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

Judgment reserved on: **25.07.2022**
Judgment pronounced on: **13.10.2022**

\+ **FAO (COMM) 179/2021 and CM APPL. 39706/2021**

SHRIRAM TRANSPORT FINANCE CO. LTD. ..... Appellant
Through: Mr Bharat Singh with Mr Suraj K. Singh and Mr Devesh Gupta, Advocates.

versus

SHRI NARENDER SINGH ..... Respondent
Through: None.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MS JUSTICE TARA VITASTA GANJU
[Physical Court Hearing/ Hybrid Hearing (as per request)]

JUDGMENT

TARA VITASTA GANJU, J.:

FAO (COMM) 179/2021 & CM APPL. 39706/2021 [*Application for Condonation of Delay*]

1. The present Appeal has been filed under the provisions of Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (hereinafter "the Act") read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 against the judgment of the learned District Judge dated 17.12.2020 (hereinafter "the Impugned Judgment"). By the Impugned Judgment, the learned District Judge has allowed the Petition under Section 34 of the Act and set aside the Arbitral Award dated 16.07.2019 on the following two grounds:

(i) There is non-compliance of Section 21 of the Act;

(ii) The Arbitrator did not make the requisite disclosure as is required under Section 12 of the Act.

1.1 At the outset, it is noticed that the Appeal is wrongly filed under the provisions of Section 37(1)(b) instead of Section 37(1)(c) of the Act by the Appellant Company. Accordingly, this Appeal is treated as being filed under Section 37(1)(c) of the Act.

2. The matter was listed before this Court on 10.11.2021, wherein this Court recorded as follows:

> *"5. On being queried, Mr. Bharat Singh, who appears for the appellant, does not dispute the fact that, the learned arbitrator has been engaged on earlier occasions by the appellant.*
>
> *6. At the request of Mr Singh, list the matter on 14.12.2021.*
>
> *7. In the meanwhile, Mr Bharat will file the entire record which was placed before the learned arbitrator. The record will be duly indexed and paginated.*
>
> *8. Furthermore, Mr Bharat will file a note, not exceeding two pages, indicating therein, the ground(s) on which the appellant wishes to assail the impugned judgment."*

2.1 We are informed by the Counsel for the Appellant Company that the Arbitral record has since been filed and a certificate in that regard has been placed on record.

2.2 A perusal of the case file, however, shows that the pleadings before the District Judge have not been filed by the Appellant Company. No written submissions, as directed on 10.11.2021, have been filed either.

2.3 The matter was listed on 14.12.2021, 12.07.2022, 18.07.2022 and 25.07.2022, when the Counsel for the Appellant Company addressed

arguments in support of maintainability of the Appeal. We may clarify here that, since we have not admitted the Appeal, no notice to the Respondent has been issued.

3. Since the Appellant Company failed to file the pleadings as filed before the District Judge, the brief facts of this case have been culled out from the Impugned Judgement. These are set forth below:

3.1 The Respondent (Petitioner before the District Judge) purchased a vehicle on loan from the Appellant (Respondent before the District Judge) (hereinafter "Appellant Company") by a Loan Agreement No. AZDPRO201040008, dated 16.09.2014 for an amount of Rs.6,00,000/- (hereinafter "Loan Agreement").

3.2 Owing to disputes between the parties, the vehicle was repossessed on 18.04.2017 and consequently sold by the Appellant Company. Thereafter, the Appellant Company sent a notice of demand dated 20.09.2018 to the Respondent, demanding a payment of Rs.4,70,248/- as on 12.09.2018 and mentioning therein that the Arbitration clause would be invoked on failure of the Respondent to make such payment.

3.3 Subsequently, the Appellant Company, by its letter dated 27.09.2018, appointed Shri B.L. Garg (Retd. ADJ) as the Sole Arbitrator (hereinafter "the Arbitrator") to adjudicate the disputes/differences between the parties. The Arbitrator entered into reference on 11.02.2019 and held hearings on 18.03.2019, 23.04.2019, and 31.05.2019.

3.4 It was contended *inter-alia* by the Respondent that the Respondent appeared before the Arbitrator on 18.03.2019 and the case was fixed for 23.04.2019, when the Appellant Company submitted its Statement of Claim with documents. The matter was thereafter adjourned to

31.05.2019 for the Respondent's reply/objections. The Respondent further submitted that on 31.05.2019, he could not reach the venue of the Arbitration in time and that when he reached the venue, he was informed by the Arbitrator that the proceedings were closed and that the outcome of the proceedings would be sent to him by post.

3.5 The Respondent stated that on 20.07.2019, he received the Arbitral Award dated 16.07.2019 (hereinafter "the Arbitral Award"). The Respondent further stated that it was only on a perusal of the Arbitral Award, that the Respondent came to know that *ex-parte* evidence was led by the Authorised Representative of the Appellant Company on 04.07.2019 and the matter was adjourned to 16.07.2019 for final arguments and pronouncement of the Arbitral Award. The Arbitrator awarded a sum of Rs.4,70,248/- (Rupees Four Lakh Seventy Thousand Two Hundred and Forty Eight) along with interest at the rate of 18% per annum and a sum of Rs.12,000/- (Rupees Twelve Thousand) as costs of these proceedings to the Appellant Company in terms of the Arbitral Award.

3.6 The Respondent filed a Petition under Section 34 of the Act for setting aside the Arbitral Award. It was stated by the Respondent that the Arbitrator did not give him any opportunity nor send him a notice or information of the dates of 04.07.2019 and 16.07.2019 and that the proceedings were conducted by the Arbitrator in a hasty manner. It was further contended that, upon enquiries made by the Respondent thereafter, it was revealed that the Arbitrator is a frequent Arbitrator for the Appellant Company and has passed similar *ex-parte* award(s) in favour of the Appellant Company. It was argued by the Respondent that all these circumstances raise a doubt on the conduct of

the Arbitrator and coupled with the non-disclosure as mandated under Section 12 of the Act, that the Arbitrator is a frequent stock Arbitrator for the Appellant Company is a ground to set aside the Arbitral Award, being opposed to the fundamental policy of India.

3.7 The Appellant Company filed its Reply to the said Petition, *inter-alia*, stating that the Petition under Section 34 is barred by limitation being filed after three months of the date of the Arbitral Award.

3.8 The Appellant Company further contended that the objections filed by the Petitioner do not fall within the purview of Section 34(2) of the Act and are liable to be dismissed. Allegations that the Respondent has failed to approach the Court with clean hands were also made by the Appellant Company against the Respondent.

4. In para 12 of the Impugned Judgment, it has been held by learned District Judge, that the Petition under Section 34 of the Act is barred by limitation is untenable as the Arbitral Award was passed on 16.07.2019 and it was received by the Respondent by post on 20.07.2019. Therefore, the objections filed by the Petitioner on 18.10.2019 were within time.

4.1 The learned District Judge, after dealing with the other objections of the Appellant Company, has allowed the Petition under Section 34 of the Act filed by the Respondent and set aside the Arbitral Award, stating that there is no compliance of the provisions of Sections 12 and 21 of the Act.

5 Being aggrieved with the findings of the learned District Judge, the Appellant Company has filed the present Appeal, challenging the Impugned Judgment on the following grounds:

"A. Mandatory notice as stipulated under section 21 of the

Arbitration and Conciliation Act, 1996 was duly issued to the respondent;
B. There was no violation of section 12 of the Arbitration and Conciliation Act, 1996;
C. The respondent didn't object the appointment of the Ld. Arbitrator during the Arbitral proceedings."

6. Sub-section (3) of Section 34, states that an Application for setting aside an Arbitral Award is to be made within three months from the date of receipt of the Arbitral Award. The proviso thereto also sets forth that the Court may condone a delay for a period of up to 30 days thereafter (and no more) if sufficient reasons are given by an Application filed under this Section. Since the Arbitral Award was received by Respondent on 20.07.2019, the Application made by the Respondent on 18.10.2019 was within the period of three months, as prescribed by the statute. The Application was, therefore, made by the Respondent in time. Hence, we find no infirmity with this finding of the learned District Judge.

7. The next challenge made by the Appellant Company is, that it has wrongly been held in the Impugned Judgment, that the provisions of Section 21 of the Act have not been complied with, when in fact, such, compliance was done. The Appellant Company has relied on letters dated 20.09.2018 and 27.09.2018 to contend that the procedure under Section 21 of the Act in this regard.

7.1 It is further submitted by the Appellant Company that the learned District Judge had wrongly relied on *Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd.* reported as *2017 SCC OnLine Del 7228*, of a Single Judge of this Court, Muralidhar, J. (as he then was) and on other decisions of this Court to hold that there was no valid reference of

dispute to Arbitration. It was submitted that these decisions would not apply to the present case as Section 21 of the Act, had been complied with, by the Appellant Company.

8. To better appreciate the case at hand, it is first necessary to set forth the Arbitral clause in the Loan Agreement which provides for the procedure for appointment of an Arbitrator.

8.1 Article 15 of the Loan Agreement states as follows:

> "*All disputes, differences and/or claims arising out of these present or as to the construction, meaning or effect here of or as to the rights and liabilities of the parties hereunder shall be settled by arbitration to be held in Delhi in accordance with the provisions of the Arbitration and the Conciliation Act, 1996 or any other statutory amendments thereof or any statue enacted for replacement thereof and shall be referred to the sole arbitration of a person to be nominated/appointed by Shriram. In the event death, refusal, neglect, inability or incapability of the person so appointed to act as an arbitrator, Shriram may appoint a new arbitrator. The award including the interim award/s of the arbitrator shall be final and binding on all the parties concerned. The arbitrator may lay down from time to time the procedure to be followed by him in conducting arbitration proceedings in such a manner as the considers appropriate. Any proceedings to be initiated in any courts of law in pursuance of this arbitration shall be instituted and held in the court at Delhi only."*
>
> [Emphasis is ours]

8.2 As per the aforesaid clause, "*all disputes, differences and/or claims*" between the parties under the Loan Agreement, were to be referred to Arbitration by a Sole Arbitrator who is "*to be nominated/appointed by Shriram*" (Appellant Company herein).

8.3 A perusal of the Arbitral record as filed by the Appellant Company shows that a letter dated 20.09.2018 was addressed by the Appellant

Company to the Respondent stating that in the event, the payment due is not made within 7 days, the disputes "*stand referred to Arbitration*" and further that the Appellant Company shall initiate Arbitral proceedings. The relevant portion of the said letter is extracted below:

> *"7. Hence kindly take Note that you addresses are advised to pay and clear entire outstanding dues amounting to Rs. 470248/- as on date 12/09/2018 and also with accrued interest/Penal all other charges till the date of repayment/realization and charges, within 7 days on the receipt of this notice, failing which company will refer the matter for arbitration.*
>
> *8. If you have failed to comply with the requisitions contained in notices, the disputes, differences and claims shall be deemed to have arisen under the said Agreement and the said disputes, differences and claim shall stand referred to the Arbitration.*
>
> *9. If you are failed to pay the outstanding amount as per out [sic: our] loan agreement ARTICAL [sic: Article] No. 15. We have a right to initiate arbitration processing. So we will initiate the arbitration proceeding"*
>
> [Emphasis is ours]

8.4 From a plain reading of this letter, two things are clear:

(i) The letter dated 20.09.2018 merely states that the Appellant Company has a right to initiate Arbitration proceedings so they will initiate such proceedings;

(ii) This letter does not name any person as an Arbitrator, nor the fact that the person is being appointed as an Arbitrator in terms of the procedure set forth in the Loan Agreement.

8.5 A week later, a letter dated 27.09.2018, was sent by the Appellant Company to the Arbitrator appointing him as the *"Sole Arbitrator to adjudicate the disputes and differences between Shriram Transport Finance Co. Ltd. and Mr Narender Singh (Hirer) and pass the award."*

This letter was neither marked to the Respondent nor is there any averment by the Appellant Company that the letter dated 27.09.2018 was in fact sent to the Respondent.

8.6 From a perusal of the Arbitral Award, it is also apparent that the letter dated 27.09.2018 was sent by the Appellant Company to the Arbitrator, by hand, through one Mr Tekchand Sharma, Attorney for the Appellant Company.

9. In order to deal with the objection of the Appellant Company, the notice under Section 21 of the Act was sent, we would need to refer to the said provision. Section 21 of the Act, which sets forth the date of commencement of Arbitral proceedings, reads as follows:

> *"21. Commencement of Arbitral proceedings. – unless otherwise agreed by the parties, the Arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to Arbitration is received by the respondent."*

9.1 A plain reading of this Section shows that Arbitral proceedings commence on the date on which the request for the dispute to be referred to Arbitration is received by the concerned Respondent. Therefore, the commencement of Arbitral proceedings is incumbent on the "*receipt of such request or notice"*. If no notice is received by the concerned Respondent, there is no commencement of Arbitral proceedings at all. Emphasis here is also made to the fact that the notice should not only be *"sent"* but also that the notice should be *"received"* for such request for commencement.

9.2 Section 21 will have to be read with Section 34 of the Act. Section 34 (2) (iii) provides that an award may be set aside, in the event, where the party appointing the Arbitrator has not given proper notice of the

appointment of an Arbitrator or the Arbitral proceedings.

9.3 The judgement in *Alupro Building* case (supra) has aptly explained the relevance of a notice under Section 21 of the Act. It was held that the Act does not contemplate unilateral appointment of an Arbitrator by one of the parties, there has to be a consensus for such appointment and as such, the notice under Section 21 of the Act serves an important purpose of facilitating such a consensus on the appointment of an Arbitrator. It was further held in *Alupro Building* case (supra) that the parties may opt to waive the requirement of notice under Section 21 of the Act. However, in the absence of such a waiver, this provision must be given full effect to.

9.4 We are in agreement with the principles as expressed in the decision of *Alupro Building* case (supra), which are enunciated below:

(i) The party to the Arbitration Agreement against whom a claim is made should know what the claims are. The notice under Section 21 of the Act provides an opportunity to such party to point out if some of the claims are time barred or barred by law or untenable in fact or if there are counter-claims.

(ii) Where the parties have agreed on a procedure for appointment, whether or not such procedure has been followed, will not be known to the other party unless such a notice is received.

(iii) It is necessary for the party making an appointment to let the other party know in advance the name of the person who it proposes to appoint as an Arbitrator. This will ensure that the suitability of the person is known to the opposite party including whether or not the person is qualified or disqualified to act as an Arbitrator for the various reasons set forth in the Act. Thus, the

notice facilitates the parties in arriving at a consensus for appointing an Arbitrator.

(iv) Unless such notice of commencement of Arbitral proceedings is issued, a party seeking reference of disputes to Arbitration upon failure of the other party to adhere to such request will be unable to proceed under Section 11(6) of the Act. Further, the party sending the notice of commencement may be able to proceed under the provisions of Sub-section 5 of Section 11 of the Act for the appointment of an Arbitrator if such notice does not evoke any response.

10. The Appellant Company has relied on the letters dated 20.09.2018 and 27.09.2018 to show compliance with Section 21 of the Act. This reliance by the Appellant Company is completely misconceived. The letter of 20.09.2018 was a unilateral communication sent by the Appellant Company to the Respondent. As discussed above, the letter did not set-forth any details about who was being appointed as an Arbitrator or the procedure being followed. The Appellant Company merely stated that they have a right to initiate Arbitral proceedings and so they will initiate Arbitral proceedings. There was no person named as an Arbitrator therein nor was any consensus sought in such appointment. There is no evidence of this letter ever being received by the Respondent on record either. As such, the letter dated 20.09.2018 would not qualify as notice under Section 21 of the Act.

10.1 The letter dated 27.09.2018, was never sent to the Respondent so there was no question of this letter being received by the Respondent. It was only sent to the Arbitrator. This letter could not qualify to be the notice of commencement of proceedings either.

10.2 The record also shows that the parties had no agreement for a waiver of the requisite notice under Section 21 of the Act.

10.3 Hence, we hold that the Arbitral appointment made by the Appellant Company was not made in accordance with the provisions of Section 21 of the Act.

11. We now propose to deal with the second objection in the said Appeal raised by the Appellant Company that there was no violation of Section 12 of the Act. It has been held by the learned District Judge that the letter/notice dated 11.02.2019, sent by the Arbitrator to the parties, did not furnish the mandatory disclosure under Section 12 of the Act. The Counsel for the Appellant Company has submitted that such disclosure is not a mandatory requirement in the Act and challenged these findings in the present Appeal.

11.1 A perusal of the letter/notice dated 11.02.2019 addressed by Shri B.L. Garg (Retd. ADJ and the Arbitrator) states that he had been appointed by the Appellant Company, as the Sole Arbitrator to decide the disputes that have arisen between the Appellant Company and the Respondent. The letter/notice is addressed to the Appellant Company as well as the Respondent. The letter did not contain any reference to the disclosure as mandated under Section 12 of the Act.

11.2 The letter/notice dated 11.02.2019, is reproduced below:

"BEFORE SHRI B.L.GARG. ARBITRATOR.
(Addl. District &Sessions Judge (Retd)

…….

SPEED/REGD. POST

FILE NO. ARB/BLG/7528/2019 Dated.11-02-2019.

IN THE MATTER OF ARBITRATION BETWEEN

SHRIRAM TRANSPORT FINANCE.COMPANY LIMITED,
Regd. Office at Mookambika, Complex, 3rd Floor,
4, Lady Desika Road, Mylapore, Chennai-600004.

Branch Office at: 431/64/1 Ground Floor, LDA Trust Estate,
Kewai Park Extn. Azadpur, Delhi-110033 Claimant

AND

1. MD, Narender Singh, S/o Sh. Hari Singh Thakur,
R/o H.N, A-930, Block-A,
Jahangirpuri, Delhi-110033.

2. Sh. Kharak Singh, S/o Sh. Prem Singh,
R/o H.No.E-280, Budh Nagar,
Inderpuri, Delhi-110012. Respondents

Whereas, M/s Shrirarn [sic : Shriram] Transport Finance Co. Ltd. Vide letter dated 27-09-2018, by invoking the Arbitration Clause of Loan Agreement No. AZDPRO410170003 has appointed me as Sole Arbitrator to decide the dispute that has arisen between the above named parties.

<u>Now Therefore Notice Is Hereby Given That:</u>

The hearing in the above case will be held on 18-03-2019 at 4.00 p.m. at A-9, Ganpati Apartments, 6, Alipur Road, Civil Lines, Delhi - 110054.

The parties shall file their Statement of Facts/Counter Statement of facts, if any, together with documents in support thereof on the said date, place and time.

If any of the party fails to attend the hearing, I (Arbitrator) shall be at liberty to conduct the proceedings, ex-parte.

Sd/-
(B.L. GARG)"

11.3 The record further shows that there is no disclosure as is envisaged under the provisions of the Act, made during the pendency of the Arbitral proceedings by the learned Sole Arbitrator.

12. The Impugned Judgment has discussed in detail the provisions of Sections 12 and 34 of the Act along with the Fifth, Sixth, and Seventh Schedules of the Act, thereof and has relied on the Judgment of *Alupro Building* case (supra), wherein a similar non-disclosure by an Arbitrator led to setting aside of the Award.

12.1 The Impugned Judgment, further discussed other judgments of this Court and the judgment of the Supreme Court in the matter of *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, reported as *(2020) 20 SCC 760*, which dealt with the independence and impartiality of an Arbitrator. The Supreme Court in *Perkins Eastman* case (supra) has held that the relationship between the parties to the Arbitration and the Arbitrator is contractual in nature and that the Act itself requires an Arbitrator to rise above the interest of the parties in performing his adjudicatory role and, therefore, must be independent of the parties and impartial as well.

12.2 The Counsel for the Appellant Company, has contended that the provisions of Section 12 and the Fifth and Sixth Schedules of the Act do not state that it is mandatory for the Arbitrator to make any such disclosure and hence the non-disclosure by the Arbitrator was not a ground to set aside the Arbitral Award.

13. We are unable to agree with this submission. Section 12 and Fifth, Sixth and Seventh Schedules have been inserted in the Act, pursuant to the 2016 amendment (Act 3 of 2016). Sub-section (1) and (2) of Section 12 of the Act are relevant in this regard.

13.1 Section 12(1)(a) of the Act, states that any person who is approached in connection with his possible appointment as an Arbitrator *"shall"* disclose in writing any circumstances which are likely to give rise to

justifiable doubts as to his independence or impartiality. The disclosure is clearly mandatory. It reads as follows:

> *"Section 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."*
>
> [Emphasis is ours]

13.2 The Explanation to Section 12(1) of the Act states that, "*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.*"

13.3 Section 12(2) casts a duty upon the Arbitrator to make such a disclosure as follows:

> *"(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."*
>
> [Emphasis is ours]

13.4 Section 12(3) explains that a challenge to an Arbitrator may be made in two circumstances:

> *"(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."

13.5 Thus, the grounds as mentioned in the Fifth Schedule of the Act become guiding factors to determine whether any justifiable ground exists regarding the independence and impartiality of the Arbitrator.

13.6 We are supported in our view by the judgment of the Supreme Court in *HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Ltd.* reported as *(2018) 12 SCC 471*, which has clarified Section 12 of the Act, as follows:

> *"11. Under Section 12, it is clear that when a person is approached in connection with his possible appointment as an arbitrator, he has to make a disclosure in writing, in which he must state the existence of any direct or indirect present or past relationship or interest in any of the parties or in relation to the subject-matter in dispute, which is likely to give justifiable doubts as to his independence or impartiality. He is also to disclose whether he can devote sufficient time to the arbitration, in particular to be able to complete the entire arbitration within a period of 12 months. Such disclosure is to be made in a form specified in the Sixth Schedule, grounds stated in the Fifth Schedule being a guide in determining whether such circumstances exist…."*
>
> [Emphasis is ours]

14. It has not been disputed by the Counsel for the Appellant Company that the Arbitrator is the regular Arbitrator for the parties and has acted on various occasions for the Appellant Company. This fact was also affirmed by the Counsel for the Appellant Company, as noted in our Order dated 10.11.2021. However, this fact was never disclosed by the Sole Arbitrator to the parties in the format specified in the Sixth

Schedule or otherwise.

14.1 The only exception to the above circumstances is Explanation 3 to the Fifth Schedule, which, however, is inapplicable to the present case. Explanation 3 states as follows:

> *"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."*

14.2 The facts, as available from the record show:

(i) The Arbitrator addressed letter/notice dated 11.02.2019 to both parties of his appointment by the Appellant Company by its letter dated 27.09.2018. As discussed hereinabove, the letter dated 27.09.2018 was not sent to the Respondents. The Respondent only got notice of the Arbitral proceedings after the Arbitrator entered reference, upon receipt of the letter/notice dated 11.02.2019.

(ii) The letter/notice dated 11.02.2019, sent by the Arbitrator to the parties informing them of his appointment mentions the date and time of hearing, and requires the parties to file their Statement of Claim/Counter Statement of Claim along with documents. It does not contain any declaration under Section 12 of the Act.

(iii) The proceeding sheets recording the Arbitral proceedings on 18.03.2019, 23.04.2019, 31.05.2019, 04.07.2019 and 16.07.2019 *[at pages 125-126 and 134-135 of the case file]* do

not contain any reference to this mandatory requirement of the Act either.

14.3 As the Arbitrator has acted in the past for the Appellant Company, Section 12(1)(a) and 12(2) of the Act makes it incumbent upon him to make a disclosure regarding his relation with the Appellant Company, at the time of entering into reference in terms of these provisions of the Act. Therefore, the following clauses of the Fifth Schedule will be applicable in the facts of this case:

> "*The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators*.
>
> *"Previous services for one of the parties or other involvement in the case*
>
> *....*
>
> *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.....*
>
> *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....."*

14.4 However, the Arbitrator did not furnish the mandatory disclosure either at the initial stage or thereafter, during the pendency of the proceedings.

15. The effect of such non disclosure as is required by Section 12 read with the Fifth Schedule of the Act is required to be seen. The law in regard to this provision of the Act is well settled. The Supreme Court, in a Judgment titled *Bharat Broadband Network Limited v. United Telecoms Limited* reported as *(2019) 5 SCC 755*, while dealing with the law, in relation to Section 12 and the Fifth and Sixth Schedules of the Act, has

held that the disclosures under the Act, are required to be made and where these are not complied with, the Arbitral appointment may be challenged. The relevant extract is below:

> *"14. From a conspectus of the above decisions, it is clear that Section 12(1), as substituted by the Arbitration and Conciliation (Amendment) Act, 2015 ["the Amendment Act, 2015"], makes it clear that when a person is approached in connection with his possible appointment as an arbitrator, it is his duty to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality. The disclosure is to be made in the form specified in the Sixth Schedule, and the grounds stated in the Fifth Schedule are to serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Once this is done, the appointment of the arbitrator may be challenged on the ground that justifiable doubts have arisen under sub-section (3) of Section 12 subject to the caveat entered by sub-section (4) of Section 12. The challenge procedure is then set out in Section 13, together with the time-limit laid down in Section 13(2). What is important to note is that the Arbitral Tribunal must first decide on the said challenge, and if it is not successful, the Tribunal shall continue the proceedings and make an award. It is only post award that the party challenging the appointment of an arbitrator may make an application for setting aside such an award in accordance with Section 34 of the Act."*
>
> [Emphasis is ours]

15.1. The Supreme Court, in the case of *HRD Corpn.* (supra), while discussing the changes made by the 2016 Amendment to the Act (Act 3 of 2016), explained the principles of challenge under the Fifth and Seventh Schedule of the Act and held as follows:

> *"12. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become "ineligible" to be appointed as arbitrators, and persons about whom*

justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible"…..

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 arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds…."

[Emphasis is ours]

16. The Appellant Company in ground 'C' of this Appeal has submitted that since the Respondent did not object to the appointment of the Arbitrator during the Arbitral proceedings and was, therefore, precluded from raising this objection in its Petition under Section 34 of the Act.

16.1 In order to discuss the challenge raised, it is necessary to set forth the relevant provisions of Section 13 of the Act. Section 13 of the Act is to be read with the provisions of Section 12 of the Act. The relevant extract of Section 13 of the Act reads as follows:

"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."

[Emphasis is ours]

16.2 Section 12(3)(a) of the Act (reproduced in para 13.4 hereinabove) makes it incumbent for an Arbitrator to make a disclosure of any circumstances which would give rise to justifiable doubts as to his independence or impartiality, *inter-alia,* in terms of the Fifth Schedule of the Act. Sub-section 3(b) of Section 12 of the Act is not applicable in

this case and the provision applicable here is Section 12(3)(a) of the Act.

16.3 Sub-section (2) of section 13 of the Act then sets forth how/when an Arbitrator must be challenged. This Section limits the challenge to two circumstances:

(i) Within 15 days or after becoming aware of the constitution of the Arbitrator/Arbitral Tribunal; or

(ii) After becoming aware of the circumstances referred to in Section 12(3)(a) or (b) of the Act.

16.4 We find that initially, as discussed above, no notice as contemplated under the provisions of Section 21 of the Act was ever received by the Respondent to make such a challenge. After receipt of the notice from the Arbitrator on 11.02.2019, the Respondent did appear before the Arbitrator for the hearings on 18.03.2019 and 23.04.2019. The Impugned Judgment states that on 31.05.2019, the Respondent was unable to appear on time and was informed by the Arbitrator that the proceedings were closed.

16.5 A perusal of the order sheets of the Arbitrator [*see pages 134-135 of the case file*] however shows that on 31.05.2019, the Respondent was proceeded *ex-parte* without recording the factum of his late appearance. Subsequently, the Appellant Company led *ex-parte* evidence on 04.07.2019 and the Arbitral Award was pronounced by the Arbitrator on 16.07.2019. On these 3 dates, there was appearance by the Appellant Company and not by the Respondent who was *ex-parte*.

16.6 The question that therefore arises is whether the challenge made by the Respondent was in terms of the provision of Sub-section (2) of Section 13 of the Act.

16.7 As discussed, the phrase referred to in Section 13(2) of the Act is "*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"*. Admittedly, the Respondent did appear on two dates (18.03.2019 and 23.04.2019) before the Arbitrator without making any such challenge, hence the challenge was not made within 15 days of the constitution of the Arbitral Tribunal. However, the Arbitrator had not complied with the provision of Section 12 of the Act, by making the mandatory disclosure of the fact that he had previously appeared as an Arbitrator for the Appellant Company. Without such knowledge, there was no occasion for the Respondent to doubt the Arbitrator. The challenge could only, therefore, be made by the Respondent after becoming aware of these circumstances, which, as discussed above, he became aware of after obtaining a certified copy of the *ex-parte* Arbitral Award on 20.07.2019. In the present case, the Respondent has made the challenge of "*circumstances*" as envisaged in Sub-section (3) of Section 12 of the Act, after passing of the Arbitral Award. This objection was therefore, taken by the Respondent in his Petition under Section 34 of the Act stating therein the reason for the said challenge. We, therefore, hold that there is no non-compliance of the provisions of the Act by the Respondent.

17. The scope and ambit of a challenge under Sections 34 and 37 of the Act is no longer *res integra.* In a recent decision by the Supreme Court in the matter of *PSA SICAL Terminals Pvt. Ltd. v Board of Trustees of V.O. Chidambranar Port Trust Tuticorin* reported as *2021 SCC OnLine SC 508*, the Supreme Court has reiterated its view, in *MMTC Limited v. Vedanta Limited* reported as *(2019) 4 SCC 163*, and held as follows:

"41. It will be relevant to refer to the following observations of this court in the case of MMTC Limited (supra):

> *"11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e., if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian Law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., [1948] 1 K.B. 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.*
>
> *12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2) (b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes*

to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts.

....

14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the Court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the Court under Section 34 has not exceeded the scope of the provision..."

[Emphasis is ours]

17.1 Recently the Supreme Court, in *UHL Power Co. Ltd. v. State of H.P.* reported as *(2022) 4 SCC 116*, has further clarified the principles for the exercise of jurisdiction under Sections 34 and 37 of the Act as follows:

> *"16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In MMTC Ltd. v. Vedanta Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163:(2019) 2 SCC (Civ) 293], the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained .....*
>
> *17. A similar view, as stated above, has been taken by this Court in K. Sugumar v. Hindustan Petroleum Corpn. Ltd. [K. Sugumar v. Hindustan Petroleum Corpn. Ltd., (2020) 12 SCC 539], wherein it has been observed as follows : (SCC p. 540, para 2)*
>
> > *"2. The contours of the power of the Court*

> *under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of the civil court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator…..."*
>
> [Emphasis is ours]

17.2 In exercise of powers under Section 37 of the Act, the scope of interference is completely curtailed. The Supreme Court has, however, held that where in the Arbitral proceedings the illegality goes to the very root of the matter, interference by the Court is warranted. Such interference will be justified especially when the Arbitrators conduct and impartiality is in doubt.

18. As already discussed above, in the present case, there has been non-compliance with Section 21 of the Act by the Appellant Company. Further, the Arbitrator's disclosure as mandated in Section 12 of the Act read with the Fifth and Sixth Schedules of the Act, is also absent. Thus, any Award rendered by such an Arbitrator, as such, cannot be sustained.

18.1 The learned District Judge has exercised jurisdiction under the provisions of Section 34 of the Act on finding non-compliance with the provisions of Section 12 and 21 of the Act and has proceeded to set

aside the Arbitral Award.

18.2 In view of the aforegoing discussions and the findings in respect of Section 12 read with the Fifth and Sixth Schedules, Section 13 and Section 21 read with Section 34(2)(iii) of the Act, we find that no infirmity or illegality exists in the Impugned Judgment, that would merit our interference under Section 37 of the Act.

18.3 The Appeal is, therefore, misconceived and is accordingly dismissed. The pending Application is also dismissed. There shall be no order as to costs. The record be consigned to the record room as per the procedure.

TARA VITASTA GANJU, J

RAJIV SHAKDHER, J

OCTOBER 13, 2022
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Click here to check corrigendum, if any