2023 INSC 932

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

MISCELLANEOUS APPLICATION NO(S). 184 OF 2023
IN
SPECIAL LEAVE PETITION (CIVIL) NO(S). 8553 OF 2022

CHENNAI METRO RAIL LIMITED
ADMINISTRATIVE BUILDING …APPELLANT(S)

VERSUS

M/S TRANSTONNELSTROY
AFCONS (JV) & ANR. …RESPONDENT(S)

WITH

CIVIL APPEAL NO(S). 4591 OF 2023

J U D G M E N T

S. RAVINDRA BHAT, J.

1. Chennai Metro Rail Limited, the applicant (hereinafter referred to as "Chennai Metro"), a joint venture between the Central Government and the Government of Tamil Nadu, had, pursuant to a public tender, awarded the contract to the respondent (hereafter referred to as "Afcons") have called for a project the total value of Rs. 1566 crores. The contract was signed on 31.01.2011. Eventually, on 15.04.2021, Afcons sought a reference of several heads of disputes to arbitration after certain interlocutory proceedings. Eventually on 29.04.2021,

it was agreed that two dispute heads (claim 2(b) to 2(d)) and the Chennai Metro's counter claim would be referred to a three-member tribunal under the Arbitration and Conciliation Act, 1996 (hereafter "the Act"). The tribunal was then constituted.

2. The tribunal by Minutes dated 14.05.2021 recorded the agreement of parties, that the hearing fee for each arbitrator (there were three members of the Tribunal) was fixed at ₹ 1,00,000/- per session of hearing date. During the course of the proceedings, one member of the tribunal passed away and had to be substituted, which was done on 12.08.2021. The parties proceeded with the conduct of arbitration. In the mean-while, another tribunal had dealt with two claims of Afcons. The award passed in those proceedings became the subject matter of challenge (by Afcons) under Section 34 which was declined by an order of the Madras High Court. The appeal against that order was thereafter pending.

3. The tribunal in the present case on 13.04.2022 decided that suspension of its proceedings due to the pendency of the appeal, to await the outcome of the Division Bench was not in the larger interest of justice and proceeded with other part of the claim which was pending before it. The 10th Meeting/hearing was held on 28.06.2022 and its minutes were issued on 01.07.2022. The tribunal sought to revise the fee payable from ₹ 1,00,000/- to ₹ 2,00,000/- for each session of three hours. Chennai Metro objected to this revision on 08.07.2022 through an affidavit. Expressing its disagreement with the enhancement, Afcons by its affidavit dated 10.07.2022 submitted that the applicability of Schedule IV of the Act, and the issue of increase of tribunals' fee, after initial fixation, was *sub-judice* before this court and the arguments were concluded on 11.05.2022. Afcons therefore requested the tribunal to keep its direction for modification of fee, in abeyance till the decision of this court. In these circumstances, the proceedings continued and cross-examination of Afcons' witnesses was taken up by Chennai Metro on three later dates of hearing. According to Chennai Metro, the issue of

fees was not taken up; yet in the minutes of these proceedings issued on 24.07.2022, the tribunal reiterated its stand about entitlement of revised fee. The tribunal also stated that the session would be considered one complete session for four and a half hours i.e. between 3.30 p.m. to 8 PM. The parties were directed to pay the revised fee from the 10th Virtual Meeting onwards i.e. in effect for the past hearings too. The Tribunal further stated that it was not known when this court would deliver its judgment and also raised doubts about the applicability of the said decision on the present tribunal.

4. Afcons, by its e-mail dated 28.07.2022 informed Chennai Metro that it had paid the revised fee for five hearings (i.e., for 10th to 14th virtual hearings). Chennai Metro therefore filed an application before the Madras High Court on 10.08.2022. In this proceeding under Section 14, the relief sought was a declaration that the mandate of the tribunal (whose members were impleaded as second to the fourth respondents, hereafter collectively referred to as "the tribunal") was terminated in respect of the disputes referred to them. It was highlighted in these proceedings, that the payment of the disputed increased amount by one party, placed Chennai Metro *"in an embarrassing situation and cause the petitioner to be prejudiced and not be treated in an impartial manner by the Ld. Arbitral Tribunal, resulting in the Ld. Arbitral Tribunal to become de jure unable to perform its functions as required."*[1]

5. On 15.09.2022, all three members of the tribunal filed affidavits, in response to the Section 14 petition acknowledging that this court's judgment in *ONGC v. AFCONS Gunasa JV*[2] (hereafter *"ONGC"*) delivered on 30.08.2022 had decided the issue and thus members of the tribunal decided to revert back to the originally agreed fee i.e., ₹1,00,000. In identically worded affidavits, members of the tribunal stated that orders would not create any prejudice to any

[1] As per petition filed by Chennai Metro before HC under section 14 and 15 of the Act.
[2] 2022 (10) SCR 660

party and they were in agreement that they would continue to discharge their duty in an independent and impartial manner in deciding the dispute and that parties need not have any apprehensions. Afcons too resisted the application. Initially, the High Court granted an interim order, staying the proceedings.[3] However, after hearing counsel for the parties, and considering the materials on the record, the court dismissed the application, filed by Chennai Metro through the impugned judgment.

Contentions of Chennai Metro

6. The learned Additional Solicitor General Mr. N. Venkataraman, (hereafter referred to as "ASG") and Mr. Ritin Rai argued that the unilateral increase of fee by the tribunal despite the protests or objections of one of the disputing parties, is impermissible in law, which renders the tribunal being exposed to the charge that justifiable grounds about their continuing to be impartial, arises. Reliance was placed on the judgment of this Court in *ONGC* (supra). In that judgment the court had emphasized that the entire philosophy of arbitration is premised on party autonomy; thus parties are at liberty to fix the fee payable to the Arbitrator. Furthermore, and importantly the court had stressed that once the terms of engagement are finalized it is not open to the tribunal to either vary the fee fixed or the heads under which fee may be charged. It was urged that this court ruled that any deviation from the original terms, [which are in the form of a tripartite arrangement, between the parties and the tribunal], mean that any amendments or modifications can only be with the consent of all the parties; it cannot be unilateral. The ASG relied upon various observations in *ONGC* (supra) and highlighted that the High Court by the impugned order fell into error in selectively considering portions of the judgment. It is submitted that observations made casually cannot form the basis of this court's ratio.

[3] By interim order dated 25.08.2022 in A. No 3566/2022.

7. The Learned ASG relied upon other judgments such as *State of West Bengal vs. Shivanand Pathak*[4] where it was held that bias has many forms which includes judicial obstinacy. Likewise, he relied upon *N.K. Bajpai vs. Union of India*[5], *State of Punjab vs. Devenderpal Singh Bhuller*[6] and *Supreme Court Advocates on record Association vs. Union of India*[7], to elaborate the various forms or heads of bias. According to the ASG, the facts of this case satisfy and attract the principle of bias. Despite resistance by Chennai Metro, the tribunal's insistence that it would continue with the proceedings and charge the higher amount which was not agreed by both parties, led to a reasonable apprehension of bias which goes into the root of the proceedings.

8. It was submitted that Chennai Metro is justified in arguing that the apprehension that the proceedings or the outcome would not be conducted and finalized with an impartial mind. It was argued that the impugned judgment is in error in as much as accepted its face value of the affidavits and the statements contained in it of the members of the tribunal, [who stated that no prejudice would be caused, and that they would conduct the proceedings impartially]. It was highlighted that whether there is a reasonable apprehension of bias or circumstances exist that the conduct of the arbitrator has led to justifiable doubts as to her or his conduct of proceedings not being partial are not based on a subjective statement but rather application of an objective test which is that – '*whether the circumstances are such that a reasonable man having due regard to the facts, would conclude that bias exists*'.

9. It was submitted that the tribunal also withheld and suppressed the fact that the members had received payment of the revised fee from Afcons on 25.07.2022. This is one more aspect which ought to have been duly noted by the High Court.

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[4] (1998) 5 SCC 513
[5] (2012) 4 SCC 653
[6] (2011) 14 SCC 770
[7] (2016) 5 SCC 808

This conduct and the persistence of the members of the tribunal to insist that the higher fee should be paid - and for the past period too, would lead any reasonable man to conclude that there was bias or real likelihood of bias and that the tribunal would not conduct its proceedings in an impartial manner.

10. It was further submitted that the High Court fell into error in holding that the issue of non-payment of fees was a mere temporary phenomenon. The ASG further urged that the reversal of its earlier position by the tribunal did not remove Chennai Metro's apprehensions that the proceedings would not be conducted in an impartial manner, or the outcome may not be based on objective consideration of the merits of the dispute only. It was submitted that permitting the tribunal to continue the proceedings despite these facts would set a wrong precedent.

11. Learned counsel submitted that the decisions relied upon by respondent Afcons which are *HRD Corporations v. Gas Authority of India Ltd.*[8] (hereafter *"HRD"*) and *Bharat Broadband Network Limited v. United Telecoms Ltd*[9] (hereafter *"Bharat Broad Band"*) to the extent that the application under Section 14 is not maintainable unless the party applies to the Tribunal in the first instance, are inapplicable. It is submitted that this was a clear case where both *de facto* and *de jure*, the conduct of the tribunal's members had terminated their mandate.

Contentions of Afcons

12. Mr. Darius J. Kambhatta, urged the court not to interfere with the impugned order. It was submitted that the application under Section 14 was not maintainable; counsel joined issue with the ASG on the applicability of Section 14.

13. It was highlighted that Section 12(5) read with Seventh Schedule [to the Act] provides a comprehensive framework for addressing specific instances of

[8] 2017 (11) SCR 857
[9] (2019) 6 SCR 97

ineligibility and if an arbitrator, is challenged only on those grounds, the parties can directly approach the court under Section 14. The contents of Fifth Schedule [read with Explanation to Section 12 (1)] on the other hand provide a list of relationships which can lead to justifiable grounds that need disclosure at the time of appointment and further, by Section 12 (2) during the course of proceedings, whenever they occur. It is contended that this list includes the "orange" and "red" lists from the IBA[10] guidelines. There is no doubt about an overlap of about 19 items which are of the most serious types. If the circumstances fall within those enumerated 19 items [in the seventh schedule] the party aggrieved can directly approach the court under Section 14; whereas this is not so in other cases. Learned counsel submitted that all other circumstances of justifiable reason to doubt the tribunal's impartiality fall within the ambit of Section 12(3). The remedy in such cases is to approach the tribunal under Section 13(2) and in the eventuality of no success, challenge the award if it is adverse, under Section 34 of the Act.

14. Learned Senior Counsel relied upon the observations of this court in *HRD* (supra), which he said categorically held that Section 12(5) read with the Seventh Schedule, render the arbitrator ineligible and that in such event it is *de jure* unable to perform its functions under Section 14(1)(a). On the other hand, if the grounds are those enumerated in the Fifth Schedule with respect to independence or impartiality, the same has to be decided as a matter of fact by the Tribunal. If unsuccessful, that becomes the ground for challenge by virtue of Section 13(5), under Section 34. Learned Counsel also relied upon the observations in *Bharat Broadband* (supra), which recognize that Section 12(5) is a new provision.

15. Refuting the submissions of the ASG that there is a distinction between two terms "bias and impartiality" it was submitted that bias is synonymous with partiality and therefore opposed to the concept of impartiality. If an individual is biased, automatically he cannot be deemed impartial. Both bias and partiality are

[10] International Bar Association

interchangeable, and the underlying premise for both is the existence of a prejudiced outlook which is opposed to the fundamental tenet of impartiality. Learned counsel points out that the expression used by the Chennai Metro in its Section 14 petition is only "impartial".

16. It is pointed out that in two other references, the Tribunal members, had directed parties to pay revised fees on 09.11.2020 and 15.09.2021. Both Afcons and Chennai Metro paid the revised fee. It was submitted that the tribunal's order dated 09.11.2020 in the other arbitration (UAA-01 reference I-A) and its order dated 15.09.2021 and UAA-05 (reference I-A) and its order in the present case demonstrate these facts. Learned counsel stated that on this premise, having regard to the past conduct of Chennai Metro in paying the revised fee, Afcons informed Chennai Metro by an e-mail dated 28.07.2022 that they had paid the revised fee in the present case. It was lastly argued that the threshold for establishing bias, is extremely high; reliance was placed on *International Airport Authority v. K.D. Bali & Another*[11], where it was underlined that there must be a real likelihood of bias and not mere suspicion of bias.

Legal provisions

17. The relevant provisions of the Act, after its amendments in 2015 and 2019, read as follows:

> ***"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*

[11] 1988 (3) SCR 370

(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.

Explanation1.—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.]

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.
(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

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

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

13.Challenge procedure.—*(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.*

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section(3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub- section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

***14. Failure or impossibility to act**.—(1) [The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if]—*

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section(3) of section 12.

***15. Termination of mandate and substitution of arbitrator**.—(1) In addition to the circumstances referred to in section 13 or section 14,the mandate of an arbitrator shall terminate—*

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

[..]"

Analysis and findings

18. Bias (an expression that the Act has deliberately avoided; instead the term used is *justifiable doubts about the… impartiality* of an arbitrator) is an expression with many facets: subject matter bias; pecuniary bias and personal bias.[12] It is also described as a *"predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias. There must be*

[12] *G. Sarana v University of Lucknow & Ors., 1977 (1) SCR 64*

reasonable apprehension of that predisposition."[13] It has also been held, in *G.N. Nayak v Goa University*[14] that:

> *"Bias may be generally defined as partially or preference. It is true that any person or authority required to act in a judicial or quasi-judicial matter must act impartially."*

19. In *S. Parthasarathi v. State of Andhra Pradesh* (hereafter, *"Parthasarathi"*)[15] this court observed that:

> *"The tests of 'real likelihood' and reasonable suspicion' are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it, whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The Court must look at the impression which other people have."*

Later, in *Kumaon Vikas Mandal v Girija Shankar Pant (hereafter, "Kumaon Vikas Mandal")*[16] the court while agreeing with the position taken in *Parthasarathi* (supra) relied on below observations of this court in *Parthasarathi* (supra):

> *"If right-minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the inquiry; nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced."*

The court [in *Kumaon Vikas Mandal* (supra)], at the same time, remarked on the futility to *'define or list the factors which may or may not give rise to a real danger of bias."*

The other important judgment, which has enriched the discourse on what could be a *reasonable apprehension of bias*, is *Ranjit Thakur v Union of India*[17]*:*

> *"The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and is whether*

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[13] *Secretary to Government, Transport Deptt., Madras v. Munuswamy Mudaliar & Anr.* 1988 (Supp) (2) SCR 673
[14] 2002 (1) SCR 636
[15] 1974 (1) SCR 697
[16] 2000 Supp (4) SCC 248
[17] 1988 (1) SCR 512

> *respondent 4 was likely to be disposed to decide the matter only in a particular way'.*
>
> *[..]*
>
> *As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Indian Judge is not to look at his own mind and ask himself, however, honestly, "Am I biased?"; but to look at the mind of the party before him."*
>
> *(emphasis supplied)*

20. One of the most significant rulings on the issue of bias, was rendered in *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 2)*[18]. The court reviewed the jurisprudence, and several previous precedents, and in *Kumaon Vikas Mandal* (supra) observed that:

> *"The test, therefore, is as to whether a mere apprehension of bias or there being a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom--in the event however the conclusion is otherwise inescapable that there is existing a real danger of bias…"*

21. Returning to the present case, Section 12 (1) of the Act applies at the stage of appointment – which mandates disclosure requirements applicable to arbitrators; (a) sets out the kinds of influence which may lead to 'justifiable doubts' about 'independence and impartibility'; Section 12 (1)(b) sets out the disclosure requirement with respect to the arbitrator's ability to "devote sufficient time". Explanation (1) refers to the grounds of possible conflicts, which need disclosure: they are enumerated under separate heads under Section 34 of the Act, and grouped in seven broad categories in the Fifth Schedule to the Act. The second explanation to Section 12(1) requires disclosure in the form set out in the Sixth Schedule.

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[18] [2000] 1 AC 119

22. Section 12(2) requires disclosure of any event or circumstance which is mandatorily to be shared with the parties – if such circumstances arise after the appointment. Section 12(3) lays out the grounds of challenge to an arbitrator if "justifiable doubts" exist in relation to his "independence or impartiality". Section 12(4) restricts challenge by parties – after appointment *"only for reasons which he becomes aware after appointment is made"*.

23. Section 12(5) was inserted w.e.f. 23.10.2016; it begins with a *non-obstante* clause overriding any *"prior agreement to the contrary"* and stipulates that any person with any kind of relationship set out in the Seventh Schedule (which outlines 19 specific heads and types of relationships - professional, familiar or associational) would be ineligible for appointment as arbitrator. The proviso to Section 12(5) enables the parties to waive the ineligibility conditions under Section 12(5) (read with Seventh Schedule) by express agreement in writing.

24. Section 13 (1) deals with the challenge procedure and enables parties to agree on a procedure to challenge the arbitrator. By Section 13(2), if there is no agreement, the party who intends to challenge the arbitrator has to within 15 days after becoming aware of the tribunal's constitution or within fifteen days after becoming aware of any circumstances referred to in Section 12(3) apply in writing to the reasons for challenge to a tribunal. Section 12(3), as noticed earlier, states that the grounds of challenge to existence of circumstances, giving rise to justifiable doubts about tribunal's independence or impartiality. Section 13(3) states that if the arbitrator does not withdraw or the other party does not in the absence of the other party agreeing according to the challenge; the tribunal has to decide upon it. By Section 13(4) if the challenge is unsuccessful the tribunal would continue with the proceedings and finalize its award. Section 13(5) states that any party can challenge the arbitrator's decision, after the award is made under Section 34. Section 13(6) keeps open the issue of fee to be payable to the arbitrator in the event, the award is set aside on the ground under Section 13(5).

25. Section 14 deals with the contingency of failure or impossibility of the arbitrator or tribunal to act and stipulates that the mandate of an arbitrator shall terminate and he shall be substituted by another "if he becomes *de jure* or *de facto* unable to perform its functions or for other reasons fails to act without undue delay or withdraws from his office or parties agrees to the termination of his mandate". By Section 14(2) if a controversy remains, concerning the grounds referred to in Section 14 (1), the Court may be approached by the parties to decide upon the issue of termination on mandate.

26. Having regard to the above statutory position it would be necessary to consider the judgments cited. The first in this series would be *M/s. Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd.*,[19] where taking note of the amendment made to the Act in 2015, the Court underlined that it was with the objective to induce neutrality of arbitrators especially their independence and impartiality that the amendment act of 2015 was introduced. The amended provision was enacted to identify the circumstances that gave rise to justifiable doubts about the independence or impartiality of the arbitrator and in the event, any of those circumstances exist, the remedy provided is under Section 12. The court particularly underlined Section 12(5) which nullified prior agreements to the contrary. In the facts of that case, it was held that if an advisor had any past or present business relationship with a party, he was ineligible to act as arbitrator.

27. The next case *HRD* (supra), needs to be closely analyzed. The court first examined with some detail, the background of the 2015 amendment, the circumstances leading to it which is the Law Commission Report and eventually, the amendment. The Court then significantly ruled as follows:

> *"15. 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-*

[19] 2017 (1) SCR 798

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.

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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.

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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 common-sensical 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."

28. At this stage it would be crucial to notice that the court made a differentiation. It stated, firstly, that a disclosure in writing about circumstances likely to give justifiable doubts is to be made, at the stage of appointment, and then stated that the disclosure can be challenged under Sections 12(1) to 12(4)

read with Section 13. The court however underlined that in the next category where the person became *ineligible* to be appointed as arbitrator, there was no need for a challenge to be laid before the arbitrator. In such circumstances outlined in Section 12(5), the party aggrieved could directly approach the court under Section 14(1)(a). It was further underlined that in all cases under Section 12(5), there is no challenge procedure to be availed of and that if the arbitrator continues at such, the ground of being unable to perform his function since he falls in any of the categories enumerated in the Seventh Schedule, the party concern may apply to the court.

29. It is, therefore, evident that the rules for disqualification or ineligibility are fairly clear. The ineligibility which attaches to the appointment is the first category: it is contained in Section 12(1) read with the explanation and the Fifth Schedule to the Act. As recounted earlier this schedule has 34 items. In the event any of these circumstances exist, the appointment of the arbitrator is barred. The second category is where the arbitrator to start with is eligible but after appointment incurs any, or becomes subject, to any of the conditions, as enumerated in the Fifth Schedule. In that event, it is open to the party to claim that there could be justifiable doubts about his independence or impartiality. The remedy even then, would be that the party has to seek recourse and apply to the arbitrator in the first stance by virtue of Section 13(2). The wording of Section 13(2) clarifies that a party who intends to challenge the arbitrator, after becoming aware of certain circumstances which lead to justifiable doubts, that party has to within 15 days [of becoming aware] approach the tribunal and seek a ruling. In the event the party is not successful under Section 13(4), the tribunal is duty bound to continue with the proceedings. When the award is made, it can be subjected to challenge under Section 34, by operation of Section 13(5). Clearly, then the substantive grounds and the procedure applicable in relation to situations

where justifiable reasons exist or arise, for questioning the eligibility of a tribunal to decide the reference are enumerated in Sections 12 and 13.

30. As clarified in *HRD* (supra)**,** the grounds of ineligibility which would apply at the appointment stage, would also continue during the proceedings by virtue of Section 12(2). In other words, if during the continuance of the proceedings, the arbitrator becomes subject to any eligibility condition outlying in the Fifth Schedule, the application for his removal on the grounds of justifiable doubts about his impartiality and independence, can be made. According to the procedure outlined in Section 13(2) read with Section 12, such a procedure has to first be followed which means that the party should first appear before the arbitrator and object to his continuance. In case of ineligibility which goes the root of the appointment - and this is the consequence of the introduction of Section 12(5) [which is in emphatic terms and overrides other previous agreements], the arbitrator's relationship with the parties or counsel or the subject matter of the dispute or the existence of any of the categories of the Seventh Schedule (which are 19 specific enumerated grounds) render that tribunal ineligible to even continue. The only exception is if the party waives that ineligibility expressly in writing in terms of the proviso to Section 12(5). Per *HRD* (supra), in that event, the Arbitral Tribunal becomes *de jure*, unable to perform its functions.

31. The analysis in *HRD* (supra), and the subsequent decision in *Bharat Broad Band* (supra), therefore are clear enunciations of law in that any legal disability which attaches on the grounds enumerated in the Fifth Schedule [or any other circumstance, given the terminology of Section 12 (3) which is not restricted to fifth schedule ineligibility], the aggrieved party has to first apply before the tribunal as a matter of law. In other words, the tribunal should be given the opportunity to deal with the party's reservations and decide whether or not to continue with the proceedings. This view is in accord with the long line of

decisions of this court rendered in the context of reasonable apprehension of bias by courts and quasi-judicial authorities starting from *Manak Lal v Dr. Prem Chand*[20] to raise the issue, at the earliest opportunity before same forum.

32. The decisions in *HRD* (supra) and *Bharat Broadband* (supra) are unequivocal and to the effect that the issue of bias should be raised before the same tribunal at the earliest opportunity. The advertence of the time limit of 15 days is nothing but a statutory incorporation of that idea. However, when the grounds enumerated in the Seventh Schedule occur or are brought to the notice of one party unless such party expressly waives its objections, it is *ipso facto* sufficient for that party, to say that the Tribunal's mandate is automatically terminated. The party aggrieved then can go ahead and challenge the tribunal's continuation with the proceedings under Section 14.

33. In the present case, this court is conscious of the fact that *ONGC* (supra) is the authority for the proposition that the issue of fixation of fee, is contractual, and wherever there is no prior arrangement or court order, the tribunal has to fix it at the threshold. The arrangement is by way of a tripartite agreement, which means that regardless of what mode of payment (*ad-valorem* or sitting fee, or different rates, depending upon the number of hearings, or the issue of fee increase being contemplated allowing the tribunal to revise its fee at a later stage), any revision or revisiting of the fee condition, should be based on consultation, and agreement of both contesting parties, and the tribunal. This is clear from the directives enunciated by *ONGC* (supra), through the majority opinion, which has the concurrence of the third judge as well:

> *"1. [..]*
>
> *2. In cases where the arbitrator(s) are appointed by parties in the manner set out in the arbitration agreement, the fees payable to the arbitrators would be in accordance with the arbitration agreement. However, if the arbitral tribunal*

[20] 1957 [1] SCR 575

> *considers that the fee stipulated in the arbitration agreement is unacceptable, the fee proposed by the arbitral tribunal must be indicated with clarity in the course of the preliminary hearings in accordance with these directives. In the preliminary hearings, if all the parties and the arbitral tribunal agree to a revised fee, then that fee would be payable to the arbitrator(s). However, if any of the parties raises an objection to the fee proposed by the arbitrator(s) and no consensus can be arrived at between such a party and the tribunal or a member of the tribunal, then the tribunal or the member of the tribunal should decline the assignment.*
>
> *3. Once the Terms of Reference have been finalised and issued, it would not be open for the arbitral tribunal to vary either the fee fixed or the heads under which the fee may be charged.*
>
> *4. The parties and the arbitral tribunal may make a carve out in the Terms of Reference during the preliminary hearings that the fee fixed therein may be revised upon completion of a specific number of sittings. The quantum of revision and the stage at which such revision would take place must be clearly specified. The parties and the arbitral tribunal may hold another meeting at the stage specified for revision to ascertain the additional number of sittings that may be required for the final adjudication of the dispute which number may then be incorporated in the Terms of Reference as an additional term."*

34. The ruling in *ONGC* (supra) is undoubtedly clear that fee increase can be resorted to only with the agreement of parties; in the event of disagreement by one party, the tribunal has to continue with the previous arrangement, or decline to act as arbitrator. Yet, whether the breach of that rule, as in the present case, by insisting that the increase of fee should prevail does not in this court's opinion, amount to a *per se* ineligibility, reaching to the level of voiding the tribunal's appointment, and terminating its mandate. This can be illustrated with the facts in *HRD* (supra), where the challenge was on the ground of existence of factors mentioned in the fifth schedule, i.e. rendering of opinion by a former Chief Justice, to one of the parties to the dispute, in relation to an unconnected case. The court rejected the plea of ineligibility. Similarly, the objection to the continuance of another arbitrator, a former judge, because he had rendered an award in a previous reference between the same party, and the assumption that he would have some kind of subject matter bias, was overruled. The other case, where this court noted that a fee increase was sought and was warranted, because of revision of fee in a schedule referred to for the purpose of ascertaining fee,

became the focus of dispute. The tribunal noted the need to increase the fee; yet after justifying it, declined to actually direct its increase, because of a previous High Court judgment to the contrary. This court held that such conduct did not render the tribunal ineligible from continuing and deciding the reference. It would be useful to advert to the decision of this court in *National Highways Authority of India & Ors. vs. Gayatri Jhansi Roadways Limited & Ors.*[21] where in an analogous fact situation, where the tribunal felt that fee increase was justified, its mandate was challenged. The court overruled the plea, and held that:

> *"12. We have heard learned Counsel for the both the sides. In our view, Shri Narasimha, learned senior Counsel, is right in stating that in the facts of this case, the fee Schedule was, in fact, fixed by the agreement between the parties. This fee schedule, being based on an earlier circular of 2004, was now liable to be amended from time to time in view of the long passage of time that has ensued between the date of the agreement and the date of the disputes that have arisen under the agreement. We, therefore, hold that the fee Schedule that is contained in the Circular dated 01.06.2017, substituting the earlier fee schedule, will now operate and the arbitrators will be entitled to charge their fees in accordance with this Schedule and not in accordance with the Fourth Schedule to the Arbitration Act.*
>
> *13. We may, however, indicate that the application that was filed before the High Court to remove the arbitrators stating that their mandate must terminate, is wholly disingenuous and would not lie for the simple reason that an arbitrator does not become de jure unable to perform his functions if, by an order passed by such arbitrator(s), all that they have done is to state that, in point of fact, the agreement does govern the arbitral fees to be charged, but that they were bound to follow the Delhi High Court in Gayatri Jhansi Roadways Limited case which clearly mandated that the Fourth Schedule and not the agreement would govern.*
>
> *14. The arbitrators merely followed the law laid down by the Delhi High Court and cannot, on that count, be said to have done anything wrong so that their mandate may be terminated as if they have now become de jure unable to perform their functions. The learned Single Judge, in allowing the Section 14 application, therefore, was in error and we set aside the judgment of the learned Single Judge on this count."*

35. In a recent decision of the UK Supreme Court, in *Halliburton Company v Chubb Bermuda Insurance Ltd*[22] *., (hereafter, "Halliburton")* it was held, that

[21] 2019 [9] SCR 1001
[22] 2021 [2] All E.R. 1175

arbitrators were under a duty of disclosure under the English law. The principle of party autonomy, the court concluded that, by an agreement, could be waived by the parties. This duty itself is implied in a mandatory provision of the UK Arbitration Act (of 1996).

36. Halliburton (supra) was concerned an *ad hoc* arbitration governed by the laws of New York but seated in London. The removal of the presiding arbitrator became the subject of an application on various grounds, including his failure to disclose certain appointments had given rise to justifiable doubts regarding his impartiality. The applicant alleged this duty meant that he should have disclosed various previous arbitration engagements by the insurance company, which nominated him, especially in some cases, where the claims were somewhat similar to those that the applicant had been exposed to, but the insurer had denied its liability for. The Supreme Court underlined that arbitrators perform judicial functions and are required to act as judges would, without fear or favour, affection or ill-will. One way of satisfying the parties as to an arbitrator's impartiality is disclosure. The role of disclosure was summarised by the Lord Hodge who delivered the opinion of the Court:

> *"70. An arbitrator, like a judge, must always be alive to the possibility of apparent bias and of actual but unconscious bias. ... One way in which an arbitrator can avoid the appearance of bias is by disclosing matters which could arguably be said to give rise to a real possibility of bias. Such disclosure allows the parties to consider the disclosed circumstances, obtain necessary advice, and decide whether there is a problem with the involvement of the arbitrator in the reference and, if so, whether to object or otherwise to act to mitigate or remove the problem…"*

The UK Act does not place <u>any express obligation on potential or serving arbitrators</u> to disclose to parties regarding matters that concern their independence or impartiality. This duty was not previously recognized by the courts in the UK. The Supreme Court in *Halliburton (supra)* had to uniquely determine where such a duty existed in English law. The Court found that the duty of disclosure for arbitrators was implicitly based on section 33 of the 1996 Act (Arbitration Act,

1996), which provides that arbitral tribunals shall act fairly and impartially as between the parties. As the Court said that the legal obligation to disclose matters that could give rise to justifiable doubts as to an arbitrator's impartiality was *"encompassed within the statutory obligation of fairness" i*t was *"also an essential corollary of the statutory obligation of impartiality."*

37. Discussing the duty, the UK Supreme Court considered if an arbitrator with a financial relationship with a party to the dispute in which he or she was appointed was under a duty to disclose it; and held that it would *"be incumbent on the arbitrator to disclose the relationship in order to comply with his statutory duty of fairness under section 33 of the 1996 Act."* The court held that there was a legal duty of disclosure in English law which was *"encompassed within the statutory duties of an arbitrator under section 33,"* while adding that this was *"a component of the arbitrator's statutory duty to act fairly and impartially," and that it* did not override the separate duty of privacy and confidentiality under the English law.

38. Our enactment is in a sense, an improvement. Parliament's conscious effort in amending the Act, because of the inclusion of the fifth schedule, as a disclosure requirement, as an eligibility condition [Section 12 (1)] and a continuing eligibility condition, for functioning [Section 12 (2)] and later, through Section 12 (5), the absolute ineligibility conditions that render the appointment, and participation illegal, *going to the root of the jurisdiction, divesting the authority of the tribunal, thus terminating the mandate of the arbitrator*, as a consequence of the existence of any condition enumerated in the seventh schedule, are to clear the air of any ambiguities. The only manner of escaping the wrath, so to say of Section 12 (5) is the waiver- in writing by the party likely to be aggrieved.

39. The attempt by Chennai Metro to say that the concept of *de jure* ineligibility because of existence of justifiable doubts about impartiality or independence of the tribunal on unenumerated grounds [or other than those

outlined as statutory ineligibility conditions in terms of Sections 12 (5)], therefore cannot be sustained. We can hardly conceive of grounds other than those mentioned in the said schedule, occasioning an application in terms of Section 12 (3). In case, this court were in fact make an exception to uphold Chennai Metro's plea, the consequences could well be an explosion in the court docket and other unforeseen results. Skipping the statutory route carefully devised by Parliament can cast yet more spells of uncertainty upon the arbitration process. In other words, the *de jure* condition is not the key which unlocks the doors that bar challenges, *mid-stream,* and should *"not to unlock the gates which shuts the court out"*[23] from what could potentially become causes of arbitrator challenge, during the course of arbitration proceedings, other than what the Act specifically provides for.

40. For the foregoing reasons, this court holds that Chennai Metro's application cannot succeed. The Arbitrators are directed to resume the proceedings and decide the case in accordance with law. The impugned order is upheld. The application is accordingly dismissed and the appeal is disposed of in above terms.

.....J.
[S. RAVINDRA BHAT]

.....J.
[ARAVIND KUMAR]

NEW DELHI,
OCTOBER 19, 2023.

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[23] *Union of India v Hindustan Development Corporation* 1993 (3) SCR 108- so said in a different context, about the applicability of the doctrine of legitimate expectation.