IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/PETN. UNDER ARBITRATION ACT NO. 140 of 2021

With

CIVIL APPLICATION (FOR DIRECTION) NO. 1 of 2021
In R/PETN. UNDER ARBITRATION ACT NO. 140 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE ASHUTOSH J. SHASTRI Sd/-

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

==========

SANDIPBHAI ASHOKBHAI PARMAR
Versus
THE ARBITRATOR, KUMARI NEETABEN VITTHABHAI PATEL

==========

Appearance:
MR.ANSHIN DESAI, SENIOR ADVOCATE WITH MR. JAY M THAKKAR(6677) for the Petitioner(s) No. 1
for the Respondent(s) No. 1
MR DIGANT B KAKKAD(6523) for the Respondent(s) No. 3

MR MRUGEN K PUROHIT, ADVOCATE WITH MR. MITUL K. SHELAT, ADVOCATE (1224) for the Respondent(s) No. 2

==========

CORAM:**HONOURABLE MR. JUSTICE ASHUTOSH J. SHASTRI**

Date : 28/01/2022
CAV JUDGMENT

[1] By way of this Arbitration Petition, the petitioner has prayed for following reliefs:

> *"8. A) THIS HON'BLE COURT may kindly be pleased to admit and allow this Application;*
>
> *B) THIS HON'BLE COURT may be pleased to issue writ of mandamus or any other appropriate writ, order or direction and thereby be pleased to quash and set aside the appointment of respondent no.1 as Arbitrator in Arbitration Case No. 1/2020 between petitioner and respondent no. 2 & 3 as being in breach of provisions of section 11 & 12 of the Arbitration and Conciliation Act, in the interest of justice;*
>
> *C) THIS HON'BLE COURT may be pleased to appoint any appropriate person as arbitrator in terms of procedure for appointment of arbitrator laid down in Clause 13 of agreement dated 04.09.2008 for adjudication of dispute between the parties, in interest of justice;*
>
> *D) Pending the admission and final hearing of this petition, this Hon'ble Court may be pleased to stay the further proceedings of Arbitration Case No.1/2020 pending before respondent no.1, in the interest of Justice;*
>
> *E) THIS HON'BLE COURT may be pleased to grant such other and further relief/s as may deem fit, just and proper in the facts and circumstances of the case, in the interest of justice;*

[2] The case of the petitioner is that petitioner and respondent No.2 formed a partnership firm on 01.08.2008 in the name and style of "Ronak Developers". The said partnership business was for purchasing of land and developing residential houses as well as commercial complex. In connection with aforesaid partnership, the petitioner and respondent No.2 entered into a Deed of Partnership dated 04.09.2008. According to the petitioner, the said Deed is containing an Arbitration Clause 13, which is reproduced hereunder:

> *"13. Any dispute or difference of opinion which may arise between the partners of their representatives with regards to the constitution meaning and effect of this deed or any part thereof effecting the accounts profits or losses of the business or the right and liabilities of the partnership under this deed or any other matter relating to the firm shall be referred to the arbitrator and the decision of a sole arbitrator if the partners in dispute so agree upon or otherwise two or more arbitrators according to the members of partners of the firm are to be nominated by each partners and in case of difference of opinion between them by the umpire selected by them at the commencement of reference and this clause shall be deemed to be submission within the meaning of the arbitration Act 1940 including its statutory modification and reenactment."*

[3] During the passage of time, the dispute arose

between petitioner and respondent No.2 and then respondent No.2 invoked an Arbitration Clause, as referred to above. By issuance of notice to the petitioner on 23.08.2019 *inter alia* informing the petitioner that respondent No.2 is appointing respondent No.1 as an Arbitrator and also called upon the petitioner to appoint his Arbitrator. It is the case of the petitioner that without adhearing to the requirements of Section 11 of the Act, respondent No.2 straightaway referred the matter to the Arbitrator, namely, respondent No.1 by filing statement of claim. Such appointment of respondent No.1 is unilateral and is in apparent breach of Section 11 of the Arbitration Act and as such the very initiation of arbitration proceedings gets vitiated. On the contrary, it is the case of the petitioner that after initiation of arbitration proceedings by the Sole Arbitrator i.e. respondent No.1, the petitioner became aware that learned advocate for the claimant i.e. present respondent No.2 and the learned Arbitrator had worked together in one office as advocates in various cases. It was further inquired by the petitioner that the petitioner could find one vakalatnama filed in one

civil suit before learned Civil Court at Anand wherein there is a signature of learned advocate for claimant as well as learned Arbitrator appearing for same party. The petitioner also came across a telephone diary of Anand District Advocate wherein besides the column of name of learned Arbitrator as Advocate, respondent No.1 has mentioned details of name of learned advocate of claimant as well as his office phone numbers, which fortify that learned Arbitrator had a working relationship with learned advocate for claimant in past. Even joint vakalatnama is also placed on record to contend this and therefore, this information which has been received has raised a justifiable doubt as to independence and impartiality of learned Arbitrator. As such being aggrieved and dissatisfied with the appointment of Arbitrator and for seeking appointment of another Arbitrator, the present petition is brought before this Court under Article 226 of the Constitution of India read with Provisions of Arbitration Act.

[4] Mr. Anshin Desai, learned senior advocate with Mr.Jay M. Thakkar, learned advocate appearing for the petitioner

has vehemently contended that from the material on record, it is realized that the close proximity of professional relationship of learned Arbitrator with learned advocate of claimant would clearly raise a justifiable doubt about the independence and impartiality and as such, such unilateral appointment deserves to be quashed with consequential fresh appointment. It has been vehemently contended that pursuant to such unilateral appointment of respondent No.1 as an Arbitrator, even disclosure in writing in terms of Section 12(1) of the Act, which is mandatory in nature has also not been disclosed. After initiation of arbitration proceedings by respondent No.1, It has been found clearly that learned Arbitrator had worked together with the learned advocate for the claimant in one office as advocate in various cases even a joint vakalatnama of one of the civil suit was also noticed wherein signature of both of them were found on such vakalatnama appearing for the very same party. So much so that a telephone directory of Anand District Advocates also reflects the details regarding office telephone members which clearly established a close professional

proximity and as such the appointment and the proceedings initiated thereupon gets vitiated. According to Mr. Anshin Desai, learned senior advocate, justice not only to be done but it should appear to be done as well and the manner in which the proceedings are being commenced raised a clear doubt that no impartial justice would be parted with. Section 12(1)(a) of the Act is clearly clinching the issue and as such on this count alone, respondent No. 1 being ineligible to proceed with arbitration, the appointment of Respondent No.1 in Arbitration Case No. 1 of 2020 deserves to be quashed by granting consequential relief as prayed for in the petition. Mr. Anshin Desai, learned senior advocate has submitted that Section 12 of the Act coupled with relevant provisions which requires a mandatory disclosure and conjoint reading of it alongwith Rule 26 of the schedule V, Item Nos. 1 and 8 as well as schedule VII clearly justified the relief which has been sought by the petitioner in present proceedings. It has also been projected by learned senior advocate that alongwith this petition there are several documents attached to the petition compilation to indicate

a close professional relation which would be sufficient enough to justify the relief as prayed for. Mr. Anshin Desai, learned senior advocate has submitted that Courts power are not that much circumscribed to ignore such eventuality and just allow a party to proceed with wherein it would certain that no impartial outcome is likely to come and as such also, on the basis of relevant material which is produced on record, the relief prayed for deserves to be granted.

[4.1] To substantiate his contentions, Mr. Anshin Desai, learned senior advocate has referred to and relied upon few decisions hereunder and after referring to aforesaid decisions, a request is made to grant relief as prayed for in the petition.

(i) In the case of Bharat Broadband Network Limited versus United Telecoms Limited reported in (2019) 5 SCC 755.

(ii) In the case of TRF Limited versus Enerogo Engineering Projects Limited reported in (2017) 8 SCC 377.

(iii) In the case of Walter BAU AG, Legal Successor, of the Original Contractor, DYCKERHOFF and WIDMANN A.G. versus Municipal Corporation of Greater Mumbai and Another reported in (2015) 3 SCC 800.

(iv) In the case of Haryana Space Application Centre (HARS AC) and another versus Pan India Consultants Private Limited reported in (2021) 3 SCC 103.

(v) In the case of Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited & Ors. Versus M/s Ajay Sales & Suppliers passed in Special Leave Petition (Civil) No. 13520 of 2021

[5] As against this, Mr. Mitul K. Shelat, learned advocate appearing for the respondent No.2 and Mr. Digant B. Kakkad, learned advocate appearing for the respondent No. 3 have vehemently opposed the petition by contending that petition itself is not maintainable in view of the fact that basic prayer made in the petition is about cancellation of appointment of respondent No.1 as an Arbitrator. By virtue of specific provision under the Act,

this very issue can well be agitated before an alternative forum and as such also, the petition does not deserves to be entertained. Further Mr. Mitul Shelat, learned advocate has submitted that this apprehension which is tried to be voiced out is ill-founded in view of the fact that prior to almost about 14 years, in the year 2000, some vakalatnama is signed and i.e. made a subject matter of apprehension. If this apprehension is allowed to be precipitated and accepted then in no case the Arbitrators can be appointed or can act with impartiality and here the allegations does not relate to a cause or a party to the reference and further this Arbitration Case is of 1 of 2020 in which no such allegation is voiced out during petitioner participation in proceedings. So much so that even extension of 4 months has also been granted wherein also no such objection was raised and this petition at a belated stage is brought just with a view to thwart the proceedings. Further Mr. Shelat, learned advocate has submitted that in a previous petition which was filed before this Court being Special civil Application No.13800 of 2020 wherein also no such grievance was raised,

though the petitioner was very much a party to the issue and as such once having participated and raised no objection now at this stage when the process has already been commenced, the petitioner cannot utilized this petition as a tool to thwart the proceedings now from its conclusion. Mr. Shelat, learned advocate has submitted that Arbitration Act requires a completion of proceedings with a time schedule and if this application is entertained, the said time schedule will not be maintained and further the judgments which are tried to be pressed into service are of no assistance to the petitioner and hence, petition in the background of this fact may not be entertained.

[5.1] In any case, Mr. Mitul Shelat, learned advocate has submitted that it is for the petitioner to first raise such contention before the Arbitrator himself / herself and then to approach the appropriate forum as available for him and here by virtue of Section 13 and Section 14 of the Act, there is a clear remedy available to ventilate such grievance and raise such issue and as such when statutory mechanism has provided a specific remedy, the petition in the present form is not permissible to be brought by the

petitioner. Mr. Shelat, learned advocate has further submitted and drawn the attention to the affidavit-in-reply filed by respondent No.2 and has submitted that there was a notice given on 23.08.2019 to the petitioner for appointment of Arbitrator. The said notice was not objected by the petitioner and subsequentlly when the present opponent i.e. respondent No.2 has submitted a claim statement before the respondent No.1 a Sole Arbitrator wherein also, the petitioner without objecting to such appointment of learned Arbitrator submitted to the jurisdiction of respondent No.1 and has also filed his written statement objecting to the claim of respondent No.2 and also filed his reply to the stay application. According to Mr. Shelat, learned advocate at no point of time petitioner has ever objected to the appointment of respondent No.1 as a Sole Arbitrator and as such by virtue of effect of Section 4 of Arbitration Act, the petitioner has waived his right to object to the appointment of respondent No.1 for adjudicating dispute between the parties. It has been further submitted that deponent i.e. respondent No.2 preferred an application before learned

Arbitrator for impleadment of father of the petitioner as party to respondent in arbitration proceedings which was allowed by the learned Arbitrator and the said order was challenged by way of Special Civil Application No. 13800 of 2020 which was dismissed *vide* order date 10.03.2021 and in that proceedings also, the petitioner, according to Mr. Shelat has not raised such grievance. Mr. Shelat, learned advocate has raised a serious grievance that present petition is filed by invoking extraordinary jurisdiction under Article 226 of the Constitution of India as well as under Section 11 of the Arbitration Act is a misconceived petition and the same on this count alone be dismissed. So far as contention with regard to Section 12 of the Act is concerned, it has been submitted that the grounds for challenging appointment of an Arbitrator are mentioned in the petition and a perusal of schedule either V or VII none of the entries are applicable to the present controversy and as such no disclosure from respondent No.1 was required.

[5.2] In any case, according to Mr. Shelat, learned advocate, the Arbitration Act is a self contained code in

which there is a clear remedy made available to the petitioner to assail the award including to raise this kind of grievance and by making reference to Sections 13 and 14 of the Act, it has been contended that the petitioner could have approached the learned Arbitrator and ought to have challenged but has not applied up sub section (2) of Section 13 of the Act but no such attempt was made instead after belated approach an attempt is made to question the appointment and as such, in these circumstances, the petitioner can approach appropriate forum for challenging the ultimate outcome by resorting to Section 34 of the Act in which every such point is available to contend.

[5.3] Mr. Shelat, learned advocate has submitted that even assuming the case of the petitioner falls under Section 12(5) of the Act wherein the learned Arbitrator is *de jure* unable to perform his function, then the provision of Section 14 may come into play wherein the petitioner will have to approach the concerned Court, namely, the District Court for challenging the appointment of respondent No.1 and as such when a complete

mechanism is provided the petition under Article 226 read with Section 11 of the Act is not entertainable at this stage.

[5.4] On the contrary, Mr. Shelat, learned advocate has submitted that petitioner alongwith respondent No.3 are not co-operating the arbitration process and are only trying to prolong the process by filing vexatious litigations and since by virtue of Section 29(A) of the Act, the proceedings are to be conducted in a strict time bound schedule still respondent No.3 who is the father of the petitioner alongwith him is trying to delay the process of arbitration proceedings by adopting dilatory tactics. After raising these issues even on merit also, Mr. Shelat, learned advocate has submitted that there is no case made out of any nature which calls for any interference.

[5.5] Mr. Shelat, learned advocate has submitted vehemently that filing of joint vakalatnama 20 years back will not bring the case of petitioner in any of the entries of schedule V, VII of the Act of 1996 and further a telephone directory of Anand District Advocates produced before this

Court is of the year 2007 i.e. 13 years prior to filing of arbitration proceedings, therefore also, no reference of schedule V or VII of the act in any case is available to the petitioner. On the contrary, information revealed further which is not disclosed that respondent No.1 Arbitrator had left the office way back in the year 2004, and thereafter, she had been appointed as Assistant Public Prosecutor in Anand District Court for number of years by now and as such also at this stage to question the appointment is nothing but an afterthought measure just to thwart the proceedings and such conduct or attempt may not be encouraged by the Court by entertaining the present petition.

[5.6] To substantiate his contention, Mr. Mitul Shelat, learned advocate has referred to and relied upon following decisions and after referring to these decisions has reiterated that the petition on the contrary deserves to be dismissed with exemplary costs.

(i) In the case of Uttarakhand Purv Sainik Kalyan Nigam Limited versus Northern Coal Field Limited reported in (2020) 2 SCC 455.

(ii) In the case of HRD Corporation (Marcus Oil and Chemical Division) versus GAIL (India) Limited (Formerly Gas Authority of India Limited) reported in (2018) 12 SCC 471.

(iii) In the case of Chandrakant Dayalji Patel versus Jayant Sanghvi reported in 2014 (0) AIJEL-HC 231573.

(iv) In the case of National Highways Authority of India versus K.K.Sarin & Ors. reported in 2009 SCC Online Del 764.

(v) In the case of Lalitkumar V. Sanghavi (Dead) Through Lrs. Neeta Lalit Kumar Sanghavi and Another versus Dharamdas V. Sanghavi and Others reported in (2014) 7 SCC 255.

(vi) In the case of Ashokbhai Raisingbhai Parmar versus the Arbitrator, Kumari Neetaben V. Patel passed by the Coordinate Bench of this Court in Special Civil Application No.13800 of 2020 on 10.03.2021.

[6] Having heard the learned advocates appearing for the respective parties, before adverting to the grievance, which was raised in the petition, relevant few provisions of the Act deserves to be considered. Under the provisions of Arbitration and Conciliation Act, in addition to other provisions straightaway, if we see the relevant provisions contained under Section 12, which deals with grounds for challenge, it stipulates like this:-

> "*12. Grounds for challenge. - [(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—*
>
> *(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and*
>
> *(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.*

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.]

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

(3) An arbitrator may be challenged only if—

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

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

[(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in

the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

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

[7] Section 13 is dealing with the procedure relating to such challenge and Section 14 deals with the failure or impossibility to Act, which read as under:-

"*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) 3 [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."

[8] Section 15 of the Act deals with the termination of mandate and substitution of Arbitrator, which reads as under:-

"*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.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal."

[9] In the context of aforesaid provisions, a perusal of schedule VII as well as schedule V also deserve to be considered. The schedule V is framed which relates to Section 12(1)(b) of the Act dealing with grounds giving rise to justifiable doubts as to independence and impartiality of Arbitrator. Since, the schedules are relevant to the controversy involved in the petition, it needs to be reproduced hereunder:-

> *"THE FIFTH SCHEDULE*
>
> *[See section 12(1) (b)]*
>
> *The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators:*
>
> *Arbitrator's relationship with the parties or counsel*
>
> *1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.*
>
> *2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.*
>
> *3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.*
>
> *4. The arbitrator is a lawyer in the same law firm*

which is representing one of the parties.

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

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

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

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

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

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

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

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

Relationship of the arbitrator to the dispute

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

16. The arbitrator has previous involvement in the case.

Arbitrator's direct or indirect interest in the dispute

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

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

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party

who may be liable to recourse on the part of the unsuccessful party in the dispute.

Previous services for one of the parties or other involvement in the case

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

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

22. The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.

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

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

Relationship between an arbitrator and another arbitrator or counsel

25. The arbitrator and another arbitrator are lawyers in the same law firm.

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

27. A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties or an affiliate of one of the parties.

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

29. The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.

Relationship between arbitrator and party and others involved in the arbitration

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

31. The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a

former employee or partner.

Other circumstances

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

33. The arbitrator holds a position in an arbitration institution with appointing authority over the dispute.

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

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

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

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

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

[10] Correspondingly, in the context of Section 12(5), the schedule VII is prescribing the circumstance which relates to relationship with parties or counsel of the Arbitrator. The same is also reproduced hereunder:-

"*THE SEVENTH SCHEDULE*

[See section 12(5)]

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the

arbitration.

6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

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

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

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

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

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

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

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

Relationship of the arbitrator to the dispute

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

16. The arbitrator has previous involvement in the case.

Arbitrator's direct or indirect interest in the dispute

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

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

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

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

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

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

[11] A perusal of Sub Section (1) of Section 12 indicates that when a person is approached in connection with his possible appointment as an Arbitrator, he shall disclose in writing any circumstance as indicated in Clause A and B and explanation thereto is indicating as to what are the justifiable grounds as guiding feature prescribed in schedule V. Sub section (2) of Section 12 is indicating that an Arbitrator from the time of his appointment and through out the arbitral proceedings shall without delay disclose to the parties in writing any circumstance referred to under sub section (1) unless they have already been

informed of them by him. If perusal of sub section (5) of Section 12 is read, it prescribes that any person whose relationship with parties or counsel or the subject matter of dispute falls under any of the categories specified in schedule VII shall be ineligible to be appointed as an Arbitrator, unless subsequently parties may agree by express writing. In the context of this provision, the apprehension which has been voiced out by the petitioner is that, in past, the respondent No.1 Arbitrator had a professional relationship and in one of the suit, has filed vakalatnama in the proceedings before the Civil Court and further a telephone diary of Anand District Advocates is indicating a common telephone number in the office as well. This vakalatnama which has been produced on page 37, is of the year 2000 precisely dated 18.11.2000 meaning thereby filed prior to almost 10 years back. Further, the telephone diary which has been brought to the notice is a directory of District Advocates of the year 2007, reflecting on page 38, and the telephone number, which has been further pointed out from page 41 is from a directory dated 19.03.2006. Now, these are two

circumstances which are tried to be pressed into service by the learned counsel appearing for the petitioner for raising justifiable doubt about impartiality or independence of an Arbitrator to decide or resolve the dispute. Apparently, there is no other circumstance reflecting in averments except bald allegation in paragraph F on page 9 that in various cases the vakalatnama has been filed and this was one of the vakalatnama pointed out. In this circumstance, a perusal of schedule V which deals with the grounds which may give rise to justifiable doubt about independence or impartiality which are prescribed as a guiding factor and perusal of it, is indicating relevant clauses are Nos. 1, 4 and 8. Clause 1 of schedule V is indicating that Arbitrator if is an employee, consultant, advisor or has any other past or present business relationship with a party, which circumstance is not apparent in the present case. Clause 3 indicates that Arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties which also is not visible. Clause 4 indicates that Arbitrator is a lawyer in same law firm which is representing one of the parties.

Now, this is not established beyond doubt except telephone numbers of a diary way back of 2007. Clause 8 indicates that Arbitrator regularly advises the appointing party or an affiliate of appointing party even though neither the Arbitrator nor his or her firm derives a significant financial income therefrom which circumstance is also not visible here. So from conjoin reading of all these clauses, which are mentioned, have the effect of giving justifiable rise if any of the circumstances are reflecting from the case on hand and here on case on hand none appears. So far as Clause 16 is concerned, it prescribes that the Arbitrator has previous involvement in the case which is also not visible. In this schedule, one of the agitated grievance is about relationship between Arbitrator and Counsel, for this purpose, Clause 26 of this very schedule is indicating that the Arbitrator was within the past three years a partner or otherwise affiliated with another Arbitrator or any of the Counsel in the same Arbitration which also is not visible from the record and correspondingly, if Clause 29 is seen, it prescribes that the Arbitrator has within the past three years received more

than three appointments by the same Counsel or the same law firm which also is not the subject matter of present controversy.

[12] In addition to this, the clauses contained in schedule VII also prescribes the relationship with parties or counsel of Arbitrator. This schedule VII relates to Section 12(5) of the Act wherein a close perusal of this, is apparently clearly suggesting that the petitioner has not cogently established anything which may attract intelligibility circumstance as an Arbitrator, none of the clauses indicating in the present background of facts, which may give a justifiable doubt or remote suspicion to indicate impartiality or ineligibility and as such the stand which has been taken by the petitioner's counsel appears to be ill-founded in view of the fact that several years back if there was some joint vakalatnama or a telephone number of a diary may not persistently continue to raise impartiality or doubt about the Arbitrator. Further the vakalatnama in the arbitration case which has been filed in which also there appears to be no association of the present

Arbitrator remotely except original telephone number of the learned advocate representing the private respondent. Hence, this in considered opinion of this Court is not sufficient enough to entertain the grievance voiced out by the petitioner. Simply because an inauguration has taken place of an office of Arbitrator would not be sufficient enough to entertain such kind of doubt about impartiality of an Arbitrator when the law does not justifiably permits to raise.

[13] In addition to aforesaid circumstances, the conduct of the petitioner also deserves to be considered more particularly when at the initial stage itself no such grievance is voiced out. On the contrary, by conduct they have submitted to the process of arbitration without any demur initially. As a result of this, at the instance of petitioner, proceedings which are going on are not to be intercepted. It has been undisputedly pointed out that in the earlier petition being Special Civil Application No. 13800 / 2020 the petitioner was very much a party and till the same was disposed of, no such issue was raised either

by the petitioner or his father with regard to Section 12(5) of the Act. On the contrary, by participating in the process of arbitration the petitioner has submitted to the jurisdiction without any demur. On the contrary, there is no relationship remotely established cogently with the party whose grievance is being adjudicated in the arbitration proceedings. Even when the extension for a further period of four months was granted, no such grievance was raised and further, in view of the fact that declaration, which required to be given, can be during the process of arbitration and as such the Court see no justifiable reason to entertain the grievance voiced out by the petitioner in the present proceedings. If the chronology of events are to be looked into, none of the circumstance is required to be considered at this stage of the proceedings since the petitioner is not remedyless.

[14] The Act has prescribed a specific mechanism statutorily available to the petitioner to ventilate grievances including this kind of grievance and for which specific remedies are contained under Sections 13 and 14 of the Act. It appears that no such remedy is availed of by

the petitioner and straightaway a combined petition is brought before the Court by invoking extraordinary jurisdiction as well as jurisdiction under Section 11 of the Arbitration and Conciliation Act and even apart from that, after the award, also if aggrieved, there is a specific statutory forum available where all these grievances are possible to be raised and as such to exercise extraordinary jurisdiction at this stage of the proceeding and to thwart the process is not in the fitness of things in considered opinion of this Court. Particularly, when the process under a special statute has already set in motion, it cannot be intercepted on the basis of such kind of grounds which are not justifiable. The concept of de jure which is tried to be voiced out in the background of aforesaid discussion, appears to be not available to the applicant.

[15] At this stage, recently, in the case of Bhaven Construction through authorised signatory Premjibhai K. Shah versus Executive Engineer, Sardar Sarovar Narmada Nigam Limited and another reported in (2022) 1 SCC 75, the Hon'ble Apex Court while dealing with an issue has

propounded that discretion under Article 226 / 227 of the Constitution of India cannot be exercised to allow any judicial interference beyond procedure established under the Arbitration and Conciliation Act, 1996. This power needs to be exercised in exceptional rarity, wherein one party is left remedyless under the statute or on a clear bad faith shown by one of the parties. No circumstance is visible or made out cogently by the petitioner in the present proceedings except circumstances, which are narrated hereinabove. Since the decision of Hon'ble Apex Court upon analysing the scheme of Act has propounded hence, Court deems it proper to reproduce relevant paragraphs contained in the judgment hereunder:

> "*18. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a Constitutional right. In Nivedita Sharma v. Cellular Operators Association of India, (2011) 14 SCC 337, this Court referred to several judgments and held:*
>
> > *“11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and*

prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation - L. Chandra Kumar v. Union of India, (1997) 3 SCC 261. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/ instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

(emphasis supplied)

It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient.

19. In this context we may observe M/s. Deep Industries Limited v. Oil and Natural Gas Corporation Limited, (2019) SCC Online SC 1602, wherein interplay of Section 5 of the Arbitration Act and

Article 227 of the Constitution was analyzed as under:

> *"16. Most significant of all is the non- obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed (See Section 37(2) of the Act)*
>
> *17. This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non-obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us herein above so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction."*

20. In the instant case, Respondent No. 1 has not been able to show exceptional circumstance or 'bad

faith' on the part of the Appellant, to invoke the remedy under Article 227 of the Constitution. No doubt the ambit of Article 227 is broad and pervasive, however, the High Court should not have used its inherent power to interject the arbitral process at this stage. It is brought to our notice that subsequent to the impugned order of the sole arbitrator, a final award was rendered by him on merits, which is challenged by the Respondent No. 1 in a separate Section 34 application, which is pending.

23. *Respondent No. 1 did not take legal recourse against the appointment of the sole arbitrator, and rather submitted themselves before the tribunal to adjudicate on the jurisdiction issue as well as on the merits. In this situation, the Respondent No. 1 has to endure the natural consequences of submitting themselves to the jurisdiction of the sole arbitrator, which can be challenged, through an application under Section 34. It may be noted that in the present case, the award has already been passed during the pendency of this appeal, and the Respondent No. 1 has already preferred a challenge under Section 34 to the same. Respondent No. 1 has not been able to show any exceptional circumstance, which mandates the exercise of jurisdiction under Articles 226 and 227 of the Constitution.*

26. It must be noted that Section 16 of the Arbitration Act, necessarily mandates that the issue of jurisdiction must be dealt first by the tribunal, before the Court examines the same under Section 34. Respondent No. 1 is therefore not left remediless,

and has statutorily been provided a chance of appeal. In Deep Industries case (supra), this Court observed as follows:

> *"22. One other feature of this case is of some importance. As stated herein above, on 09.05.2018, a Section 16 application had been dismissed by the learned Arbitrator in which substantially the same contention which found favour with the High Court was taken up. The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34."*
>
> *(emphasis supplied)*
>
> *26. In view of the above reasoning, we are of the considered opinion that the High Court erred in utilizing its discretionary power available under Articles 226 and 227 of the Constitution herein. Thus, the appeal is allowed and the impugned Order of the High Court is set aside. There shall be no order as to costs. Before we part, we make it clear that Respondent No. 1 herein is at liberty to raise any legally permissible objections regarding the jurisdictional question in the pending Section 34 proceedings."*

[16] Yet another decision of Hon'ble Apex Court of a recent time, which is in the case of Uttarakhand Purv Sainik (supra) wherein also considering the amendment

which has taken place under the Act in the year 2015, the law is summarized by the Hon'ble Apex Court and prescribed the limitations suggesting that if preliminary objections are raised with regard to even jurisdiction or limitation, the same deserves to be decided by the Arbitrator and once the Court had determined the existence of arbitration agreement, it was bound to appoint Arbitrator once the same was found to exist and hence, considering the aforesaid proposition, Court see no justifiable reason to entertain the grievance since petitioner is not remedyless and the Act is a complete code providing enough protection to ventilate the grievance. Hence, the present petition deserves to be dismissed.

[17] In the context of aforesaid discussion and the background of facts, both the sides have cited large number of decisions but in view of the latest pronouncement by the Hon'ble Apex Court based upon complete analysis of the scheme of Act and the previous ruling as well, the Court is not finding it proper to over burden present order by minutely narrating those

decisions but the Court has gone through the said decisions but facts are quite distinct and hence, no assistance is possible to be extended to the case of present petitioner. First decision which is in the case of Haryana Space Application Centre (HARS AC) (supra) which is relied upon by Mr. Anshin Desai, learned senior advocate is with respect to a department of Science and Technology, Government of Haryana which is a nodal agency for geographic information system. The said nodal agency invited request for proposal from qualified vendors for modernization of land record and awarded contract to one Pan India Consultants (P) Ltd. and three other vendors and with respect to that work the issues arose and the same has resulted into filing of the suit before the Delhi High Court and later on the nodal agency i.e. HARSAC invoked the arbitration clause contained in the service level agreement and appointment of one Principal Secretary to the Government of Haryana as their nominee Arbitrator and in that factual background the Hon'ble Apex Court has examined the issue. It further transpires from paragraphs 17 and 18 that there was a lapse of four years'

time since the constitution of Tribunal and the award was not pronounced even though dates were given. So in that peculiar background of facts, the Hon'ble Apex Court had pronounced a verdict with regard to appointment of Principal Secretary as a nominee Arbitrator whereas here in the case on hand none of the clauses of the schedule either V or VII are attracted. Hence, in absence thereof, the petitioner is not entitled to any relief.

[18] Further in another decision, which has been brought to the notice is with regard to questioning the appointment of Arbitrator contrary to the procedure agreed upon in the arbitration agreement. The said decision reported in Walter BAU AG, Legal Successor, of the Original Contractor, DYCKERHOFF and WIDMANN A.G. (supra) is in the different factual matrix and the Arbitrator was appointed in complete disregard to the procedure contained in the agreement itself and as such the Hon'ble Apex Court has observed in the relevant paragraphs. But while going through paragraph 9 of the said decision, it has been observed clearly that with regard to appointment of Arbitrator the remedy of aggrieved

persons is not under Section 11(6) but lies elsewhere and under the different provisions of the Act, namely, Sections 12, 13 and 14. So here also, once having participated to the jurisdiction and the procedure of the Arbitrator, there is hardily any justifiable reason for the petitioner to invoke extraordinary jurisdiction of this Court. The learned senior advocate has not been able to point out so cogently that such kind of objections were raised at any point of time during the passage of time neither at the stage of reply to the notice nor in earlier petition as referred to in which the applicants were party and further during the extension of time also, no such grievance was voiced out and as such, Court is not inclined to entertain such grievance.

[19] In the light of aforesaid discussions and recent pronouncement even the judgment which is tried to be relied upon in the case of TRF Limited (supra) and Bharat Broadband Network Limited (supra) is of no assistance to the petitioner. So far as last decision, which is tried to be relied upon, of the Hon'ble Apex Court in case of Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited (supra), no doubt observations have been made with regard to

Section 12(5) of the Act but a close perusal of the facts are clearly suggesting in the said decision that all disputes and differences shall be referred to the sole Arbitrator i.e. the Chairman, Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited and his decision shall be final and binding. The Hon'ble Apex Court has examined the proceedings and the law, but as said earlier, in very recent decision in the case of Bhaven Construction through authorised signatory Premjibhai K. Shah (supra), the Hon'ble Apex Court has clearly propounded that the Court should refrain from making any judicial intervention specially when the process under the arbitration is already set in motion. Hence, in considered opinion of this Court none of the circumstances are sufficient enough to convince the Court to intervene in the proceedings since the petitioner is not remedyless under the statute itself.

[20] So from the overall discussion and proposition of law laid down by various decisions, petitioner has not made out any case to call for any interference. Hence, the petition being devoid of merits stands dismissed.

[21] However, while parting with the present order, it is

made clear that this Court has not expressed any opinion with regard to merit on any issue and the process which is underway before respondent No.1.

[22] In view of the order passed in the main matter, Civil Application does not survive and stands dismissed accordingly.

Sd/-

(ASHUTOSH J. SHASTRI, J.)

Further order

At this stage, after pronouncement of the order, learned advocate Mr. Jay M. Thakkar has requested to suspend the operation of the present order which in considered opinion of the Court is not desirable or justified. Accordingly, request stands rejected.

Sd/-

(ASHUTOSH J. SHASTRI, J.)

DHARMENDRA KUMAR