sections 12(5) and 14 of the A&C Act, before the Arbitrator, praying that he recuses himself from the arbitral proceedings. The petitioner, *inter alia*, contended that he was ignorant about the proviso to Section 12(5) of the A&C Act when he had agreed for referring the disputes to the Arbitrator. The Arbitrator rejected the said application by an order dated 19.11.2021.

11.10 The Arbitrator is related to the parties as the daughter of Sh. Vivek Shekhar, eldest brother of the parties – who is not involved in the disputes – is married to the son of the Arbitrator.

12. Mr. P. Nagesh contended that the Arbitrator is related to both the parties and is rendered ineligible in terms of Entry no. 9 of the Seventh Schedule of the A&C Act. He submitted that the proviso to Section

12(5) of the A&C Act is not attracted as the petitioner has not executed any agreement waiving the right to object to the ineligibility of the Arbitrator. He referred to the decision of the Supreme Court in *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*⁴ and submitted that the proviso to Section 12(5) of the A&C Act would be applicable only in case the parties had entered into an express agreement in writing. He also referred to the judgment of the Supreme Court in *State of Punjab v. Davinder Pal Singh Bhullar & Ors.*⁵ and contended that the question of waiver would arise only where a party is fully informed of his right and has intentionally abandoned the same. He referred to the decision of a Coordinate Bench of this Court in *JMC Projects (India) Ltd. v. Indure Private Ltd.*⁶ holding that an agreement to waive the applicability of Section 12(5) of the A&C Act is required to be in writing and must reflect the awareness as to the applicability of the said provision.

13. Mr. Sethi countered the aforesaid submissions. He contended that none of the circumstances as referred to in the Seventh Schedule of the A&C Act were attracted. He submitted that the Arbitrator was equally related to the parties and not one of the parties. He submitted that the Parliament had used the expression “*one of the parties*” in Entry no. 9 of the Seventh Schedule of the A&C Act as in such a case, the same would lead to justifiable doubts as to the independence and impartiality of an arbitrator. However, if an arbitrator chosen by the parties is

⁴ (2019) 5 SCC 755

⁵ (2011) 14 SCC 770

⁶ 2020 SCC OnLine Del 1950

equally related to both the parties, no objection, on account of his being partial to any one of the parties due to his relationship, could arise. Second, he submitted that the Arbitrator was related but was not closely related.

Reasons and Conclusion

14. At the outset, it is also relevant to note that, in his application before the Arbitrator, the petitioner had unequivocally stated that he had not cast any aspersion on the integrity or the character of the Arbitrator. He had sought his recusal solely on the ground that he was ineligible to act as an arbitrator and to ensure that neither party, at a future stage, could raise a challenge on the said ground. Paragraphs 3 and 11 of the said application are relevant and set out below:

“3. At the outset, it is submitted that the Applicant has highest regard for the Ld. Sole Arbitrator and by way of the instant application is not raising any question on the competency and integrity of the Arbitrator. It is stated that independence and the impartiality of an Arbitrator is of utmost importance for the sanctity of an arbitration proceeding and any iota of doubt on the same by either of the parties have the effect of the nullifying the whole effort of the Arbitrator to adjudicate the dispute between the parties.

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11. At the cost of the Repetition, the Applicant is again clarifying that by filing the instant application, the Applicant is not casting any aspersions on the integrity and character of the Ld. Sole Arbitrator and it is solely on the ground of the ineligibility attracted to the Ld.

Sole Arbitrator by virtue of Section 12(5) read with Seventh Schedule of the Arbitration Act, 1996 the Applicant is compelled to file the present application in order to ensure that neither of the Parties at a future stage take a stance the arbitration proceedings were conducted by an Arbitrator who was *de jure* ineligible which will scuttle the whole arbitration proceedings and lead to unnecessary wastage of the valuable time and money of the parties and the Ld. Sole Arbitrator.”

15. In the aforesaid context, the questions that fall for consideration of this Court are (i) Whether the Arbitrator is ineligible to be appointed as an arbitrator under Section 12(5) of the A&C Act; and, (2) If so, whether the petitioner has waived his right to object to such ineligibility.

16. Section 12(5) of the A&C Act is set out below:

“12. Grounds for challenge. –

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(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

17. Entries nos. 1 to 9 of the Seventh Schedule of the A&C Act relate to an arbitrator's relations with the parties or the counsel. Entry No. 9 – which is central to the controversy in this petition – reads as under:

“THE SEVENTH SCHEDULE

Arbitrator's relationship with the parties or counsel

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.”

18. The above quoted entry uses the expression '*close family relationship*'. It is not sufficient that the arbitrator is related to any one of the parties; the relationship must be a 'family relationship' and, that too, a close one. Obviously, if an arbitrator has a close family relationship with one of the parties, it is likely to raise doubt as to his independence and impartiality.

19. As noticed above, the Seventh Schedule of the A&C Act was introduced by the Arbitration and Conciliation (Amendment) Act, 2015 based on the 246th Report of the Law Commission of India. The said Report indicates that the Law Commission had drawn extensively from the IBA Guidelines⁷ to suggest inclusion of the Seventh Schedule (referred to as 'Fifth Schedule in the said Report').

20. The IBA Guidelines include a Non-waivable Red List and a Waivable Red List. Entry no. 9 of the Seventh Schedule of the A&C

⁷ International Bar Association Guidelines on conflict of interest in International Arbitration

Act is similarly worded as Clause 2.3.8 of the Waivable Red List. Neither the Seventh Schedule of the A&C Act nor the IBA Guidelines define the expression ‘*close family relationship*’. However, there are number of statutes, which define the said expression.

21. The Vermont Securities Regulations, 2016 defines the expression ‘*close family relationship*’ to mean “*a person within the third degree of relationship, by blood or adoption, or a spouse, step child or a fiduciary of a person within the third degree of relationship*”.⁸ The Employment Standards Act, SNB 1982 (New Brunswick, Canada) defines the expression ‘*close family relationship*’ to mean the relationship “*between parents and their children, between siblings and between grandparents and their grandchildren, and includes a relationship between persons who, though not married to one another and whether or not a blood relationship exists, demonstrate an intention to extend to one another the mutual affection and support normally associated with those relationships first mentioned.*”⁹

22. It is also relevant to refer to Explanation I to the Seventh Schedule of the A&C Act, which defines the expression ‘*close family member*’ as under:

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

⁸ Vermont Securities Regulations (S-2016-01) V.S.R. § 1-2 (m)

⁹ Employment Standards Act, SNB 1982, c E-7.2

23. The expression ‘*close family member*’ is also used in Entries nos. 10, 18 and 19 of Seventh Schedule of the A&C Act. The said entries read as under:

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

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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.”

24. It is seen that even in cases, where there is a likelihood of bias, such as where a family member of an arbitrator has a significant financial interest, the same is applicable only if the family member is a “*spouse, sibling, child, parent or life partner*”. This also indicates that by no stretch, the relationship between the Arbitrator and the parties can be described as a close family relationship solely on the basis that the Arbitrator’s son is married to their niece. He is, in fact, not even a close family member of Sh. Vivek Shekhar (the eldest brother of the parties) within the meaning of Explanation I to the Seventh Schedule of the A&C Act. The family relationship of the parties with the Arbitrator is through Sh. Vivek Shekhar and at best, can be described as distant.

25. The Seventh Schedule of the A&C Act is not exhaustive; the circumstances, as mentioned in the Seventh Schedule of the A&C Act,

are indicative. Nonetheless, the plain language of Entry no. 9 indicates that it is not the legislative intent to render a distant relative of the parties to be ineligible for being appointed as an arbitrator, if both the parties so agree.

26. In the present case, the family relationship between the Arbitrator and the parties cannot be described as a close family relationship. The Arbitrator's son is married to the daughter of the eldest brother of the parties. The Arbitrator is not from the same family as that of the parties.

27. The contention that the parties are closely related to Sh. Vivek Shekhar (as brothers) and he has close family relationship with the Arbitrator, as he is the father-in-law of his daughter, is unpersuasive. Close family relationship of A with B and B with C does not necessarily mean that A and C have a close family relationship. This is clear if one considers that first cousins from the maternal side and first cousins from the paternal side can hardly be considered to have any family relationship.

28. In view of the above, it is unnecessary to decide the question whether the Arbitration Agreement dated 04.10.2021, constituted a waiver in terms of the proviso to Section 12(5) of the A&C Act.

29. Before concluding, it is necessary to note that the learned counsel for Sh. Sudhir Singhal, who was appearing in another appeal, had stated that he would voluntarily join the arbitral proceedings and agree to be a signatory to the Arbitration Agreement, if the mandate of Arbitrator is terminated and another person is appointed in his place.

30. As noticed above, it does appear that Mr. Singhal is also involved in the disputes as he is involved in the family business and holds 33.3% shares in the Company. Therefore, a complete and effective resolution of the disputes may not be possible without him joining the arbitration and agreeing to be bound by the award.

31. In this view, Mr Sethi had sought time to seek instructions and the hearing was adjourned to enable him to secure the necessary instructions. However, after obtaining the necessary instructions, he stated that the respondent was not willing for the disputes to be referred to another arbitrator. The respondent insists on continuing with the arbitration before the Arbitrator, notwithstanding that neither Sh. Sudhir Singhal nor the Company are parties to the proceedings.

32. The petition is unmerited and is, accordingly, dismissed.

MAY 31, 2022
'gsr'/RK

VIBHU BAKHRU, J