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IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

BEFORE:-

THE HON'BLE JUSTICE RAJASEKHAR MANTHA

EC 145 of 2020
IA No.: GA 1 of 2020,
GA 2 of 2021

C AND E LTD (COMPONENTS AND EQUIPMENTS LTD) AND ANR.

VERSUS

GOPAL DAS BAGRI AND ORS.

AP 364 of 2020
IA No. GA 1 of 2020

GOPALDAS BAGRI AND ORS.
VERSUS
C AND E LTD AND ORS.

AP 402 of 2020
IA No. GA 1 of 2020

FEATHER TOUCH LIMITED AND ANR.
VERSUS
C AND E LTD AND ORS.

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EC 81 of 2022
IA No. GA 1 of 2020

C AND E LTD (COMPONENTS AND EQUIPMENTS LTD) AND ORS.
VERSUS
GOPAL DAS BAGRI AND ORS.

For the Petitioners : Mr. Nalin Kohli, Senior Adv.
Mr. Sandip Agarwal, Adv.
Mr. Abhishek Swaroop, Adv.
Mr. Tanay Agarwal, Adv.
Mr. Naman Kandar, Adv.
Mr. Vasu Manchanda, Adv.
Ms. Nimisha Menon, Adv.
Ms. Surabhi Banerjee, Adv.
Mr. Biswaroop Bhattacharya, Adv.
Ms. Sulagna Mukherjee, Adv.
Ms. Shristi Sharma, Adv.

For the Respondent : Mr. Dhruba Ghosh, Adv.
Ms. Sananda Ganguly, Adv.
Ms. Ajaya Choudhury, Adv.

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Mr. Soumyajit Ghosh, Adv.
Mr. Rajarshi Dutta, Adv.
Mr. Arindam Halder, Adv.
Mr. Shubradip Roy, Adv.

Hearing Concluded on : 21st July, 2023.

Judgment On : 27th July, 2023.

Rajasekhar Mantha, J.:-

1. The subject matter of the instant proceeding is an award dated 29th February 2020 passed by Mr. XXX, learned Senior Advocate and Sole Arbitrator. The Arbitrator was appointed by consent as recorded in Consent Terms filed by the parties, recorded in order dated 1st August 2014 in C. S. No. 344 of 2014 filed in the Ordinary Original Civil Jurisdiction of this Court.
2. AP 364 of 2020 (Gopal Das Bagri Vs. C & E Ltd. &Ors.) has been filed by the award debtors under Section 34 of the Arbitration and Conciliation Act of 1996 (the Act of 1996).
3. AP 402 of 2020 (Feather Touch Ltd. Vs. C & E Ltd.) has been filed for setting aside the award under Section 34 of the Act.
4. EC 145 of 2020 (C & E Ltd. Vs. Gopal Das Bagri) is another application for execution under Section 36(1) of the said Act.
5. EC 81 of 2022 (C & E Ltd. Vs. Gopal Das Bagri) has been filed by the award holder under Section 36(1) of the said Act.
6. GA 1 of 2022 has been filed in AP 364 of 2020 by the award debtor under Section 36(2) of the said Act for the unconditional stay of the award, inter alia, for being vitiated by fraud.
7. The applications under Section 36(2), being GA 1 of 2020 in AP 402 of 2020 and GA 1 of 2020 in AP 364 of 2020 were taken up first.

8. In course of hearing of the said applications, this Court had directed the counsel for the parties to also address on the preliminary issue with regard to the applications under Section 34 as well as section 36(1) of the said Act. The parties have made detailed, elaborate submissions over 7 days, spread over a period of 4 months.

FACTS OF THE CASE

9. The dispute is between the Bagri group, headed by Gopal Das Bagri and his sons on one side, and the Bhaiya group, headed by Bulaki Das Bhaiya on the other side. The said Bulaki Das Bhaiya died in the course of the proceeding before this Court. Substitutions have been carried out.

10. Originally C.S. No. 344 of 2012 was filed by the Bagri family comprising Gopal Das Bagri, Rama Bagri, Anil Bagri, Inder Kumar Bagri, and Sarala Bagri, against M/s. C.& E. Ltd., Bulaki Das Bhaiya, and one M/s. Feather Touch Ltd. and Abhishek Kothari for various reliefs in the Ordinary Original Civil Jurisdiction of the Hon'ble Court.

11. As per consent terms filed in the said suit, a Single Bench of this court on 1st August 2014 referred all disputes and differences to Arbitration, and then Mr. XXX was appointed by consent of the parties.

12. In the first sitting of the arbitration, held on 10th August 2014, the learned Arbitrator disclosed in writing to the parties that he had earlier represented Bulaki Das Bhaiya and his group companies who is evidently a claimant in the proceedings. Upon such disclosure, the award debtors indicated to the Arbitral Tribunal that they had full faith

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and confidence in the learned Arbitrator. The relevant portions of the minutes of the meeting held on 10th August 2014 are set out below:-

> "2.1 At the outset, the Arbitrator informed the parties that he had professionally been engaged several years ago as counsel to appear for Mr. Bulaki Das Bhalya, one of the claimants in this proceeding, or by companies within his management and control in certain earlier legal proceedings with regard to which Shri Bhalya had attended the conferences and had occasion to confer with and meet the Arbitrator. The Arbitrator further informed the parties that his son Mr. Ravi Kapur, Advocate, had apparently also appeared for the claimants in interlocutory proceedings arising out of C.S. No. 344 of 2012 before the Hon'ble High Court.
> 2.2 Mr. JishnuSaha, appearing for the respondent No.1 to 5 and Ms. Sulagna Mukherjee, Advocate appearing for the respondent Nos. 6, 7 and 8 informed the Arbitrator that they had been apprised of detalls of the foregoing circumstances and being fully aware of the same had proposed the name of the Arbitrator before the Hon'ble High Court to act as Arbitrator in this proceeding. Counsel also stated that they had full confidence and no doubts about the independence and impartiality of the Arbitrator and requested him to enter upon reference and continue with the arbitral proceedings.
> 3.1 The Arbitrator thereupon commenced the arbitral proceedings."

13. As many as 126 sittings were held in the Arbitration between 10th August 2014 and 9th December 2017. After a year-long hiatus, on the 3rd of January 2019, the Arbitrator declared that a draft of the award was ready and after corrections and proofreading, the final Award would be ready soon. The minutes of the meeting dated 3rd January 2019 are as follows:-

> "The Arbitrator apprised the parties that his draft of the Award was ready and it would take a few days to do the proof reading of the same as well as making necessary correction of typographical mistakes and he expected the final copy to be ready very soon.

The Arbitrator directed both the parties to deposit Rs.2 lakhs each with him by Monday, the 7th January 2019 to meet the secretarial expenses, etc. in respect of preparation of the award."

14. Between 5th June 2018 to 19th July 2018, the Learned Arbitrator, in his capacity as a Senior Advocate of this Court, appeared in the High Court in APD 252 of 2015 arising out of C.S. No. 274B of 1996 [M/s. Standard Shoe Sole & Mould (India) Ltd. (SSSMIL) v. M/s. Essem Chemical Industries], before Divison Benches of this Court, as lead counsel for the said SSSMIL on 11 occasions. It is stated on affidavit that the said Bulaki Das Bhaiya attended meetings and conferences with the Learned Arbitrator, in connection with the aforesaid APD 252 of 2015, held with the Learned Arbitrator.

15. Admittedly the said SSSMIL was formerly known as Chemcrown India (Private) Ltd. M/s. SSSMIL is a company owned, controlled, and managed by one BG Chemicals Pvt. Ltd., with an ownership of 25.68% shares. B.G. Chemicals Pvt. Ltd. itself is owned, controlled, and managed by Bulaki Das Bhaiya and his family members. The registered office of SSSMIL is the same as that of the award holder, C & E Ltd. i.e., 95 Park Street, 2nd Floor, Kolkata-700016. The shareholding pattern of M/s. B. G. Chemicals Pvt. Ltd. is as follows:-

B G CHEMICALS PRIVATE LIMITED
Regd. Office: Plot No. 31, Pragati ViharPoharpur, Jajmau, Kanpur, UP 203010
City Office: 95, Park Street, 2nd Floor, Kolkata – 700016
CIN: U24119UP1993PTC015489; E-Mail : bgchemicalpvtltd@gmail.com
List of shareholders as on 31.03.2019

A-Promoter Group Shareholding

Sl. No.	Full name	Address	No. of Shares
1	NA	NA	NA

TOTAL(A)

B- Other Shareholders

Sl. No.	Full name	Address	No. of Shares
1	Bulaki Das Bhaiya	17 Sunny Park, 2nd Floor, Ballygunge, Kolkata-700019	80
2	Gouri Shankar Baldewa	20L, Motilal Basak Lane, Kolkata-700054	20
3	Ganga Devi Bhaiya	17 Sunny Park, 2nd Floor, Ballygunge, Kolkata-700019	8000
4	Bulaki Das Bhaiya HUF	95, Park Street, 2nd Floor, Kolkata – 700016	1900
TOTAL (B)			10000

Total Shareholding (A+B) = 10000 Equity shareholders of Rs.10 Each

16. On 23rd February 2019, the Learned Arbitrator directed the parties to make submissions afresh, despite having already indicated on 3rd January 2019, that the award had been finalised. The minutes of the meeting dated 23rd February 2019 recorded as follows:-

> "Before dealing with other matters I find from Mr Singhvi's letter of February 19, 2019 that he has referred to the issue of delay.
> Undoubtedly, there has been delay.
> The expectation of counsel was that he matter would be concluded in a six month's time when they took the order of reference from the Hon'ble Court.
> Regrettably, within six month's time parties did not complete additional pleadings.
> After that the Arbitrator - without intending offence to anybody - was compelled to give due regard to the overburdened professional times of counsel.
> Howsoever that may have been, the hearings intermittently-accommodating everybody- continued until mid 2017 when I told both sides that they must proceed on a day to day basis and conclude the hearing.
> I was assured that notes would be given before arguments were made. Regrettably this was not done.
> One set of notes was received from the respondents around June or perhaps July, 2017 and then counsel argued for the respondents on the first claim with regard to price of goods sold and delivered.
> After that counsel for the claimant took over and presented his arguments. I did not then get any notes from anybody.
> This continued till 3rd December 2017 when I closed the arguments and asked counsel to give me their notes.

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One set of notes was received in January 2018 the second set came from the other side in February 2018, and the last set came from the claimants in May 2018 which was just on the eve of summer vacation. I was then proceedings abroad and then took up the matter for consideration after the vacation.
By then, I must honestly admit that very little of the case, if anything at all, remained within my immediate recollection. I was compelled to read the entire bundles of papers by myself and put together my own determination with regard to over 20 separate issues.
I had prepared a draft Award in December, 2018 and before finalisation I took some time when unfortunately the matter because of my commitments went out of my mind again.
By my notice of 18th February 2019 I asked the parties to come to address me on certain matters which I think they had left incomplete in their earlier arguments.
Hence the meeting today."
…………

17. As many as 13 more sittings were held from 23rd February 2019 to 9th September 2019. The award was made 6 months thereafter, on 29th February 2020.

18. A brief chart or sequence of events and dates in the Arbitration and the relevant intervening actions is set out herein below:-

10th August, 2014	The Learned Arbitrator informed the parties about his professional engagement with Mr. Bulakidas Bhaiya before the arbitration proceedings.
13th September, 2014 - 9th December, 2017	About 126 sittings were held in the arbitration proceedings during this period.
January, 2018 – December, 2018	Hiatus.
3rd January, 2019	The Learned Arbitrator informed the parties that the Award had been finalised.
23rd February, 2019	Despite having notified the parties that the award would be delivered on 29th February 2019, the learned arbitrator wanted further hearing.
3rd March, 2019 – 9th September, 2019	The arbitration recommenced and as many as 13 sittings were held.
29thFebruary, 2020	The award was pronounced.

19. The Arbitrator, admittedly did not disclose or inform the parties that he had appeared several times in the High Court, for the said M/s. SSSMIL during the aforesaid hiatus period. The award was declared in favour of the Bhaiya group and its associates for an overall sum of Rs. 22 crores together with interest. The operative part of the award is as follows:-

30.**RELIEFS & FINAL DIRECTIONS**
In conclusion therefore, I am again collating hereunder particulars of the awards as made with regard to the respective claims of the parties in serial order:

Claim No.-1 - There will be a Award in favour of the Claimant companyagainst Indra Kumar Bagri, Sarla Bagri, Abhishek Kothari and Feather Touch Limited for a sum of USD 5,15,409.50 together with simple interest thereon @ 12% per annum calculated from 1st June, 2012 up to the date of payment.
Claim No.-2 - There will be an Award in favour of the Claimant companyagainst Indra Kumar Bagri, Sarla Bagri, Abhishek Kothari and Feather Touch Limited for a sum of Rs.30,02,037/- together with simple interest thereon @ 12% per annum calculated from 1st January, 2012 up to the date of payment.
Claim No.-3 :There will be an Award in favour of the Claimant company against Gopaldas Bagri, Indra Kumar Bagri, Sarla Bagri, Anil Bagri and Abhishek Kothari for a sum of Rs.17.5 crores together with simple interest thereon @ 12% per annum calculated from 1 January, 2019 up to the date of payment.
Claim No.-4- There will be an Award against Inder Kumar Bagri in favour of the Claimant company for a sum of RMB 3,24,351.14 together with simple interest thereon @ 12% per annum calculated from 1st January, 2012 up to the date of payment.
Claim No.-5-There will be an Award against Inder Kumar Bagri in favour of the Claimant company for a sum of RMB 1,92,770. This amount will not carry any interest.
Claim No.-6-There will be an Award against Inder Kumar Bagri in favour of the Claimant company for a sum of RMB 5,23,254.68together with simple interest thereon @ 12% per annum calculated from 1st January, 2012 up to the date of payment.

Claim No.-7 - The Claim No. 7 for a sum of RMB 5,66,645 is rejected.

Claim No.-8- There will be an Award against Inder Kumar Bagri in favour of the Claimant company for a sum of RMB 28,000 together with simple interest thereon @ 12% per annum calculated from 1st January, 2012 up to the date of payment.

Claim No.-9- There will be an Award against Inder Kumar Bagri and Abhishek Kothari jointly and also severally in favour of the Claimant company for a sum of RMB 52,800 together with simple interest thereon @ 12% per annum calculated from 1st December, 2011 up to the date of payment.

Claim No. 10 There will be an Award against Gopaldas Bagri in favour of the Claimant company for a sum of Rs.2,48,374.23 together with simple interest thereon @ 12% per annum calculated from 1 January, 2012 up to the date of payment.

Claim No.-11 Claim No 11 for RM 2,03,577.23 on account of foreign exchange fluctuations is rejected.

Claim No.-12:

a) There will be an Award against Respondent Nos. 1, 3, 4, 5, 6 and 7 in favour of the Claimant company for a sum of RMB 24,63,160.56 together with simple interest thereon @ 12% per annum calculated from 1st January, 2012 up to the date of payment.

b) There will be an Award against Inder Kumar Bagri in favour of the Claimant company for a sum of USD 10,23,925 together with simple interest thereon @ 12% per annum calculated from 1st January, 2012 up to the date of payment.

Claim No.-13 The claim made by the claimant for a sum of Rs.5 crores on account of profits of FTL between 2005-2011 is rejected.

Claim No 14:1 further summarize the reliefs awarded with regard to the claims of the respondents.

a) There shall be an Award in favour of Gopaldas Bagri against the claimant company for a sum of Rs.24,933/- being his claim on account of salary that was raised in the Solan suit filed by him. This amount will carry interest @ 12% per annum calculated from 1stApril, 2012 until the date of payment. All other claims of Gopaldas Bagri are rejected.

b) So far as the claims made by IK Bagri against the company are concerned, all of them are rejected.

c) So far as the claims made by Abhishek Kothari against the company are concerned, all of them are rejected.

d) As agreed between the parties the respondents shall sell and transfer their entire shareholding[consisting of 10,33,716 equity shares of the face value of Rs. 10 each representing

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34.98% of the issued share capital of the claimant company] in the Claimant Company free from all or any encumbrances to the Claimant No 2, BulakidasBhaiya or his nominees at the rate of Rs. 80/- per share. The details of the shareholdings to be sold are set out hereunder:

Name of Shareholder	Number of Shares held	Percentage
Gopal Das Bagri	88,944	3.01%
Mrs. Rama Bagri	3,51,393	11.89%
Anil Kumar Bagri	1,53,675	5.20%
Inder Kumar Bagri	4,39,275	14.87%
Gopal Das Bagri Karta of Gopaldas Bagri HUF	429	0.01%

e) For the purposes of completing such sale and transfer the said respondents and each of them shall sign and deliver duly stamped and properly executed transfer deeds together with the original share scrips to BulakidasBhaiya or his nominee-purchasers in respect ofthe shares standing in their names respectively in the Register of Members of the Claimant Company.

f)In consideration of such sale of shares the Claimant Company will be entitled to set-off and/or adjust the price of the shares sold in full settlement or in diminution of any claim due and owing to the claimant company under any of the sums awarded to the company by this final Award.

g) The claimant company will be reimbursed by the purchasers the full price of the shares sold and transferred by the Bagri Group of respondents to BulakidasBhaiya and his nominees within a period of 7 days' from date of the handing over of the share scrips and properly executed transfer deeds by the sellers to the purchasers in terms of this final Award.

h) All other claims by parties against each other that is to say such as are not hereby adjudicated including such as were referred to me as the Arbitrator in respect of the company proceedings by the order of the Hon'ble Mr. Justice Sanjib Banerjee shall stand dismissed and extinguished altogether.

i) The claim for relief regarding pending criminal proceedings made by Mr. Sandip Agarwal on behalf of the Bagri respondents is dismissed.

j) All or any claims between the parties interse only shall stand adjusted and settled as determined in this Award; but this of course shall be without prejudice to any rights in accordance with law that the claimants may have in respect of the subject

matter of these proceedings against any third parties who were neither arrayed as parties eonomine nor participated in these arbitral proceedings at all.

15. COSTS: There will be no order as to costs.

This Final Award is made and published by me at my Chamber at No. 14B, Ballygunge Circular Road, Kolkata 700019 on this the Twenty-Ninth day of February 2020.

SUBMISSIONS ON BEHALF OF THE AWARD DEBTORS, THE BAGRI GROUP

20. Learned counsel for the Award Debtors, Mr. Nalin Kohli argued as follows:-

21. That there can be no dispute as regards the control of M/s. SSSMIL by said Bulaki Das Bhaiya. He had the direct or indirect power to control the Management affairs and policies of SSSMIL, either by himself and/or through his family members. It is stated that M/s. SSSMIL acted as per the dictates and wishes of the said Bulaki Das Bhaiya and his immediate family members. Reliance has been placed on paragraphs 50 and 51 of the decision of ***Arcelormittal India Pvt. Ltd. v. Satish Kumar Gupta and Ors.***, reported in **(2019) 2 SCC 1.**

22. The award is vitiated by fraud and hence in conflict with public policy and/or fundamental policy of India for non-disclosure and active concealment by the Learned Arbitrator of having represented and/or been associated with the award debtor, namely M/s. SSSMIL during the year-long hiatus in the Arbitration. He relied upon the following decisions:-

i. ***State of Maharashtra v. Budhikata Subbarao*** reported in **(1993) 2 SCC 567**, paragraph 3;

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ii. ***Shib Prasad Biswas v. State Bank of India*** reported in **2009 SCC Online Cal 2274**, paragraphs 5 and 6;

iii. ***Government of Kerala v. SomDatt Builders Ltd.*** reported in **2002 SCC OnLine Ker 134**, paragraph 19;

iv. ***McDermott International Inc. v. Burn Standard Corporation Ltd.*** reported in **(2006) 11 SCC 181**, paragraph 52;

v. ***Venture Global Engg. v. Satyam Computer Services Ltd.***, reported in **(2010) 8 SCC 660**, paragraph 40;

vi. ***Venture Global Engg. LLC v. Tech Mahindra Ltd.*** reported in **(2018) 1 SCC 656**, paragraph 120.

23. Mr. Kohli alternatively argues that the aforesaid actions give rise to justifiable doubts, within the meaning of Section 12 (1), (2), and (5), as regards the independence and impartiality of the Learned Arbitrator, and hence the award is vitiated. He relied upon the following decisions:-

a. ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd. reported in **(2007) 5 SCC 304**, paragraph 21;

b. ***International Airports Authority v. K.D. Bali***, **(1988) 2 SCC 360** reported in **(1988) 2 SCC 360**;

c. ***Himadri Chemicals & Industries Ltd. v. Steel Authority of India Limited*** reported in **2012 SCC Online CAL 3589**, paragraphs 22, 23, and 28.

24. He submits that in view of the clear mandate of Section 12 of the Act, there is no need to prove actual bias on the part of the Arbitrator. The award is therefore vitiated. He relies upon paragraph 47 of the case of

Alcove Industries Ltd. v. Oriental Structural Engineers Ltd. reported in **ILR (2008) 1 Delhi 1113.**

25. Reliance is placed also on paragraphs 7 to 10 of the decision of ***Vinod Bhaiyalal Jain v. Wadhwani Parmeshwari Cold Storage (P) Ltd.*** reported in **(2020) 15 SCC 726**, and paragraph 10 in the case of ***Jagdish Kishanchand Valecha v. SREI Equipment Finance Limited and Another*** reported in **2021 SCC OnLine Cal 2076**.

26. Referring to the test of whether a reasonable person would have understood bias on the part of the Arbitrator in the facts, reliance is placed on paragraphs 15 and 17 of the case of ***Ranjit Thakur v. Union of India &Ors.*** reported in **(1987) 4 SCC 611**.

27. On the question of control of M/s. SSSMIL by said Bulaki Das Bhaiya, it is argued that he had the direct or indirect power to control the Management and Policies of SSSMIL by contract and or through his family members. Reliance has been placed on paragraphs 50 and 51 of the decision of ***Arcelormittal India Pvt. Ltd.(Supra)***

28. On the violation of the mandatory provision, it is argued that section 12(1)(a) requires the Arbitrator to disclose any past or present relationship with the parties in terms of section 12(2) of the Act. It is further argued that such obligation to disclose continues from the time of his appointment throughout the arbitral proceedings until the end. Reliance in this regard has been placed on paragraph 40 of the case of ***Alcove Industries Limited (supra)***.

29. On the requirement of the disclosure, paragraph 42 of the decision of ***Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd.***

reported in **2017 SCC Online Del 7228** has been relied upon. Further reliance has also been placed on paragraph 50 of the decision of ***Ganesh Builders, Nagpur v. Nagorao S/O Motiram Kaware and Ors.*** reported in **2019 SCC Online Bom 1730**.

30. On the proposition that the Arbitrator must disclose to the parties all circumstances giving rise to justifiable doubts, reliance is placed on paragraph 20 of the decision of the Supreme Court in the case of ***Voestalpine Schienen GmbH v. Delhi Metro Rail Corp. Ltd.*** reported in **(2017) 4 SCC 665**.

31. By placing reliance on section 12(5) of the said Act and the Seventh Schedule, it is argued by Mr. Kohli that the Arbitrator had become de jure, incapable of performing his functions by reason of having appeared for the said M/s. SSSMIL during the pendency of the Arbitration. Reliance in this regard is placed on paragraph 17 of the decision of ***Bharat Broadband Network Ltd. v. United Telecoms Ltd*** reported in **(2019) 5 SCC 755**. Section 12(5) read with section 12(2), according to Mr. Kohli, casts a continuous obligation upon the Learned Arbitrator to "Disclose" from the commencement of the arbitration to the end.

32. On the rules against the bias applying to all judicial and quasi-judicial proceedings, Mr. Kohli relied upon paragraph 14 of the ***Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited and Others v. Ajay Sales & Suppliers*** reported in **2021 SCC Online SC 730**.

33. Relying upon paragraphs 20 and 22 on the case of ***HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Limited*** reported

in **(2018) 12 SCC 471**, it is submitted that the mandate under amended section 12 in the year 2015, when the Fifth and Seventh schedules, of the said Act, were introduced, would apply to the Arbitrator in the instant case, irrespective of whether the arbitration commenced before or after the amendment.

SUBMISSIONS ON BEHALF OF THE AWARD HOLDERS, THE BHAIYA GROUP

34. Mr. Dhruba Ghosh, Ld. Senior Advocate, representing the award holder, would vehemently oppose the preliminary objections to the application under Section 36(1) of the 1996 Act and consequently the preliminary issue in the application under Section 34 of the Act filed by the award debtors i.e. the Bagri Group.

35. Mr. Ghosh argued that the allegations of fraud and corruption have been made out without any particulars and hence no credence whatsoever should be given to the argument of the award debtors, in this regard. Reliance is placed in the case of ***Svenska Hanelsbanken v. M/s. Indian Charge Chrome and Ors.*** reported in **(1994) 1 SCC 502**, paragraph 41, and ***Bishundeo Narain and Anr. v. Seogeni Rai and Anr.*** reported in **1951 SCC Online SC 34** paragraph 22.

36. Fraud must be established beyond reasonable doubt and the standard of proof is of a high degree, that has not been discharged by the award debtors. Reliance is placed on the case ***A.L.N Narayanan Chettyar and Anr v. Official Assignee of the High Court, Rangoon and Anr.*** reported in **AIR (1941) PC 93.**

37. It is next argued that the award debtors have not been able to prove or demonstrate that the award was induced and affected by alleged fraud or corruption. Ineligibility and bias do not amount to fraud.

38. Mr. Ghosh has elaborated on the meaning of "affiliate" within the meaning of Fifth and Seventh schedules to the said Act. An "affiliate" can only be of a company and not of an individual (in the instant case, Bulaki Das Bhaiya). There is no proof or argument to say that M/s. SSSMIL was an affiliate of C & E Ltd. There is therefore no ineligibility that can be attributed to the Arbitrator.

39. As regards the argument of non-disclosure amounting to concealment and fraud, Mr. Ghosh submits that there is no causal connection or link between the act of appearance for M/s. SSSMIL and the lis in the Arbitration, as argued by the counsel for the award debtors. It is also argued that the writ petitioners' counsels have broad-brushed the issues and made an unwarranted quantum leap, to jump to a conclusion of fraud by reason of non-disclosure.

40. It is next argued that the consent given by the petitioner at the inception of the arbitration, pursuant to the disclosure by the Arbitrator amounts to waiver and consent to the Arbitrator's subsequent and continuous association, representation, and appearance as the counsel for the companies of the Bhaiya Group.

41. It is next argued that the award debtors themselves are shareholders in M/s. SSSMIL and must be deemed to have known about the engagement of the Arbitrator as counsel in APD 252 of 2015. No application under Section 13 was made during the pendency of the

arbitration. The alleged discovery of the Arbitrator's engagement and appearance in APD 252 of 2015, later, cannot be believed.

42. The non-disclosure by the Arbitrator can be attributed to oversight and was believed to be unnecessary. Non-disclosure in the instant case therefore cannot ipso facto be deemed as wilful, deliberate, or fraudulent. There is no causal connection between non-disclosure and the result of the proceedings and hence the same does not amount to concealment. The APD 252 of 2015 has little or nothing to do with the role of the Arbitrator in the instant proceedings.

43. On the argument under section 12 advanced by Mr. Kohli, Mr. Ghosh has submitted that section 12(5) and the Seventh schedule deal with cases of ineligibility at the time of appointment of the Arbitrator. The same cannot be applied to the facts of the instant case. It is only section 12(2) that would apply to the facts of the case, along with the Fifth schedule. The Fifth schedule and section 12(2), do not specify the requirement of any continuous disclosure. The Arbitrator did not guarantee or undertake, at the time of initial disclosure, that he would not represent any of the respondents again. Hence, in the facts of the case invoking section 12(5) and the Seventh schedule, to automatically terminate the mandate of the Arbitrator, is therefore incorrect and unwarranted.

44. The petitioners, being shareholders of M/s. C&E Ltd and M/s. SSSMIL themselves, are deemed to be aware of the engagement of the Learned Arbitrator by Bulaki Das Bhaiya.

45. The requirement of waiver by the parties, to be expressed in writing under section 12(5) and the Seventh schedule, cannot be applied to section 12(2) and the Fifth schedule.

46. The Learned Arbitrator is a Senior Counsel of repute and standing of more than 50 years at the Bar in the Calcutta High Court. Reckless allegations have been made against him despite having been proposed and accepted as Arbitrator by the award debtors themselves.

47. The unavoidable and unintentional overlaps between the professional engagement of a Senior Advocate and his duties as an Arbitrator, cannot be a ground for allegation of bias or fraud against the Arbitrator. Reliance in this regard has been placed at paragraph 22 of the decision of ***HRD Corporation (Marcus Oil and Chemical Division) v. Gail India Limited*** reported in **(2018) 12 SCC 471**. Mr. Ghosh has then proceeded to distinguish the cases relied upon by Mr. Kohli.

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FINDINGS OF THIS COURT

Is M/s. SSSMIL an affiliate of the Bhaiya Group

48. Having heard counsel for the parties, this Court finds that the Bagri Group has not seriously disputed the shareholding of Bulaki Das Bhaiya and his family members in M/s. B.G. Chemicals Pvt. Ltd. which has a controlling interest in M/s. SSSMIL. Except to say that members of the Bagri family are also shareholders in M/s. SSSMIL, the control of Bulaki Das Bhaiya in M/s. SSSMIL through M/s. B.G. Chemicals Pvt. Ltd. could not be seriously disputed. On the contrary

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at page 9 of the Affidavit-in-Opposition, there is an indirect assertion to that effect.

"9.The allegations made in paragraph 4 of the said petition are denied and disputed. It is denied that the information given by learned Arbitrator to the parties, as is evident from the minutes of the first sitting of arbitration, in itself amounted to a representation that he would not appear for, represent or advise Bulaki Das Bhaiya or for any of his companies in the course of the arbitration, as alleged. It is denied that the petitioners, FTL and Abishekh Kothari agreed to the learned Arbitrator entering upon reference and continuing with the arbitral proceeding, clearly with the understanding that the learned Arbitrator would not act as legal adviser of Bulaki Das Bhaiya or any of his group companies during the pendency of the reference, as alleged.

....

16. In this connection it is stated that several sitting were held after July 2018 and the advocates appearing for the award debtors before the arbitrator were well aware of the fact that the learned senior arbitrator had appeared in the SSSMIL appeal in his professional capacity. In fact the learned senior advocate Mr JishnuSaha had also appeared in other matters of SSSMIL. As such it was though unnecessary to record the same at that time since the learned Arbitrator had already made full disclosureunder section 12 of the Act and all the parties had consented to his appointment. No application was made challenging his qualification independence and/or integrity even though continued upto February 2020 At every meeting the representative of the applicants were present and no one raise any objection. The learned Arbitrator is a Senior Advocate and had been associated with the suit C.S. 274B of 1996 at all material times. The plaintiff in the suit SSSML is not a party to the instant arbitration and there was no reason for the learned Arbitrator to disclose the proceedings in the appeal (APD No 252 of 2015 arising out of the decree passed in the said suit).

17. In fact some of the respondents in the arbitration proceedings are also shareholders in SSSML i.e. Inder Kumar Bagri 2400, Gopal Das Bagri 1600, & Rama Bagri 2000 and knew and/or were to deemed to have known about the said appeal. It is unfortunate that the applicant is insinuating that the advocates appearing for the claimant in the arbitration proceedings were also representing the appellants in APD no, 252 of 2015. As mentioned above the learned Arbitrator is an eminent and popular senior counsel and has even appeared with the advocates appearing for the applicants and in particular learned Senior Advocate

JishnuSaha and advocate Sandip Agarwal in numerous matters during the pendency of the arbitration proceedings. In fact, I have been informed by the Award Holder No. 2 that the learned Arbitrator held several conferences with the aforementioned advocates of the applicant / respondent during the continuance of the arbitration proceedings. Moreover, the learned Senior Advocate JishnuSaha has also appeared for SSSMIL in other matters from timeto time during the continuance of the proceedings and as such the insinuation made about the advocates appearing on behalf of the claimant is not appreciated. I state that the allegations made in the paragraph under reference are irrelevant, in bad taste and improper. Only because the learned Arbitrator happens to be a busy Senior Counsel working with different advocates and advocates on record who happen to represent the parties herein, does not ipso facto disqualify him from appearing as arbitrator. The appearance of the learned Senior Counsel in such matters including APD no. 252 of 2015 could not have under any circumstances led the applicants to reasonably believe that he appeared for other matters for B. D. Bhaiya or his companies. In fact there is no other matter wherein the learned Arbitrator appeared as counsel for B. D. Bhaiya or "his companies" as alleged. Copies of the orders evidencing the fact that Mr. JishnuSaha, senior advocate had appeared for and behalf SSSMIL as counsel and copies of orders evidencing the Mr. JishnuSaha, Learned Advocate appearing in various other matters with the learned Arbitrator during the pendency of arbitral proceeding are annexed hereto and collectively marked "A""

49. From a conjoint reading of the extract from the affidavits as above; the declaration of the Arbitrator in the first sitting, also extracted hereinabove; the shareholding pattern of M/s. B.G. Chemicals Pvt. Ltd., its 27-odd percentage shareholding in M/s. SSSMIL and the other shareholders of the said M/s. SSSMIL, it could be inferred that Bulaki Das Bhaiya has overall Control and Management of M/s. SSSMIL and M/s. C&E Ltd. It can also be inferred that the managers, directors, and employees are accustomed to acting as per the sole wish and dictate of the said Bulaki Das Bhaiya.

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50. In GA 1 of AP 364 at paragraph 3 it has been averred that Bulaki Das Bhaiya has founded Chem Crown India Pvt. Ltd. which is the former name of M/s. SSSMIL. Mr. Bhaiya was personally present in most of the sittings in the arbitration. It could therefore not be difficult to believe that he must have personally attended most of the conferences with the Learned Arbitrator at the time of briefing for appearances in connection with APD 252 of 2015 between January and December 2018.

51. Family-controlled companies are commonplace in India. The control of the family is exercised either through direct shareholding of the family members or through other companies controlled by the same family or a member of the same.

52. The above proposition is clear from the expression "control and management" as explained succinctly in the case of ***Arcelormittal (supra)***. At paragraphs 50 and 51 it was held as follows:-

> "**50.** The expression "control" is therefore defined in two parts. The first part refers to de jure control, which includes the right to appoint a majority of the Directors of a company. The second part refers to de facto control. So long as a person or persons acting in concert, directly or indirectly, can positively influence, in any manner, management or policy decisions, they could be said to be "in control". A management decision is a decision to be taken as to how the corporate body is to be run in its day-to-day affairs. A policy decision would be a decision that would be beyond running day-to-day affairs i.e. long-term decisions. So long as management or policy decisions can be, or are in fact, taken by virtue of shareholding, management rights, shareholders agreements, voting agreements or otherwise, control can be said to exist.
>
> **51.** Thus, the expression "control", in Section 29-A(*c*), denotes only positive control, which means that the mere power to block special resolutions of a company cannot amount to control. "Control" here, as contrasted with "management", means de facto control of actual management or policy decisions that can be or are in fact taken. A judgment of the Securities Appellate Tribunal in *Subhkam Ventures (I) (P) Ltd.* v. *SEBI* [*Subhkam Ventures (I) (P) Ltd.* v. *SEBI*, 2010 SCC OnLine SAT 35] , made the following observations qua "control" under the SEBI

(Substantial Acquisition of Shares and Takeover) Regulations, 1997, wherein "control" is defined in Regulation 2(1)(*e*) in similar terms as in Section 2(27) of the Companies Act, 2013. The Securities Appellate Tribunal held : (SCC OnLine SAT para 6)

"*6*. … The term control has been defined in Regulation 2(1)(*c*) of the Takeover Code to "include the right to appoint majority of the Directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner". This definition is an inclusive one and not exhaustive and it has two distinct and separate features : (*i*) the right to appoint majority of Directors or, (*ii*) the ability to control the management or policy decisions by various means referred to in the definition. This control of management or policy decisions could be by virtue of shareholding or management rights or shareholders agreement or voting agreements or in any other manner. This definition appears to be similar to the one as given in *Black's Law Dictionary* (Eighth Edn.) at p. 353 where this term has been defined as under:

> 'Control—The direct or indirect power to direct the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee.'

Control, according to the definition, is a proactive and not a reactive power. It is a power by which an acquirer can command the target company to do what he wants it to do. Control really means creating or controlling a situation by taking the initiative. Power by which an acquirer can only prevent a company from doing what the latter wants to do is by itself not control. In that event, the acquirer is only reacting rather than taking the initiative. It is a positive power and not a negative power. In a board managed company, it is the board of Directors that is in control. If an acquirer were to have power to appoint majority of Directors, it is obvious that he would be in control of the company but that is not the only way to be in control. If an acquirer were to control the management or policy decisions of a company, he would be in control. This could happen by virtue of his shareholding or management rights or by reason of shareholders agreements or voting agreements or in any other manner. The test really is whether the acquirer is in the driving seat. To extend the metaphor further, the question would be whether he controls the steering, accelerator, the gears and the brakes. If the answer to these questions is in the affirmative, then alone would he be in control of the company. In other words, the question to be asked in each case would be whether the acquirer is the driving force behind the company and whether he is the one providing motion to the organization. If yes, he is in control but not otherwise. In short control means effective control."

53. In the context of the Income Tax Act, the Supreme Court recently in the case of ***Mansarovar Commercial Pvt. Ltd. Vs. Commissioner of***

Income Tax, Delhi reported in **(2023) SCC OnLine SC 386** at Paragraph 71 has stated as follows:-

> "**71.** The sum and substance of the above decisions of this Court as well as various High Courts would be that where the head and seat and directing power of the affairs of the company and the control and management is must be shown is not merely theoretical control and power, i.e., not *de jure* control and power, but *de facto* control and power actually exercised in the course of the conduct and management of the affairs of the firm; that the domicile or the registration of the company is not at all relevant and the determinate test is where the sole right to manage and control of the company lies."

54. Given that the definition of "affiliate", under section 12 of the Act, encompasses all the companies including the parent company, this Court is hesitant to hold that M/s. SSSMIL is an affiliate of M/s. C&E Ltd. of the Bhaiya group, in the Arbitration. Mr. Ghosh's argument, that an individual i.e. Bulaki Das Bhaiya in control and management of M/s. SSSMIL, does not qualify as an affiliate, cannot be accepted by this Court. The said Bulaki Das Bhaiya and his family members directly or indirectly do control and manage M/s. SSSMIL and M/s C&E Ltd. and the latter two companies function as per the wishes and dictates of Bulaki Das Bhaiya. This Court is, therefore, of the view that an individual or a group of persons, including a family, in control and management of a company, upon lifting of its corporate veil, can definitely qualify as an "affiliate", within the meaning of the Explanation 2 to the Fifth and Seventh Schedules, read with Section 12 of the Act of 1996.

<u>Has the Arbitrator rendered himself ineligible under Section 12(2) & (5) and Grounds 2, 11, 15, and 20 of the FIFTH SCHEDULE and</u>

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Grounds 2, 8, and 15 of the SEVENTH SCHEDULE of the Act of 1996

55. The preliminary question in the application under Section 36(1) and Section 34 is whether by reason of appearing for M/s. SSSMIL on several occasions in APD no. 252 of 2015, the Learned Arbitrator, rendered himself ineligible to continue the arbitral proceedings in an impartial manner. In other words, whether the Arbitrator has fallen foul of any of the grounds under the Fifth Schedule, in terms of Section 12(2) of the Act, and the Seventh Schedule in terms of sub-Section 5 of Section 12(5).

56. The first objection raised by the Bhaiya group, through their counsel Mr. Ghosh, is that since the alleged incident of the Learned Arbitrator appearing for M/s. SSSMIL occurred during the pendency of the arbitration proceedings, the Bagri group ought to have filed an application under Section 13 of the Act before the Arbitrator himself.

57. It is also argued that since the family members of the Bagri group are also shareholders of M/s. SSSMIL, they are deemed to have known of the appearance of the Arbitrator as a counsel for M/s. SSSMIL in APD No. 252 of 2015, on 11 occasions.

58. This Court has noted that the Bagri group stated on affidavit, that they came to know of the engagement and appearance of the Arbitrator after the award was passed, in course of a search on the internet.

59. This Court need not enter into an enquiry as regards when the Bagri Group came to know of the alleged impropriety of the Learned

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Arbitrator. What is important is whether the same would attract ineligibility under section 12(2) and (5) of the Act of 1996.

60. The incident leading to the likelihood of ineligibility of the Arbitrator occurred during the pendency of the arbitration proceedings and there was admittedly no formal disclosure of the same in the Arbitration.

61. It also appears to this Court that the Arbitrator had not disclosed in the first sitting that he and/or his family members have represented M/s. SSSMIL in the suit and interlocutory proceedings leading to APD no. 252 of 2015.

62. Given the very limited scope of challenge of an award under section 34 of the said Act of 1996, the requirement of neutrality of the Arbitrator has assumed the highest importance. No matter how fair and judicious an award may be, one cannot be oblivious to the fact that there is one side who will succeed in receiving the huge financial benefit and the other side shall be liable for the same. The consequence of the award and the limited scope of challenge for the same are far-reaching on the parties.

63. It is observed from the language of Section 12(2) that it same castes a continuous obligation on the Arbitrator to remain neutral and continue to disclose to the parties any acts or omissions that are likely to fall foul of the mandate under Section 12, in the course of the Arbitration.

64. The observations of the Hon'ble Supreme Court in the case of ***Voestalpine Schienen GmbH (supra)*** must be noted.

"**25.** Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence and impartiality. The amended provision is enacted to identify the "circumstances" which give rise to "justifiable doubts" about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which would attract the provisions of sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empanelled by the respondent are not covered by any of the items in the said list."

65. In ***Himadri Chemicals &Industries Ltd. (supra)***, at paragraphs 22, 23, and 28, it was held as follows:-

22. Having regard to the scheme of the Act, there can be no two opinions that the object thereof is to provide to the disputing parties an alternate mechanism by which speedy and expeditious resolution of dispute(s) and/or difference(s) may be had by nominating unbiased adjudicators, called arbitrators. A person, who is free from bias and in whom the parties can repose faith and confidence, must conduct every process involving adjudication of claims and counter claims of the parties to the lis according to the applicable law does not admit of any doubt. The insistence is essentially a demand that natural justice ought to be complied with. That is what fair trial is all about. Two rules have been evolved by a process of judicial interpretation as representing the principles of natural justice - *nemo debet esse judex in propria causa sua*, i.e. no one shall be a judge in his own cause, and *audi alteram partem*, i.e. no one ought to be condemned unheard. These principles constitute the basic elements of a fair hearing. A corollary to the above principles has been deduced over the years, viz. justice should not only be done, but should manifestly be seen to have been done. Elementary though, these salutary principles are at times ignored leading to unnecessary legal tussles.

23. Importantly, even though a party may be heard in support of its claim or in defence to the claim of his opponent, such hearing would be of little avail and a mere pretence if the adjudicator is biased and predetermined to decide against it. It would be destructive of the concept of fair trial/hearing if a party is compelled to face a biased adjudicator. It is for this reason that appearance of bias is frowned upon. This Court entirely agrees with the observations in *Subhash Projects* (supra) that the pristine rule of adjudicative ethics rests on the premise that the arbitral tribunal permitted by law to try disputes and resolve controversies must not only be unbiased but must avoid even the appearance of bias and that independence and impartiality of an arbitrator being inseverable attributes to vest him with the legal authority to adjudicate differences between the parties, he would be *de jure* disqualified from discharging his functions once he renounces the above qualities.

28. In the present case, there could be no dispute that the petitioner agreed to the appointment procedure, if at all disputes and differences were to arise in future between it and the opposite party no. 1 in relation to working out the contract,

leading to the opposite party no. 2 assuming jurisdiction as the arbitrator. According to the petitioner, it was only after the proceedings commenced that the opposite party no. 2 by his biased conduct demonstrated that he was incapable of resolving the disputes between the parties in a fair, just and proper manner. Bias of an arbitrator is *de jure* inability to conduct proceedings and the petitioner having justifiable doubts regarding lack of independence and impartiality of the opposite party no. 2 could have taken recourse to either of the two remedies that the Act provides, i.e. a challenge in terms of Sections 12 and 13 of the Act before the arbitrator himself or by presenting an application under Section 14 before the Court. It opted for the remedy made available by Sections 12 and 13 by presenting the challenge application before the opposite party no. 2. Mr. Bose is right in his contention that the petitioner on various occasions participated in the proceedings before the opposite party no. 2 to press the challenge application and, in the process, also obtained adjournments, at times on worthy but quite often on unworthy grounds and that the opposite party no. 2 never demonstrated a non-cooperative attitude to delay a decision on the point raised by the petitioner. If indeed a party seeks to challenge appointment of the arbitrator or constitution of the arbitral tribunal on the ground of lack of reflection of independence or impartiality, he must choose between the fora provided by Section 13 and Section 14 of the Act. It has to be borne in mind that the petitioner did not approach the learned Judge with any claim that the opposite party no. 2 has been suffering from such a disability that a decision on the challenge application cannot be rendered by him or that he has incurred *de jure* inability of a nature different from the one alleged in the challenge application. This Court is, accordingly, of the opinion that, in the circumstances, the petitioner having laid a challenge that is permissible under Sections 12 and 13 of the Act and the opposite party no. 2 not being under any apparent disability to decide such challenge and the petitioner being at fault for delaying a decision on such application cannot midway turn around and decide not to pursue the challenge application, and then prefer an independent application under Section 14 of the Act before the Court, basically on the same ground raised in the former, urging that *de jure* inability of the arbitrator disqualifies him to continue proceedings. The learned Judge was right in not entertaining a challenge on the ground of *de jure* inability of the opposite party no. 2.

66. In this backdrop, the Arbitration and Conciliation Act came to be amended in October 2015 by the insertion of section 12(5). The object and purpose behind the amendment with regard to the findings of the Law Commission have already been dealt with at length in the ***Voestalpine Schienen GmbH (supra)*** decision.

67. In this regard, it may also be necessary to set out the observation in paragraph 13 of the ***Jaipur Zila Dugdh (supra)*** decision.

> "**13.** So far as the submission on behalf of the petitioners that the agreement was prior to the insertion of Sub-section (5) of Section 12 read with Seventh Schedule to the Act and therefore the disqualification under Sub-section (5) of Section 12 read with Seventh Schedule to the Act shall not be applicable and that once an arbitrator - Chairman started the arbitration proceedings thereafter the High Court is not justified in appointing an arbitrator are concerned the aforesaid has no substance and can to be accepted in view of the decision of this Court in*TrfLtd.*v.*Energo Engineering Projects Ltd.*,(2017) 8

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> SCC 377;*Bharat Broadband Network Limitedv.United Telecoms Limited*,(2019) 5 SCC 755;*Voestalpine Schienen GMBH* v. *Delhi Metro Rail Corporation Limited*,(2017) 4 SCC 665. In the aforesaid decisions this Court had an occasion to consider in detail the object and purpose of insertion of Subsection (5) of Section 12 read with Seventh Schedule to the Act. In the case of*VoestalpineSchienen GMBH*(Supra) it is observed and held by this Court that the main purpose for amending the provision was to provide for 'neutrality of arbitrators'. It is further observed that in order to achieve this, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject-matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. It is further observed that in such an eventuality i.e. when the arbitration clause finds foul with the amended provisions (Sub-section (5) of Section 12 read with Seventh Schedule) the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator as may be permissible. It is further observed that, that would be the effect of non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of the arbitration agreement."

68. This Court is however not inclined to accept, that the non-disclosure by the Arbitrator having represented M/s. SSSMIL in the High Court during the pendency of the arbitration, would amount to fraud. Admittedly to establish fraud, a very high degree of proof is necessary. The same is required to be preceded by sufficient particulars included in the application under Section 32 of the Act of 1996. Sufficient particulars are not available in the applications, or the affidavit filed to the application under Section 36(1) of the Act.

69. Mr. Kohli has candidly submitted in the course of his arguments, that his clients do not wish to press the argument of corruption and bias against the Arbitrator. In the above circumstances, the issue of fraud is not dealt with. This Court, even otherwise, does not find any fraud having been committed by the Arbitrator in the proceedings.

70. It is however necessary to consider, whether the Arbitrator representing M/s. SSSMIL, an affiliate of M/s. C&E Ltd. and Bulaki Das Bhaiya, during the pendency of the arbitration, would either

constitute bias or act likely to suggest or indicate bias on the part of the Arbitrator.

71. Reference in this regard is made to paragraph 8 of the decision in the case of ***Hasmukhlal H. Doshi and another Vs. M.L. Pendse, Retired Chief Justice, Karnataka High Court and others*** reported in **2000 SCC OnLine Bom 242**.

> "**8.** The Apex Court thereafter considered various Judgments as reflected in paragraphs 18, 19, 20 and 21 and has set out the various tests laid down by Courts, in England and in the United States of America. It would be gainful to reproduce some of the tests as set out by the Apex Court in the case of *State of West Bengal* v. *Shivananda Pathak*, (1998) 5 SCC 513.
>
> > "25. Bias may be defined as a preconceived opinion or a predisposition or predetermination to decide a case or an issue in a particular manner, so much so that such predisposition does not leave the mind open to conviction. It is in fact, a condition of mind, which sways judgments and renders the judge unable to exercise impartiality in a particular case.
> >
> > 26. Bias has many forms. It may be pecuniary bias, personal bias, bias as to subject-matter in dispute, or policy bias, etc. In the instant case, we are not concerned with any of these forms of bias. We have to deal, as we shall presently see, a new form of bias, namely, bias on account of judicial obstinacy.
> >
> > 27. Judges, unfortunately, are not infallible. As human beings, they can commit mistakes even in the best of their judgments reflective of their hard labour, impartial things and objective assessment of the problem put before them. In the matter of interpretation of statutory provisions or while assessing the evidence in a particular case or deciding questions of law or facts, mistakes may be committed *bona fide* which are corrected at the appellate stage. This explains the philosophy behind the hierarchy of Courts. Such a mistake can be committed even by a judge of the High Court which are corrected in the Letters Patent Appeal, if available.""

72. At Paragraph 40 in the case of ***Alcove Industries Ltd. (supra),*** the Delhi High Court stated:-

> "**40.** Section 12 of the Act casts a duty on the Arbitrator to disclose in writing at the outset, such facts which may give rise to justifiable doubts as to his independence or impartially. This obligation continues throughout the arbitral proceedings i.e. whenever such facts come into being during the arbitral proceedings. Therefore, what the law stipulates as a disqualification to become or remain an Arbitrator in a

given dispute, is not the existence of actual bias, but the existence of such facts and circumstances as are "*likely to give rise to justifiable doubts as to his independence and impartiality*". An Arbitrator may be challenged only on limited grounds i.e. if circumstances exist that give rise to justifiable doubts as to his independence or impartiality or that he does not possess the qualifications agreed to by the parties. Even this challenge is limited only to such cases where the party raising the challenge who has participated in the appointment of the Arbitrator becomes aware of the grounds on which the challenge is made after the Arbitrator has been appointed. Therefore, if a party was aware of such facts and circumstances at the time of participating in the process of appointment of the Arbitrator as would otherwise be considered good enough to give rise to justifiable doubts as to the independence or impartiality of the Arbitrator, that party is disentitled from challenging the Arbitrator on the same ground. Moreover, the challenge is required to be made within 15 days of the party learning of the relevant circumstances. If the challenge is not made in a timely manner, the same may fail as having being condoned and waived on the ground of his acquiescence in the holding of further proceedings."

73. In the backdrop of the above, this Court notices that having once made a disclosure in the first sitting that the Arbitrator and his family members were connected with and represented the Bhaiya group in CS 344 of 2015, the Learned Arbitrator was obliged not to represent them any further. The object and purpose of the disclosure in terms of section 12(2) essentially mean that the Arbitrator shall not, during the subsistence of the proceedings, continue such association. The tenor of the arguments of Mr. Ghosh is that once the Arbitrator makes the disclosure of being associated in the past with one of the parties in litigation, he is given a carte blanche by the parties to continue to do so during the subsistence of the proceedings. He can freely associate with the said party in any manner, during the pendency of the proceeding. The said arguments deserve to be rejected as preposterous and with disdain. A disclosure by the Arbitrator of past association with one party to the Arbitration would essentially impose an undertaking on the

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Arbitrator not to do so, during the pendency of the Arbitration. By representing the Bhaiya group in APD 252 of 2015, the Arbitrator has committed breach of such undertaking, underlying such disclosure.

74. In addition to the aforesaid breach, the Arbitrator also suppressed and/or failed to disclose before the parties to the arbitration, that he had appeared for M/s. SSSMIL (Bhaiya group) in APD No 252 of 2015. The chain of events between December 2017 and February 2019 would definitely give rise to a real likelihood or danger that the Arbitrator may have allowed himself to have been compromised and consequently raise justifiable doubts as regards his independence. This Court sees the above in no uncertain terms as any reasonable man in the facts of the case would also see. There is clear breach and/or infraction of the principle that 'justice must not only be done but manifestly seem to have been done'.

75. It is well established that this Court or any Court or person cannot enter into the mind of the Arbitrator to determine whether there was actual or real bias. Even a threadbare reading of the Award in fact and law may not disclose or indicate any bias.

76. What must be borne in mind is that if two views are possible in the facts of a case and the Arbitrator has taken one view, a Court under Section 34 cannot impose the other plausible view and interfere with an award. In the facts of the instant case, this Court or any Court for that matter or any reasonable man would have to invariably doubt as to why the Learned Arbitrator has taken the other plausible view. This is not

permitted under section 34 of the Act. Hence Section 12(2) and (5) must be strictly enforced and imposed in the instant case.

77. Given the very narrow scope of intervention with an award under Section 34, the rigours of Section 12 and the Fifth and Seventh Schedules must be strictly and compulsively imposed. Such strict, compulsive, and rigorous imposition of the mandate of Section 12 is necessary to ensure that the institution of the arbitration remains sacrosanct. After all, the parties are deemed to have imposed pious and reverent faith in one individual or persons to resolve their disputes.

78. Any infraction of section 12(2) and (5) and the grounds under the Fifth and Seventh Schedules and the object and purpose thereof, would desecrate the foundation of the institution of Arbitration.

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Bias; Real Bias; Likelihood of Bias; Danger of Bias; Apparent Bias

79. This Court, on the basis of the dicta of the Supreme Court and other Courts referred to herein, is of the view, that after a fair reading and/or fair and proper application of the mandate under Section 12, the actions of an Arbitrator should not suggest any likelihood of bias.

80. It should not appear to a common person or a prudent and informed reasonable man that there is likelihood and/or danger of bias on the part of the Arbitrator, as regards the representation of M/s. SSSMIL before the High Court during the pendency of the arbitration proceedings. Actual proof of bias may not be necessary as in most cases it is not possible. What is most important is a reasonable likelihood or danger of being inferred from the acts, not disclosed by the Arbitrator.

81. While discussing bias, at paragraph 15 of the decision of the Supreme Court in the case of ***A.K. Kraipak and Others v. Union of India and Others*** reported in **(1969) 2 SCC 262**, it was held that a mere suspicion of bias is not sufficient. The actual bias need not be present, reasonable likelihood of bias must be ascertained.

> "**15.**It is unfortunate that Naqishbund was appointed as one of the members of the selection board. It is true that ordinarily the Chief Conservator of Forests in a State should be considered as the most appropriate person to be in the selection board. He must be expected to know his officers thoroughly, their weaknesses as well as their strength. His opinion as regards their suitability for selection to the All-India Service is entitled to great weight. But then under the circumstances it was improper to have included Naqishbund as a member of the selection board. He was one of the persons to be considered for selection. It is against all canons of justice to make a man judge in his own cause. It is true that he did not participate in the deliberations of the committee when his name was considered. But then the very fact that he was a member of the selection board must have had its own impact on the decision of the selection board. Further admittedly he participated in the deliberations of the selection board when the claims of his rivals particularly that of Basu was considered. He was also party to the preparation of the list of selected candidates in order of preference. At every stage of his participation in the deliberations of the selection board there was a conflict between his interest and duty. Under those circumstances it is difficult to believe that he could have been impartial. The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. We agree with the learned Attorney General that a mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias. In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct. It was in the interest of Naqishbund to keep out his rivals in order to secure his position from further challenge. Naturally he was also interested in safeguarding his position while preparing the list of selected candidates."

82. In ***Ranjit Thakur v. UOI (supra)*** at paragraphs 16, 17, and 18, it was held as follows.

> "**16.**It is the essence of a judgment that it is made after due observance of the judicial process; that the court or tribunal passing it observes, at least the minimal requirements of natural justice; is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial "*coram non-judice*". (See*Vassiliades*v.*Vassiliades*[AIR 1945 PC 38 : 221 IC 603] .)
>
> **17.** As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, "Am I biased?"; but to look at the mind of the party before him.

18. Lord Esherin*Allinson*v.*General Council of Medical Education and Registration*[(1894) 1 QB 750, 758-59] said:
"The question is not, whether in fact he was or was not biased. The court cannot inquire into that. . . . In the administration of justice, whether by a recognised legal court or by persons who, although not a legal public court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biased."

83. The principle of likelihood of bias as opposed to actual bias has been explained in the case of ***International Airports Authority of India (supra)***, where at paragraphs 5 and 6, it was held as follows:-

"**5.**Several points were taken in support of the application for revocation. It was sought to be urged that the petitioner had lost confidence in the sole arbitrator and was apprehensive that the arbitrator was biased against the petitioner. It is necessary to reiterate before proceeding further what are the parameters by which an appointed arbitrator on the application of a party can be removed. It is well settled that there must be purity in the administration of justice as well as in administration of quasi-justice as are involved in the adjudicatory process before the arbitrators. It is well said that once the arbitrator enters in an arbitration, the arbitrator must not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. It is not a question of the effect which misconduct on his part had in fact upon the result of the proceeding, but of what effect it might possibly have produced. It is not enough to show that, even if there was misconduct on his part, the award was unaffected by it, and was in reality just; arbitrator must not do anything which is not in itself fair and impartial. See Russel on *Arbitration*, 18th Edn., p. 378, and observations of Justice Boyd in*Re Brien and Brien*[(1910) 2 Ir R 83, 89] . Lord O'Brien in*King (De Vosci)*v.*Justice of Queen's Country*[(1908) 2 Ir R 285] observed as follows:

> "By bias I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must in my opinion be reasonable evidence to satisfy us that there was a real likelihood of bias. I*do not think that their vague suspicions of whimsical, capricious and unreasonable people should be made a standard to regulate our action here.*It might be a different matter if suspicion rested on reasonable grounds — was reasonably generated — but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of decision."

(emphasis supplied)

See*Queen*v.*Rand*[(1866) 1 QB 230 : 35 LJMC 157] ;*Ramnath*v.*Collector, Darbhanga*[AIR 1955 Pat 345 : ILR 34 Pat 254] ,*Queen*v.*Meyer*[(1875) 1 QBD 173] and*Eckersley*v.*Mersey Docks and Harbour Board*[(1894) 2 QB 667] .

6.In the words of Lord O' Brien, L.C.J. there must be a real likelihood of bias. It is well settled that there must be a real likelihood of bias and not mere suspicion of bias before the proceedings can be quashed on the ground that the person conducting the proceedings is disqualified by interest. See in this connection*Gullapalli Nageswara Rao*v.*State of Andhra Pradesh*[AIR 1959 SC 1376 : (1960) 1 SCR 580] and*Mineral Development Ltd.*v.*State of Bihar*[AIR 1960 SC 468 : (1960) 2 SCR 609] . Recently this Court in a slightly different context in*RanjitThakur*v.*Union of India*[(1987) 4 SCC 611 : 1988 SCC (L&S) 1 : AIR 1987 SC 2386 : (1987) 5 ATC 113] had occasion to consider the test of bias of the Judge. But there must be reasonableness of the apprehension of bias in the mind of the party. The purity of administration requires that the party to the proceedings should not have apprehension that the authority is

biased and is likely to decide against the party. But we agree with the learned Judge of the High Court that it is equally true that it is not every suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is biased. The apprehension must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person. While on this point we reiterate that learned counsel appearing for the petitioner in his submissions made a strong plea that his client was hurt and had apprehension because the arbitrator being the appointee of his client was not acceding to the request of his client which the petitioner considered to be reasonable. We have heard this submission with certain amount of discomfiture because it cannot be and we hope it should never be (that) in a judicial or a quasi-judicial proceeding a party who is a party to the appointment could seek the removal of an appointed authority or arbitrator on the ground that appointee being his nominee had not acceded to his prayer about the conduct of the proceeding. It will be a sad day in the administration of justice if such be the state of law. Fortunately, it is not so. Vague suspicions of whimsical, capricious and unreasonable people are not our standard to regulate our vision. It is the reasonableness and the apprehension of an average honest man that must be taken note of. In the aforesaid light, if the alleged grounds of apprehension of bias are examined, we find no substance in them. It may be mentioned that the arbitrator was appointed by the Chief Engineer of the petitioner, who is in the service of the petitioner."

84. At Paragraph 15 of the decision of ***Ganesh Builders v. Nagorao (supra)*** the Bombay High Court found :-

"**15.** When the facts of the present case are considered, it can be seen that arbitration agreement sought to be relied upon by the claimant is dated 17- 8-1999 in which Shri C.V. Kale, Advocate is named as an Arbitrator. The Arbitrator has been named in case any disputes were to arise in the context of the earlier agreement dated 1-4-1999. Specific performance of the earlier agreement has been sought. In a case where the Arbitrator has been named, the date of the arbitration agreement cannot not be ignored. The provisions of section 12(2) of the said Act in fact require an Arbitrator from the time of his appointment and throughout the arbitral proceedings to disclose to the parties the existence of any of the circumstances referred to in section 12(1) of the said Act that could give rise to justifiable doubts as regards his independence or impartiality. There is no reason found to exclude applicability of the principles on which the provisions of section 12(2) of the said Act are based. Thus if an Arbitrator is named by the parties, it would be reasonable to expect of the Arbitrator to disclose to the parties any circumstances that exist from the date of his appointment which could give rise to justifiable doubts as to his independence or impartiality. Merely because the arbitration proceedings have commenced after a substantial period of time from the date when the arbitration agreement naming the Arbitrator was entered into, the same would not be a reason to exempt the Arbitrator from disclosing in writing any circumstance that had occurred or arisen from the date of the arbitration agreement naming the said Arbitrator till the actual commencement of the arbitration proceedings. The object of the aforesaid provisions being to allay any doubts in the mind of the parties as regards any circumstance likely to give rise to justifiable doubts as to his independence or impartiality, it would be in the fitness of things to expect the Arbitrator to disclose existence of any such circumstance as contemplated by section 12(1) of the said Act. The period from the date of the arbitration agreement naming him till conclusion of the arbitration proceedings would thus be relevant. Taking a narrow view of the

matter would result in doing violence to the object behind the enactment of section 12(1) of the said Act. The words "from the time of his appointment" in section 12(2) are distinct and have no connection with the provisions of section 21 of the said Act that refer to the commencement of arbitral proceedings."

85. It is clear and explicit from the above dicta that the conduct of an Arbitrator and his duty to disclose commences and continues from the time of appointment of the Arbitrator till the award is passed. It is a continuous obligation. Any act on the part of the Arbitrator, that would suggest a likelihood of bias would, in the most uncertain terms, lead to the termination of the mandate of the Arbitrator.

86. There may not be a causal connection between the result of the Arbitration and the act indicating actual bias. Actual bias need not either be proved or demonstrated. The aforesaid view is taken not only in view of the dicta of the Hon'ble Supreme Court and other courts indicated hereinabove but also to maintain the sanctity and dignity of the institution of the arbitration as an Alternative Dispute Resolution Mechanism. There can be no instance or act on the part of the Learned Arbitrator or members of the Tribunal that would indicate a reasonable likelihood or danger of bias or a conscious or unconscious prejudice by reason of the act complained of.

87. Reference, with regard to specific instances of bias and consequent ineligibility of the Arbitrator, is made in the case of ***Vinod Bhaiyalal Jain (supra)***. Applying the test indicated hereinbelow, the Supreme Court found that the conduct of the Arbitrator therein fell foul of the mandate under Section 12.

"**9.**In the ultimate analysis since we are not adverting to the merits of the claim and in that regard since, we have not adverted to the finding recorded

by the learned arbitrator on the merits of claim we would not venture to examine with regard to the ultimate conclusion on the claim as to whether it is justified or not. However, in the above background, what is to be seen is that there has been a reasonable basis for the appellants to make a claim that in the present circumstance the learned arbitrator would not be fair to them even if not biased. It could no doubt be only a perception of the appellants herein. Be it so, no room should be given for even such a feeling more particularly when in the matter of arbitration the very basis is that the parties get the opportunity of nominating a Judge of their choice in whom they have trust and faith unlike in a normal course of litigation where they do not have such choice.

10. That apart when one is required to judge the case of another, justice should not only be done, but it should also seem to be done, is the bottom line. Hence in that background, if the present circumstance is taken not, there was reasonable basis for the appellants to put forth such contention which resulted in the situation wherein they had not participated in the arbitration proceedings. If nothing else, at least propriety demanded that the learned arbitrator should have recused in the present facts; but he has failed to do so. In that view, such an award passed by the learned arbitrator was not sustainable and the learned District Judge was justified in entertaining the petition under Section 34 of the 1996 Act to set aside the award. In that view, we are of the opinion that the learned Judge of the High Court of Judicature at Bombay was not justified in allowing the appeal filed under Section 37(1)(*b*) of the 1996 Act."

88. The decision of the Hon'ble Supreme Court in the case of *V.K. Dewan and Company v. Delhi Jal Board and Others* reported in (2010) 15 SCC 717 was relied upon in the above case. In the case of ***Alupro Building Systems Pvt. Ltd. Case (supra)*** the Delhi High Court observed as follows:-

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"**41.** The emphasis therefore is on "a fair trial by an impartial Tribunal". This forms the basis of Section 12 of the Act. Incidentally, there have been some significant changes to Section 12 with effect from 23rd October, 2015 which have further strengthened the requirements of disclosures by arbitrators to obviate any likelihood of bias. However, as far as the present case is concerned, when the AT was seized of the matter, Section 12 of the Act as it stood prior to the above amendment was relevant and it reads 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.

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

(3) An arbitrator may be challenged only if—

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

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

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

42. Section 12(2) of the Act requires an Arbitrator from the time of his appointment and throughout the arbitral proceedings, to mandatorily disclose to the parties, "without delay" and "in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him." The circumstances under sub-section (1) of Section 12 of the Act as it stood prior to 23rd October, 2015 were "any circumstances likely to give rise to justifiable doubts as to his independence or impartiality."

43. At this point, it is necessary to recapitulate the distinction between 'actual bias' and 'apparent bias'. In *Director General of Fair Trading* v. *The Proprietary Association of Great Britain* (decision dated 21st December 2000 of the Court of Appeal (Civil Division) in case No. C/2000/3582), this distinction has been succinctly explained by the Court of Appeals as under:

"38. The decided cases draw a distinction between 'actual bias' and 'apparent bias'. The phrase 'actual bias' has not been used with great precision and has been applied to the situation:

(1) where a Judge has been influenced by partiality or prejudice in reaching his decision and

(2) where it has been demonstrated that a Judge is actually prejudiced in favour of or against a party.

'Apparent bias' describes the situation where circumstances exist which give rise to a reasonable apprehension that the Judge may have been, or may be, biased."

44. Referring to the decision in *Rex* v. *Sussex Justices, ex. P. McCarthy* (1924) 1 K.B. 256, the Court of Appeals in *Director General of Fair Trading* v. *The Proprietary Association of Great Britain* (supra) discussed the leading judgment of Lord Hewart C.J. The facts of that case were that one of the Clerks to the Justices was a member of a firm of solicitors acting in a civil claim against the Defendant arising out of an accident that had given rise to the prosecution. The Clerk retired with the Justices who returned to convict the Defendant. On learning that the Clerk was a member of the firm of solicitors acting against the Defendant, the Defendant applied to have the conviction quashed. Lord Hewart CJ, who was satisfied that the conviction must be quashed reasoned that "a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

45. Explaining the above opinion of Lord Hewart CJ, the Court of Appeals in *Director General of Fair Trading* v. *The Proprietary Association of Great Britain* (supra) observed as under:

"42. Had Lord Hewart asked the question 'was there any likelihood that the Clerk's connection with the case influenced the verdict?' he would have answered in the negative on the basis that he accepted the evidence that the Clerk had not intervened in the Justices' discussion. Had he asked the question 'would a reasonable onlooker aware of all the material facts, including the fact that the Clerk did not speak to the Justices after retiring, have concluded that the Clerk's connection with the case might have influenced the verdict?' he would equally have answered in the negative. His

decision was reached on the premise that what actually transpired between the Clerk and the Justices behind closed doors was not relevant. The fact that the Clerk had retired with the Justices gave an appearance of the possibility of injustice, and that was enough to lead to the quashing of the verdict."

46. The two alternative tests applied by the Courts in considering whether a decision was vitiated on account of bias or not, are as under:

"(1) Did it appear to the Court that there was a real danger that the Judge had been biased?

2) Would an objective onlooker with knowledge of the material facts have a reasonable suspicion that the Judge might have been biased?""

89. A Co-ordinate Bench of this Court in ***Jagdish Kishanchand Valecha (supra)*** found another incident of ineligibility of the Arbitrator at paragraph 10 which stated as follows:-

"**10.** Even if this Court were to disregard the aforesaid ground on the objection taken, the ground on the perception of bias needs to be addressed. The Arbitrator has admittedly acted as arbitrator in other arbitration proceedings instituted at the instance of the respondent award-holder. This Court has also been shown instances where the Arbitrator has been engaged as counsel for the respondent group of companies in several other instances including as consultant for the respondent. The Amendment Act of 2016 precisely sought to address such instances and eliminate all possible apprehension of bias and conflict of interest on the part of the arbitrator by introduction of Section 12 to the 1996 Act. Section 12(1)(a) requires an Arbitrator to disclose in writing any direct or indirect relationship with or interest in any of the parties or the subject-matter in dispute. The fine print in this regard has been codified in the Seventh Schedule to the Act, clauses 2 and 3 of which take into account an Arbitrator's relationship with the parties to the arbitration. Read together, the fundamental objective is to ensure that the arbitrator is impartial and independent. The facts in the present case fall directly within the safeguards introduced in Section 12 read with the Seventh Schedule and the impugned award is thus liable to be set aside on this ground alone."

90. Mr. Dhruba Ghosh relied upon a recent decision of the Single Bench of the Bombay High Court in the case of ***Sheetal Maruti Kurundwade v. Metal Power Analytical (I) Pvt. Ltd. And Others*** reported in **2017 SCC Online Bom 251**. In the said case the High Court refused to accept that a counsel engaged by a law firm in other matters between the parties of arbitration is ineligible to act as

Arbitrator. The Court found that the real test of likelihood of bias and sometimes more than that, should not amount to fanciful apprehension. The proposition of law of the Court cannot be disputed. However, it may not be applicable in the facts of this case.

91. Mr. Ghosh has placed the definition of reasonable man from the 8th Edition of Black's Law Dictionary.

> "reasonable person. 1. A hypothetical person used as a legal standard, esp. to determine whether someone acted with negligence; specif., a person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others' interests. The reasonable person acts sensibly, does things without serious delay, and takes proper but not excessive precautions. Also termed reasonable man; prudent person; ordinarily prudent person; reasonably prudent person; highly prudent person. See reasonable care under CARE. [Cases: Insurance 1818; Negligence 233. C.J.S. Negligence §§ 34, 118-121,125-127, 130-131, 133.]

> "The reasonable man connotes a person whose notions and standards of behaviour and responsibility correspond with those generally obtained among ordinary people in our society at the present time, who seldom allows his emotions to overbear his reason and whose habits are moderate and whose disposition is equable. He is not necessarily the same as the average man - a term which implies an amalgamation of counter-balancing extremes." R.F.V. Heu- ston, Salmond on the Law of Torts 56 (17th ed. 1977).

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92. This Court has no quarrel with the above definition and is inclined to accept the same. Mr. Ghosh then relied upon the decision of the Court of Appeal in the case of ***AT & T Corporation and Anr. Vs. Saudi Cable Co.*** reported in **(2000) Volume 2 Lloyd's Law Reports Page 127.** Particularly paragraphs 57 to 63.

> "Bias
> 57. The question has been raised on this appeal as to whether in English law the test to be applied on a complaint of bias against an arbitrator in respect of an award should be different from that applied to Judges and tribunals in respect of decisions made by them in the course of the public administration of justice. So far as I am aware, it is the first time that an argument that the tests should diverge has ever been advanced. It arises following the decision of the House of Lords in Gough which considered the question of bias in the context of the public administration of justice, but in which Lord Goff of Chieveley expressed the firm opinion that "the same test should be applicable in all

cases of apparent bias, whether concerned with justices or members of inferior tribunals, or with jurors or with arbitrators."

58. I respectfully agree with that opinion. It seems to me that, whatever the test should be, and it is clearly laid down in Gough in terms of the "real danger" test, it is desirable that it should apply universally in cases before the English Court, where such cases fall to be decided according to English law and no different statutory or contractual test is applicable. Adjudication upon an application to the English Court brought under its statutory powers of supervision and intervention in relation to the conduct of arbitrators is itself an aspect of the public administration justice. The fact that the tribunal over which the supervision is being exercised is one whose appointment depends upon the agreement of the parties does not deprive it of that character. There are many persons or bodies who adjudicate in matters of discipline or private dispute, or who otherwise resolve complaints, whose jurisdiction depends on agreement, whether under bilateral agreements, or multilateral agreements such as the rules of clubs, associations, sporting bodies, etc. All such persons or bodies, whether performing judicial or quasi-judicial functions, have a duty to act without bias and, in principle, there seems to me every reason why. absent some differing test or formula expressly or impliedly agreed between the parties, a universal test of bias should be applicable.

59. We have not been referred to any reported decision prior to Gough which suggests that the English Court, when faced with an allegation of bias or apparent bias on the part of an arbitrator, has considered that a different test from that said to be appropriate in the case of publicly constituted Courts or tribunals should be applied. It is true that, for the reasons, and having regard to the decisions, which troubled the House of Lords in Gough, Judges dealing with applications to set aside arbitrations for misconduct on the grounds of bias have faced difficulty in formulating the objective test to be applied: see, for instance, The Elissar, [1984] 2 Lloyd's Rep. 84 per Lord Justice Ackner at p. 89; Bremer Handelsgesellschaftm.b.H. v. Ets. Soules et Cie, [1985] 1 Lloyd's Rep. 160 per Mr. Justice Mustill at pp. 164-165 and [1985] 2 Lloyd's Rep. 199 per Lord Justice Ackner at pp. 201-202; Tracomin S.A. v. Gibbs, [1985] 1 Lloyd's Rep. 586 per Mr. Justice Staughton at pp. 595-596.

60. In that last-mentioned case, following a review of the relevant authorities, Mr. Justice Staughton observed:

> In many if not most cases it will make no difference which test is applied. That is so in the present case, and I am content to adopt real likelihood, which appears to lay the heaviest burden on the person alleging bias. But I do not, with great respect share the view of Lord Justice Cross (in Hannam's case) and Lord Justice Ackner (in the Liverpool City Justice's case) that there is little if any difference between the two. tests. If it had been necessary to decide the point. I would have followed what was said by Lord Justice Edmund-Davies in the Metropolitan Properties case [1969] 1 Q.B. at p. 606:
> With profound respect to those who have propounded the "real likelihood" test I take the view that the requirement that justice must manifestly be done operates with undiminished force in cases where bias is alleged and that any development of the law which appears to emasculate that requirement should be strongly resisted. That the different tests, even when applied to the same facts, may lead to different results is illustrated by Reg. v. Barns- ley Licensing Justices itself, as Devlin LJ made clear in the passage I have quoted. But L cannot bring myself to hold that a decision may properly be allowed to stand even. although there is reasonable suspicion of bias on the part of one or more members of the adjudicating body

61. I am bound to say I agree with the observations of Mr. Justice Staughton in relation to the authorities as they then stood and it seems to me that, in propounding the "real danger" test in Gough, Lord Goff was seeking so far as possible to strike the right balance between the "real likelihood" and "reasonable suspicion" tests. Sir Sydney Kentridge argues that in that respect Lord Goff has not avoided a practical dilution of the principle proclaimed by Lord Hewart, C.J. that justice must manifestly be seen to be done, whereas to have adopted the test of reasonable apprehension or suspicion would not have had such effect.

62. It may well be that adoption of the reasonable suspicion test would afford more comfort to those coerned to preserve the sanctity of Lord Hewart's dictum. However, as it seems to me, the real danger test is intended to be a working test designed to give effect to that dictum, while having regard to substance as well as appearance. In that respect, the remarks of Mr. Justice Slade in R. v. Camborne Justices ex parte Pearce, [1955] 1 Q.B. 41 at p. 52 are salutary:

> Whilst endorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done.
>
> Whether or not that is so, I agree with the realism of the post-Gough assessment of Sir Thomas Bing- ham, M.R. in ex parteDallaglio at p. 162, that the famous aphorism of Lord Hewart now requires qualification in the light of the real danger test. Equally, however, I consider that the need forconcern in that respect is more illusory than real.

63. It is not in dispute that reasonable apprehesion of bias is a test in which reasonableness is judged by the standards of the reasonable objective observer. That is, in reality, the Court itself embodying the standards of the informed observe. viewing the matter at the relevant time, which is o course the time when the matter comes before the Court. That last qualification is important because. in judging whether there is bias or apparent bias the Court approaches the matter on the basis of ar observer informed as to the facts upon which, and the context in which, the allegation of bias is made As Lord Goff observed in Gough:

> The law has first to ascertain the real circum- stances from the available evidence, knowledge of which would not necessarily be available to an observer at court."

93. Placing the said decision, it is argued that the concept of a "reasonable man", as laid down in the Wednesbury Test by Courts as originally held by the Court of Appeal in the case of ***Associated Picture Houses Ltd. v. Wednesbury Corporation*** reported in **LR [1948] 1 KB 223**, has undergone a change in the context of Arbitration. The reasonable man should be the Judge himself and the

test is not whether there is a real likelihood of bias. There should be a danger of bias which is not fanciful, that can be inferred from the conduct of the Arbitration.

94. In the facts of the said ***AT&T Case (supra)***, the Arbitrator was a renowned QC from Montreal, Canada, appointed after the consent of the parties under the ICC Rules. He had failed to disclose to the parties that he was a non-executive director on the board of a Canadian Company, one M/s. Nortel, a competition of M/s. AT & T. The said M/s. Nortel also competed with M/s. AT &T for another series of contracts with M/s. Saudi Cable Company during the same time of the contract which was the subject matter of Arbitration. In fact M/s. Nortel and M/s. AT&T were also rivals competing in the telecom industry in North America and across the world. The Arbitrator was challenged after conciliation failed and a partial award was passed. Earlier M/s. Nortel had agreed to terminate an exclusive supply agreement with Bell Canada, in return for political support from the US Government in the contracts with Saudi Cable.

95. This Court is of the view that the conclusion of the Court of Appeals in the said case, upholding the mandate of the Arbitrator after setting aside the views of the High Court, may not apply to a case where there are codified rules like section 12 and Fifth and Seventh Schedules to the Act of 1996.

96. Secondly, in the instant case, the Arbitrator falls foul of the duty of disclosure of facts that would lead to justifiable doubts, both before and during the pendency of the arbitration. It is a completely different

matter, as to how Indian Courts would look at the facts and scenario available in the ***AT&T case (supra)***, in the context of the said Act of 1996.

97. However, this Court finds the danger and probability of bias test more acceptable as opposed to the likelihood and possibility of bias test. Even if one were to apply the real danger of bias and the probability thereof test, the Arbitrator's conduct in the instant case would certainly fall foul of the mandate of grounds 2, 11, 15, and 20 of the Fifth Schedule and grounds 2, 8, and 15 of the Seventh Schedule under Section 12(2) and 12(5) of the Act of 1996.

98. In fact, the Hon'ble Supreme Court has already, in the cases of ***State of West Bengal v. Shivananda Pathak*** reported in **(1998) 5 SCC 513** at paragraph 33, and ***N. K. Bajpai v. Union of India*** reported in **(2012) 4 SCC 653** at paragraph 48, held as follows.

> ***State of W.B. v. Shivananda Pathak*, (1998) 5 SCC 513**
>
> **33.** Bias, as pointed out earlier, is a condition of mind and, therefore, it may not always be possible to furnish actual proof of bias. But the courts, for this reason, cannot be said to be in a crippled state. There are many ways to discover bias; for example, by evaluating the facts and circumstances of the case or applying the tests of "real likelihood of bias" or "reasonable suspicion of bias". de Smith in *Judicial Review of Administrative Action*, 1980 Edn., pp. 262, 264, has explained that "reasonable suspicion" test looks mainly to outward appearances while "real likelihood" test focuses on the court's own evaluation of the probabilities.
>
> ***N.K. Bajpai v. Union of India*, (2012) 4 SCC 653**
>
> **48.** Bias must be shown to be present. Probability of bias, possibility of bias and reasonable suspicion that bias might have affected the decision are terms of different connotations. They broadly fall under two categories i.e. suspicion of bias and likelihood of bias. Likelihood of bias would be the possibility of bias and bias which can be shown to be present, while suspicion of bias would be the probability or reasonable suspicion of bias. The former lead to vitiation of action, while the latter could hardly be the foundation for further examination of action with reference to the facts and circumstances of a given case. The correct test would be to examine whether there appears to be a real danger of bias or whether there is only a probability or even a preponderance of

probability of such bias, in the circumstances of a given case. If it falls in the prior category, the decision would attract judicial chastisement but if it falls in the latter, it would hardly affect the decision, much less adversely."

99. The next case relied upon by Mr. Ghosh is the case of ***Microsoft Corporation v. ZOAI Foundation*** decided by a Single Bench of the Delhi High Court reported in **2023 SCC Online Del 3800.** He relies on paragraph 13 thereof to argue that an award can be set aside in case of apparent bias and/or whether in the facts, the Arbitrator could have the propensity to decide the matter in favour of any one of the parties.

100. While the test to determine whether there are justifiable doubts may not be a fanciful or casual one, sometimes likelihood more seriously attracting the danger of bias creeping in, as is found in the instant case, is required to declare an Arbitrator ineligible and consequently render the award passed as vitiated.

101. The sheet anchor of the submissions of Mr. Ghosh however are the observations of the Supreme Court in the case of ***HRD Corporation case (supra)***. Discussing the scope of the Fifth and Seventh Schedules of the Arbitration and Conciliation Act, at paragraphs 18, 20, and 22, must be noted.

> "**18.**Shri Divan is right in drawing our attention to the fact that the 246th Law Commission Report brought in amendments to the Act narrowing the grounds of challenge coterminous with seeing that independent, impartial and neutral arbitrators are appointed and that, therefore, we must be careful in preserving such independence, impartiality and neutrality of arbitrators. In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in*ONGCLtd.*v.*Saw Pipes Ltd.*[*ONGC Ltd.*v.*Saw Pipes Ltd.*, (2003) 5 SCC 705] has been expressly done away with. So has the judgment in*ONGCLtd.*v.*WesternGeco International Ltd.*[*ONGC Ltd.*v.*WesternGeco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] Both Sections 34 and 48 have been brought back to the position of law contained in*Renusagar Power Co. Ltd.*v.*General Electric Co.*[*Renusagar Power Co. Ltd.*v.*General Electric Co.*, 1994 Supp (1) SCC 644] where "public policy" will now include

only two of the three things set out therein viz. "fundamental policy of Indian law" and "justice or morality". The ground relating to "the interest of India" no longer obtains. "Fundamental policy of Indian law" is now to be understood as laid down in*Renusagar*[*Renusagar Power Co. Ltd.*v.*General Electric Co.*, 1994 Supp (1) SCC 644] . "Justice or morality" has been tightened and is now to be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the Court as understood in*Associate Builders*v.*DDA*[*Associate Builders*v.*DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Section 28(3) has also been amended to bring it in line with the judgment of this Court in*Associate Builders*[*Associate Builders*v.*DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one.

20. However, to accede to Shri Divan's submission that because the grounds for challenge have been narrowed as aforesaid, we must construe the items in the Fifth and Seventh Schedules in the most expansive manner, so that the remotest likelihood of bias gets removed, is not an acceptable way of interpreting the Schedules. As has been pointed out by us hereinabove, the items contained in the Schedules owe their origin to the IBA Guidelines, which are to be construed in the light of the general principles contained therein—that every arbitrator shall be impartial and independent of the parties at the time of accepting his/her appointment. Doubts as to the above are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision. This test requires taking a broad commonsensical approach to the items stated in the Fifth and Seventh Schedules. This approach would, therefore, require a fair construction of the words used therein, neither tending to enlarge or restrict them unduly. It is with these prefatory remarks that we proceed to deal with the arguments of both sides in construing the language of the Seventh Schedule.

22. Shri Divan has pressed before us that since on a legal issue between GAIL and another public sector undertaking an opinion had been given by Justice Lahoti to GAIL in the year 2014, which had no concern with respect to the present matter, he would stand disqualified under Item 1 of the Seventh Schedule. Items 8 and 15 were also faintly argued as interdicting Justice Lahoti's appointment. Item 8 would have no application as it is nobody's case that Justice Lahoti "regularly" advises the respondent. And Item 15 cannot apply as no legal opinion qua the dispute at hand was ever given. On reading Item 1 of the Seventh Schedule, it is clear that the item deals with "business relationships". The words "any*other*" show that the first part of Item 1 also confines "advisor" to a "business relationship". The arbitrator must, therefore, be an "advisor" insofar as it concerns the business of a party. Howsoever widely construed, it is very difficult to state that a professional relationship is equal to a business relationship, as, in its widest sense, it would include commercial relationships of all kinds, but would not include legal advice given. This becomes clear if it is read along with Items 2, 8, 14 and 15, the last item specifically dealing with "legal advice". Under Items 2, 8 and 14, advice given need not be advice relating to business but can be advice of any kind. The importance of contrasting Item 1 with Items 2, 8 and 14 is that the arbitrator should be a regular advisor under Items 2, 8 and 14 to one of the parties or the appointing party or an affiliate thereof, as the case may be. Though the word "regularly" is missing from Items 1 and 2, it is clear that the arbitrator, if he is an "advisor", in the sense of being a person who has a business*relationship*in Item 1, or is a person who "currently" advises a

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> party or his affiliates in Item 2, connotes some degree of regularity in both items. The advice given under any of these items cannot possibly be one opinion given by a retired Judge on a professional basis at arm's length. Something more is required, which is the element of being connected in an advisory capacity with a party. Since Justice Lahoti has only given a professional opinion to GAIL, which has no concern with the present dispute, he is clearly not disqualified under Item 1."

102. In the facts of the said case, the Hon'ble Supreme Court was not inclined to accept the argument of the appellant that merely because the Arbitrator therein had given a legal opinion to one of the parties earlier in an unrelated matter, he was ineligible to act with neutrality in the dispute he was ceased. Relying on the said decision and the ***Sheetal Maruti case (supra)*** it is argued that a counsel briefed by either a party or a firm cannot be deemed to have a commercial relationship with such party.

103. It is also argued by Mr. Ghosh that the representation of the affiliate, M/s. SSSMIL, before the High Court by the Learned Arbitrator must be treated, at best, as legal advice at arm's length, and that too in a matter not related to the arbitration.

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104. This Court is unable to apply the dicta of the Supreme Court in the ***HRD Corporation case (supra)*** and ***Sheetal Maruti case (supra)***, to the facts of the instant case, particularly the chain of events and the Arbitrator representing the affiliate (M/s. SSSMIL) of Bulaki Das Bhaiya, the principal party of one side in the arbitration.

105. Admittedly the Arbitrator is a much sought after Senior Counsel, of repute and standing of more than 50 years at the Bar. A Causal connection between him representing M/s. SSSMIL during the

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pendency and the actual award passed may not be apparent or established, and hence need not be established.

106. One need not also enter into the merits of an award while assessing the reasonable likelihood of bias. What is important is as to whether the representation of the Arbitrator before the High Court, on behalf of M/s. SSSMIL, which is a body corporate, exclusively in control and management of Bulaki Das Bhaiya, during the pendency of the arbitration, would reasonably indicate a likelihood and/or danger of bias to an uninformed common man and any of the parties in the arbitration.

CONCLUSION

107. In the facts and circumstances of the instant case, this Court is of the view that the Arbitrator has rendered himself ineligible by reason of his actions, and non-disclosure thereof. Either bona fide or otherwise, his actions fall foul of the mandate under Section 12 of the Arbitration and Conciliation Act, particularly, grounds 11, 15, and 20 and the Fifth Schedule and ground 15 of the Seventh Schedule read with explanation 2 thereof.

108. The impugned award stands set aside. AP 364 of 2020 and AP 402 of 2020 are allowed. EC 145 of 2020 and EC 81 of 2022 shall stand dismissed. Consequently, all interim applications shall stand dismissed. GA 1 of 2022 in AP 364 of 2020 shall stand disposed of as infructuous. GA 1 of 2020 in AP 402 of 2020 shall also disposed of as infructuous.

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109. There shall be no order as to costs.

110. Urgent Photostat Certified server copy of this judgment, if applied for, be supplied to the parties on urgent basis.

(Rajasekhar Mantha, J.)

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