HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION (L) NO. 27638 OF 2023
WITH
COMMERCIAL ARBITRATION PETITION (L) NO. 27643 OF 2023

Era International .. Petitioner

Versus

Aditya Birla Global Trading India Private Limited Previously known as Swiss Singapore India Pvt Ltd and others .. Respondents

...

Mr. Rahul Totala with Mr.Manish Priyadarshi with Mr.Naman Maheshwari, Ms.Vidisha Rohira and Ms.Apeksha Agarwal i/b Ashwin Poojari, R.T. Legal for the petitioner.
Mr.Rushabh Sheth with Mr.Sayeed Mulani and Ms.Akshata Kadam and Ms.Ria Goradia i/b Mulani & Co. for respondent no.1.
Mr.Vikram Nankani, Sr. Advocate with Mr.Sumeer Nankani, Anuja, Ms.Neha Bhosale, Ms.Laveena Tejwania and Mr.Divadkar i/b NDB Law for respondent no.2.

CORAM: BHARATI DANGRE, J.
RESERVED : 29th JANUARY, 2024
PRONOUNCED: 26th FEBRUARY, 2024

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JUDGMENT:-

1 The above mentioned two petitions are filed by the petitioner, Era International (for short "Era"), a partnership firm engaged in the activity, of import of quality coal from global sellers and catering to a diverse clientele operating brick kilns and various industries within India.

The respondent no.1 Aditya Birla Global Trading Pvt Ltd (for short 'Aditya Birla') is also a Company, involved *inter alia*, in supply of thermal, cooking and petroleum coal to energy deficit countries its sourcing being spread all over the globe.

2 The background facts of the present petitions reveal that in or about September 2022, pursuant to the requirement of Era and premised on the representation made by Aditya Birla, three sale contracts were entered for supply of distinct quantities of US coal to the following effect :-

(i) sale contract no.1 dated 27/9/2021 for supply of 5000 MT
(ii) sale contract no.2 dated 7/10/2021 for supply of 2500 MT
(iii) sale contract no.3 dated 9/10/2021 for supply of 5000 MT of US coal.

Petitions filed under Section 14 read with Section 11 of the Arbitration and Conciliation Act, 1996, Era seek reliefs in the backdrop of three contracts entered in or about September 2022, with the respondent Aditya Birla, in form of sale contracts for supply of distinct quantities of US coal.

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Copies of the distinct contracts are enclosed along with the petitions, and it is the case of the petitioner, that from time to time, it has deposited earnest money(EMD) in furtherance of the said contracts, which contain certain standard clauses.

Clause no.6 of the subject Contract, provide for quality determination and stipulate that the quality of the coal shall be final, as per Load Port Report (LPR) and according to Clause 14, the risk of loss or damage to the goods is transferred from seller to the buyer on execution of the contract and it contemplate that the title will pass to the buyers from the sellers, when the entire payment is made by the buyer and the delivery note is issued by the seller.

It is the case of Era, that Clause no.6 of the said contract mandated the submission of a Load Port Report (LPR) for the supplied coal for quality determination and it accuses respondent no.1 Aditya Birla of violating the contract by failing to provide contract wise LPRs, as required under clause 6 of the Sale contract for quality determination, and this ultimately resulted into disputes. It is the allegation against the representative of Aditya Birla that he directed Era to take delivery of coal without conducting any requisite quality assessment, as he intended unwarranted solicitations for remuneration from Era.

Though it was insisted that the material be lifted, without due compliance, Era opted not to lift the coal unless the issues were resolved, which prompted Aditya Birla to threaten it

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about sale of the material to third party and book the loss on its account.

Era requested Aditya Birla to furnish detail information concerning the disposal rates of the coal and to obtain confirmation of the said rates from it before selling it to third party, as it was ready with its internal evaluation and market analysis of US coal prices during the relevant period.

3 Era attribute unprofessional conduct to Aditya Birla, and as a consequence, it opted not to lift the cargo and never took possession of the goods (coal) in question.

Correspondence was exchanged between the parties and according to Era, in a completely whimsical manner, the respondent no.1, through an email dated 6/4/2022 conveyed, that owing to the alleged breach of contract no.1 and 2, it was compelled to dispose off the contractual cargo to third party, as a measure to mitigate losses to be communicated to Era shortly. Further, it purportedly adjusted the EMD deposited by Era against the sale contract no.1 and sale contract no.2, respectively, and claimed alleged losses of Rs.50,91,224.78 from it.

At a little later point, the respondent no.1, through its email communication, intimated about the sale of third contractual cargo, covered by sale contract no.2 and purportedly offset the EMD deposited by Era and assessed and alleged loss of Rs.67,14,69.21 in respect of sale contract no.3, whereas on 25/4/2022, the respondent no.1 communicated the sale of

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contractual cargo in sale contract no.1 and sale contract no.2. It is alleged that in an arbitrary manner, it purportedly adjusted the EMD amounting to Rs.49,20,000/- and Rs. 57,13,222/- deposited by Era against sale contract nos.1 and 2 respectively and claim alleged loss of Rs.50,91,224.78.

Though at one point of time, the respondent no.1 concurred with Era's proposition to sell the contractual cargo, on the other hand, it expressed its intention to disinvest the contractual coal to third party to mitigate the losses and indicated that any resultant losses stemming from the sale of coal to third parties, exceeding the EMD, would be ascribed to Era.

According to Era, the title and possession of the goods in question was never passed on to it, and all the while, remained in Aditya Birla and hence, there was no question of any losses incurred.

4 The petitioner, by addressing an email on 13/5/2022, submitted objections regarding the respondent no.1's action in relation to the sale of contractual cargo and sought release of the EMD, but as expected, no heed was paid to its request.

An attempt was made to reconcile the sale price with request to refund the surplus amount, but even this attempt did not yield any result and instead of refund of the EMDs submitted by the petitioner, a legal notice dated 19/12/2022 was issued by respondent no.1 invoking arbitration clause i.e. clause no.23 of sale contract no.2, as well as sale contract no.3.

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5 Era received a letter dated 3/2/2023 from the respondent no.1's Advocate's Law Firm Mulani & Company and the letter was addressed to the Registrar, Mumbai Centre for International Arbitration (MCIA) i.e. respondent no.2 and the referral was sought for appointment of an arbitrator concerning sale contract no.2 and sale contract no.3.

6 The present petitions are filed by the petitioner, Era International under the provision of Section 14 read with Section 11 of the Arbitration and Conciliation Act, 1996, in the background fact, that though the parties involved in the dispute had chosen 'MCIA" as a private arbitral institution in the arbitration agreement, it has failed to appoint an unbiased/impartial arbitrator and has initiated the process of arbitration in complete violation of the Act of 2016, as well as MCIA Rules, 2017. The petitions also raise a grievance as regards the process adopted by respondent no.2 in appointing the arbitrator.

It is the contention of the petitioner, that Rule 3.1 of the MCIA Rules 2017 mandate that any party intending to commence arbitration as the claimant shall furnish a written request for a reference before MCIA along with the requisite details and in this case, the respondent no.1's Advocate/firm is neither a claimant nor a party to the ongoing dispute and therefore, it lacks standing to initiate reference on behalf of Aditya Birla and the reference in question, suffer from acute deficiency,

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specifically in absence of the requisite Letter of Authority, Power of Attorney, Vakalatnama, Board Resolution etc.from respondent no.1.

7 Upon the reference being made on 24/3/2023, the MCIA registered the request and converted the same into arbitration case no. MCIA/Arb/60/2022 and MCIA/Arb/63/2022 and designated Ms.Ila Kapoor, as a Sole Arbitrator to preside over the disputes pertaining to sale contract dated 7/10/2021 and sale contract dated 9/10/2021.

8 The learned arbitrator scheduled the initial hearing for 7/4/2023 and this was communicated to the petitioner via e-mail dated 6/4/2023 and the petitioner was aggrieved by nomination of the Sole Arbitrator.

As per the petitioner, Ms. Ila Kapoor is a Partner at Shardul Amarchand Mangaldas, a Law firm based in New Delhi and according to it, the said Law firm had previously represented the group of companies of respondent no.1 Aditya Birla on numerous occasions.

Hence, on 6/4/2023, the petitioner via email explicitly conveyed to the Arbitrator, about its reservations and indicated that since the arbitration proceedings are expected to be conducted in a fair and impartial manner and as the Arbitrator shall not be connected, directly or indirectly with the parties to the Arbitration, the arbitrator was requested not to enter upon the reference, though it was indicated that there is no objection for the arbitration process, as such.

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Despite the petitioner's objection, MCIA continued with the nomination of Ms.Ila Kapoor as the Sole Arbitrator, in respect of sale contract no.2 and 3, and the petitioner did not extend consent to either of the two appointments, owing to the reservations expressed by him.

In the interest of ensuring complete independence and impartiality, the petitioner requested MCIA to appoint a retired judicial officer, either from the Punjab and Haryana High Court, or from the Bombay High Court, as a Sole Arbitrator, however, this request was disregarded.

9 The learned Arbitrator continued with the arbitral proceedings and issued instructions to submit Statement of Claim/counter claim by her order dated 9/6/2023.

Since the learned Arbitrator continued with the proceedings, the petitioner submitted applications u/s.12 and 13 of the Arbitration and Conciliation Act, 1996, in conjunction with Schedule V and VII before the Sole Arbitrator which was accompanied with relevant documents and copies of internet screen shots, to demonstrate that the learned Arbitrator, either personally or through her Law firm was providing legal services to the respondent no.1 Aditya Birla.

The respondent no.1 submitted an extensive reply opposing the application, though the Arbitrator refrained from providing any statement regarding her impartiality and integrity.

10 Vide email dated 26/7/2023, the Arbitrator

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forwarded the petitioner's challenge and the respondent's reply to the MCIA Council for resolution in terms of Rule 10 of the MCIA Rules of 2017 and the Arbitral proceedings were in the mean time, suspended, pending the petitioner's challenge.

11 The petitioner requested the MCIA to offer an opportunity of hearing in person, so as to substantiate its objection regarding appointment of Ms.Ila Kapoor as the Sole Arbitrator in the two arbitral proceedings, as according to it, the appointment was in the teeth of Section 12(5) and Schedule VII of the Act of 1996.

It is the case of the petitioner that though, it kept on persuading the MCIA for an opportunity of hearing, the petitioner was informed on 7/9/2023, that it had arrived at a decision, which shall be communicated subsequently.

12 On 8/9/2023, the MCIA dismissed the petitioner's challenge by asserting it to be misconceived and by reasoning, that the Arbitrator's Law Firm (Shardul Amarchand Mangaldas) has not represented any Aditya Birla Entity, in connection with the transaction cited by the petitioner and it was also reflected that, the Managing Partner of the said law firm, served on the Advisory Council of BITS Law School, in her personal capacity, a position, by no stretch of imagination, shall compromise with the role as an Arbitrator, giving rise to any doubt about her independence and impartiality.

13 MCIA thereafter permitted the nominated Arbitrator

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to proceed and conduct the arbitral proceedings and it is in this background, the petitioner has sought the relief, of terminating the mandate of the Arbitrator i.e. respondent no.3, who was appointed by respondent no.2, in relation to sale contracts and thereafter, appoint an independent Arbitrator by exercising the power u/s.11 of the Arbitration and Conciliation Act, 1996.

By way of interim order, it is also prayed that the respondent no.2 and 3 be restrained from proceeding ahead with the arbitral proceedings.

14 I have heard learned counsel Mr.Rahul Totala for the petitioner and Mr.Rushabh Seth for the respondent no.1. The learned senior counsel Mr.Vikram Nankani representing respondent no.2, has passionately supported the decision of the MCIA, in rejecting the objections raised by the petitioner, creating a doubt on the neutrality and impartiality of the sole arbitrator appointed by it.

Mr.Nankani has raised a preliminary objection about the maintainability of the caption proceedings u/s.14 of the Act of 1996, and it is submitted by him that clause no.23 of Sale Contracts executed between the parties set out the Arbitration agreement and it is agreed between the parties that the disputes arising between them shall be resolved through Arbitration in accordance with the Arbitration Rules of Mumbai Centre for International Arbitration (MCIA Rules) and hence, they formed part of the arbitration agreement and the parties have agreed to be

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governed by the said Rules, for the purpose of administration and conduct of the arbitral proceedings.

By relying upon various clauses of the MCIA Rules, it is his contention that the Rules and the procedure set out, therein, for conduct of Arbitration(s) are comprehensive and they stand on par with globally accepted standards and principles. Further, according to Mr.Nankani, the Rules are in consonance with the Scheme of 1996 Act, and are framed in tune with the overall object of Arbitration, being an alternate, efficacious and expeditious Dispute Resolution Mechanism.

Having accepted the MCIA rules as a part of the Arbitration Agreement and since the bedrock of an arbitration is party autonomy, Mr.Nankani would urge that the primacy has to be afforded to the agreement between the parties, to be governed by institutional rules and for this purpose, he would rely upon the decision of the Apex Court in case of *Amazon.com NV Investments Holdings LLC Vs. Future Retail Ltd.*[1] (2022) 1 SCC 209 which has categorically held that upon agreeing to be governed by the institutional rules, no party can after participating in the proceedings before an emergency arbitrator, on losing, turn around and say that the award is nullity, considering the binding nature of the award.

He would submit that when once the parties have agreed to have the proceedings conducted through the arbitral

1 (2022) 1 SCC 209

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institution, it is not now open to the petitioner to oppugn the process itself; particularly, when as per the procedure contemplated in the MCIA Rules, the objection raised to the nomination of the Arbitrator, has been turned down. Mr.Nankani would further submit that the petitioner himself has acted in accordance with the MCIA Rules, as he invoked it for the purpose of raising challenge to the appointment of the Arbitrator by preferring an application under Rule 10.

Having agreed to be governed by the MCIA Rules, which provide a full-fledged mechanism for the purpose of challenging the Arbitrator's appointment, the learned Senior counsel would submit that, now it is not open to the petitioner to maintain the caption proceedings u/s.14 of the Act, as this Court shall not sit in Appeal against the decision of MCIA Council dismissing the petitioner's challenge to the appointment of Arbitrator on ground of lack of impartiality. The objection raised having been rejected, according to him, a two-fold blow cannot be mounted, by approaching this Court under Section 14, when the remedy available under the Rules is availed by approaching the Council and the only remedy now available is, to assail the award passed by the Arbitrator, under Section 34 of the Arbitration and Conciliation Act of 1996.

15 Mr.Nankani would lay his emphasis upon the words "unless otherwise agreed by the parties" in sub-section (2) of Section 14, as he would develop his argument, by asserting that

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when the parties implicitly agreed to be referred to Arbitration, and preferred institutional arbitration, now, the parties should follow the same route and when, once under Rule 10, the Council has pronounced its decision, then, it cannot be subjected to challenge before the Court.

He would place reliance upon Rule 36 of the MCIA Rules, which provide that the decision of the Chairman, the Council and the Registrar, with respect to all matters relating to an arbitration, shall be conclusive and binding upon the parties and the Tribunal and they shall not be required to provide reasons for such decisions.

He would also rely upon Rule 36.2 of the MCIA Rules, which provide that the parties shall be taken to have waived, any right of Appeal or Review, in respect of any decision of Chairman, the Council and the Registrar to any State Court or other judicial authority.

16 Mr.Rushabh Seth, representing the respondent no.1 join Mr.Nankani, in raising challenge to the maintainability of the petition u/s.14(2), in view of the fact that the parties have agreed to the procedure by referring the disputes to MCIA and the rules formulated, provide that the decision taken by MCIA Council, shall be final and binding on the parties. It is also his contention that the petition u/s.14(2) of the Act, would not be maintainable, in view of the challenge to the mandate of the Arbitrator having already decided u/s.13 of the Act of 1996.

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Mr.Seth would invoke the law laid down by this Court in case of *Hasmukhlal H. Doshi and Anr, Vs. M.L. Pendse, Retired Chief Justice of the Karnataka High Court and Ors,*[2] and the specific observations in paragraph no.14 of the Law Report, which is followed and accepted by Andhra Pradesh High Court in case of *Yashwitha Constructions (P) Ltd. Vs. Simplex Concrete Piles India Ltd.*[3].

Relying upon the pronouncement in these two decisions, it is his contention that when a decision is rendered u/s.13(3) of the Act and in the wake of the embargo created by Section 5, that no judicial authority, shall intervene except as provided under the Act, the petition under section 14 cannot be entertained.

Mr.Seth would further submit that the petitioner made a specific application under Seventh Schedule citing *de jure* ineligibility of the arbitrator and called upon the Council to specifically decide the same, under the challenge procedure provided under Rule 10 of the MCIA Rules and having obtained a decision on the same, the petitioner is precluded from re-agitating the same issue before this Court by mounting one more attack.

17 Dealing with the aforesaid preliminary submissions, Mr.Totala, learned counsel for the petitioner would submit that if

2 *(2000) 3 Mh.L.J, 690*

3 *(2008) 4 ANDH LT 266*

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the appointment of Arbitrator is hit by Seventh Schedule, he is ineligible to continue as an Arbitrator and his mandate stand automatically terminated.

Mr.Totala do not dispute that the parties agreed for resolution of their disputes through the Mumbai Centre for International Arbitration (MCIA) and he has no objection for the arbitration being conducted as per the Arbitration Rules of the MCIA, but he would submit that, at the time of signing of the Agreement, with the inclusion of an MCIA clause, the petitioner did not contemplate that an Arbitrator, nominated by it, would be unfit or that his/her appointment shall be in the teeth of Schedule VII of the Act of 1996, and if it is so, he becomes *de jure* ineligible and cannot continue as such.

According to the learned counsel, Arbitration Act, 1996 equally governs the adhoc arbitration and institutional arbitrations and therefore, the provisions, in form of Sections 12 to 14 would govern the institutional arbitration too.

18 By relying upon *non obstante* clause in Section 12, Mr.Totala would urge that any person, with any kind of relationship set out in Seventh Schedule would be ineligible for appointment as an arbitrator, unless the parties waive the ineligibility expressly, in writing, in terms of proviso to Section 12(5).

He would further submit that in view of Section 12(5) of the Act and the law laid down by the Apex Court in

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Jaipur Zila Dugdh Utpadak Sahakari Sangh Limited & Ors. Vs. M/s. Ajay Sales & Suppliers,[4] and the decision in case of *Bharat Broadband Network Limited Vs. United Telecoms Limited*[5], any agreement between the parties contracting out of the remedy u/s.14(2) to approach the Court, cannot mean to include a challenge on account of the circumstances contemplated in Seventh Schedule, which by virtue of law, act as a disqualification for the Arbitrator to conduct arbitration. According to him, the ineligibility accruing in the wake of Seventh Schedule, applies strictly and goes to the root of the matter and the only manner to waive its applicability, is through an express agreement in writing between the parties.

19 It is also the submission of Mr.Totala, that MCIA is a private arbitral institution and not an 'arbitral institution' as defined u/s.2(ca) of the Arbitration and Conciliation Act (Amendment) Act, 2019 and in case of any inconsistency in the MCIA Rules, and the provisions of the Arbitration Act, the Act shall prevail. It is also his specific submission that the impugned decision of the MCIA Council under the garb of MCIA Rules cannot permit violation of Section 12(5) read with Seventh Schedule and there is no bar to get the issue adjudicated through this Court u/s.14(2), despite rejection of an application under Rule 10 by the Council, which is akin to Section 13, as both provisions operate in distinct fields.

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4 (2021) 17 SCC 248

5 2019 (5) SCC 755

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In any case, he would submit that an award passed by a person who is ineligible to act as an Arbitrator, by virtue of Section 14, is a nullity and cannot be enforced and party autonomy cannot be used as a shield, to cure such an illegality and this Court shall definitely exercise its power when the mandate of law is breached or circumstances, so require.

20 I shall first deal with the argument of maintainability of the petition advanced by Mr.Nankani and Mr.Seth, which is strongly contested by Mr.Totala.

In the scheme of the Arbitration and Conciliation Act, 1996, as contained in Chapter III, which provides for composition of Arbitral Tribunal, Section 11 contemplate that subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbtirators.

Sub-Section (3-A) of Section 11 permit the Supreme Court and High Court to designate the arbitral institutions for the purpose of this Act.

Sub-section (8) of Section 11 introduced with effect from 23/10/2015 require a disclosure from the prospective arbitrator and it reads to the following effect:-

> ***11(8)*** *The arbitral institution referred to in sub-sections (4), (5) and (6) before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to -*
>
> *(a) any qualifications required for the arbitrator by the agreement of the parties; and*
>
> *(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.*

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The applicability of Section 12 is, therefore, extended even to the arbitral institutions, and the disclosure from the prospective arbitrator is mandatory.

21 Section 12 of the Arbitration Act provide the grounds for challenge to the appointment of an Arbitrator and in view of sub-section (1) inserted by Act 3 of 2016, when a person is approached in connection with his possible appointment as an Arbitrator, he shall disclose in writing the following circumstances:-

> *a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and*
> *(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.*

Explanation 1 and 2 appended to sub-section (1) of Section 12 reads thus:-

> *Explanation* 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.
> *Explanation* 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.]

22 It is also necessary to reproduce the other sub-sections of Section 12.

> *(2) An Arbitrator, from the time of his appointment and through out the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.*

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(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.

23 Section 13 of the Act prescribe a challenge procedure and it reads thus,

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.

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24 In the above Scheme of the Statute, it is also necessary to take note of Section 14, which provide for termination of the mandate of the arbitrator and its substitution by another, in the following manner :-

> ***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 (2) of Section 12.*

Apart from this, Section 15 provide for some additional circumstances, when the mandate of the Arbitrator shall stand terminated, where the arbitrator withdraws from office for any reason, or by or pursuant to the agreement of the parties, the mandate is terminated.

25 In order to ensure the sanctity of the process of arbitration, it necessarily depend upon its basic character, being offering resolution through a neutral and impartial person, to act as an Arbitrator. When a person is approached in connection with his possible appointment, sub-section (1) of Section 12 contemplate that he shall disclose in writing any circumstances,

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such as 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 doubt, as to his/her independence or impartiality.

26 The above rigor also apply with equal force in case of institutional arbitration too.

In determining so, the grounds stated in the Fifth Schedule shall be the guiding factor and the disclosure is to be made in the form specified in Sixth Schedule. Further, if from the time of the appointment of the Arbitrator, and throughout the Arbitral proceedings, any contingency occur, which would give rise to justifiable doubts, about the independence or impartiality of the Arbitrator, then the Arbitrator shall inform of such circumstances.

An appointment of Arbitrator can be challenged only if the circumstances exist that give rise to justifiable doubts as to his independence or impartiality.

27 Another provision of much significance introduced in Section 12, is sub-section (5), which reads thus :-

> "(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."

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In the wake of the aforesaid provision, any person whose relationship, either with the parties or counsel or the subject matter of the dispute, fall within the ambit of Seventh Schedule, he shall be ineligible to be appointed as an Arbitrator, though it is permissible for the parties to waive the applicability of the sub-section, only by an express agreement in writing.

Sub-section (5) begins with a *non-obstante* clause stating any "prior agreement to the contrary", which stipulate that any person, with the kind of relationship as set out in Seventh Schedule, would be ineligible to be appointed as an Arbitrator. Even if such an Arbitrator is appointed, he shall be ineligible to continue as such, with only one exception, i.e. when the parties waive the ineligibility, expressly. Any prior agreement to the contrary between the parties is thus nullified by the mandate of sub-section (5) of Section 12 and the said provision read with Schedule VII, is the mandatory and re-negotiable provision.

28 In light of this statutory scheme, when the dispute between the parties were referred to MCIA, it nominated an Arbitrator and upon this appointment, the petitioner expressed doubt as according to it, the appointment was hit by Section 12(5) r/w Seventh Schedule.

Though the petitioner raised a challenge to the appointment of the Arbitrator, it was turned down by the decision of the Council by exercising the power under Rule 10 of the MCIA Rules, which according to MCIA provide, a complete

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mechanism for challenging the appointment, if circumstances give rise to justifiable doubts, as to the Arbitrator's impartiality and/or independence.

10.9 of the MCIA Rules, provide that if the Council rejects the challenge, the Arbitrator shall continue with the Arbitration and the arbitral shall proceedings continue before the Arbitrator appointed by MCIA.

29 The question that arises for consideration is, whether this finality and bindingness of the decision of the Council, would prevent this Court from exercising the power available under sub-section (2) of Section 14, which clearly stipulate that if a controversy remains concerning any of other grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed, apply to the Court, to decide on termination of the mandate.

Sub-section (1) of Section 14 contemplate that the mandate of the Arbitrator shall terminate, if he become *de jure* or *de facto* unable to perform his functions and the Arbitrator who, in the wake of sub-section (5) of Section 12 is ineligible to be appointed as an Arbitrator, in the wake of his appointment falling in any of the category in Seventh Schedule, would incur a *de jure* inability to discharge his role as an Arbitrator.

In such a scenario, when a controversy remains whether an Arbitrator has incurred an ineligibility and it is left to the Court, to pronounce upon, as to whether the mandate of the

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Arbitrator is terminated, merely on the ground that the parties have agreed to refer their disputes to the MCIA i.e. Institutional Arbitration, will not by itself exclude the applicability of sub-section (2) of Section 14 and it shall not denude the Court, of this power.

30 The Arbitration and Conciliation Act, 1996 contemplate reference of disputes to an Arbitral Tribunal, which means either a Sole Arbitrator or a panel of arbitrators. The reference of dispute to the Arbitral Tribunal can be made either by reference to an arbitral institution, which is defined in Section 2(ca) as an institution designated by the Supreme Court or the High Court under the Act, or it can be on adhoc basis. It must be specifically noted that the Act, and in particular, part -1, which relate to those arbitrations, where the place of arbitration is in India do not make any distinction between institutional arbitration and adhoc arbitration.

For all purposes, the Arbitrations shall be governed by Part-1 and it would even cover applicability of Section 12 to Section 15.

Once the Arbitral proceedings commence, the power to be exercised by the Arbitral Tribunal as contemplated under Chapter IV also do not make any distinction, whether the arbitration is being conducted through institutional arbitration or it is an adhoc arbitration.

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As far as MCIA is concerned, it is recognised arbitral institution and it is not in dispute that the Supreme Court as well as this Court, on various occasions, have referred arbitrations to MCIA and it is one of the leading international arbitration institutions in the country.

31 For the purpose of uniformity and certainty, MCIA has framed its own Rules in the year 2017 and the rules govern the arbitration conducted through MCIA. However, clause 1.1 of the Rules clearly stipulate as below :-

> ***"1.1*** *Where parties have agreed to refer their disputes to the MCIA for arbitration (whether before or after a dispute has arisen), the parties shall be deemed to have agreed that the arbitration shall be conducted and administered in accordance with these Rules or (unless the parties have agreed otherwise) such amended rules as the MCIA may have adopted hereafter and may be in effect on the date of commencement of the arbitration, and that such Rules have been incorporated by reference into their agreement. If any of these Rules are in conflict with a mandatory provision of law applicable to the arbitration or the arbitration agreement from which the parties cannot derogate, that mandatory provision shall prevail."*

The Rules have defined "Council" to mean council of arbitration of the MCIA and includes a Committee of the Council.

In tune with the Arbitration and Conciliation, 1996, the MCIA Rules provide for the procedure to be adhered to, in conduct of the arbitral proceedings through the MCIA and the proceedings shall commence when a written request for arbitration is received by the Registrar, which is accompanied with a Statement of Claim. It is followed by the response to the

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request for arbitration and the response may also include the Statement of Defence and the Statement of counter claim.

The Rules also lay its emphasis on independence, impartiality and neutrality of the arbitrator and in sync with the Act of 1996, the prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence in the form prescribed by MCIA.

In the said statement, the prospective arbitrator, in terms of Rule 6.2, shall disclose any facts or circumstances, which may give rise to justifiable doubts about his impartiality or independence and he shall immediately disclose to the parties any such circumstances, which may arise any time during the proceedings.

32 Rule 10 of the Rules of 2017 adumbrate the procedure for challenge of arbitrators and it provide thus :-

> ***"10.1*** *Any Arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and/or independence, and/or if the arbitrator does not possess any requisite qualification which the parties have previously agreed, and/or if the arbitrator becomes de jure or de facto unable to fulful his functions and/or is not fulfilling those functions in accordance with the Rules or within the prescribed time limits.*
>
> ***10.4*** *The notice of challenge shall be filed with the Registrar and shall be sent simultaneously to the other party, the Arbitrator who is being challenged and the other members of the Tribunal. The notice of challenge shall be in writing and shall state the reasons for the challenge.*
>
> ***10.5*** *When an arbitrator is challenged by one party, the other party may agree to the challenge. The challenged arbitrator may also withdraw voluntarily from his office. In neither case does this imply acceptance of the validity of any of the grounds for the challenge.*

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> ***10.6*** *In instances referred to in Rule 10.5, a substitute arbitrator shall be appointed in accordance with the procedure referred to in Rule 11, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to nominate an arbitrator. The time-limits provided in Rule 11 shall commence from the date of receipt of the agreement of the other party to the challenge or the challenged arbtirator's withdrawal."*

Upon the Arbitrator been prevented to act as such, either being *de jure* or *de facto,* ineligible, he shall be replaced on the Council's own initiative and a substitute arbitrator shall be appointed.

The decision of the Council has been accorded finality and relying upon the said Rule, the argument of Mr.Nankani is that it will exclude the operation of Section 14(2) of the Act of 1996, and the only remedy available would be challenging of the arbitral award u/s.34 of the Arbitration and Conciliation Act. 1996.

33 In the case in hand, the parties have agreed to refer the disputes to arbitration to be conducted through MCIA and have also agreed to be governed by the MCIA Rules. However, merely because the Arbitration is being conducted through MCIA, as an institutional arbitration, it shall not exclude the power of the Court to decide on termination of the mandate, if any controversy remains, concerning any of the grounds referred to in clause (a) of sub-section (1) of Section 14.

By no stretch of imagination, the words used in sub-section (2) of Section 14 "unless otherwise agreed by the parties"

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would amount to surrender of this remedy in favour of the MCIA Council. Merely because a party has participated in an Arbitration conducted by an Institute and it being conducted by a set form of rules and the Arbitrators are appointed from a pre-selected panel, it is nowhere indicative of the Court, being denuded of its statutory power, wherever the statute permit it to be exercised, whether it is at the stage of sub-section (2) of Section 14 or u/s.34 or Section 37, in form of an Appeal.

34 The legislature was more than cautious while providing, in explicit terms, in Section 5, that no judicial authority shall intervene in the matters governing part-1 except where and to the extend provided in the said part. The clear mandate is, therefore, to bar judicial interference except in the manner provided in the Act, conversely, if there is no provision to deal with a particular situation, Courts cannot assume jurisdiction and interfere.

The minimal interference, when arbitration is resorted to, as a mode of resolution of disputes, was found to be an effective stance, in expeditious disposal of the disputes.

The Arbitration Act of 1996 cover a situation, even when there is a challenge to the constitution of the Arbitral Tribunal, it is left to the Arbitrator to decide the same in first instance and if a challenge before the Arbitrator is not successful, the Arbitral Tribunal is permitted to continue with the arbitral proceedings and make an award. A challenge to the constitution

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of Arbitral Tribunal before the Court, is then deferred and it could only be raised after the arbitral award is made, when the parties seek setting aside of the Award and it can then take a ground regarding the constitution of the Arbitral Tribunal.

The course of action to be chartered out in such contingency is spelt out in the Act itself and this is based on a principle of minimum intervention by the Court during the pendency of the arbitral proceedings and the mischief which existed earlier, is sought to be removed by allowing interference only when and at the stage which is clearly set out by the Statute itself.

35 For a party which has any grievance against the nomination of the Arbitrator on account of bias and prejudice remedy, is provided in the act itself and before the stage of challenge of award u/s.34 comes, Section 13 of the Act, which provide for the challenge procedure and the Arbitral Tribunal itself is empowered to decide upon the challenge.

On a challenge being raised, it is open for the Arbitrator to recuse himself on the objection being taken qua his functioning as an Arbitrator or where both the parties agree to his removal as per the procedure accepted by them. If both fail, the Arbitrator is required to decide on the challenge to his functioning as an arbitrator, levelled by a party. Since the Arbitrator is expected to be a fair person and if he finds that there is substance in the allegations, he is expected to dispassionately

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rule on such objection.

Finely tuned with the ethos of the Act of 1996, which encourages speedy progress of arbitral proceedings, it is only when the circumstances exist that give rise to justifiable doubts as to independence or impartiality of Arbitrator or when the Arbitrator do not possess the qualifications agreed to by the parties, his appointment shall be subject to challenge and this challenge can be raised before the Arbitrator himself by taking recourse to Section 13.

However, sub-section (5) of Section 12, contemplate a situation where, on account of a relationship of a person with the parties or counsel or subject matter of the dispute, falls under any of the categories specified in Seventh Schedule, and such person is ineligible to be appointed as an Arbitrator and thus he becomes de jure or *defacto* unable to perform his functions. In such a situation, Section 14 of the Act of 1996 comes into play which provide for a termination of his mandate and his substitution.

36 When a controversy remains whether the Arbitrator has incurred an eligibility *de jure* or *defacto*, unless it is otherwise agreed between the parties, a party will resort to the remedy available i.e. is applying to the Court, to decide on termination of his mandate.

After the 2016 Amendment Act, a dichotomy is introduced in the Act, between person who become 'ineligible' to

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be appointed as arbitrator under section 12(5) and person about whom justifiable doubt exist, as to his/her independence or impartiality as per sub-section (3) of Section 12. The issue of ineligibility goes to the root of the appointment of an arbitrator and if the arbitrator falls in any one of the categories, specified in Seventh Schedule, he becomes 'ineligible' to act as arbitrator. Upon incurring such disability, as per Section 14(1)(a) he becomes de jure unable to perform his functions.

In order to determine whether he is de jure unable to perform his role as an arbitrator, it is not necessary to raise a challenge u/s.13, but since such a person would lack jurisdiction to proceed further, an application may be filed u/s.14(2), to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrators' independence or impartiality, such doubts shall be determined as a matter of fact by raising the same before the Tribunal u/s.13 and sub-section (3) of section 13, it is open to the Tribunal to decide the challenge and when such challenge is not successful, the Tribunal shall continue the arbitral proceedings and make an award and in such a situation, on an award being made, it is open to challenge in accordance with section 34.

37 Section 12 has been amended with the object to induce neutrality of Arbitrator/s i.e. their independence and

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impartiality and the amended provision identify the circumstances which give rise to 'justifiable doubts' about existence of bias and Fifth Schedule enumerates the grounds to that effect. However, quite distinct from this, Seventh Schedule enlist those circumstances which would attract the provisions of sub-section (5) of Section 12 and nullify any prior agreement to the contrary.

Mr.Totala has rightly placed reliance upon the decision in case of *Jaipur Zila Dugdh Utpadak Sahakari Sangh Limited and ors* (supra), where it is held that there must be an 'express agreement' in writing to satisfy requirement of section 12(5) proviso. The Apex Court has noticed the salient feature of Section 12(5), by holding that it is a new provision which relates to the de jure inability of an arbitrator to act as such, and it is clear from the provision, that where, under any agreement between the parties, a person falls within any of the categories, set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an Arbitrator. The only way in which this ineligibility can be removed, again, in law, is that the parties may after disputes, have arisen, waive the applicability of this sub-section by an express agreement in writing.

In paragraph 17 of the Law Report, the impact of such ineligibility as in contrast to Section 12(4) is set out in the following words :-

> *"However, where a person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before*

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such arbitrator. In such a case i.e. a case which falls u/s.12(5), Section 14(1)(a) of the Act gets attracted in as much as the arbitrator becomes, as a matter of law (i.e. de jure), unable to perform his functions u/s.12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator u/s.14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all, Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise u/s.14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act.

Section 12(4) will only apply when a challenge is made to an arbitrator, inter alia, by the same party who has appointed such arbitrator. This then refers to the challenge procedure set out in Section 13 of the Act. Section 12(4) has no applicability to an application made to the Court u/s.14(2) to determine whether the mandate of an arbitrator has terminated as he has, in law, become unable to perform his functions because he is ineligible to be appointed as such under Section 12(5) of the Act."

38 It is for this very reason, the decision in case of *Hasmukhlal Doshi and Anr,* (supra) cannot be of any succor to Mr.Seth, the decision is a proposition for the law which prevailed then, when no provision in form of sub-section (5) of Section 12 existed and therefore, the Court with the existing scheme of the statute rightly held that when the Arbitral Tribunal has decided on the challenge u/s.13(3), it was not open to raise a challenge under Section 14, as a specific challenge could be raised to an Award passed u/s.34.

However, the statute itself and in particular, Section 12 having undergone change, the decision no longer holds good.

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39 The Act of 1996 do not make any distinction in arbitration to be conducted, adhoc or governed by institutional procedures and rules.

When the parties chose adhoc arbitration, they have a choice of drafting and carving out their own rules and procedures which fit the need of their dispute. Institutional arbitration, on the other hand, is the one in which the specialized institution with has permanent character, and assumes the function of aiding and administering the arbitral process, as provided by rules of such institution.

Essentially, the contours and the procedure of the arbitration proceedings are determined by the institution designated by the parties, and such institutions may provide qualified arbitrators empanelled with it and the institution offer assistance in form of Secretariat and professional staff. As a result of the structured procedure and administrative support provided by the institutional arbitration, it has certain advantages which are unavailable to the parties opting for adhoc arbitration.

40 Since the parties who agree to be bound by the decision of an Arbitrator, which is the outcome of an arbitration proceedings, they have chosen to arbitrate and not litigate. In a case where they decide to rely upon the institutional arbitration, where it has a set of rules, right from selecting and appointing the arbitrator(s) and to be governed by such institutional rules, the proceedings undoubtedly will be governed by the rules framed

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by the institution. However, for the principle underlying in the conduct of the arbitral proceedings, the institutional arbitration shall not deviate and would be still governed by the provisions of the Act of 1996.

This necessarily would be indicative, of the stages where the judicial intervention is permitted by the statute, then, this right is available to a party, whether it has participated in an adhoc arbitration or an institutional arbitration. The remedy available u/s.14(2) to contest an appointment of an Arbitrator on the ground that it falls within the Seventh Schedule and the Arbitrator is thus ineligible to be appointed and continue the arbitral proceedings, he having incurred *de jure* inability to perform his functions, would ultimately result in the mandate of the Arbitrator being terminated.

Though, in the present case, the petitioner deemed it appropriate to raise this challenge before the Arbitrator, which was ultimately placed before the Council and on finding no merit in the same, the objection is rejected.

The petitioner has therefore, knocked the doors of the Court in the wake of sub-section (2) of Section 14 as the controversy remains whether the Arbitrator appointed by the MCIA has become *de jure* ineligible to act as an Arbitrator and it is the specific case of the petitioner, that it has not waived the applicability of sub-section (5), by any express agreement in writing and definitely not, by merely submitting itself to the

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process of arbitration as contemplated by the MCIA rules, and therefore, I find merit in the aforesaid stand, justifying the exercise of power under sub-section (2) of Section 14 and I am unable to agree with Mr.Nankani, who has suggested that once the Council has taken a decision, it has attained finality and it shall be to the exclusion of the power of this Court under sub-section (2) of Section 14.

41 Now coming to the merits of the matter, the objection of the petitioner about the appointment of the Arbitrator by the MCIA will have to be tested on the principle against bias, being one of the fundamental principles of natural justice, which apply to all judicial and quasi judicial proceedings.

Independence and impartiality of arbitrator/s is the hallmark of arbitration proceedings and a person who fall within the ambit of Section 12(5) read with Schedule VII, would render himself ineligible to conduct arbitration and this being so, the objection that was raised by the petitioner before the Council, was to the effect that the law firm of the nominee arbitrator i.e. Shardul Amarchand Mangaldas, where the respondent no.3, the appointed arbitrator is an equity partner, has represented the affiliates of Aditya Birla Finance Limited. With the particulars provided along with the objection, it was contended that the Arbitrator had become *dejure* ineligible to act in the said capacity. It is this objection which has been turned down and the Arbitrator is directed to continue with the proceedings.

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42 Mr.Totala has specifically invoked Clause no.7 of the Seventh Schedule, which provides for the following:-

> *"7 The Arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties"*

It is on account of this relationship of the nominated arbitrator with the respondent, a serious objection is raised, as if a person who is ineligible to act as an Arbitrator, declare an Award, it would be a nullity and is not enforceable.

Mr.Totala has made it clear that he is not at all objecting to the Arbitration through MCIA and state that Era shall abide by the MCIA rules, but what it is objecting, is the conduct of Arbitration by respondent no.3 and if the Arbitrator is replaced/ substituted, he is ready to go on with the proceedings.

43 I find substance with the submission of Mr.Totala as the respondent no.3 could not have acted as an Arbitrator in the wake of the cloud raised by the petitioner and sufficient material has been placed to demonstrate the clash of interest. It is not in dispute that the Arbitrator nominated has association with Shardul Amarchand Mangaldas & Co. as from the proceedings itself, it is evident. The address of the nominee in the proceedings is indicated as follows :-

> "Shardul Amarchand Mangaldas & Co,
> Amarchand Towers, 216, Okhla Industrial
> Estate, Phase III, New Delhi 110020.
> email : ila.kapoor@amsshardul.com"

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44 The petitioner having raised challenge before the arbitrator, though it was not imperative for it to do so, the arbitrator placed the challenge before the MCIA Council, which rejected the same on 8/9/2023 on superfluous ground, without examining the material placed on record by the petitioner, establishing the connect of the arbitrator with the respondent and the order passed by the Council, and in my view, the rejection is perfunctory, in essence, as it is *sans* any deliberation on the material placed before the Council. The rejection is worded as under :-

> *"The MCIA Council ('Council' has rejected the respondent's challenge to the arbitrator, Ms.Ila Kapoor, in accordance with Rule 10. The Council has noted as follows :-*
> *(1) On merits, the challenge is misconceived since the arbitrator's firm (Shardul Amarchand Mangaldas) did not represent any Aditya Birla Entity in relation to the transaction relied upon by the respondent.*
>
> *(2) The Manager Partner of the firm is on the Advisory Council of BITS Law School in her personal capacity. This would not impinge the arbitrator's independence, impartiality and does not give rise to any justifiable doubts.*
>
> *(3) Even though the application for challenge was made after the 14 day timeline, as prescribed under Rule 10.3, the Council does not consider this as a sole criterion for the rejection of the challenge.*
> *As per Rule 10.9, we thus request the Tribunal to proceed with the arbitration proceedings in MCIA/Arb/60/2022 and MCIA/Arb/63/2022."*

45 The petitioner has annexed the list of proceedings where the respondent is represented by Shardul Amarchand Mangaldas, the firm, in which the nominated arbitrator is a

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partner and since the arbitration is expected to be conducted by an independent mind, with an impartial attitude, and the appointment of the nominee arbitrator is hit by Entry 7, in Schedule VII read with Section 12(5). Hence, I deem it appropriate to direct the MCIA to substitute the Arbitrator and appoint an independent Arbitrator to continue with the arbitral proceedings.

The necessary exercise shall be carried out within a period of four weeks from the date of receipt of the order by MCIA.

The counsel for the petitioner shall communicate the order to MCIA.

Petitions are made absolute in the aforesaid terms.

(SMT. BHARATI DANGRE, J.)

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