Before Alka Sarin, J.

RELIANCE INFRASTRUCTURE LTD.—*Petitioner*

versus

STATE OF HARYANA AND ANOTHER—*Respondents*

CR No.7191 of 2019

June 03, 2020

Arbitration and Conciliation Act, 1996 —S.12 (3), (4) & (5), S.13 and S.14(1) (a)—Petitioner was awarded contract by the respondent Haryana Power Generation Corporation Ltd.—dispute arose—the agreement provided for appointment of an arbitrator by the State government—Managing Director of the Corporation proposed/suggested a sole arbitrator by name since she was seized of a similar arbitration between the parties and had knowledge of the contractual provisions—after government approval she was appointed by the Governor—challenge to, on the grounds that the arbitrator could not have been recommended by the Managing Director—besides, the arbitrator, being a former Chief Secretary to the State Government, would be interested in the outcome of arbitration—she would de jure be unable to perform her functions — Held, if an arbitrator falls in any of the categories mentioned in the Seventh Schedule, he/she becomes de jure unable to perform and regarded as ineligible S.14 (1) (a)—such a person would lack inherent jurisdiction to proceed with arbitration, and an application under S.14 (2) may be filed in Court to decide on termination of arbitrator's mandat.—In case grounds stated in the Fifth Schedule are disclosed giving rise to justifiable doubts as to arbitrator's independence or impartiality, such grounds are to be raised before the arbitrator under S.13, and on their rejection proceedings are to continue—only after passing of the arbitral award application may be made under S.34 for setting it aside on the aforesaid grounds—On facts, therefore, challenge laid to the appointment of arbitrator on the grounds contained in the Fifth Schedule was not gone into by the Court as it was to be raised before the sole arbitrator—Further held, since the sole arbitrator was appointed by the government, which was neither a party nor signatory to the agreement, the case did not fall in either of the two situations discussed in Perkins Eastman case, as the Managing Director was not named as an arbitrator, nor had he been given additional power to appoint anyone else as arbitrator—Simply

because the State of Haryana has some financial interest in setting up of respondent corporation or has a nominee on its Board, it would not ipso facto mean that it has any interest in the arbitral proceeding—Further, merely because the government has also zeroed down on the same person as suggested by the Managing Director, it would not imply that the government did not independently apply its mind or that the Managing Director played a role in the appointment—Additionally, there is no clause in the Seventh Schedule which renders the appointment of an arbitrator void because he/she is already dealing with another dispute between the same parties—petition dismissed.

Held that if an Arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes ineligible to act as Arbitrator and under Section 14(1)(*a*) of the Act he then becomes de jure unable to perform his functions as he/she is regarded as ineligible. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) of the Act to the Court to decide on the termination of his/her mandate on this ground. In such circumstances there would be no need for a party to approach the Arbitral Tribunal. However, in a situation where grounds stated in the Fifth Schedule are disclosed and which grounds give rise to justifiable doubts as to the Arbitrator's independence or impartiality, such grounds are to be raised and determined before the Arbitral Tribunal under Section 13 of the Act. If the Arbitral Tribunal rejects such grounds then the arbitral proceedings are to continue and an award is to be made. 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 of the Act on the aforesaid grounds. Any challenge contained in the Fifth Schedule against the appointment of the Arbitrator can be gone into only after the Arbitrator has given an award.

(Para 35)

Further held, that hence in the present civil revision petition, which arises from a petition filed under Section 14 of the Act, this Court is only to delve into the question as to whether the Sole Arbitrator falls in any one of the categories specified in the Seventh Schedule and has become ineligible to act as Sole Arbitrator since under Section 14(1)(*a*) of the Act she has become de jure unable to perform her functions. The challenge, therefore, laid by the petitioner

to the appointment of the Sole Arbitrator on the grounds contained in the Fifth Schedule cannot be gone into by the Court and had to be raised before the Sole Arbitrator by following the procedure set out in Section 13 of the Act.

(Para 37)

Further held, that the Supreme Court in the case of ***Perkins Eastman*** (supra), while considering the decision in ***M/s TRF Limited*** (supra), held that that there are two categories of cases - one where the Managing Director himself is named as an Arbitrator with an additional power to appoint anyone else as an Arbitrator and second, where though the Managing Director is not authorised himself to act as an Arbitrator but is authorised to appoint anyone else as an Arbitrator. The contention by the counsel for the petitioner that the present case falls in the second category since the Managing Director of respondent No.2 by proposing/suggesting a name to the State of Haryana which name was approved by the State of Haryana, had rendered the Sole Arbitrator de jure ineligible and was hit by the rigours of Section 12(5) of the Act, is untenable. This argument deserves to be rejected simply on the ground that it is not the case set up that the Managing Director of respondent No.2 was the Sole Arbitrator or that the power to appoint the Sole Arbitrator vested with the Managing Director of respondent No.2 under the contract/agreements. The Sole Arbitrator was admittedly appointed by the Government of Haryana which, as pointed out above, was neither a party nor a signatory to the contract/agreements. The present case clearly does not fall in either of the two situations discussed by the Supreme Court in the case of ***Perkins Eastman*** *(supra)*. In the contract/agreements containing the arbitration clause, the Managing Director of respondent No.2 is not named as an Arbitrator nor has he been given any additional power to appoint anyone else as an Arbitrator. Further, the Managing Director of respondent No.2 is not authorized himself to act as an Arbitrator and is also not authorised to appoint anyone else as an Arbitrator. It is not the case of the Petitioner that the Arbitrator could not have been appointed by the Government of Haryana or that the Government of Haryana being a stake holder in respondent No.2 had been rendered ineligible to appoint a Sole Arbitrator.

(Para 39)

Further held, that the other ground argued on behalf of the petitioner that there are common interests of both the respondents in the arbitration as respondent No.2 is a Government-owned

Corporation and, therefore, the nomination by respondent No.2 of the Sole Arbitrator is a contravention of the Seventh Schedule to the Act is an off-shoot of the point discussed above and, thus, also deserves to be rejected. Merely because the State of Haryana has some financial interest in the setting up of respondent No.2 or has a nominee on the Board of respondent No.2 would not *ipso facto* mean that it has any interest in the arbitral proceedings. That apart, no material is available on the record to substantiate this point. If the contention of the petitioner is accepted then virtually in every dispute involving a State Board, Corporation, Organization, etc. the State Government would not be in a position to appoint an Arbitrator.

(Para 41)

Further held, that the argument on behalf of the petitioner that respondent No.2 would be interested in the outcome of the arbitration and would, therefore, be disentitled from playing any role in the appointment of the Sole Arbitrator is also unacceptable. The Sole Arbitrator was appointed by the Government of Haryana which, as pointed out above, was neither a party nor a signatory to the contract/agreements. Merely because the Government of Haryana has also zeroed down on the same person as mentioned in the noting made by the Managing Director of respondent No.2 would not imply that the Government did not independently apply its mind before selecting and appointing the Sole Arbitrator or that respondent No.2 played a role in the appointment of the Sole Arbitrator. No doubt the unilateral appointment of an Arbitrator by an authority which is interested in the outcome of the decision would be directly hit by the law laid down by the Supreme Court but these circumstances are non existent in the present case. There is no material on the record before this Court, nor has it even been argued by the counsel for the petitioner, that the Government of Haryana, which appointed the Sole Arbitrator, was in any manner interested in the outcome of the decision in the arbitral proceedings. That being so it cannot be held that the appointment of the Sole Arbitrator was bad in view of the provisions of Section 12(5)of the Act.

(Para 42)

Further held, that the contention on behalf of the petitioner that the consideration of the pendency of another arbitration proceeding before the same Sole Arbitrator while recommending her name as Sole Arbitrator by respondent No.2 also indicates the that respondent No.2 wanted an Arbitrator of its choice and that the appointment is, thus,

void ab initio as per the provisions of Section 12(5) of the Act as interpreted by the Supreme Court, also does not cut any ice. There is no clause in the Seventh Schedule which renders the appointment of an Arbitrator as void because he/she is already dealing with another dispute between the same parties. Section 12(5) of the Act comes into play only when the relationship of the Arbitrator with the parties or counsel falls within the ambit of the Seventh Schedule. The pendency of another dispute between the same parties before the same Arbitrator is not a factor mentioned in the Seventh Schedule. In ***HRD Corporation*** *(supra)* the appointment of one of the Arbitrators was challenged and one of the grounds raised was that he had already rendered an award in a previous arbitration between the parties. However, this plea was not accepted by the Supreme Court. Moreover, in the ***HRD Corporation*** case the matter reached the Supreme Court from proceedings initiated under Section 12 of the Act whereas the present case relates to proceedings initiated under Section 14 of the Act. Further, the factum of the Sole Arbitrator already being seized of another dispute between the parties was known to the petitioner when it filed the petition under Section 11 before this Court being ARB. No.166 of 2016. This ground was neither raised nor argued in that petition. While dismissing the said petition vide judgement dated 27.10.2016 (Annexure P/13) this Court held:

> "34. xxx xxx xxx xx
>
> In the circumstances, if it is found subsequently that the arbitrator was ineligible to be appointed for any reason, the petitioner's remedy to challenge the appointment would be under section 13 or under section 16 and not under section 11.
>
> xxx xxx xxx xx
>
> 39. In the circumstances, the petition is dismissed. Needless to clarify that if it is found later that the said arbitrator suffers from any disqualification, the petitioner would be entitled to adopt appropriate proceedings to challenge her appointment."

Further held, that the disqualification of the Sole Arbitrator now urged by the petitioner is not part of the Seventh Schedule to the Act and consequently could not be agitated in a petition filed under Section 14 of the Act. The petitioner also did not raise such a plea in the petition filed by it under Section 11 of the Act.

(Para 43)

Akshay Bhan, Senior Advocate with A.S. Talwar, Advocate, *for the petitioner.*

Naresh Markanda, Senior Advocate with Sonia Madan, Advocate and Neihal Dogra, Advocate, for respondent No.2

ALKA SARIN, J.

(1) The present revision petition has been filed challenging the order dated 24.9.2018 (Annexure P/24) passed by the Special Commercial Court, Gurgaon in Arbitration Case No.116. The petition was originally filed as Civil Writ Petition No.27320 of 2018. However, subsequently, the said civil writ petition was treated as a petition under Article 227 of the Constitution of India vide order dated 22.10.2019.

(2) The facts relevant to the present case are that pursuant to the bids invited by the respondent No.2, the petitioner herein was awarded by respondent No.2 an Engineering, Procurement & Construction Contract (EPC) for 2x600 MW Coal-fired Thermal Power Plant at Khedar, District Hisar (Haryana). A series of agreements dated 30.10.2007 were executed by the parties. In these agreements, Clause 6 related to Settlement of Disputes and Arbitration and reads as under:

> "It is specifically agreed by and between the parties that all the differences or disputes arising out of the Agreement or touching the subject matter of the Agreement shall bedecidedby process of Settlement of Disputes and Arbitration as referred Clause No.2.26 (2.26.1 to 2.26.5) of General Conditions of Contract to specification."

(3) Clause 2.26.0 of the General Conditions of Contract relates to Settlement of Disputes/Arbitration and Clause 2.26.5 thereof reads as under:

> "2.26.5 If amicable settlement cannot be arrived at, the dispute shall be settled by the arbitration of a Sole Arbitrators, to be appointed by the Government of Haryana. The arbitration shall be in accordance with the Arbitration & Reconciliation Act, 1996 or any subsequent amendment there of. The venue of arbitration shall be Panchkula and the language of arbitration shall be English. The arbitration shall be subject to jurisdiction of District Court at Panchkula only."

(4) Vide letter dated 1.7.2016 (Annexure P-5), the petitioner wrote to the Chief Engineer (Projects) of Haryana Power Generation Corporation Limited (respondent No.2 herein) enumerating therein certain disputes which had arisen and, in view thereof, requested that an Arbitrator be appointed by the Government of Haryana in such a manner that it does not give rise to justifiable doubts about the Arbitrator's independence and impartiality.

(5) On 6.7.2017, the Managing Director of respondent No.2 put up an office note, copy whereof was obtained by the petitioner under the Right to Information Act, 2005 (hereinafter referred to as the RTI Act), which reads as under:

> "The office note at NP-1 may kindly be perused.
>
> RInfra has invoked the Arbitration against contract for 2x600 MW RGTPP, Hissar vide letter dated 01.07.2016 (Ch-1). The Sole Arbitrator is to be appointed by the Govt. of Haryana within a month.
>
> Smt. Promilla Issar, IAS (Retd.) Ex-Chief Secretary, Haryana has been appointed as the Arbitrator by the Govt. of Haryana (Ch-5) for the ongoing Arbitration between HPGCL & RInfra against the contract for DFRTPP, Yamunanagar. The Arbitration process is in advance stage and the award is likely to be announced before March 2017.
>
> In this contract, it is submitted that the contract for DCRTPP, Yamunanagar and RGTPP, Hisar are quite similar and the contractual provisions are almost the same. Smt. Promilla Issar, IAS (Retd.) has gained sufficient background of the contractual provisions and has obtained a fair knowledge of the complex issues involved in the Arbitration matter.
>
> In view of the above, it would be preferable to appoint Smt. Promilla Issar, IAS (Retd.) as the Sole Arbitrator in this case.
>
> Submitted for approval of Govt. of Haryana.
>
> Sd/-
> Managing Director, HPGCL
> ACS (Power) 06.07.2016"

(6) The said note/proposal was put up before the Chief Minister

with the noting *"May please peruse the above note/proposal. In case Govt. agrees consent of Mrs. Issar will be required before appointment"* and was approved by the Chief Minister on 15.7.2016. The matter was thereafter put up for appointment of Arbitrator by the Government of Haryana with the noting *"Submitted for appointment of arbitration of arbitrator by Govt. of Haryana in view of approval of it at NP-9"*. Thereafter, vide order dated 29.7.2016 (Annexure P/8), the Governor of Haryana appointed Smt. Promilla Issar, IAS (Retd.), Ex-Chief Secretary, Haryana as the Sole Arbitrator to examine and decide the issues between the parties.

(7) On 8.8.2016, the Sole Arbitrator issued a letter (Annexure P/9) to the parties to attend the first meeting of the arbitration proceedings on 19.8.2016 at 11.30 A.M.

(8) In August 2016 the petitioner herein filed Arbitration Case No.166 of 2016 before this Court under Section 11(5) of the Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the 'Act') praying for the appointment of a Sole Arbitrator. This Court vide judgement dated 27.10.2016 (Annexure P/13) dismissed the said petition holding inter-alia as under:

> "34. There is nothing to indicate that the respondent failed to appoint the arbitrator. There is nothing to indicate that the appointment is ex-facie bad in law. Mr. Bhan fairly stated more than once that the petitioner does not allege any mala fides whatsoever against the arbitrator but rests its case only on the legal submissions, which I have dealt with.
>
> In the circumstances, if it is found subsequently that the arbitrator was ineligible to be appointed for any reason, the petitioner's remedy to challenge the appointment would be under section 13 or under section 16 and not under section 11.
>
> xxx
>
> 39. In the circumstances, the petition is dismissed. Needless to clarify that if it is found later that the said arbitrator suffers from any disqualification, the petitioner would be entitled to adopt appropriate proceedings to challenge her appointment."

(9) Vide letter dated 8.11.2016 (Annexure P/15) the petitioner

informed the Arbitrator about its decision of filing a Special Leave Petition (SLP) before the Supreme Court of India and requested that the arbitration proceedings be adjourned to await the final outcome of the Special Leave Petition. The order dated 27.10.2016 (Annexure P/13) was challenged by the petitioner before the Supreme Court vide SLP. No.33777 of 2016.

(10) On 21.11.2016 a preliminary hearing was held before the Sole Arbitrator. In the minutes of the meeting recorded on 21.11.2016 (Annexure P/17) the Sole Arbitrator made the following disclosure under Section 12(2) of the Act:

> "6. The parties had already been informed in the letter dated 29.07.2016 of the Haryana Government, appointing the Arbitrator in the present case, that the Arbitrator is the former Chief Secretary of Haryana. It is pertinent to note here that no format has been prescribed for a disclosure under Section 12(2). Therefore, the parties were informed in the hearing that though the Arbitrator is the retired Chief Secretary of Haryana, and was an All India Services Officer allotted to the State of Haryana, she did not have any interest of any kind, direct or indirect or any past or present relationship of any kind or in relation to the subject matter in dispute in the present case with either of the parties i.e. RInfra and HPGCL, which is likely to give rise to justifiable doubts as to her independence or impartiality."

Thereafter, further proceedings were adjourned to 21.12.2016.

(11) The Special Leave Petition filed by the petitioner against order dated 27.10.2016 (Annexure P/13) was heard on 6.12.2016 and was reserved for orders. However, on 29.3.2017 the petitioner withdrew its said Special Leave Petition vide order Annexure P/18.

(12) On 31.3.2017 the petitioner addressed a letter (Annexure P/19) to the Sole Arbitrator stating therein inter-alia as under:

> "3. In view thereof, there is no objection/challenge as on date, to the Order dated 28th July, 2016 issued by the Government of Haryana regarding appointment of Sole Arbitrator to adjudicate the dispute between RInfra and HPGCL arising out the Contract/Agreement dated 30th October, 2007 and the Arbitration Proceedings in respect thereof initiated by Rinfra against HPGCL before your good self as the Sole Arbitrator, can now be proceeded with.

> 4. Accordingly, we hereby request you to kindly convene the hearing in the Arbitration between RInfra and HPGCL arising out the Contract/Agreement dated 30th October, 2007 for the Project, preferably on 7th April, 2017 (when an arbitration hearing between RInfra and HPGCL related to Yamuna Nagar Thermal Power Project is already scheduled) or at your earliest convenience."

(13) The petitioner filed an application in its SLP. No.33777 of 2016 (which was withdrawn on 29.3.2017) praying that the period of one year laid down for finalization of the award may be counted from 29.3.2017 i.e. the day the case was dismissed as withdrawn by the Supreme Court. This application was allowed by the Supreme Court vide order dated 28.4.2017 (Annexure P/21).

(14) On 3.7.2017 the Supreme Court delivered its decision in the matter of ***M/s TRF Limited*** versus ***Energo Engineering Project Ltd***.[1].

(15) After the decision was rendered in the case of ***M/s TRF Limited*** *(supra)* by the Supreme Court, the petitioner filed an application before the Supreme Court praying for recall of its earlier order dated 29.3.2017 (Annexure P/18) and for restoring the dismissed Special Leave Petition to its original position. However, vide order dated 1.12.2017 the said application was dismissed as withdrawn.

(16) Thereafter, the petitioner, in the light of the judgment in the case of ***M/s TRF Limited*** *(supra)*, filed a petition (Annexure P/23) under Section 14 of the Act before the Special Commercial Court, Gurgaon praying that *"Declare that the purported appointment of the arbitrator was void ab-initio and hence that she had no mandate under the Act to be the arbitrator, or alternatively declare that the mandate of the purported arbitrator stands terminated, or alternatively, terminate the mandate of the purported sole arbitrator in terms of Section 14 of the Act"*. This petition was resisted by the respondents. Vide order dated 24.9.2018 (Annexure P/24) the Special Commercial Court, Gurgaon dismissed the petition filed by the petitioner under Section 14 of the Act.

(17) The petitioner filed a civil writ petition being CWP No.27320 of 2018 in this Court challenging the said order dated 24.9.2018 (Annexure P/24). Vide order dated 22.10.2019 the said civil writ petition came to be treated as a petition under Article 227 of the

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[1] AIR 2017 SC 3889

Constitution of India with a prayer for setting aside of the order dated 24.8.2018 (Annexure P/24).

(18) I have heard Mr. Akshay Bhan, Senior Advocate on behalf of the petitioner and Mr. Naresh Markanda, Senior Advocate on behalf of respondent No.2.

(19) Mr. Akshay Bhan, Senior Advocate has contended that the mandate of the Sole Arbitrator is *void ab initio* as respondent No.2 had recommended the name of the Sole Arbitrator to the Government of Haryana (respondent No.1) which name was merely approved by the Government of Haryana. This is against the provision of Clause 2.26.5 of the General Conditions of Contract and also in contravention of the provisions of the Act. It has further been contended that the said action of recommending the name of its own Sole Arbitrator is in contravention of the law laid down in this regard by the Supreme Court in various judgments. It has further been argued that the test is that a person who is interested in the outcome of the arbitration would have a possible bias and, thus, this would disentitle such a person from being appointed or nominated as an Arbitrator or play any role in the appointment and any violation of this dictum would render the appointment *void ab initio*. An Arbitrator would be *de jure or de facto* unable to perform his functions. It has further been submitted that the facts of the present case attract a disqualification in terms of the Seventh Schedule of the Act as interpreted by the Supreme Court and, thus, the only remedy available with the petitioner was to file the petition under Section 14 of the Act.

(20) The second argument raised by Mr. Akshay Bhan, Senior Advocate is that the reason given by respondent No.2 while recommending the name of the Sole Arbitrator is that she was already seized of a similar arbitration and had knowledge of the contractual provisions. According to him this itself is a ground for determining the bias of an Arbitrator as per Clause 24 of the Fifth Schedule to the Act. The consideration of the pendency of another arbitration proceeding before the same Arbitrator while recommending her name as Sole Arbitrator clearly indicates the intention of respondent No.2 in having the Sole Arbitrator of its choice and also reflects the justifiable doubts with the petitioner as to the independence of the Sole Arbitrator. Such an appointment, according to him, is *void ab initio* in the light of the interpretation of Section 12(5) of the Act in the judgments rendered by the Supreme Court.

(21) The third argument raised in the present case is that the

appointment of the present Sole Arbitrator at the behest of respondent No.2 shows common interests of the respondents in the arbitration. Respondent No.2 is a Government-owned Corporation in which the Government of Haryana has huge financial stakes, financial control and administrative control. The Financial Commissioner (Power), Government of Haryana is involved in the management of respondent No.2. Thus, the conduct of respondent No.2 in nominating an Arbitrator in its own case without disclosing this fact renders the appointment a contravention of the Seventh Schedule to the Act.

(22) The fourth argument raised by Mr. Akshay Bhan, Senior Advocate is that there is no disclosure as required by Section 12(1) of the Act and enumerated in the Sixth Schedule. It is submitted that the Sole Arbitrator has failed to make a disclosure as required by Section 12(1) in the format given in the Sixth Schedule in the light of the guiding factors enumerated in the Fifth Schedule. Such a non-disclosure goes to the root of the matter and renders the Sole Arbitrator *de jure or de facto* unable to perform his/her functions and, hence, liable to be removed.

(23) Mr. Bhan, Senior Advocate has placed reliance on ***Perkins Eastman Architects DPC & Anr.*** versus ***HSCC (India) Ltd.***[2]***; Bharat Broadband Network*** versus ***United Telecoms Limited***[3]***; HRD Corporation*** versus ***GAIL (India) Limited (formerly Gas Authority of India Ltd.)***[4]***; Lite Bite Foods Pvt. Ltd*** versus ***Airports Authority Of India***[5] and ***M/s TRF Limited*** (supra) in support of his arguments.

(24) *Per contra*, it has been submitted by Mr. Naresh Markanda, Senior Advocate appearing on behalf of respondent No.2 that the issue of disclosure was finally settled by this Court in its judgment dated 27.10.2016 (Annexure P/13) rendered in Arbitration Case No.166 of 2016 which was *inter se* the parties wherein this Court had held in categorical terms that the requisite disclosure had been furnished, inasmuch as, the only disclosure that was required to be made was that the Sole Arbitrator was the former Chief Secretary of the State. It has further been submitted that in the aforesaid judgment the issue regarding disclosure as foreseen under Sections 12(1) and 12(2) of the Act has also been dealt with. He further submitted that Section 12(1) of

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[2] 2019 SCC Online SC 1517
[3] 2019 (5) SCC 755
[4] 2018 12 SCC 471
[5] 2019 SCC Online Bom 5163

the Act envisages disclosure to be made prior to the appointment of an Arbitrator for which the format is given in the Sixth Schedule to the Act. Section 12(2) of the Act provides for disclosure by the Arbitrator after the appointment has been made and no format has been prescribed in the Act for this purpose and, according to him, the necessary disclosure has been made in the present case. It has further been submitted that in the judgement dated 27.10.2016 (Annexure P/13) this Court had considered the provisions of Section 12(1), 12(2) and 12(5) of the Act read with the Fifth and Seventh Schedules. He further submits that liberty was granted to the petitioner by this Court to challenge the appointment of the Arbitrator under Section 13 or 16 of the Act, if it is found subsequently that the Arbitrator was ineligible to be appointed for any reason. It has further been submitted that the petitioner had filed a Special Leave Petition against the judgement dated 27.10.2016 (Annexure P/13) delivered by this Court which Special Leave Petition was argued and reserved for judgment on 6.12.2016. However, the petitioner unreservedly withdrew the same on 29.3.2017 (Annexure P/18). In view of the above, he would submit that it is no longer open to the petitioner to raise the issue of disclosure as the same has finally been settled by this Court vide judgment dated 27.10.2016 (Annexure P/13).

(25) The next submission of Mr. Naresh Markanda, Senior Advocate is with regard to the information made available to the petitioner under the RTI Act and the appointment of the Arbitrator being *void ab initio*. He would submit that the information under the RTI Act was admittedly received by the petitioner on 4.11.2016. After receiving this information, the petitioner chose not to file a review before this Court of the judgement dated 27.10.2016. In the Special Leave Petition preferred bythe petitioner against the judgement dated 27.10.2016, specific challenge had been laid to the appointment of the Arbitrator by relying on information received by it under the RTI Act. However, the Special Leave Petition was withdrawn unconditionally on 29.3.2017. Thereafter, the petitioner vide letter dated 31.3.2017 (Annexure P/19) addressed to the Sole Arbitrator had specifically stated that there was no objection/challenge as on date to the order dated 29.7.2016 regarding the appointment of the Sole Arbitrator. It is further submitted that on 7.4.2017 the petitioner had stated before the Sole Arbitrator that it would be filing an application in the Supreme Court to the effect that the period of one year for finalization of the award under Section 29A of the Act be reckoned from 29.3.2017 i.e. the date of dismissal of the Special Leave Petition. Such an application

for clarification dated 10.4.2017 (Annexure R-2/1 with CM. No.4888 of 2020) was filed by the petitioner in the Supreme Court stating therein that the disputes between the parties in the present case were referred to the Sole Arbitrator on 29.7.2016 and it was prayed that *"direct that the statutory period for passing the award by the Arbitral Tribunal shall commence from the date of disposal of the instant petition i.e. 29.3.2017"*. The said application was allowed by the Supreme Court on 28.4.2017 (Annexure P/21) in terms of the prayer made in the said application. It is further submitted that having expressly stated on affidavit in the Supreme Court for the commencement of the one year period for finalizing the award to be reckoned from 29.3.2017, the petitioner cannot now turn around and say that the appointment was *void ab initio*. In fact, the petitioner voluntarily gave up it's right to challenge the appointment in view of the foregoing acts on it's part. Mr. Markanda further relied upon Section 4 of the Act to contend that the principle of waiver is attracted in the instant case. He would submit that there being an express agreement between the parties as contemplated under Section 12(5) of the Act, the petitioner is barred by the principle of waiver to assail the appointment of the Sole Arbitrator. He relied upon ***APSRTC & others*** versus ***S. Jayaram***[6] in support of his argument.

(26) It was further contended by Mr. Markanda, Senior Advocate that the rulings relied upon by the petitioner are not applicable to the facts of the instant case inasmuch as in all the judgments the commonality is that either the appointing authority was to itself act as an Arbitrator or nominate someone else to act as such in its place. In these circumstances, the Supreme Court held that neither the party itself can act as an Arbitrator or nominate anyone to act as an Arbitrator. The said judgments are not applicable to the instant case since the appointing authority is the Government of Haryana which is not a party to the agreement between the parties. He further submits that all the judgments are subsequent to various developments in the instant matter i.e. the order of the Supreme Court dated 29.3.2017 (Annexure P/18), arbitration proceedings dated 7.4.2017 (Annexure P/20) and the application dated 10.4.2017 (Annexure R-2/1) filed by the petitioner before the Supreme Court, and the order dated 28.4.2017 (Annexure P/21) passed thereon by the Supreme Court. He would contend that there was an express consent on the part of the petitioner in the instant matter expressly agreeing to the appointment of the Sole

[6] (2004) 13 SCC 792

Arbitrator and the judgments relied upon by Mr. Akshay Bhan do not come to the aid of the petitioner in any manner.

(27) In support of his arguments Mr. Markanda, Senior Advocate has relied upon ***Government of Haryana PWD Haryana (B&R) Branch*** versus ***G.F. Toll Road Pvt. Limited & Ors.***[7], ***BSNL*** versus ***Motorola India (P) Ltd.***[8] and ***APSRTC*** *(supra)*.

(28) In rebuttal, it has been submitted by Mr. Bhan, Senior Advocate that the judgement dated 27.10.2016 (Annexure P/13) passed by this Court only related to the issue as to whether the non-disclosure by the Arbitrator about her being a former Chief Secretary would amount to failure to disclose as envisaged by Section 12 of the Act. Disclosure in the format given in the Sixth Schedule was held to be mandatory in the said judgement. The liberty granted by this Court while dismissing the petition clearly shows that the issue regarding any disqualification under Section 12 of the Act was left open and it was held that Section 11 of the Act was not a remedy for challenging the appointment of an Arbitrator. The withdrawal of the Special Leave Petition would operate to bring into force the rejection of an application under Section 11 of the Act while having no effect on the other remedies available to the petitioner in law. It is further submitted that the withdrawal of the Special Leave Petition was in line with the provisions of the Act as it had already been held by the Supreme Court in the case of ***HRD Corporation*** *(supra)* and ***Perkins Eastman*** *(supra)* that proper proceedings to adjudicate a disqualification under the Seventh Schedule would be an application under Section 14 of the Act which lies before the District Court. It has further been submitted that the Supreme Court in the case of ***Bharat Broadband*** *(supra)* had held that the enunciation of law regarding disqualification arising from a nomination by a person such as a Managing Director was only declared on 3.3.2017 in the judgment of ***M/s TRF Limited*** *(supra)*. Any action of the parties in appointing an Arbitrator or participating in arbitration proceedings by filing a claim petition will not protect the appointment of the Arbitrator as it is by operation of law *void ab initio*. In the present case, on declaration of the law by the Supreme Court in ***M/s TRF Limited (****supra)*, the petitioner rightly filed an application under Section 14 of the Act which was the correct remedy in law. It has further been submitted that the letter dated 31.3.2017 (Annexure P/19)

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[7] 2019 (3) SCC 505

[8] 2009 (2) SCC 337

would not operate as a waiver against the petitioner in terms of the proviso to Section 12(5) of the Act. The said letter, according to the learned senior counsel for the petitioner, was only an intimation to the Sole Arbitrator that the Special Leave Petition against the judgement dated 27.10.2016 (Annexure P/13) stood withdrawn and, as a consequence, the arbitration could proceed. It has further been submitted that the same would, at the most, be akin to filing of a claim before the Sole Arbitrator and participating in the arbitration proceedings. He contended that this issue stands settled by the Supreme Court in favour of the petitioner in the case of ***Bharat Broadband*** (supra) wherein it had been held that even appointing an Arbitrator or filing a claim cannot act as an express waiver for the purposes of Section 12(5) of the Act. Such a waiver of ineligibility has to be expressed i.e. by way of an agreement in writing between the parties waiving the applicability of the sub-section, despite the ineligibility, in words expressing faith in the Arbitrator. It has further been submitted that the letter dated 31.3.2017 was prior to the enunciation of law in ***M/s TRF Limited*** *(supra)*. The Supreme Court in ***Bharat Broadband*** *(supra)* has held that the declaration of law in ***M/s TRF Limited*** *(supra)* was made on 3.7.2017 and all appointments hit by the disqualification would be null and void notwithstanding the action of the parties prior to that date. It has further been submitted that the judgement dated 27.10.2016 (Annexure P/13) passed by this Court had not waived the requirement of filing a disclosure in the format provided in the Sixth Schedule. This Court had held that where a person proposed to be appointed as an Arbitrator fails to make a disclosure, it cannot be said that the party proposing to appoint him has failed to act. This Court also held that if it is found subsequently that the Arbitrator was ineligible to be appointed for any reason, the remedy to challenge the appointment would be under Sections 13 or 16 and not under Section 11.

(29) Before dealing with the facts of the instant case, the law pertaining to Section 12 of the Act needs a deeper look especially post the judgment by the Supreme Court in ***M/s TRF Limited*** *(supra)*.

(30) Their Lordships in the case of ***M/s TRF Limited*** *(supra)* while dealing with the proposition whether the managing director who was named as the Sole Arbitrator and further given the power to nominate anyone else as Arbitrator could be held eligible to nominate an Arbitrator, having being rendered ineligible by virtue of Section 12(5) of the Act held as under:

> "54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."

(31) Post the judgment in ***M/s TRF Limited*** *(supra)* delivered on 3.7.2017, their Lordships of the Supreme Court in the case of ***Bharat Broadband*** *(supra)* dealt with the proposition where the appellant therein having appointed the Arbitrator prior to the judgement in ***M/s TRF Limited*** *(supra)*, referred to the said judgment and made a prayer before the Sole Arbitrator that since he is *de jure* unable to perform his function as Arbitrator, he should withdraw from the proceedings to allow the parties to approach the High Court for the appointment of a substitute Arbitrator. The Sole Arbitrator rejected the application without assigning any reasons. The appellant therein then approached the High Court under Sections 14 and 15 of the Act stating therein that the Sole Arbitrator had become *de jure* incapable of acting as such and that a substitute Arbitrator be appointed. The petition was rejected by the High Court holding that the very person who had appointed the Arbitrator could not challenge the appointment after participating in the proceedings. The High Court also relied upon the proviso to Section 12(5) of the Act to hold that the appellant therein had itself appointed the Arbitrator, and the respondent therein had filed a statement of claim without any reservation and the same would amount to an express agreement in writing, which would, therefore, amount to a waiver of the applicability of Section 12(5) of the Act. The matter was carried to

the Supreme Court.

(32) While setting aside the decision of the High Court, the Supreme Court held as under:

> "18. On the facts of the present case, it is clear that the Managing Director of the appellant could not have acted as an arbitrator himself, being rendered ineligible to act as arbitrator under Item 5 of the Seventh Schedule, which reads as under:
>
> "**Arbitrator's relationship with the parties or counsel**
>
> xxx xxx xxx xx
>
> 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."
>
> Whether such ineligible person could himself appoint another arbitrator was only made clear by this Court's judgment in TRF Ltd. on 3.7.2017, this Court holding that an appointment made by an ineligible person is itself void ab initio. Thus, it was only on 3.7.2017, that it became clear beyond doubt that the appointment of Shri Khan would be void ab initio. Since such appointment goes to "eligibility" i.e. to the root of the matter, it is obvious that Shri Khan's appointment would be void. There is no doubt in this case that disputes arose only after the introduction of Section 12(5) into the statute book, and Shri Khan was appointed long after 23.10.2015. The judgment in TRF Ltd. nowhere states that it will apply only prospectively i.e. the appointments that have been made of persons such as Shri Khan would be valid if made before the date of the judgment. Section 26 of the Amendment Act, 2015 makes it clear that the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after 23.10.2015. Indeed, the judgment itself set aside the order appointing the arbitrator, which was an order dated 27.1.2016, by which the Managing Director of the respondent nominated a former Judge of this Court as sole arbitrator in terms of Clause 33(d) of the purchase order dated 10.5.2014. It will be noticed that the facts in the present case are somewhat similar. The APO itself is of the

year 2014, whereas the appointment by the Managing Director is after the Amendment Act, 2015, just as in TRF Ltd. Considering that the appointment in TRF Ltd. of a retired Judge of this Court was set aside as being non est in law, the appointment of Shri Khan in the present case must follow suit."

(33) Yet again in the case of ***Perkins Eastman*** *(supra)* their Lordships of the Supreme Court while dealing with an application under Sections 11(6) and 11(12)(a), filed on the ground that the arbitration clause gave a complete discretion to the Chairman and Managing Director to make the appointment of an Arbitrator of his choice, the Chairman and Managing Director would naturally be interested in the outcome of the decision in respect of the dispute and as such prayed for the appointment of an Arbitrator by the Court, held as under :

"19. It was thus held that as the Managing Director became ineligible by operation of law to act as an arbitrator, he could not nominate another person to act as an arbitrator and that once the identity of the Managing Director as the sole arbitrator was lost, the power to nominate someone else as an arbitrator was also obliterated. The relevant Clause in said case had nominated the Managing Director himself to be the sole arbitrator and also empowered said Managing Director to nominate another person to act as an arbitrator. The Managing Director thus had two capacities under said Clause, the first as an arbitrator and the second as an appointing authority. In the present case we are concerned with only one capacity of the Chairman and Managing Director and that is as an appointing authority.

20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly

relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.

21. But, in our view that has to be the logical deduction from TRF Limited. Paragraph 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation

(Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited."

(34) Reverting to the facts of the present case vis-à-vis the law laid down by the Supreme Court. The present civil revision petition has arisen out of a petition filed by the petitioner under Section 14 of the Act. It is trite that once an Arbitrator is appointed and the disclosure is to be made in the form specified in the Sixth Schedule, the grounds stated in the Fifth Schedule serve as guiding principles in determining whether circumstances exist to give rise to justifiable doubts as to independence or impartiality of an Arbitrator. Once the Arbitrator has been appointed, his/her appointment may be challenged on the grounds enumerated in Sections 12(3) and/or 12(4) of the Act. The procedure for challenge to the appointment is laid down in Section 13 of the Act. The Arbitral Tribunal must first decide on the challenge and in case the party challenging the appointment of the Arbitrator is not successful before the Arbitral Tribunal then the only remedy available to it is to challenge the same post the award by making an application for setting aside such an award in accordance with Section 34 of the Act. The Supreme Court in the case of ***HRD Corporation*** *(supra)* has held as under :

> "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". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the 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. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal."

(35) If an Arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes ineligible to act as Arbitrator and under Section 14(1)(*a*) of the Act he then becomes de jure unable to perform his functions as he/she is regarded as ineligible. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) of the Act to the Court to decide on the termination of his/her mandate on this ground. In such circumstances there would be no need for a party to approach the Arbitral Tribunal. However, in a situation where grounds stated in the Fifth Schedule are disclosed and which grounds give rise to justifiable doubts as to the Arbitrator's independence or impartiality, such grounds are to be raised and determined before the Arbitral Tribunal under Section 13 of the Act. If the Arbitral Tribunal rejects such grounds then the arbitral proceedings are to continue and an award is to be made. 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 of the Act on the aforesaid grounds. Any challenge contained in the Fifth Schedule against the appointment of the Arbitrator can be gone into only after the Arbitrator has given an

award.

(36) Yet again in the matter of ***Bharat Broadband*** (supra) it was held by the Supreme Court as under:

> "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."

(37) Hence in the present civil revision petition, which arises froma petition filed under Section 14 of the Act, this Court is only to delve into the question as to whether the Sole Arbitrator falls in any one of the categories specified in the Seventh Schedule and has become ineligible to act as Sole Arbitrator since under Section 14(1)(*a*) of the Act she has become de jure unable to perform her functions. The challenge, therefore, laid by the petitioner to the appointment of the Sole Arbitrator on the grounds contained in the Fifth Schedule cannot be gone into by the Court and had to be raised before the Sole Arbitrator by following the procedure set out in Section 13 of the Act .

(38) The admitted position in the present case is that the Sole Arbitrator was appointed by the State of Haryana which is not a party

to the contract/agreements executed by the parties. The arbitration clause was invoked by the petitioner vide its letter dated 1.7.2016 (Annexure P/5) addressed to respondent No.2. This letter was not marked to the State of Haryana. A perusal of this letter shows that the petitioner was aware that the appointment of the Sole Arbitrator was to be made by the State of Haryana and not by respondent No.2. On receipt of this letter, the file regarding appointment of the Sole Arbitrator was forwarded by respondent No.2 to the State of Haryana with notings of the Managing Director of respondent No.2. These notings included a proposal/suggestion for appointment of Smt. Promilla Issar, IAS (Retd.), Ex-Chief Secretary, Haryana as the Sole Arbitrator. The reason for making this proposal/suggestion is also disclosed in the noting. On 29.7.2016 the State of Haryana, which is not a party to the contract/agreements, appointed Smt. Promilla Issar, IAS (Retd.), Ex-Chief Secretary, Haryana as the Sole Arbitrator after obtaining approval of the Chief Minister. The Managing Director of respondent No.2 did not, and could not, appoint the Arbitrator under the contract/agreements.

(39) The Supreme Court in the case of ***Perkins Eastman*** *(supra)*, while considering the decision in ***M/s TRF Limited*** *(supra)*, held that that there are two categories of cases - one where the Managing Director himself is named as an Arbitrator with an additional power to appoint anyone else as an Arbitrator and second, where though the Managing Director is not authorised himself to act as an Arbitrator but is authorised to appoint anyone else as an Arbitrator. The contention by the counsel for the petitioner that the present case falls in the second category since the Managing Director of respondent No.2 by proposing/suggesting a name to the State of Haryana which name was approved by the State of Haryana, had rendered the Sole Arbitrator de jure ineligible and was hit by the rigours of Section 12(5) of the Act, is untenable. This argument deserves to be rejected simply on the ground that it is not the case set up that the Managing Director of respondent No.2 was the Sole Arbitrator or that the power to appoint the Sole Arbitrator vested with the Managing Director of respondent No.2 under the contract/agreements. The Sole Arbitrator was admittedly appointed by the Government of Haryana which, as pointed out above, was neither a party nor a signatory to the contract/agreements. The present case clearly does not fall in either of the two situations discussed by the Supreme Court in the case of ***Perkins Eastman*** *(supra)*. In the contract/agreements containing the arbitration clause, the Managing Director of respondent No.2 is not

named as an Arbitrator nor has he been given any additional power to appoint anyone else as an Arbitrator. Further, the Managing Director of respondent No.2 is not authorised himself to act as an Arbitrator and is also not authorised to appoint anyone else as an Arbitrator. It is not the case of the Petitioner that the Arbitrator could not have been appointed by the Government of Haryana or that the Government of Haryana being a stake holder in respondent No.2 had been rendered ineligible to appoint a Sole Arbitrator.

(40) Section 12(5) of the Act relates to the *de jure* inability of an Arbitrator to act as such. The moment the relationship of the Arbitrator with the parties or counsel falls within the ambit of the Seventh Schedule, Section 12(5) declares such a person to be ineligible to be appointed as an Arbitrator. The learned senior counsel for the petitioner has not been able to show how the present case fell within the situations enumerated in the Seventh Schedule to the Act or the parameters laid down by the Supreme Court in the cases of ***M/s TRF Limited, Bharat Broadband or Perkins Eastman*** *(supra)*.

(41) The other ground argued on behalf of the petitioner that there are common interests of both the respondents in the arbitration as respondent No.2 is a Government-owned Corporation and, therefore, the nomination by respondent No.2 of the Sole Arbitrator is a contravention of the Seventh Schedule to the Act is an off-shoot of the point discussed above and, thus, also deserves to be rejected. Merely because the State of Haryana has some financial interest in the setting up of respondent No.2 or has a nominee on the Board of respondent No.2 would not *ipso facto* mean that it has any interest in the arbitral proceedings. That apart, no material is available on the record to substantiate this point. If the contention of the petitioner is accepted then virtually in every dispute involving a State Board, Corporation, Organization, etc. the State Government would not be in a position to appoint an Arbitrator.

(42) The argument on behalf of the petitioner that respondent No.2 would be interested in the outcome of the arbitration and would, therefore, be disentitled from playing any role in the appointment of the Sole Arbitrator is also unacceptable. The Sole Arbitrator was appointed by the Government of Haryana which, as pointed out above, was neither a party nor a signatory to the contract/agreements. Merely because the Government of Haryana has also zeroed down on the same person as mentioned in the noting made by the Managing Director of respondent No.2 would not imply that the Government did not

independently apply its mind before selecting and appointing the Sole Arbitrator or that respondent No.2 played a role in the appointment of the Sole Arbitrator. No doubt the unilateral appointment of an Arbitrator by an authority which is interested in the outcome of the decision would be directly hit by the law laid down by the Supreme Court but these circumstances are non existent in the present case. There is no material on the record before this Court, nor has it even been argued by the counsel for the petitioner, that the Government of Haryana, which appointed the Sole Arbitrator, was in any manner interested in the outcome of the decision in the arbitral proceedings. That being so it cannot be held that the appointment of the Sole Arbitrator was bad in view of the provisions of Section 12(5) of the Act.

(43) The contention on behalf of the petitioner that the consideration of the pendency of another arbitration proceeding before the same Sole Arbitrator while recommending her name as Sole Arbitrator by respondent No.2 also indicates the that respondent No.2 wanted an Arbitrator of its choice and that the appointment is, thus, *void ab initio* as per the provisions of Section 12(5) of the Act as interpreted by the Supreme Court, also does not cut any ice. There is no clause in the Seventh Schedule which renders the appointment of an Arbitrator as void because he/she is already dealing with another dispute between the same parties. Section 12(5) of the Act comes into play only when the relationship of the Arbitrator with the parties or counsel falls within the ambit of the Seventh Schedule. The pendency of another dispute between the same parties before the same Arbitrator is not a factor mentioned in the Seventh Schedule. In ***HRD Corporation*** *(supra)* the appointment of one of the Arbitrators was challenged and one of the grounds raised was that he had already rendered an award in a previous arbitration between the parties. However, this plea was not accepted by the Supreme Court. Moreover, in the ***HRD Corporation*** case the matter reached the Supreme Court from proceedings initiated under Section 12 of the Act whereas the present case relates to proceedings initiated under Section 14 of the Act. Further, the factum of the Sole Arbitrator already being seized of another dispute between the parties was known to the petitioner when it filed the petition under Section 11 before this Court being ARB. No.166 of 2016. This ground was neither raised nor argued in that petition. While dismissing the said petition vide judgement dated 27.10.2016 (Annexure P/13) this Court held :

> "34. xxx xxx xxx xx
>
> In the circumstances, if it is found subsequently that the arbitrator was ineligible to be appointed for any reason, the petitioner's remedy to challenge the appointment would be under section 13 or under section 16 and not under section 11.
>
> xxx xxx xxx xx
>
> 39. In the circumstances, the petition is dismissed. Needless to clarify that if it is found later that the said arbitrator suffers from any disqualification, the petitioner would be entitled to adopt appropriate proceedings to challenge her appointment."

(44) The disqualification of the Sole Arbitrator now urged by the petitioner is not part of the Seventh Schedule to the Act and consequently could not be agitated in a petition filed under Section 14 of the Act. The petitioner also did not raise such a plea in the petition filed by it under Section 11 of the Act.

(45) Coming to the argument raised by the senior counsel appearing for the petitioner that there is no disclosure as required by Section 12(1) of the Act and enumerated in the Sixth Schedule and that the Sole Arbitrator has failed to make a disclosure as required by Section 12(1) in the format given in the Sixth Schedule, this Court cannot permit the petitioner to reagitate an issue which has attained finality. The petitioner had earlier filed a petition in this Court being ARB. No.166 of 2016 wherein it had raised several grounds of challenge including the non-disclosure by the Sole Arbitrator. The said petition was dismissed by a detailed judgement dated 27.10.2016 (Annexure P/13). The petitioner contends that after the dismissal of the said petition it obtained information under the RTI Act which substantiates its case to the hilt.

(46) However, this Court is of the opinion that the petitioner cannot now be permitted to once again re-agitate the point regarding non-disclosure by the Sole Arbitrator. No doubt the petitioner received the information under the RTI Act on 4.11.2016 i.e. after the dismissal of its petition being ARB. No.166 of 2016 on 27.10.2016 (Annexure P/13). The petitioner then filed a Special Leave Petition (Annexure P/14) before the Supreme Court wherein it raised additional grounds of challenge based upon the information it had received under the RTI Act. However, the Special Leave Petition was withdrawn unconditionally on 29.3.2017 (Annexure P/18) after it had been

reserved for orders on 6.12.2016. Thereafter, as per the averments made in the application filed by the petitioner under Section 14 of the Act (Annexure P/23), in view of the judgement in the ***M/s TRF Limited*** *(supra)* case, the petitioner approached the Supreme Court by filing Misc. Application No.1370 of 2017 praying for recall of the order dated 29.3.2017 (Annexure P/18) and restoring the dismissed Special Leave Petition to its original position. This miscellaneous application was also dismissed as withdrawn on 1.12.2017.

(47) The judgement dated 27.10.2016 (Annexure P/13) has attained finality. In the judgement dated 27.10.2016 (Annexure P/13) it was inter-alia held as under:

> "8. Mr. Bhan submitted that the appointment of the former Chief Secretary as an arbitrator is void being in violation of section 12(1)(a) read with schedule 6, as the arbitrator failed to file the disclosure. He further submitted that the appointment of the arbitrator is contrary to section 12(5) read with schedule 7, items 1 and 5 and is, therefore, also void. Relying essentially upon sections 11(8) and 12(1), he submitted that the disclosure must be made before the appointment.
>
> 9. Mr. Bhan submitted that section 12(1)(a) is of the widest import. I agree. It is of the widest import in every significant aspect. Firstly, the nature of the relationship, requiring a disclosure, may be direct or even indirect. Secondly, the ambit is not restricted in time - it may be past or present. Thirdly, the nature of the relationship or interest of the arbitrator requiring disclosure is also sufficiently wide. The relationship may be with and the interest may be qua the parties as also qua the subject matter in dispute. Further still, the nature of the relationship may be with or the interest may be in a variety of circumstances - financial, business, professional or other kind. Also well- founded is Mr. Bhan's submission that the disclosure is contemplated not merely where the circumstances actually impinge upon the independence or impartiality of the arbitrator. Further, the disclosure is not dependent upon the belief of the arbitrator himself. The disclosure must be made if the circumstances are "likely to give rise to justifiable doubts as to his independence or impartiality". In other words, Mr. Bhan submitted that the test is not whether there is actual

bias but whether the circumstances in question give rise to a justifiable apprehension of bias. We would put the test a little differently. According to us, the test indeed is not whether there is actual bias but whether, considering the facts and circumstances, a reasonable person is likely to apprehend the possibility of bias. What circumstances would justify such an apprehension in the mind of a reasonable person would depend upon the facts and circumstances of the case. It is neither possible nor desirable to attempt an enumeration of such circumstances.

10. There is a clear distinction between sub-section (1) and sub-section (5) of section 12. Sub-section (1) of section 12 deals with the requirement of a person to disclose in writing the circumstances which are likely to give rise to justifiable doubts as to the person's independence or impartiality as an arbitrator and 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 12 months. The mere existence of these conditions, illustrations of which are furnished in the Fifth Schedule, does not necessarily result in the disqualification of a person being appointed as an arbitrator. Sub-section (5), on the other hand, stipulates the conditions which render a person ineligible to be appointed as an arbitrator.

11. The facts to be disclosed under sub-section (1) of section 12 do not necessarily render a person ineligible to be appointed an arbitrator. These facts are only to be disclosed. Explanation 1 provides that the grounds stated in the Fifth Schedule are only a guide to determining whether they are to be disclosed or not. The grounds stated in the Fifth Schedule are, therefore, not exhaustive. Sub-section (5), on the other hand, renders a person ineligible to be appointed an arbitrator if his relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule. If the facts required to be disclosed under sub- section (1) also fall under any of the categories specified in the Seventh Schedule, he would be ineligible to be appointed as an arbitrator. If, however, the facts disclosed under sub-section (1) do not fall under any of the categories specified in the

Seventh Schedule, he would not be rendered ineligible per se. Whether such facts ought to render him ineligible or not would then depend upon the facts of the case. Some of the categories in the Fifth and the Seventh Schedules are the same. In such cases, the person would be ineligible to be appointed an arbitrator in view of sub-section (5). The present case is an illustration where a disclosure was bound to be made under sub-section (1) but the circumstances do not render the Ex-Chief Secretary ineligible to be appointed an arbitrator.

12. In the present case, a disclosure was required to be made by the arbitrator. The requirement is evident from section 12(1)(a) for the arbitrator was a former Chief Secretary of the State of Haryana. A disclosure would be required under section 12(1)(a) for that engagement constituted the existence of a direct past relationship between the arbitrator and the State of Haryana which relationship even if not financial, business or professional would fall within the ambit of the category constituted by the words "other kind". As I will shortly indicate - the disclosure, however, was not necessary in view of the circumstances mentioned in the Fifth Schedule, Item 1. It is necessary for an arbitrator to disclose a relationship past or present as an employee, consultant or advisor. In any event, the relationship between the Chief Secretary and the State, in which the person was appointed as a Chief Secretary, falls within the ambit of the words "other kind" in section 12(1). I would not read the words "other kind" ejusdem generis. It is not necessary to elaborate upon importance of the position of a Chief Secretary for it is far too obvious and evident. Suffice it to state that the Chief Secretary of a State is the head of the administrative machinery of the State, has control over the administrative offices of the State and is the main link between the State and the Centre.

13. Absent anything else, in the present case, all that the arbitrator was bound to disclose was that she is a former Chief Secretary of the State of Haryana. Further, as I will soon demonstrate, this does not render her ineligible to be appointed an arbitrator. The arbitrator as well as the State of Haryana have expressly disclosed that the said Smt.

> Promilla Issar was a former Chief Secretary of the State of Haryana. This is established by the order of the Government of Haryana dated 29.7.2016 appointing Smt. Promilla Issar as the arbitrator. The order in terms stated that she was the "Ex-Chief Secretary, Haryana". A copy of this letter was, admittedly, forwarded to the petitioner and the respondent. Further, the arbitrator, by her communication dated 8.8.2016, fixing the first meeting in terms, referred to the said order dated 29.7.2016. Thus, the State of Haryana and the arbitrator disclosed the arbitrator's past relationship with the respondent.
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> 16. Thus, even assuming that the disclosure was required to be made by the arbitrator at the time of her proposed appointment, the provisions of section 12 have been complied with."

(48) Thus, in view of the discussion above, the ground of non-disclosure by the Sole Arbitrator raised on behalf of the petitioner cannot and is not accepted.

(49) The Court below has correctly and properlydealt with the points raised by the parties and has returned findings which are legally sustainable. The supervisory jurisdiction under Article 227 of the Constitution of India is exercised for keeping the sub-ordinate courts within the bounds of their jurisdiction and has to be used sparingly and only in appropriate cases, where the judicial conscious of the High Court is pricked to act to avoid grave injustice. Moreover, the object of the Act is to minimize judicial intervention and this important object has to be kept in the forefront when a 227 petition is being disposed of against proceedings that are decided under the Act.

(50) The Court cannot shut its eyes to the fact that the matter before the Sole Arbitrator is pending since 2016 and the arbitral proceedings have been delayed by the petitioner. The petitioner has made efforts to thwart the arbitral proceedings despite having unconditionally withdrawn it's Special Leave Petition before the Supreme Court, despite specifically having requested the Sole Arbitrator to proceed with the matter and despite withdrawing its application for recall filed before the Supreme Court. Thereafter, the present petition was filed by it under Section 14 of the Act in an attempt to reagitate some grounds which had already attained finality.

The Court is also informed that the petitioner has also challenged before this Court an order dated 24.4.2019 passed by the Special Commercial Court, Gurgaon extending the mandate of the Sole Arbitrator by six months. This order dated 24.4.2019 has been stayed on 13.5.2019 by this Court in Civil Revision No.7193 of 2019 which is pending. Thus, since over a year no proceedings have been undertaken in the arbitral proceedings.

(51) For the reasons recorded above, the present civil revision petition is dismissed.

Tribhuvan Dahiya