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

\+ **Date of Decision: 24.04.2025**

% O.M.P. (T) (COMM.) 31/2025 & I.A. 10206/2025, I.A. 10207/2025

RAM KRISHAN ASSOCIATES PVT. LTD. ....Petitioner

Through: Mr. Deepak Dhingra, Mr. Aastik Dhingra, Ms. Sneh Somani, Advs.

versus

ASIAN HOTEL (NORTH) LTD. .....Respondent

Through: Ms. Akanksha Kaul, Mr. Aman Sahani, Ms. Ashima Chopra, Advs.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

JASMEET SINGH, J. *(ORAL)*

1. This is a petition filed under Section 14 of the Arbitration and Conciliation Act, 1996 ("*the Act*") seeking termination of the mandate of Justice Mr. R.K. Gauba (Retd.) ("*the learned arbitrator*") on the ground of justifiable doubts concerning his independence and impartiality.

2. Additionally, the petitioner also seeks to challenge the order dated 25.03.2025 passed by the learned arbitrator and appoint another arbitrator to adjudicate the disputes between the parties.

FACTUAL BACKGROUND

3. The case of the petitioner, one among 26 similarly placed claimants, against the respondent, arises from the alleged wrongful sealing of their respective commercial premises on 29.05.2020 located in the shopping arcade of Hotel Hyatt Regency, New Delhi.

4. The said dispute was referred to arbitration in view of the arbitration clause in the agreements.

5. *Vide* the order dated 02.09.2024 passed by this Court, the learned arbitrator was appointed as the sole arbitrator, who entered reference on 07.09.2024 and issued a declaration about his neutrality.

6. It is stated that the petitioner later discovered that prior to the appointment of the learned arbitrator, he had already been appointed as an "Administrator" of Exclusive Capital Ltd. ("*ECL*") by the National Company Law Tribunal ("*the NCLT*") in a petition initiated by shareholders of ECL who were also shareholders of the respondent company, *vide* an order dated 15.05.2024.

7. The said order was stayed by the National Company Law Appellate Tribunal ("*the NCLAT*") on 22.05.2024 and thereafter, was modified on 31.05.2024, wherein the learned arbitrator was to act as an "Observer" instead of an "Administrator", pending hearing and disposal of the appeal before the NCLAT.

8. Thereafter, the petitioner filed an application under Section 12 of the Act on 24.01.2025 seeking recusal of the learned arbitrator, which was opposed by the respondent. *Vide* the order dated 25.03.3025 passed by the learned arbitrator, the said application was rejected, wherein in para Nos. 31 to 33, the arbitrator held as under:

"31. It is not fair to impute, even obliquely, conscious non-disclosure of facts by the arbitral tribunal. The appointment as Administrator by NCLT did not come into effect as order of NCLAT had supervened. The facts which were available to the undersigned at the time of declarations did not give rise to any occasion for mention of the responsibility entrusted by NCLAT to the undersigned as Observer in relation to ECL as it was a company distinct from AHNL, there being no occasion to subject the accounts of AHNL to scrutiny. The role entrusted to the Observer vis-a-vis ECL is not managerial as is projected or understood by the applicant/Claimant. The undersigned has no personal stake in the cases at hand or for that matter in the case where he is an Observer. The additional facts which have been brought to the notice of the undersigned by the application or by reply/rejoinder filed in its wake do not make out any case of conflict of interest, direct or indirect, in the past or present or in future.

32. The ruling of Hon'ble Supreme Court reported as Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd (2017) 4 SCC 665, and two decisions of High Court of Delhi one dated 05.12.2022 in Ram Kumar and another v. Shriram Transport Finance Co. Ltd [FAO(Comm) 60/2021] and the other dated 08.10.2024 in FLFL Travel Retail Lucknow Private Limited v.

Airports Authority of India and another [O.M.P.(Comm.) 485/2022] relied upon by the applicant have no relevance to the fact-situation at hand. The undersigned is not on the panel of the Respondent nor its employee or agent, and nor appointed by the said party unilaterally. On the contrary, the Claimants were party to the submissions before the High Court and acting on the liberty sought and granted, upon joint request, had approached the undersigned to be the Arbitrator, together and by mutual consent.

33. The undersigned sits as an Arbitrator in these matters with clear conscience as to impartiality and independence, there being no clash of interest or conflict between responsibilities being discharged as an Arbitrator herein, on one hand, and as Observer, on the other, in relation to ECL, a Company distinct from AHNL which is party to the present matters. Borrowing the observations in Union of India v. Sanjay Jethi and another, (2013) 16 SCC 1 I 6, question of bias cannot be "an imaginary one or come into existence by an individual's perception based on figment of imagination", as is the basis of the application at hand. The facts and circumstances noted above do not necessitate any action or observations other than those made above to be recorded. The application is disposed of accordingly."

9. Hence, the present petition.

SUBMISSIONS ON BEHALF OF THE PETITIONER

10. Mr. Dhingra, learned counsel appearing on behalf of the petitioner, made the following submissions in support of the present petition:

A. The family of the petitioner held approximately 25% stake in the respondent company and that prior to the arbitration proceedings, multiple meetings were held to seek a compromise involving the son of the petitioner, the Managing Director of ECL and representatives from the respondent. A detailed chart of these meetings, including attendees, was submitted to the learned arbitrator.

B. The respondent did not deny the claims made by the petitioner and failed to provide a paragraph-wise reply to the application under Section 12 of the Act, which suggests an evasion of specific responses to the assertions of the petitioner.

C. The learned arbitrator was granted extensive powers as an "Administrator" of ECL by the NCLT, which were modified to "Observer", pending the petition before the NCLAT. The said order conferred wide powers to the learned arbitrator, including the authority to probe financial dealings between ECL and the respondent amounting to Rs. 98 crores. The said orders from the NCLT and the NCLAT explicitly mentioned the respondent.

D. There existed prior involvement of the learned arbitrator in overseeing the affairs of ECL in relation to the respondent, however, no such disclosure was made by the learned arbitrator in his declaration dated 07.09.2024, which is mandatory under

the Act.

E. Hence, the learned arbitrator was both *de jure* and *de facto* disqualified from accepting the arbitral reference due to his ongoing role in ECL related proceedings, which involved scrutiny of the respondent. The lack of disclosure regarding this conflict rendered the arbitral proceedings legally untenable.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

11. *Per contra*, Ms. Kaul disputes the averments of the present petition and has advanced the following submissions:

A. The petitioner relies on two orders: (i) the NCLT Order dated 15.05.2024, appointing the learned arbitrator as "Administrator" for ECL, and (ii) the NCLAT Order dated 31.05.2024, modifying the NCLT Order to designate the learned arbitrator as an "Observer". The NCLT Order was based on allegations of mismanagement by directors of the ECL, which do not concern the respondent and the respondent was not even a party to the NCLT proceedings.

B. It is contended that the role of the learned arbitrator as an Administrator/Observer does not equate to being part of the management of ECL or its affiliates. It is emphasized that the appointment of the learned arbitrator as an "Observer" does not relate to the operations and affairs of the respondent company and further, the petitioner has not substantiated its claims regarding bias.

C. It is highlighted that the debt owed by the respondent to the ECL has been taken over by a third party, VSJ Investments Pvt.

Ltd., making the concerns of the petitioner irrelevant.

D. It is argued that the petitioner has failed to specify relevant entries from the Fifth Schedule of the Act that would support claims of bias. Further, the delay in filing the application on behalf of the petitioner is also questioned, as the NCLT and NCLAT Orders were issued before the disputes were referred to the learned tribunal. Reliance is placed on ***Chennai Metro Rail Ltd. v. Transtonnelstroy Afcons (JV), (2024) 6 SCC 211.***

E. The petitioner is merely attempting to delay proceedings as the application was filed at a critical juncture in the arbitration process. The previous allegations of the petitioner of bias against another arbitrator are also highlighted as part of a pattern of behavior to derail the proceedings.

F. Hence, the petition is frivolous, lacking in legal merit, and intended solely to obstruct the arbitration process and thus, is liable to be dismissed.

ANALYSIS AND CONCLUSION

12. I have heard learned counsel for the parties and perused the material available on record.

13. The petitioner has placed reliance on the decision of the Coordinate Bench of this Court in ***National Highways Authority of India v. K.K. Sarin & Ors., 2009/DHC/5719***, which discusses the remedies available under the Act concerning challenges to arbitrators, particularly in para No.34, which reads as under:

> *"34. I have also wondered as to whether Section 13(5) leads to an inference that upon the challenge to the*

arbitrator under Section 13(1) being unsuccessful, the only remedy is under Section 34 of the Act inasmuch as Section 13(5) does not make any reference to Section 14. However, if we are to hold so then we would be rendering the de jure inability of the arbitrator to perform his functions otiose. To me, the scheme of the Act appears to be that the challenge has to be first made before the arbitrator in accordance with the Section 13 of the Act and upon such challenge being unsuccessful the challenging party has a remedy of either waiting for the award and if against him to apply under Section 34 of the Act or to immediately after the challenge being unsuccessful approach the court under Section 14 of the Act. The court when so approached under Section 14 of the Act will have to decide whether the case can be decided in a summary fashion. If so, and if the court finds that the case of de jure inability owing to bias is established, the court will terminate the mandate. On the contrary, if the court finds the challenge to be frivolous and vexatious, the petition will be dismissed. But in cases where the court is unable to decide the question summarily, the court would still dismiss the petition reserving the right of the petitioner to take the requisite plea under Section 34 of the Act. This is for the reason of the difference in language in Section 14 and in Section 34 of the Act. While Section 14 provides only for the

court deciding on the termination of the mandate of the arbitrator, Section 34 permits the party alleging bias to furnish proof in support thereof to the court. Section 34(2)(a) is identically worded as Section 48. The Apex Court in relation to Section 48 has in Shin-Etsu Chemicals Co. Ltd Vs Aksh Optifibre Ltd. AIR 2005 SC 3766 held that leading of evidence is permissible.

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

14. In ***Chennai Metro Rail Ltd. (supra)***, the Hon'ble Supreme Court held that only the grounds listed in the Fifth Schedule of the Act are valid. The relevant paragraphs read as under:

"40. Our enactment is in a sense, an improvement. Parliament's conscious effort in amending the Act, because of the inclusion of the Fifth Schedule, as a disclosure requirement, as an eligibility condition [Section 12(1)] and a continuing eligibility condition, for functioning [Section 12(2)] and later, through Section 12(5), the absolute ineligibility conditions that render the appointment, and participation illegal, going to the root of the jurisdiction, divesting the authority of the Tribunal, thus terminating the mandate of the arbitrator, as a consequence of the existence of any condition

enumerated in the Seventh Schedule, are to clear the air of any ambiguities. The only manner of escaping the wrath, so to say of Section 12(5) is the waiver in writing by the party likely to be aggrieved.

41. The attempt by Chennai Metro to say that the concept of de jure ineligibility because of existence of justifiable doubts about impartiality or independence of the Tribunal on unenumerated grounds [or other than those outlined as statutory ineligibility conditions in terms of Section 12(5)], therefore cannot be sustained. We can hardly conceive of grounds other than those mentioned in the said schedule, occasioning an application in terms of Section 12(3). In case, this Court were in fact to make an exception to uphold Chennai Metro's plea, the consequences could well be an explosion in the court docket and other unforeseen results. Skipping the statutory route carefully devised by Parliament can cast yet more spells of uncertainty upon the arbitration process. In other words, the de jure condition is not the key which unlocks the doors that bar challenges, mid-stream, and should "not to unlock the gates which shuts the court out" [Union of India v. Hindustan Development Corpn., (1993) 3 SCC 499 - so said in a different context, about the applicability of the doctrine of legitimate expectation.] from what could potentially become causes of arbitrator challenge, during the course of arbitration

proceedings, other than what the Act specifically provides for."

15. The Coordinate Bench of this Court in ***Union of India v. Reliance Industries Ltd. & Ors., 2022/DHC/005381***, which was upheld by the Hon'ble Supreme Court in ***Union of India v. Reliance Industries Ltd. & Ors., SLP(C) No.594/2023, decided on 09.01.2023,*** held that bias as distinct from de-jure ineligibility would have to be axiomatically established. The relevant paragraph reads as under:

"31. Bias as distinct from the above, would be an issue which would have to axiomatically be established in fact. An allegation of bias would have to be alleged and proven. Viewed in that light, it is manifest that it would clearly fall outside the pale of a de jure disqualification. The view taken by the Court stands fortified from a reading of Section 12(3) of the Act which mandates a party establishing that "circumstances exist" giving rise to a justifiable doubt with respect to the independence or impartiality of an arbitrator."

16. The respondent has placed reliance on ***HRD Corporation (Marcus Oil and Chemical Division) v. GAIL, (2018) 12 SCC 471,*** to urge that once an application under Sections 12 and 13 of the Act stands dismissed, the remedy available is only at the stage of challenging the final award under Section 34 of the Act. The relevant paragraphs read as under:

"12. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become "ineligible" to

be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal

must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal."

17. In ***HRD Corporation (Marcus Oil and Chemical Division) (supra),*** the Hon'ble Supreme Court observed that the Act allows challenges based on "ineligibility" or "justifiable doubts" regarding the independence or impartiality of arbitrator, wherein "ineligibility" is straightforward as per the grounds listed under Seventh Schedule, while "justifiable doubts" as per the grounds listed under Fifth Schedule require a deeper examination of the facts and provide for broader disclosure requirements.

18. I am of the view that the judgment of the Hon'ble Supreme Court in ***HRD Corporation (Marcus Oil and Chemical Division) (supra)*** is clear as regards the scheme of challenge to the mandate of the Arbitral

Tribunal. The Apex Court held that if an arbitrator is found ineligible under Seventh Schedule, the court must intervene, however, challenges under Fifth Schedule can only be raised post-award if they were not addressed earlier and once the arbitrator has come to a finding that there are no justifiable doubts as to the independence or impartiality of the arbitrator, then the Arbitral Tribunal must continue and the remedy would be under Section 34 of the Act. It further ruled that previous professional relationships or past awards do not automatically disqualify an arbitrator unless there is a clear likelihood of bias.

19. The petitioner contended that the failure of the learned arbitrator to disclose his role as an "Observer" of ECL constituted a breach of the disclosure requirements mandated by the Act. The Hon'ble Supreme Court in ***Chennai Metro Rail Ltd. (supra),*** emphasized that only grounds listed in the Fifth Schedule are valid for challenging an independence or impartiality of the learned arbitrator.

20. However, in my opinion, the learned arbitrator had declared his neutrality and independence at the time of his appointment and the subsequent role as an "Observer" of ECL did not inherently create a conflict with his duties as an arbitrator in the present case. Furthermore, the respondent was not even a party to the NCLT and the NCLAT proceedings. The role of the learned arbitrator as an "Observer" of ECL does not constitute a de facto or a de jure disqualification under Fifth or Seventh Schedule of the Act.

21. The contention of the petitioner is based on conjectures and surmises and no cogent and clinching material has been produced to prove bias

on behalf of the learned arbitrator in the present case. Hence, I am of the view that the petitioner has not "*axiomatically established*" any grounds that fall within Fifth or Seventh Schedule of the Act, as held in ***Reliance Industries Ltd. (supra)***.

22. For the said reasons, once the arbitrator has held that there is no justifiable doubt as to his neutrality, impartiality, it will not be proper for this Court to interdict the arbitration proceedings at this stage.

23. The petitioner is at liberty to raise all these issues post-award under the Section 34 petition, if required.

24. The petition is dismissed and disposed of accordingly.

JASMEET SINGH, J

APRIL 24, 2025/sp

(Corrected and released on 07.05.2025)

Click here to check corrigendum, if any