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

\+ ***Reserved on: 8th February, 2018***
Date of decision: 21st February , 2018

\+ ARB.P. 654/2017 & I.A. No.11965/2017
ARB.P. 655/2017 & I.A. No.11967/2017
ARB.P. 656/2017 & I.A. No.11970/2017
ARB.P. 657/2017 & I.A. No.11972/2017
ARB.P. 658/2017 & I.A. No.11974/2017
ARB.P. 659/2017 & I.A. No.11976/2017
ARB.P. 814/2017 & I.A. No.15007/2017

MANISH ANAND ..... Petitioner
MANISH SINHA ..... Petitioner
BIRENDRA KUMAR ..... Petitioner
GAURAV KUMAR ..... Petitioner
MURLIDHAR ..... Petitioner
VIKAS GUPTA ..... Petitioner
NARAYAN CHANDRA BISHAL ..... Petitioner

Through: Mr.Manish Sharma, Ms.Mayuri Raghuvanshi, Mr.Vyom Raghuvanshi and Mr.Ninad Dogra, Advs.

versus

FIITJEE LTD ..... Respondent

Through Mr.Mukesh M.Goel and Ms.Arti Rawat, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. These petitions under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') have been filed by the petitioner challenging the appointment of the Arbitrator by the respondent unilaterally.

2. The Arbitration Agreement between the parties is contained in Clause 21(a) of the "Supplementary Rules for the Employees of Fiitjee", which is reproduced herein under:-

> *"21(a) All disputes and differences of any nature with regard to FIITJEE service manual and the interpretation & adjudication of clauses and claims respectively shall be referred to the Sole Arbitrator appointed by the company i.e. FIITJEE. The arbitration proceedings shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act 1996 and statutory modifications thereof and rules made thereunder. The award of Arbitrator shall be final and binding on both the parties. The award of the Arbitrator shall be final and binding on every matter arising hereunder. It is further agreed that in spite of the fact that the Sole Arbitrator may be known to any of the Directors or shareholders and that he may have been dealing with the company or had occasion to deal with any matter of this agreement shall not disqualify him. Even if the Arbitrator may have expressed opinion in similar matter earlier shall also not render him disqualified. The venue of the arbitration shall be Delhi / New Delhi only."*

3. It is the contention of the petitioner that the Arbitration Agreement, so far as it vests power in the respondent to unilaterally appoint a Sole Arbitrator for adjudicating the disputes between the parties is unenforceable and in valid. I have already rejected the said contention in judgment pronounced today in OMP (T) (COMM) 101/2017 ***Bhayana Builders Pvt. Ltd. vs. Oriental Structural Engineers Pvt. Ltd.*** and for the reasons recorded therein I am unable to agree with the submissions made by the petitioner.

4. It is further contended by the counsel for the petitioner that the Arbitrator so appointed by the respondent has not given his disclosure in

terms of Section 12(1) of the Act and therefore, he is *de jure* ineligible to proceed with the arbitration.

5. Section 12(1) of the Act is reproduced herein under:-

> *"12. Grounds for challenge.— [(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—*
>
> > *(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and*
> > *(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.*
> > *Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.*
> > *Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.]*

6. Prior to its amendment by the Arbitration and Conciliation (Amendment) Act, 2015, Section 12(1) read as under:-

> *"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 likely to give rise to justifiable doubts as to his independence or impartiality."*

7. The Sixth Schedule of the Act is also reproduced herein under:-

> *"The sixth schedule*

Name:
Contact Details:
Prior experience (including experience with arbitrations):
Number of ongoing arbitrations:
CIRCUMSTANCES DISCLOSING 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 YOUR INDEPENDENCE OR IMPARTIALITY (LIST OUT):

CIRCUMSTANCES WHICH ARE LIKELY TO AFFECT YOUR ABILITY TO DEVOTE SUFFICIENT TIME TO THE ARBITRATION AND IN PARTICULAR YOUR ABILITY TO FINISH THE ENTIRE ARBITRATION WITHIN TWELVE MONTHS (LIST OUT):"

8. Law Commission in its 246th report had explained the reasons for introduction of 12(1) to the Act as under:-

"NEUTRALITY OF ARBITRATORS

53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators viz. their independence and impartiality, is critical to the entire process.
54. In the Act, the test for neutrality is set out in Section 12(3) which provides—

'12. (3) An arbitrator may be challenged only if—
(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality.…'

55. The Act does not lay down any other conditions to identify the "circumstances" which give rise to "justifiable doubts", and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any-actual-bias for that is setting the bar too high; but, whether the circumstances in question give rise to any-justifiable apprehensions-of bias.

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59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his-possible-appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the red and orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed Section 12(5) of the Act and the Fifth Schedule which incorporates the categories from the red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be –ineligible- to be so appointed, -notwithstanding - any prior agreement - to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed Explanation to Section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the red and orange lists of the IBA Guidelines), the-ineligibility-to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the red list of the IBA Guidelines)."

9. The Law Commission in its Report further added a Note after its recommendation to add the two Explanation(s) to Section 12 (1) of the Act as under:

> "*[NOTE: This amendment is intended to further goals of independence and impartiality in arbitrations, and only gives legislative colour to the phrase "independence or impartiality" as it is used in the Act. The contents of the Fourth Schedule incorporate the Red and Orange lists of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration. While Mr.Malhotra was of the view that the said provisions should not apply to the public sector, excluding the public sector will render the provision susceptible to a challenge under article 19 of the Constitution of India.]"*

10. Reading of Section 12(1) of the Act with the Sixth Schedule would clearly demonstrate the importance of the disclosure to be made by the proposed Arbitrator who is approached by the parties with his possible appointment as an Arbitrator. The disclosure is relevant and necessary as independence and impartiality of the Arbitrator are the hallmark of any arbitration proceedings. The amended provision is enacted to identify 'circumstances' which give rise to 'justifiable doubt' about the independence and impartiality of the Arbitrator.

11. Having appreciated and re-emphasized the importance of the disclosure under Section 12(1) of the Act, the question is whether an improper disclosure, as in the present case would render the Arbitrator so appointed ineligible or *de jure* incapable of proceeding with the arbitration proceedings. The answer to this, in my opinion, has to be in the negative. The legislature, while emphasizing on the disclosure under Section 12(1) of the Act, has not further stated that the consequence of

such non-disclosure would be automatic termination of the mandate of the Arbitrator so appointed. In absence of such a legislative consequences, in my opinion, it would depend on the facts of the given case whether the mandate of the Arbitrator would stand terminated upon non-disclosure or giving a false disclosure under Section 12(1) of the Act.

12. In ***Pallav Vimalbhai Shah & Ors. Vs. Kalpesh Sumatibhai Shah & Ors.*** MANU/GJ/1396/2017, High Court of Gujarat held as under:-

> *"38. In this context, the necessity of disclosure envisaged in sub-section (1) of Section 12 becomes important. Only when such a disclosure is made, that the parties can judge for themselves, if circumstances exist to give justifiable doubts as to the impartiality of an arbitrator. Upon disclosure being made any one of the following situations may arise. First is, where the parties may agree that no such circumstances giving rise to justifiable doubts as to the impartiality of the arbitrator exist or the parties may despite such circumstances existing, go ahead and appoint him as an arbitrator or in face of disagreement between the parties on this issue, one of them, as per the procedure envisaged in the arbitration clause, may proceed to appoint such a person as an arbitrator. Whatever be the fall out, it cannot be denied that disclosure of existence of any circumstance likely to give rise to justifiable doubts as to independence or impartiality of an arbitrator, would be of great importance. Not making any disclosure even though such circumstances exist, would render the appointment of an arbitrator without following the mandatory procedure. This is not to suggest that even though no such circumstances exist, mere failure to make a disclosure or in a format different from that provided in the Sixth Schedule by itself would be fatal to the appointment of the arbitrator. This is also not to suggest that if a party objecting to appointment of arbitrator is aware about existence of such circumstances before the appointment is made, he could challenge the same at a later time on the ground that disclosure was not made. Such a situation*

would be clearly covered by sub-section (3) of section 12. This is only to suggest that if circumstances exist and disclosure is not made, appointment of an arbitrator would be wholly non-est. In such a situation a party making appointment of an arbitrator without following such mandatory procedure cannot, by referring to section 13 of the Amending Act, drive the opponent to challenge his appointment before the Arbitrator Tribunal itself and if such a challenge before the Tribunal was unsuccessful, to submit to the jurisdiction of the Arbitral Tribunal and to challenge the award in accordance with Section 34 inter-alia on the ground of incompetence of the arbitrator."

13. In ***HRD Corporation Vs. Gail (India) Limited*** 2017 SCC Online SC 1024, Supreme Court negated an argument challenging the appointment of an Arbitrator on the ground that the Arbitrator had not made a complete disclosure in his disclosure statement. The Supreme Court held as under:-

"29. The appointment of Justice Doabia was also attacked on the ground that he had not made a complete disclosure, in that this disclosure statement did not indicate as to whether he was likely to devote sufficient time to the arbitration and would be able to complete it within 12 months. We are afraid that we cannot allow the Appellant to raise this point at this stage as it was never raised earlier. Obviously, if Justice Doabia did not indicate anything to the contrary, he would be able to devote sufficient time to the arbitration and complete the process within 12 months."

14. In the present case the Arbitrator has given the disclosure in terms of Section 12(1) of the Act (though not in the form prescribed in the Sixth Schedule) as under:-

"Please be informed that there exist no circumstances that give rise to justifiable doubts as to my independence or impartiality in resolving the disputes referred in this regard."

15. Though the above disclosure is not in terms of the Sixth Schedule of the Act, the same discloses the most vital aspect of the same. In any case, if the petitioner(s) were not satisfied with the said disclosure they should have made a request to the Arbitrator so appointed for making a proper disclosure or of other circumstances that may give rise to justifiable doubt as to his independence and impartiality. Instead of doing so, the petitioner(s) have filed the present petition(s) under Section 11 of the Act.

16. The petitioner(s) have placed reliance on the judgment of this Court in ***Dream Valley Farms Private Limited & Anr. Vs. Religare Finvest Limited & Ors.*** 2016 SCC Online Del 5584 to contend that in the absence of a proper disclosure by the Arbitrator, a petition under Section 11 of the Act would be maintainable. I am unable to accept the said argument. In ***Dream Valley (Supra)*** the Court was faced with a situation where the disclosure given by the Arbitrator was *ex-facie* misleading. The Court, in view of the conduct of the Arbitrator in seeking to mislead the petitioner therein and suppress, in the first instance the fact of his being a presiding Arbitrator in 27 matters relating to the respondent therein which in the opinion of the Court smacked of dishonesty and non-becoming of an Arbitrator, is held that the Arbitrator had become *de jure* disqualified as continuing as an Arbitrator and thereafter proceeded to appoint an Arbitrator in exercise of its power under Section 15 of the Act. The said judgment is therefore, distinguishable on facts of its own case.

17. In ***Indian Oil Corporation Ltd. Vs. Raja Transport Pvt. Ltd. (2009) 8 SCC 520***, the Supreme Court summarized the scope of Section 11 of the Act as under:-

> *"48. In the light of the above discussion, the scope of Section 11 of the Act containing the scheme of appointment of arbitrators may be summarised thus:*
>
> > *(i) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an arbitrator within 30 days from the receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief Justice or his designate will exercise power under sub-section (4) of Section 11 of the Act.*
> > *(ii) Where the agreement provides for arbitration by a sole arbitrator and the parties have not agreed upon any appointment procedure, the Chief Justice or his designate will exercise power under sub-section (5) of Section 11, if the parties fail to agree on the arbitration within thirty days from the receipt of a request by a party from the other party.*
> > *(iii) Where the arbitration agreement specifies the appointment procedure, then irrespective of whether the arbitration is by a sole arbitrator or by a three-member Tribunal, the Chief Justice or his designate will exercise power under sub-section (6) of Section 11, if a party fails to act as required under the agreed procedure (or the parties or the two appointed arbitrators fail to reach an agreement expected of them under the agreed procedure or any person/institution fails to perform any function entrusted to him/it under that procedure).*
> > *(iv) While failure of the other party to act within 30 days will furnish a cause of action to the party seeking arbitration to approach the Chief Justice or his designate in cases falling under sub-sections (4) and (5), such a time-bound requirement is not found in sub-section (6) of Section 11.*

The failure to act as per the agreed procedure within the time-limit prescribed by the arbitration agreement, or in the absence of any prescribed time-limit, within a reasonable time, will enable the aggrieved party to file a petition under Section 11(6) of the Act.

(v) Where the appointment procedure has been agreed between the parties, but the cause of action for invoking the jurisdiction of the Chief Justice or his designate under clauses (a), (b) or (c) of sub-section (6) has not arisen, then the question of the Chief Justice or his designate exercising power Under Sub-section (6) does not arise. The condition precedent for approaching the Chief Justice or his designate for taking necessary measures Under Sub-section (6) is that

(i) a party failing to act as required under the agreed appointment procedure; or

(ii) the parties (or the two appointed arbitrators) failing to reach an agreement expected of them under the agreed appointment procedure; or

(iii) a person/institution who has been entrusted with any function under the agreed appointment procedure, failing to perform such function.

(vi) The Chief Justice or his designate while exercising power Under Sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else."

Thus, as laid down in sub-para (v) of para 48, unless the cause of action for invoking jurisdiction Under Clauses (a), (b) or (c) of Sub-section (6) of Section 11 of 1996 Act arises, there is no question of the Chief Justice or his designate exercising power Under Sub-section (6) of Section 11."

18. In the present case as the Arbitrator has been appointed in accordance with the procedure agreed to between the parties in the Arbitration Agreement, therefore, this Court would not have jurisdiction to exercise its power under Section 11 of the Act to appoint another Arbitrator for adjudicating the disputes between the parties.

19. In view of the above, I find no merit in the present petitions and the same are accordingly dismissed, however, leaving it open to the petitioner(s) to agitate all other contentions regarding the impartiality or independence of the Arbitrator before the Arbitrator himself or in such other proceedings as may be open to it in law. There shall be no order as to cost.

NAVIN CHAWLA, J

FEBRUARY 21, 2018/rv