LAW OF BIAS IN ARBITRATORS

- CERTAIN INTERESTING ASPECTS

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Law of Bias in Arbitrators

Introduction

Independence and impartiality of the arbitrator is the basic requirement of any arbitration proceeding. Rule against bias is one of the fundamental principles of natural justice which applies to all judicial and quasi-judicial proceedings. The genesis of this principle is the necessity of an arbitrator appointed in terms of the contract and by the parties to the contract to be independent of the parties. His functions and duties require him to rise above the partisan interest of the parties and not to act in a manner so as to further the particular interests of either party.

Interestingly, in the Arbitration and Conciliation Act, 1996 ("the Act") there was no definite law to ensure that an arbitrator appointed to adjudicate the disputes between parties is indeed unbiased. The amendments made to the Act vide the Arbitration and Conciliation (Amendment) Act, 2015 ("the Amendment Act"), inter alia, attempted to introduce safeguards which warrant fairness in the conduct of arbitration proceedings, and minimise the phenomenon of bias.

Introduction of the Amendment Act saw the following significant changes in the "grounds for challenge" of an arbitrator ("Amendments"):

(i) amendment of Section 12(1)\(^1\) of the Act, now mandates an arbitrator to disclose in writing existence of any direct/indirect, past or present relationship with any of the parties to such dispute, which may raise justifiable doubts as to his impartiality. The newly introduced Schedule V to the Act\(^2\), provides guidance on what constitutes such "justifiable doubts";

(ii) introduction of Section 12(5) to the Act with the simultaneous introduction of Schedule VII\(^3\), which specifies certain categories that render an arbitrator ineligible to act\(^4\); and

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

\(^2\) To summarise: Grounds that give rise to justifiable doubts as to the independence or impartiality of arbitrators:
- a. Arbitrator's relationship with the parties or counsel (14 grounds);
- b. Relationship of the arbitrator to the dispute (2 grounds);
- c. Arbitrator's direct or indirect interest in the dispute (3 grounds);
- d. Previous services for one of the parties or other involvement in the case (5 grounds);
- e. Relationship between an arbitrator and another arbitrator or counsel (5 grounds);
- f. Relationship between arbitrator and party and others involved in the arbitration (2 grounds);
- g. Other circumstances (3 grounds).

\(^3\) To summarise: Grounds that may render an arbitrator ineligible for appointment:
- a. Arbitrator's relationship with the parties or counsel (14 grounds);
- b. Relationship of the arbitrator to the dispute (2 grounds);
- c. Arbitrator's direct or indirect interest in the dispute (3 grounds).

\(^4\) Section 12(5) as inserted by the amendment states the following:
"(5) 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 shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."
(iii) Section 14 of the Act has been amended to include the provision of substitution of another arbitrator, upon termination of the mandate of an arbitrator.

After more than 3 (three) years of introduction of the Amendments, it may be interesting to take note of certain judicial precedents to ascertain whether the Amendments have been able to accomplish the objective they had set out to achieve. This paper discusses certain interesting aspects of the Amendments, in light of various judicial decisions.

The concept of bias and the objective behind the amendments

Before taking a look at the judicial precedents concerning bias in arbitrators, it is necessary to discuss the genesis of the concept of bias and the objective behind the Amendments.

The Hon'ble Supreme Court of India has carved out a difference between independence and impartiality of an arbitrator. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality is a more subjective concept as compared to independence. Independence, which is a more objective concept, may be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the disclosures made by the arbitrator, while partiality will more likely surface during the arbitration proceedings.

In fact, in Director General of Fair-Trading v. The Proprietary Association of Great Britain, the UK Court of Appeal drew a distinction between ‘actual bias’ and ‘apparent bias’. While ‘actual bias’ denotes a demonstrable situation where a judge has been influenced by partiality or prejudice in reaching his decision, ‘apparent bias’ denotes existence of a reasonable apprehension that the judge may have been, or may be, biased.

It may be said that the Courts have more or less consistently opined that the test is not whether there is ‘actual bias’ in a given circumstance, for that would entail an onerous standard of proof, but whether the circumstances create room for justifiable apprehensions of bias.

Unfortunately, before the introduction of the Amendment Act, it was a generally accepted norm that arbitration agreements in government, statutory and public-sector contracts would contain a named arbitrator, that would generally be a departmental head. Courts did not recognize the concept of ‘apparent bias’ in situations like these. Even the Hon'ble Supreme Court of India, in Indian Oil Corporation v. Raja Transport (P) Ltd., has held:

“…senior officer/s (usually heads of department or equivalent) of a government/statutory corporation/public sector undertaking, not associated with the contract, are considered to be independent and impartial and are not barred from functioning as Arbitrators merely because their employer is a party to the contract.” (emphasis added)

5 Section 14 as amended states the following -

“(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if-
(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and
(b) he withdraws from his office or the parties agree to the termination of his mandate.
(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.
(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.”

6 Supra at 1.

7 Director General of Fair-Trading v. The Proprietary Association of Great Britain [(2001) 1 WLR 700, decided on December 21, 2001 (Court of Appeal)].

8 Indian Oil Corporation v. Raja Transport (P) Ltd [(2009) 8 SCC 520, decided on August 24, 2009 (Supreme Court of India)].
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However, such stance generally adopted by the Courts, was not without exceptions. Particular reference may be made to Union of India v. Singh Builders Syndicate\(^9\), where the Hon'ble Supreme Court had suggested that the government, statutory authorities and government companies should consider phasing out arbitration clauses providing for appointment of serving officers and encourage professionalism in arbitration. Consequently, the Law Commission of India’s Report No. 246 issued in August 2004, *inter alia*, suggested comprehensive amendments and acting upon most of these recommendations, the Amendment Act was promulgated.\(^10\)

A major milestone of the Amendments is the introduction of the Fifth Schedule and the Seventh Schedule to the Act, which has clarified the distinction between relationships and circumstances that may give rise to justifiable doubts as to the independence or impartiality of an arbitrator but not necessarily render the arbitrator ineligible to act; and relationships and circumstances with one of the parties to the arbitration or its counsel which make the person ineligible to act as arbitrator in an arbitration.\(^11\)

In the backdrop of the objective behind the Amendments, certain fascinating aspects of the Amendments are now discussed in light of some interesting judicial precedents.

**Discussion on judicial precedents**

**A former employee of an organization is not disqualified to act as an arbitrator in a dispute involving the organization:**

The Fifth and the Seventh Schedule of the Amended Act disqualifies arbitrators having past or present business relationships with either of the parties from being appointed to an arbitral tribunal constituted to resolve disputes between such parties. However, former employees are not disqualified to act as arbitrators. This will be clear from a bare reading of Entry 1 of the Seventh Schedule to the Act. A large number of decisions in this respect pertain to the interpretation of the provision, which is quoted hereinafter for ready reference:

“*Arbitrator’s relationship with the parties or Counsel. - The Arbitrator is an Employee, Consultant, Advisor, or has any other past or present business relationship with a party.*” (emphasis added)

The Hon'ble Punjab and Haryana High Court held in Reliance Infrastructure Limited Vs. Haryana Power Generation Corporation\(^12\) that the words “or has any other past or present business relationship with a party” in Entry 1 do not include a former employee, consultant or advisor of the party. The Court, following the principle of strict statutory interpretation, reasoned that the word

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\(^9\) Union of India v. Singh Builders Syndicate [(2009) 4 SCC 523, decided on (Supreme Court of India)].


\(^11\) The 246th Law Commission Report stated the following - 

“The Law Commission proposed the incorporation of the Fourth Schedule, which has drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a “guide” to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed section 12 (5) of the Act and the Fifth Schedule which incorporates the categories from the Red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed explanation to section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the Red and Orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the Red list of the IBA Guidelines).”

\(^12\) Reliance Infrastructure Limited v. Haryana Power Generation Corporation, [2016 (6) ARBLR 480 (P&H), decided on October 27, 2016 (High Court of Punjab and Haryana)].
“other” in Entry 1 excludes an employee, consultant or advisor. Hence, it recognised that Entry 1 does not make a former employee, consultant or advisor de jure ineligible to be appointed as an arbitrator.

Similarly, in Hindustan Construction Company Limited V. IRCON International Ltd\(^\text{13}\), the Hon’ble Delhi High Court observed that a former employee of the Northern Railway cannot be said to have had a business relationship with the Respondent merely because the Respondent is wholly owned by the Government of India/ Ministry of Railways. The Court identified that to attract Entry 1 of the Seventh Schedule to the Act, it must be shown that the proposed arbitrator is an employee of the Respondent or has any other past or present business relationship with it. It was therefore held that only the presently serving employees of the Northern Railway would stand disqualified to act as an arbitrator, and not a former employee.

Further, the Hon’ble Supreme Court of India had the occasion to consider the issue in The Government of Haryana PWD Haryana (B and R) Branch v. M/s G.F. Toll Road Pvt. Ltd. & Ors.\(^\text{14}\) where it was held that only present employees are disqualified under Entry 1 of the Fifth Schedule which is pari materia with Entry 1 of the Seventh Schedule of the Act. It was held that “any other past or present business relationship” refers to a relationship other than that of an employee, consultant, or advisor. It is noteworthy, however, that in this case, the employee in question had retired from employment about ten years ago, and the Court recognized such fact, without of course going into the question whether the situation would be the same where an employee has retired from service more recently.

The principles of statutory interpretation are well settled. In construing a statutory provision, the first and foremost rule of interpretation is literary construction. If a provision is unambiguous and if from the provision the legislative intent is clear, the Court need not call into aid the other rules of construction of statutes. The other rules of construction are called into aid only when the legislative intent is unclear or vague.\(^\text{15}\)

In the aforesaid cases, the Courts have applied the literal rule of construction, thereby holding that former employees are not disqualified to act as arbitrators in a dispute involving their employers. This appears to be tandem with the 246\(^\text{th}\) Report of the Law Commission that focused on “circumstances exist that give rise to justifiable doubts as to independence or impartiality” of the arbitrator rather than an “apprehension of bias.” It may be presumed that former employees acting as arbitrators may not appear to be per se partial/biased. However, the number of challenges before the Courts in respect of appointment of a former employee as an arbitrator would establish that apprehension still subsists against the practice of appointing ex-employees of parties as arbitrators.

Interestingly, in Hindustan Steel Works Construction Limited Vs. Union of India & Ors.\(^\text{16}\), the Hon’ble High Court at Patna, while considering whether a panel of retired Railway Officers who were associated with the Railway Administration would be impartial arbitrators, ruled that the purpose behind the amendment of Section 12 of the Act was to ensure that the arbitrator appointed is independent and discharges his duties without hindrance. The Court relied heavily on the decision of the Hon’ble Supreme Court of India in M/s. Voestalpine Schienen GMHB V. Delhi Metro Rail Corporation Ltd.,\(^\text{17}\) and did not approve of the panel. The Court observed:

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\(^{13}\) Hindustan Construction Company Limited V. IRCON International Ltd [ARB.P. 596/2016, decided on November 11, 2016 (High Court of Delhi)].

\(^{14}\) Reliance Infrastructure Limited v. Haryana Power Generation Corporation, [2016 (6) ARBLR 480 (P&H), decided on October 27, 2016 (High Court of Punjab and Haryana)].

\(^{15}\) Raghunath Rai Bareja and Ors. vs. Punjab National Bank and Ors. AIR 1973 SC 1034.

\(^{16}\) The Government of Haryana PWD Haryana (B and R) Branch v. M/s G.F. Toll Road Pvt. Ltd. & Ors. [Civil Appeal No. 27 of 2019, decided on January 3, 2019(Supreme Court of India)].

\(^{17}\) AIR2017SC939.
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“The aforesaid panel also seems to be consisting of retired Railway Officers, who were in some way or the other associated with the Railway Administration either through the Railway Board or the Zonal Railway. Therefore, after evaluating the suggestions made by the respondents with regard to this panel, in the backdrop of the law laid down by the Hon’ble Supreme Court in the case of Delhi Metro Rail Corporation Ltd. (supra), I am of the considered view that as all these officers were in some way or the other connected with the Railway Administration either through the Railway Board or other zonal Railways and as the dispute in question pertains to an agreement executed as per the guidelines of the Railway Board, it is not appropriate to approve the aforesaid panel.”

Similarly, in Afcons Infrastructure Limited V. Ircon International Limited18, the Hon’ble Delhi High Court appointed a broad-based arbitration panel instead of the existing panel of retired Railway Officers empaneled to work as Railway Arbitrator. Further, the Court clarified that though appointment of an ex-employee as an arbitrator did not fall within the rigor of Section 12(5) of the Act read with the Seventh Schedule to the Act, but undeniably it did give rise to apprehensions (whether justifiable or not) in the minds of the other party, and it was essential that all parties have full confidence in the arbitral process.

These decisions evidence that Courts are now indeed taking note of apprehensions of bias in former employees, though the statute per se does not provide for the same. Given that there is a gradual movement in the judicial precedents from “circumstances that give rise to justifiable doubts as to independence or impartiality exist” to an “apprehension of bias” in the arbitrator, it may be interesting to see if in the near future, there is a purposive interpretation of the provisions by the Courts of the law, or an amendment of the statute to disqualify former employees as arbitrators.

A person disqualified under Section 12(5) of the Act read with the Seventh Schedule to act as an arbitrator cannot nominate an arbitrator:

The disqualification of an arbitrator under the Seventh Schedule of the Act extends to any contractual right he might have to nominate another person as the arbitrator in such arbitration.

This question came up for consideration before the Hon’ble Bombay High Court in DBM Geotechnics & Constructions Pvt Ltd V. Bharat Petroleum Corporation Ltd19. In this case, the arbitration agreement provided that any dispute shall be referred to the sole arbitration by the Director (Marketing Division) of the Corporation or to some officer of the Corporation who may be nominated by the Director (Marketing Division). The agreement further provided that in the event of the arbitrator to whom the matter is originally referred is ‘unable to act’ for any reason, the Director (Marketing Division) shall designate another person to act as an arbitrator in accordance with the terms of the agreement.

It is obvious that following the promulgation of the Amendment Act, the Director (Marketing Division) being an employee of one of the parties to the arbitration, was not able to act as an arbitrator in a dispute involving the party. However, the Court went on to decide whether such disqualification extended to any person nominated by him. The Hon’ble High Court answered this question in the negative and held that the power of the Director (Marketing Division) to appoint a nominee arbitrator continues to subsist.

The Hon’ble Supreme Court of India differed with the decision of the Bombay High Court in TRF Ltd. v. Energo Engineering Projects Ltd.20 and held that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would be tantamount to the ineligible arbitrator carrying on the

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18 Afcons Infrastructure Limited V. Ircon International Limited [ARB.P. 21/2017, decided on May 29, 2017 (High Court of Delhi)].
19 DBM Geotechnics & Constructions Pvt Ltd V. Bharat Petroleum Corporation Ltd. [2017 (5) ABR 674, decided on May 26, 2017 (High Court of Bombay)].
20 TRF Ltd. v. Energo Engineering Projects Ltd. [Civil Appeal No. 5306 of 2017, decided on July 3, 2017. (Delhi High Court)].
proceedings of arbitration by proxy. In order to bar the same, it was held that once an arbitrator has become ineligible by operation of law, he cannot nominate another person as an arbitrator. The Court observed that:

"9. ... The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim: “Qui facit per alium facit per se” (What one does through another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the “pucca adatia”, or, as the High Court had held, he is clothed with the powers of an ordinary commission agent only."

It might be noted that the Hon'ble Supreme Court did not concern itself with the concept of apprehension of bias or suitability or respectability of the arbitrator while coming to its decision, but strictly limited itself to the question of authority and power of the ineligible named arbitrator. However, what is interesting to note is whether this disqualification extends to named arbitrators only, as even in situations where an arbitrator is not named, and parties are required to nominate their own arbitrators, officials of the organizations, who are apparently ineligible to be appointed as arbitrators themselves, make the appointment of the arbitrators. Is it the case that this principle is only applicable to cases where an official named as an arbitrator is ineligible to act, or does it extend to all appointments made by persons 'ineligible' to be appointed as arbitrators, whether or not named? Though it may be argued that the second interpretation will virtually paralyze the system and throw open several challenges in the process, however, a simple reading of the decision will appear to suggest such interpretation is a plausible one. Possibly, the position in this respect will be clear when there is a challenge to one of such appointments.

Court exercising its jurisdiction under Section 11 of the Act, cannot decide on a challenge to an arbitrator who is de jure disqualified to act: -

In case of a dispute in respect of appointment of an arbitrator, a jurisdictional court may be approached under Section 11 of the Act to decide on such appointment. Section 11(6) of the Act specifically provides that where parties fail to agree on the appointment of an arbitrator, upon request, the Supreme Court or the relevant High Court may take necessary measure to appoint such arbitrator.21

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21 Section 11 as amended states: -
"11. Appointment of arbitrators— (1) ... (2) ... (3) ... (4) ...
(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by 1 [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court].
(6) Where, under an appointment procedure agreed upon by the parties, –
(a) a party fails to act as required under that procedure; or
(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
[(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.
(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.]
(7) ... (8) ... (9) ... (10) ... (11) ... (12) ... (13) ... (14) ...” (emphasis added).
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If parties to an arbitration are apprehensive that the proposed arbitrator is ineligible under Section 12(5) of the Act read with the Seventh Schedule of the Act, seeking appointment of an arbitrator under Section 11 of the Act is a viable option. However, the question, as evident from various judicial precedents, is whether an application under section 11(6) of the Act seeking appointment of an arbitrator is maintainable, when an arbitrator becomes de jure or de facto unable to perform his functions under Section 14(2) of the Act.

The Hon’ble Supreme Court of India in TRF Ltd. v. Energo Engineering Projects Ltd. has dealt with this issue. Despite not particularly referring to Section 14(2) of the Act, it was held that the Court, under Section 11(6) of the Act, did have the power to adjudicate upon an arbitrator’s jurisdiction, and was also entitled to scrutinize the existence of the condition precedent for the exercise of his power as also his disqualification as an arbitrator. The Court relied heavily on S.B.P. and Co. v. Patel Engineering Ltd. and Another in this regard:

“…The Chief Justice or the Designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators.” (emphasis supplied)

Section 14(2) of the Act provides that in case an arbitrator becomes de jure or de facto unable to perform his functions, parties may, unless otherwise agreed, apply to the Court to decide on the termination of his mandate. Needless to mention, disqualification under Section 12(5) of the Act read with the Seventh Schedule to the Act is a condition of an arbitrator becoming de jure unable to perform his functions.

When a person, including an institution, fails to appoint an arbitrator, Sub-Section 6 of Section 11 of the Act, empowers the Supreme Court or the High Court or its designate to take necessary measure, to make such appointment. However, to extend such power to terminate the mandate of an arbitrator under Section 14 of the Act, even in the interest of expeditiousness, effectively dislocating an arbitrator already appointed, may be a little farfetched.

Such a situation arose in M/s Aargee Engineers & Co. and Another v. Era Infra Engineering Ltd. & Ors. The Hon’ble Allahabad High Court held that where there was no substantial disagreement on termination of the mandate of an arbitrator, the mandate of an arbitrator could be terminated, and an independent arbitrator can be appointed in his place, exercising jurisdiction under Section 11 of the Act.

The issue whether an arbitrator has become de jure or de facto unable to perform his functions can only be decided by a ‘Court’, as defined under Section 2(e) of the Act. The Supreme Court or a High Court, exercising jurisdiction under Section 11 of the Act, do not fall within the scope of Section 2(e) of the Act. Hence, the Supreme Court or a High Court exercising jurisdiction under Section 11 of the Act, typically cannot be said to be qualified to decide on this issue, especially when Section 11 of the Act specifically provides that in this jurisdiction, the Court shall confine itself to ascertaining the existence of the arbitration agreement and no more. It is questionable whether the Supreme Court or a High Court can pass an order terminating the mandate of an Arbitrator under Section 14(2) of the Act.

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22 TRF Ltd. v. Energo Engineering Projects Ltd. [Civil Appeal No. 5306 of 2017, decided on July 3, 2017 (Delhi High Court)].
23 S.B.P. and Co. v. Patel Engineering Ltd. and Another [2005 (3) ARBLR 285(SC), decided on October 10, 2005 (Supreme Court of India)].
25 M/s Aargee Engineers & Co. and Another v. Era Infra Engineering Ltd. & Ors. [Arbitration & Conciliation Application under Section 11(4) No.- 69 of 2014, decided on March 30, 2017 (High Court at Allahabad)].
It appears that the Hon’ble Delhi High Court has summarized the correct legal position in Delhi International Airport Private Limited v. Airport Authority of India26, by holding that Section 11 of the Act cannot be used to displace an Arbitrator who had already been appointed by a party.

The issue was also considered by the Hon’ble Supreme Court in S P Singla Constructions Pvt. Ltd. v State of Himachal Pradesh and Another27 where the Court has held if a party is dissatisfied or aggrieved by the appointment of an arbitrator then a petition for the same could be filed under Section 13 of the Act and eventually, the award passed could be challenged under Section 34 of the Act. It was clarified that the appointment of a new arbitrator could not be sought through an application under Section 11(6) of the Act when an arbitrator has already been appointed as per the terms of the contract. Though the judgment pertained to a period before the promulgation of the Amendment Act, and Section 12(5) of the Act was inapplicable to the situation, the principle still holds good in the post amendment regime.

Therefore, an application under Section 11(6) read with Section 14 of the Act cannot be relied upon to terminate the mandate of an arbitrator and appoint a fresh arbitrator. In view of the clear words of the statute, and the definition of ‘Court’, as enshrined in Section 2(e) of the Act, the Supreme Court or the relevant High Court exercising jurisdiction under Section 11 of the Act, cannot decide whether an Arbitrator has become de-jure or de-facto unable to act.

An order of an arbitral tribunal dismissing a challenge to the mandate of an arbitrator is not an interim award: -

In case a party is desirous of challenging the mandate of an arbitrator, it is open to such party to approach the arbitral tribunal with a challenge under Section 13(3) of the Act.28 In case such challenge is allowed, the arbitrator shall withdraw from office. What is interesting to consider is if an order passed by the arbitral tribunal dismissing such a challenge, may be treated as an interim award being amenable to challenge under Section 34 of the Act.29

A Division Bench of the Hon’ble Delhi High Court considered this aspect in National Highways Authority of India v Baharampore-Farakka Highways Ltd. 30 The Court did not object to the maintainability of the petition under Section 34 of the Act and held that:

“On a conjoint reading of Section 13 with Section 34 of the 1996 act, it appears to us that there is no bar in law to challenging a decision of an Arbitral Tribunal on the challenge to the constitution of the Arbitral Tribunal, which is an interim award, by filing an application under Section 34 of the 1996 Act.”

26 Delhi International Airport Private Limited v. Airport Authority of India [ARB.P. 42/2017, decided on April 20, 2017 (High Court of Delhi)].
27 S P Singla Constructions Pvt. Ltd. v State of Himachal Pradesh and Another [2018 (6) ARBLR 355(SC), decided on December 4, 2018 (Supreme Court of India)].
28 13. Challenge procedure. – (1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.
(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.
(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.
(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.
(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.
30 National Highways Authority of India v Baharampore-Farakka Highways Ltd. [FAO(OS) (COMM).47/2017 & CM Nos.7153/2017, decided on March 20, 2017 (High Court of Delhi)].
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A Single Bench of the Hon'ble Delhi High Court, subsequently however, in HRD Corporation (Marcus Oil and Chemical Division) distinguished the aforesaid decision and indicated that the Division Bench had passed the aforesaid order without considering decisions like Progressive Career Academy Pvt. Ltd v FIITJEE Ltd, A. Ayyasamy v. A. Paramasivam & Ors, S.B.P. and Co. v. Patel Engineering Ltd. and Another or Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd, where the Court held:

"9.08 The term "award" should generally be reserved for decisions that finally determine the substantive issues with which they deal. This involves distinguishing between awards, which are concerned with substantive issues, and procedural orders and directions, which are concerned with the conduct of the arbitration. Procedural orders and directions help to move the arbitration forward; they deal with such matters as the exchange of written evidence, the production of documents, and the arrangements for the conduct of the hearing. They do not have the status of awards and they may perhaps be called into question after the final award has been made (for example as evidence of 'bias', or 'lack of due process." (emphasis added)

In a more recent decision of the Hon'ble High Court at Calcutta, a similar situation arose where the Court discussed the purview of Section 2(1)(c) of the Act and relied on the decision of the Hon'ble Supreme Court in National Thermal Power Corporation Limited v. Siemens Akteilgesellschaft to hold that the decision of an arbitral tribunal can be held to be an 'interim award' within the meaning of Section 2(1)(c) of the Act when such decision finally determines an issue, at an intermediate stage of an arbitration proceeding, relating to the claim or counterclaim of the respective parties to the proceeding. A decision rendered by the arbitrator under Sections 12 and 13 of the Act, therefore, did not tantamount to an interim award.

It may, therefore, be safely concluded that the judgment of the Hon'ble Delhi High Court in National Highways Authority of India v Baharampore-Farakka Highways Ltd is a mere aberration and does not set down the correct law in this regard. A decision of the arbitral tribunal dismissing a challenge to the mandate of an arbitrator is not an interim award and hence not amenable to a challenge under Section 34 of the Act.

Whether a petition before the Court seeking termination of mandate of an arbitrator is maintainable, even after such challenge is considered and rejected by an arbitral tribunal:

Section 13(3) of the Act contemplates that a challenge to the mandate of an arbitrator be made before the arbitral tribunal and if rejected, remedy lies in challenging the final award in a petition under Section 34 of the Act. This is in contrast with Section 14(2) of the Act which allows the parties to the arbitration to seek termination of an arbitrator's mandate before a court, when an arbitrator becomes de jure or de facto unable to perform his functions.

31 Progressive Career Academy Pvt. Ltd v FIITJEE Ltd. [(2011) 180 DLT 714(DB), decided on May 16, 2011 (High Court of Delhi)].
32 A. Ayyasamy v. A. Paramasivam & Ors [2017 (3) ARBLR 393(Delhi), decided on October 10, 2016 (Supreme Court of India)].
33 S.B.P. and Co. v. Patel Engineering Ltd. and Another [2005 (3) ARBLR 285(SC), decided on October 10, 2005 (Supreme Court of India)].
34 Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd. [2017 (4) ARBLR 325(SC), decided on December 15, 2016 (Supreme Court of India)].
35 Winsome International Limited v. The New India Assurance Co. Limited [A.P. No. 866 of 2018 decided on January 22, 2019 (High Court of Calcutta)].
37 National Highways Authority of India v Baharampore-Farakka Highways Ltd. [FAO(OS) (COMM).47/2017 & CM Nos.7153/2017, decided on March 20, 2017 (High Court of Delhi)].
The question that is thrown up for consideration is whether a petition under Section 14(2) of the Act, seeking to terminate the mandate of an arbitrator before a court may be maintainable, even after such challenge has been taken up before the arbitral tribunal itself, and rejected by it. The distinction between Section 13 and Section 14(2) of the Act stems from the intention to create a balance between the need for preventing obstruction or dilatory tactics and the desire of avoiding waste of time and money.

The Hon’ble Delhi High Court in *Steel Authority of India Ltd v British Marine PLC*[^39^] held that “…as held in *Progressive Career Academy Pvt. Ltd. v. FIITJEE Limited* (supra), once a party has adopted the challenge procedure under Section 13 of the Act, it cannot seek to invoke Section 14 of the Act but will have to wait for the pronouncement of the Award.”

Similarly, in *Gangotri Enterprises Limited v NTPC Tamil Nadu Energy Company Limited*[^40^], a petition under Section 14(2) of the Act was filed, praying for termination of appointed sole arbitrator, after the arbitral tribunal was moved with a challenge under Section 13(3) of the Act. The Hon’ble High Court of Delhi considered whether the decision of the arbitrator rejecting the challenge under Section 12 of the Act can be assailed under Section 14 of the Act. The Court made a reference to sub-section (5) of section 13 of the Act and held that “Given the specific provisions of Section 13, recourse to Section 14 of the Act is not available to challenge the decisions of the arbitrator rejecting the challenge under Section 12 of the Act and to continue the arbitral proceeding….”

The Courts have generally refused to view Section 14(2) of the Act as a remedy to redress the failure of a challenge under Section 13(3) of the Act. Section 13(3) and Section 14(2) tend to be treated as parallel remedies which do not intersect.

The Hon’ble Delhi High Court has, however, clarified that merely because a challenge on the impartiality and neutrality under Section 13(3) has been made before an arbitral tribunal, there is no bar in moving a petition under Section 14(2), against an arbitrator whose relationship makes him ineligible as per the Seventh Schedule of the Act. This is because Section 12(5) stands on a separate footing as any person whose relationship with parties, counsel or subject matter of the dispute falls within the ambit of the Seventh Schedule, which contains the most serious grounds, would be ineligible to act as an arbitrator. Such a person would lack inherent jurisdiction to proceed with arbitral proceedings and thus it would be open for the party to take recourse to Section 14(2) of the Act, even if the arbitral tribunal has refused to entertain a challenge in respect of the existence of relationships falling under the categories specified in the Seventh Schedule to the Act.

The Hon’ble High Court of Delhi in *HRD Corporation (Marcus Oil and Chemical Division) v Gail (India) Limited*,[^41^] held that a petition under Section 14 of the Act challenging an arbitrator under Section 12(5) of the Act read with the Seventh Schedule, was maintainable before a court of law, notwithstanding the fact that the arbitral tribunal has dismissed a challenge before them on the same ground. However, a petition under Section 14 of the Act encompassing a challenge to the Arbitral Tribunal in respect of Section 12(1) of the Act read with the Fifth Schedule was held not maintainable. The Court held:

> “15. The scheme of Section 13 of the Act must be read in the context of the substratal legislative policy of minimizing judicial intervention in arbitral proceedings. In terms of Section 5 of the Act, no judicial authority would intervene in arbitral proceedings except where it is so provided. Thus, a party, who is unsuccessful in the challenge to an arbitrator before the arbitral tribunal, has recourse to courts, albeit, at the stage of Section 34 and not immediately on the challenge being rejected. The legislative intent is clear that the

[^39^]: *Steel Authority of India Ltd v British Marine PLC* [2016 (6) ARBLR 89(Delhi), decided on October 20, 2017 (High Court of Delhi)].

[^40^]: *Gangotri Enterprises Limited v NTPC Tamil Nadu Energy Company Limited* [2017 (2) ARBLR 116(Delhi), decided on January 16, 2017 (High Court of Delhi)].

[^41^]: *HRD Corporation (Marcus Oil and Chemical Division) v Gail (India) Limited* [2017 (3) ARBLR 393(Delhi), decided on April 24, 2017 (High Court of Delhi)].
"Arbitral proceedings are not to be impeded in such cases." (emphasis added)

"36. In view of the above, the present petitions, insofar as they seek termination of the mandate of the arbitrators on account of Section 12(5) read with Seventh Schedule of the Act, cannot be rejected at the threshold as falling outside the scope of Section 14 of the Act. However, a challenge to the appointment of the arbitrators on grounds other than the existence of relationships falling under the categories specified in the Seventh Schedule, cannot be entertained in these proceedings." (emphasis added)

The aforesaid decision has been upheld in an appeal to the Hon'ble Supreme Court of India in HRD Corporation42, where it has been held:

"It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal."

It may, therefore, be inferred that courts have generally been reluctant to entertain a challenge to the arbitrator, once the arbitral tribunal has considered and dismissed such challenge; particularly when such a challenge is in respect of Fifth Schedule to the Act. However, if such challenge against an arbitrator is in respect of the Seventh Schedule to the Act, the Courts have not rejected them at the threshold, as they pertain to ineligibility of an arbitrator to carry on with the proceeding. The decisions seem to indicate that the general trend is to minimize judicial intervention in arbitration proceedings to retain autonomy of the process where possible and intervene only in cases where an arbitrator lacks inherent jurisdiction under one of the categories specified in the Seventh Schedule, so as to enable the parties to restart the process sooner in the interest of saving time and costs.

Conclusion

Nemo in propria causa judex, esse debet, i.e., no one should be made a judge in his own cause, is popularly known as the rule against bias. The issue of independence and impartiality in arbitrators is pervasive with a growing number of commentators having explained how dual arbitrator/employee/counsel role threatens independence and impartiality. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. In this context, the Act as amended, along with the decisions of the Courts that have regard to not only actual bias, but also apprehension of likelihood of bias of the arbitrators, is definitely a step in the right direction.

This paper has been written by Pooja Chakrabarti (Partner) and Adheesh Agarwal (Associate).

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42 HRD Corporation (Marcus Oil and Chemical Division) v Gail (India) Limited [Civil Appeal No. 11126 of 2017, decided on August 31, 2017 (Supreme Court of India)].
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