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

\+ **ARB.A.No. 410/2008**

%09.04.2009 **Date of decision: 9th April, 2009**

**NATIONAL HIGHWAYS AUTHORITY OF INDIA** ..... Petitioner

Through: Mr Parag Tripathi, A.S.G. and Mr Sandeep Sethi, Sr Advocates with Mr Krishan Kumar, Ms Padma Priya, Ms V Rao and Mr Sumit Gahlawat, Advocates.

**Versus**

**MR K.K. SARIN & ORS** ..... Respondents

Through: Mr Valmiki Mehta, Sr Advocate with Ms Kiran Suri, Mr Purvesh Buttan and Ms Aparna Bhat, Advocates for respondent No.4.

***CORAM :-***
**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

1. Whether reporters of Local papers may be allowed to see the judgment? Yes

2. To be referred to the reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

**RAJIV SAHAI ENDLAW, J.**

1. The petition is filed under Section 14 of the Arbitration and Conciliation Act, 1996 for the relief of terminating the mandate of the arbitral tribunal comprising of the nominees of the petitioner and respondent No.4 and the presiding arbitrator appointed by the said two nominees and for appointment of a sole arbitrator by this court. The members of the arbitral tribunal are impleaded as the respondents 1 to 3 and though served with the notice, did not appear. The respondent No.4 contested the petition.

2. The petition has been preferred on two grounds. Firstly, that the arbitral tribunal has failed to abide by the agreement between

the petitioner and the respondent No.4 of the fee to be paid to the arbitral tribunal and ordered the parties to pay fee much in excess thereto and Secondly on the ground of bias of the arbitral tribunal against the petitioner, originating from the petitioner objecting to the payment of fee at rates higher than agreed upon with the respondent No.4; other instances of bias from certain interim orders made by the tribunal have also been pleaded.

3. The petition contained a prayer for interim relief and, on a prima facie view of the matter, vide ex parte order dated 21st November, 2008 further proceedings before the arbitral tribunal were stayed.

4. After completion of pleadings and during the course of hearing it was disclosed that certain relevant documents had remained unnoticed in the reply of the respondent No.4 and which were filed alongwith supplementary affidavit and response thereto of the petitioner elicited.

5. I will take up the aspect of fee of the arbitrator first. At the time of granting the ex parte order, it was felt that the arbitrators, being creatures of an agreement between the parties, would be bound by the agreement between the parties as to the fee also and if the fee, as per the said agreement, is not acceptable to the arbitrators, the only option for the arbitrators is to recuse themselves and the arbitrators cannot order the parties to pay fee in excess of that provided in the agreement. Section 31(8) of the Act is also subject to the agreement between the parties.

6. However, during the arguments, the documents, which are not disputed, have been filed and which lead me to believe that notwithstanding the agreement between the petitioner and the

respondent No.4 as to the fee, the petitioner and the respondent No.4 had, for the purposes of the arbitration subject matter of this petition, agreed to the fee schedule ordered by the Tribunal.

7. It is not disputed that the petitioner and the respondent No.4 are, since prior to the commencement of the arbitration subject matter of the present petition, engaged in another arbitration also, which hereafter is referred to as Arbitration-I. The arbitral tribunal in the other arbitration is also the same as in the arbitration subject matter of this petition, which hereafter is referred to as Arbitration-II.

8. The respondent No.4 vide its letter dated 5th June, 2006 to all the three arbitrators informed that certain more disputes (than subject matter of Arbitration-I) had arisen and with respect whereto the respondent No.4 had issued notice of intention to commence arbitration and had requested to refer the additional disputes to the existing arbitral tribunal and further that the petitioner had also decided to refer the said additional disputes before the existing arbitral tribunal – and requesting the arbitral tribunal that additional disputes may be adjudicated upon "on the existing terms and conditions". It is the contention of the respondent No.4 that the "existing terms and conditions" qua the fee in Arbitration–I were the same as the fee demanded by the tribunal in the Arbitration-II. It is further urged that the petitioner having agreed to pay fee to the Tribunal at a rate higher than that provided in the agreement between the petitioner and the respondent No.4, what was understood from the aforesaid communication of the petitioner was that the petitioner was willing to pay the same fee for the Arbitration-II also.

9. Per contra, the senior counsel for the petitioner has drawn attention to a supplementary agreement dated 19th August, 2005 between the petitioner and the respondent No.4 wherein a fee structure of the arbitrators was agreed and to its policy circular dated 2nd August, 2006 whereby the fee of the arbitrators, as earlier agreed, was revised. From the supplementary agreement it is not borne out that Arbitration-I was already underway at that time. It further provides in clause 7 thereof that in exceptional cases such as involving major legal ramifications/higher financial stakes etc., a special fee structure could be fixed with specific approval of chairman of the petitioner, before appointment of arbitrator and in consultation with respondent No.4. I have not found in the supplementary agreement dated 19th August, 2005 any clause entitling the petitioner to unilaterally bring out such a policy circular revising the arbitration fee.

10. The first meeting of Arbitration-I was held on 23rd November, 2005. Minutes thereof show that the petitioner herein had submitted the supplementary agreement dated 19th August, 2005 before the tribunal then also. However, the tribunal considered the fee structure provided in supplementary agreement to be unreasonable and laid down the fee structure as per the Indian Council of Arbitration as reasonable. It has not been contended by the petitioner that such fee which was not in terms of supplementary agreement has not been paid by petitioner in Arbitration-I which is informed to have culminated against the petitioner. The Minutes of Meeting held on 15th/16th May, 2006 of Arbitration-I further downwardly revised the fee but the same was still in excess of fee provided in the supplementary agreement dated 19th August, 2005.

11. A preliminary meeting of the arbitral tribunal in Arbitration-II was held on 6th June, 2006 wherein the fee structure and expenses of the arbitration were also laid down with the consent of parties. The same was not in accordance with the agreement or the policy circular aforesaid. It was the same as in Arbitration-I. Several officers and counsels of the petitioner were present in the said meeting and the minutes whereof do not show any protest having been made to the fee structure laid down by the Tribunal. The second meeting of the arbitral tribunal was scheduled for 23rd and 24th August, 2006. However, it appears that the second meeting of the arbitral tribunal did not take place as scheduled and a letter dated 5th January, 2007 was written by the petitioner to the arbitral tribunal intimating the arbitral tribunal of the supplementary agreement dated 19th August, 2005 on fee structure and as revised by the policy circular dated 2nd August, 2006 (supra). However, in the said letter also, neither any protest was made of the fee schedule laid down by the Tribunal in the preliminary meeting nor was any review thereof sought.

12. The minutes of the second meeting of the tribunal ultimately held on 29/30th January, 2007 in Arbitration-II show that the arbitral tribunal took notice of the letter dated 5th January, 2007 of the petitioner and further observed that the fee structure was agreed to by the parties as stated in para 1.06 of the minutes of the preliminary meeting held on 6th June, 2006 after taking into consideration the representation of the petitioner in its letter dated 5th June, 2006 (supra) requesting the tribunal to adjudicate the additional disputes "on the existing terms and conditions". The arbitral tribunal therefore held that the fee structure laid down on 6th June, 2006 was reasonable and decided to continue with the same.

Directions were issued for each party making initial deposit of Rs 50,000/- to each of the three arbitrators and a further deposit of Rs 75,000/- to be made by each party to two of the arbitrators.

13. The petitioner, vide its letter dated 18th June, 2007, with reference to the minutes of the meeting held on 29th/30th January, 2007 of the second arbitration, forwarded to two of the arbitrators advance of Rs 1,25,000/- each and to the third arbitrator advance of Rs 50,000/-. This payment is in consonance with the directions contained in the minutes of the first meeting held on 6th January, 2006 and the second meeting held on 29th / 30th January, 2007 of the second arbitration.

14. The petitioner submitted an application dated 7th July, 2007 to the arbitral tribunal under Section 31(8) of the Act requesting the tribunal to consider the fee as per the supplementary agreement dated 19th August, 2005 (supra). The said application was disposed of vide order dated 26th July, 2007 of the arbitral tribunal. The petitioner in its application contended that it had never agreed to pay the fee as recorded in the minutes of 6th June, 2006. The arbitral tribunal, inter alia, held that the parties could not fix the fee of the arbitrator and the arbitrators were not bound by the fee fixed by the parties which was not notified at the time of reference. It was further held by the arbitral tribunal that the representatives of the petitioner present in the meeting of 6th June, 2006 had appended their signatures thereto after reading the same. The tribunal therefore dismissed the application of the petitioner. At this stage it may also be noticed that on 19th August, 2005, besides the agreement aforesaid, qua fee of arbitration, another agreement was also executed between the parties to modify the dispute resolution

mechanism under the main agreement. This agreement provides for the arbitrators to fix their own fee.

15. The arbitral tribunal in the minutes of the meeting held on 1st, 2nd and 3rd October, 2007 directed each party to make further deposit of Rs 2 lacs each to the presiding arbitrator and another arbitrator and of Rs 1 lac to the third arbitrator.

16. The petitioner under cover of its letter dated 13th October, 2007 to the three arbitrators and in reference to the minutes of the meeting held on 1st, 2nd and 3rd October, 2007 made payment of Rs 2 lacs each to two and of Rs 1 lac to the third arbitrator respectively.

17. The arbitral tribunal, vide minutes of the meeting held on 10th January, 2008 and 11th January, 2008, directed the parties to deposit further sums of Rs 2 lacs to two of the arbitrators and Rs 1.60 lacs to the third arbitrator. The petitioner has filed its internal communication of September, 2008 wherein reference is made to the fee due as per the policy circulars of the petitioner from time to time regarding arbitrators fee and to the payments made to the arbitrators. On the basis of the said communication, it is contended by the senior counsel for the petitioner that whatever payments have been made by the petitioner to the arbitrator are in terms of its circular and not in terms of the orders/directions of the arbitrators and the petitioner cannot thus be said to have consented in any way to any schedule of fee other than as provided in its policy circulars.

18. That since the petitioner failed to make the payment, as directed on 10th and 11th January, 2008, the arbitral tribunal vide minutes of the meeting held on 8th September, 2008 directed the respondent No.4 to make the deposit in terms of Section 38(2) of the Act. However, the petitioner under cover of its letter dated 12th

September, 2008 forwarded a sum of Rs 2 lacs each to two of the arbitrators as advance, with reference to the direction in the minutes of 10th and 11th January, 2008. Vide another letter dated 18th September, 2008, the petitioner forwarded advance of Rs 51,000/- to the third arbitrator who in terms of the order dated 10th and 11th January, 2008 was to be paid a sum of Rs 1,60 lacs. This payment was thus not in accordance with the directions on 10th and 11th January, 2008.

19. In the aforesaid state of facts the question to be determined is as to whether the petitioner had agreed to pay fee at rate other than as per the supplementary agreement dated 19th August, 2005 and/or its policy circulars regarding arbitrators fees.

20. In my view the following factors show that the petitioner had agreed to the payment of fee at rate other than in terms of the supplementary agreement dated 19th August, 2005 and the policy circulars of the petitioner.

i. The petitioner notwithstanding the said supplementary agreement and policy circular had agreed to pay the fee, first in terms of the Rules of the Indian Council of Arbitration and which was subsequently revised to the tribunal qua arbitration-I.

ii. It is not the case of the petitioner that it did not pay the said fee to the tribunal.

iii. It is the petitioner who approached the arbitral tribunal constituted for arbitration-I, for the purposes of adjudication of additional disputes which became subject matter of the arbitration-II. The petitioner while so approaching the arbitrator, by its unilateral letter, did record that the reference was on the existing terms and which would indicate the terms on which the Arbitration –I was being conducted. The petitioner on that date also did not refer to the supplementary agreement dated 9th August, 2005 or to the policy circulars.

iv. Thereafter, in the preliminary meeting in arbitration-II on 6th June, 2006 also the supplementary agreement or the policy circulars were not brought up. The minutes do record the agreement/consent of the representatives

of the petitioner to the arbitration fee and expenses as being paid in arbitration-I.

v. It was only after more than six months of the preliminary meeting aforesaid that for the first time in letter dated 5th January, 2007 the question of fee as per the supplementary agreement dated 19th August, 2005 and the policy circulars was raised.

vi After the arbitral tribunal in the second meeting on 29/30th January, 2007 negatived the contention of the petitioner in the letter dated 5th January, 2007, the petitioner forwarded the fee as demanded by the arbitrators. The petitioner, while forwarding the cheques stated the same to be in terms of the directions of the arbitral tribunal and did not state that the same was as advance or that the fee, in fact, would be payable in terms of the supplementary agreement read with the policy circulars.

vii The petitioner again after making the said payment, filed an application dated 7th July, 2007. However, after the said application was dismissed in the meeting held on 1st to 3rd October, 2007, the petitioner again complied with the direction of the arbitrator for payment of further amounts.

viii It was only after the direction in the meeting on 10/11th January, 2008 for payment of further fee that the petitioner stopped paying the same. Even thereafter, the petitioner filed the present petition after nearly 10-11 months therefrom.

21. The arbitration has thus been going on for nearly two and a half years prior to the filing of this petition. It is not in dispute that the arbitration was at the stage of final hearing and the respondent/claimant had already concluded its submissions and the submissions of the petitioner were part heard. Had the petitioner not agreed to the fee schedule as directed by the tribunal, or had the petitioner refused to make the payment or yet still had the petitioner, notwithstanding the orders of the tribunal, made it known that it was willing to pay only the amounts in terms of its policy circulars, the arbitration would not have proceeded so far. The petitioner having allowed the arbitration to reach the

culmination point cannot belatedly be permitted to contest the fee aspect.

22. Therefore, even though I agree with the senior counsel for the petitioner that the arbitrators are bound by the agreement between the parties as to the payment of fee and if the said fee is not acceptable to them, are free not to accept the office as an arbitrator and/or to recuse themselves and cannot demand fee in supersession of the said agreement but in the facts of the present case I find the petitioner to have agreed to the fee schedule. The agreement between the petitioner and the respondent as to the fee schedule could always be novated and in this case is found to have been novated. Even otherwise there is no justification whatsoever for the petitioner to have agreed to pay and paid fee higher than agreed and/or as per its circular in arbitration–I and to make a grievance with respect thereto at the fag end of the proceedings in arbitration-II. The ASG had handed over a compilation of judgments on waiver but in view of above, it is not felt necessary to cite the same. The first challenge of the petitioner thus fails.

23. As far as the second challenge i.e., of bias is concerned, the elements of bias pleaded / argued are as under:

i. Directions/orders from time to time of the arbitral tribunal qua fee and the prejudice of the arbitral tribunal against the petitioner for non-payment of fee ordered.

ii. The action of the arbitrator of deciding the application of the respondent for interim measures under Section 17 of the Act without even meeting and after telephonic conversation only and passing of an order with respect thereto.

iii. The action of the arbitral tribunal of allowing the additional claims made by the respondent No.4 to be included in the arbitration proceedings, without the same going through the procedure in terms of the agreement between the parties i.e., of the Dispute Review Board.

iv. Interim order of tribunal staying encashment of Bank Guarantees.

24. During the course of hearing, the following questions were formulated with respect to bias:

A. Whether the appointment of the arbitrator on the ground of bias can be challenged under Section 14 of the Act or the grievance, if any, with respect thereto is to be made only at the stage of Section 34 of the Act.

B. If grievance of bias can be made under Section 14, then whether the grievance can be made directly before the court or the complaining party is required to first pursue the measures under Sections 12 and 13 of the Act.

C. Whether in the present case any case of bias has been made out.

25. As far as the first of the aforesaid questions is concerned, Section 14 permits a party to approach the court to return a finding if **"a controversy remains" as to whether the arbitrator has become *de jure* or *de facto* unable to perform his functions**. The 1996 Act in Section 5 thereof otherwise prohibits judicial intervention except where so provided by the Act itself. Thus unless Section 14 permits judicial intervention in the case of a bias being made out against the arbitrator, the petition on the said ground shall not lie.

26. This court in **Shyam Telecom Ltd v ARM Ltd** 113(2004) DLT 778 has held that de jure impossibility referred to in Section 14 is the impossibility which occurs due to factors personal to the arbitrator. It was held that non conclusion of arbitral proceedings within the agreed time rendered the arbitrator de jure unable to continue with the proceedings.

27. Under the 1940 Arbitration Act, Section 5 thereof permitted revocation of the authority of an arbitrator by the court. The Apex Court in **Panchu Gopal Bose Vs Board of Trustees for Port of Calcutta** AIR 1994 SC 1615 was concerned with the said provisions of the 1940 Act. It was held that the court had been given power in the given circumstances to grant leave to a contracting party to have the arbitrator or umpire removed and the arbitration agreement revoked. It was further held that the said discretion has to be exercised cautiously and sparingly considering that the parties should not be relieved from a tribunal they have chosen because they fear that the arbitrator's decision may go against them. The grounds on which the power could be exercised were to put under five heads as under:

(1) Excess or refusal of jurisdiction by arbitrator; (2) Misconduct of arbitrator; (3) Disqualification of arbitrator; (4) Charges of fraud and; (5) Exceptional cases.

28. I have already in **Sharma Enterprises Vs National Building Constructions Corporation Ltd** MANU/DE/1238/2008 held that Section 5 of the 1940 Act as interpreted in **Panchu Gopal Bose (**supra) finds place in the form of Section 14 of the 1996 Act. There can be no other interpretation of the power given to the court to terminate the mandate of the arbitrator when the arbitrator *de jure* is unable to perform this function. The *de jure* impossibility can be nothing but impossibility in law. Bias vitiates the entire judicial / arbitration process and renders the entire proceedings nugatory. Reference in this regard may also be made to **state of West Bengal Vs Shivananda Pathak** (1998) 5 SCC 513 cited by the ASG, though in a different context, holding that all judicial functionaries have

necessarily to decide a case with an unbiased mind; an essential requirement of a judicial adjudication is that judge is impartial and neutral and in a position to apply his mind objectively – if he is predisposed or suffers from prejudices or has a biased mind he disqualifies himself from acting as a judge. This equally applies to arbitrators, as statutorily provided in Sections 12 and 13. In my opinion, if the arbitrator is biased, he is de jure unable to perform his functions within the meaning of Section 14. Thus if the court without any detailed enquiry is able to reach a conclusion of arbitrator for the reason of bias is unable to perform his functions, the court is empowered to, without requiring the parties to inspite of so finding go through lengthy costly arbitration, hold that the mandate of arbitrator stands terminated. However, the said power under Section 14 has to be exercised sparingly with great caution and on the same parameters as laid down by Apex Court in **SBP & Company v Patel Engineering Limited** 2005 8 SCC 618 in relation to Section 11(6). Only when from the facts there is no doubt that a clear case of bias is made out, would the court be entitled to interfere. Else it would be best to leave it to be adjudicated at the stage of Section 34.

29. The next question is whether the party alleging bias can move a petition under Section 14 without following the procedure in Sections 12 and 13 of the Act. Section 12(3) of the Act permits challenge by a party to the arbitrator if circumstance exists that give rise to the justifiable doubt as to his independence or impartiality. Sub-section (4) permits a party who has participated in the appointment of the arbitrator to challenge the authority of the said arbitrator also. Section 13 provides the procedure for such challenge in the absence of any agreed procedure. No agreed

procedure has been cited in the present case and in the absence thereof, the petitioner who is challenging the arbitrator was required to within 15 days of becoming aware of the circumstances giving rise to justifiable doubts as to the independence of the arbitrator was required to send a written statement of the reasons for the challenge to the arbitral tribunal. No such thing has been done in the present case. Of course, sub-section (4) provides that if the challenge is not successful, the arbitral tribunal will proceed with the arbitration and sub-section (5) provides that the remedy of the aggrieved party would then be only under Section 34 of the Act.

30. The ASG draw attention to **Alcove Industries Ltd Vs Oriental Structural Engineers Ltd** 2008 (1) Arb. LR 393 (Del.) wherein a Single Judge of this court after holding that a petition under Section 14 of the Act lies on the ground of bias and that Sections 13 and 14 are to some extent overlapping, held that in appropriate cases remedy under Section 14 can be invoked without following the procedure in Section 13.

31. I had, during the course of hearing, drawn the attention of the counsels to the judgment of the Division Bench of this court in **S.N. Malhotra & Sons Vs Airport Authority of India & Others** 149 (2008) DLT 757 (DB) holding that the award cannot be challenged under Section 34 on the ground of arbitral tribunal not having the jurisdiction, without following the procedure provided under Section 16 of the Act. The Division Bench of this court thus held that unless the party has made an application in accordance with the Section 16 to the Arbitral tribunal to the effect that it does not have jurisdiction, that party would, in the event of the award going against him, would not be entitled to raise such a ground in an application under Section

34. I had also drawn the attention of the parties to the judgment of the Division Bench of this court in **Court of its Own Motion Vs State** MANU/DE/9073/2007 holding that where an application for recusal of a judge from hearing the matter is made, the same has to be heard by the same judge and cannot be heard by another judge/bench and the consequent amendment to the Delhi High Court Rules. I had put to the ASG/senior counsels that in the light of the aforesaid judgment would it not be better/advisable, even if the legislature had not so intended that an application for recusal of the arbitral tribunal on the ground of bias be made and heard first by the arbitral tribunal itself and only thereafter if the controversy remains, the court is approached to decide on the termination of the mandate. That appears to be the intention also from the use of the words ”if controversy remains…..” in Section 14(2) of the Act.

32. The ASG had, at the outset, submitted that the provisions of Section 16 are not *para meteria* to that of Section 13. It was argued that while Section 16(2) provides a limitation for a plea of jurisdiction to be raised as “not later than the submission of the statement of defence” there was no such prohibition in Section 13. It was argued that it was for the reason of the said provision only that it has been held that unless application under Section 16 has been made to the arbitral tribunal, the grounds which are to be urged thereunder, cannot be urged in an application under Section 34. It was argued that per contra, Section 13 merely provides a period of 15 days after becoming aware of the circumstance to challenge the arbitral tribunal and thus the challenge in this case could be made for the first time in a petition under Section 14 of the Act also. It was further contended that remedies under Sections 13 and 14 were independent of each other. While in Section 13 the

arbitrator to decide himself the challenge and to continue with arbitration, if negating the challenge, in Section 14 the mandate terminates. With respect to the second judgment (supra), it was answered that there was a difference in the plea of bias being raised before the arbitrator and before the court – when the plea is before court, the other judges do not sit in review or supervisory jurisdiction over the judge who is alleged to be biased, while the court has such power over arbitrators; though it was agreed that the principle in the second judgment (supra) may have persuasive value. The senior counsel for the petitioner supplemented that Section 12 from language thereof was applicable only to cases of bias owing to connection of arbitrator with one of the parties and not to cases of bias arising from conduct of proceedings.

33. I am however not convinced with any of the said arguments. Section 16(2) uses the words "not later than……." for the reason of nature of plea therein. The court in such proceedings has a limited role after the award. A plea required by law to be raised before the arbitrator, if not raised, cannot be raised for the first time in challenge to the award before the court. Without the same being raised before the arbitrator, the court will have no way of satisfying itself of correctness of adjudication thereof by the arbitrator. Similarly, the mandate of arbitrators does not terminate immediately on bias being alleged. Section 13 requires such plea of bias to be raised before the arbitrator. Section 14 as interpreted above also permits court to be approached where the controversy of arbitrator being biased remains, inspite of decision under Section 13 by the arbitrator and if such plea can be adjudicated in a summary manner. Else the remedy is only under Section 34 as provided in Section 13(5). In view of Section 13 requiring challenge to be made before

the arbitrator and the law as laid down in **Court of its Own Motion**, (supra) I also do not find any difference in the plea of bias being raised before the judge of a court and before the arbitrator. The Division Bench in **Court of its Own Motion** (supra) relied on dicta of Apex Court in **Election Commission of India Vs Dr Subramaniam Swamy** MANU/SC/0459/1996 laying down the procedure that ought to be followed in a situation concerning recusal; that case related not to judges of court, but to Election Commissioner. I also do not find any reason to take out pleas of bias arising from conduct of proceedings by arbitrators, outside the ambit of Section 13. Section 12(3) is wide enough to cover circumstances of all nature giving rise to justifiable grounds as to impartiality of arbitrator. The judgment of the Division Bench in **Court of its Own Motion** (supra) was not available to the Single Judge in **Alcove Industries**. In view of the latter pronouncement, I am taking a view different from that of coordinate bench in **Alcove Industries** (supra).

34. I have also wondered as to whether Section 13(5) leads to an inference that upon the challenge to the arbitrator under Section 13(1) being unsuccessful, the only remedy is under Section 34 of the Act inasmuch as Section 13(5) does not make any reference to Section 14. However, if we are to hold so then we would be rendering the *de jure* inability of the arbitrator to perform his functions otiose. To me, the scheme of the Act appears to be that the challenge has to be first made before the arbitrator in accordance with the Section 13 of the Act and upon such challenge being unsuccessful the challenging party has a remedy of either waiting for the award and if against him to apply under Section 34 of the Act or to immediately after the challenge being unsuccessful approach the

court under Section 14 of the Act. The court when so approached under Section 14 of the Act will have to decide whether the case can be decided in a summary fashion. If so, and if the court finds that the case of *de jure* inability owing to bias is established, the court will terminate the mandate. On the contrary, if the court finds the challenge to be frivolous and vexatious, the petition will be dismissed. But in cases where the court is unable to decide the question summarily, the court would still dismiss the petition reserving the right of the petitioner to take the requisite plea under Section 34 of the Act. This is for the reason of the difference in language in Section 14 and in Section 34 of the Act. While Section 14 provides only for the court deciding on the termination of the mandate of the arbitrator, Section 34 permits the party alleging bias to furnish proof in support thereof to the court. Section 34(2)(a) is identically worded as Section 48. The Apex Court in relation to Section 48 has in **Shin-Etsu Chemicals Co. Ltd Vs Aksh Optifibre Ltd.** AIR 2005 SC 3766 held that leading of evidence is permissible.

Per contra, Section 14 does not permit any opportunity to the petitioner to furnish proof. Thus all complicated questions requiring may be trial or appreciation of evidence in support of a plea of bias are to be left open to decision under Section 34 of the Act.

35. I therefore conclude that a party alleging bias is required to first follow the procedure in Sections 12 and 13 and if unsuccessful has choice of either waiting till the stage of Section 34 or if he feels that bias can be summarily established or shown to the court, approach the court immediately under Section 14, after the challenge being unsuccessful, for the court to render a decision.

36. The petitioner, in the present case, has not approached the arbitral tribunal with the plea of bias and has straightaway approached this court. The same is not permissible. The petitioner ought to make an application before the arbitral tribunal which will return its findings thereon. This court, whether exercising jurisdiction under Section 14 or under Section 34 of the Act would then have the benefit of the version of the arbitrators and would help the court in arriving at a decision.

37. That leaves the third question to be decided. However, since I have held that the petitioner ought to approach the arbitral tribunal first, I am refraining from returning any findings on the pleas of the petitioner of bias, to avoid prejudicing any of the parties in any manner whatsoever and so as not to influence the decision of arbitrator thereon. However, I must deal with one of the submissions of ASG/Senior counsel for the petitioner. It was argued that why should the Arbitral Tribunal, in view of apprehensions expressed by the petitioner not recuse itself or why should the respondent No.4 insist upon the same tribunal, when any apprehensions of causing delay can be allayed by providing for arbitration proceedings to continue from where left by the present tribunal. Reliance was placed on **Ranjit Thakur Vs UOI** AIR 1987 SC 386. However, that would tantamount to stating that whenever bias is alleged, the adjudicating authority without adjudicating plea of bias should recuse itself. That cannot be permitted. It would bring the entire adjudicating machinery to a naught and give a tool in hands of unscrupulous litigants. The delays on change in tribunal are inherent.

38. Both the challenges of the petitioner noticed above having failed, the petition is dismissed. The senior counsel for the respondent has vehemently argued that the present petition is an abuse of the process of the court; the petitioner suppressed facts and documents from this court and by such suppression managed to obtain an ex parte order of stay of arbitration proceedings which have been stalled for the last about 4 months. It is further argued that in fact in arbitration –I the award is against the petitioner and which led the petitioner to institute the present petition. Undoubtedly, the petitioner did not place the order in arbitration-I consenting to the costs and also did not place on record the documents showing payment to the arbitrators in accordance with the first two directions. The hearing has spanned over 5 days. The senior counsel has represented the respondent on each of these days. In the circumstances, in an endeavour to compensate with actual costs, the petitioner is burdened with costs of Rs 5,00,000/-.

**RAJIV SAHAI ENDLAW**
**(JUDGE)**

April 09, 2009
M