

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 29.08.2019

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

WP(C) No.36 of 2018

Petitioner : Prakash Chand Pradhan

versus

Respondents : Union of India and Another

Petition under Article 226 of the Constitution of India

Appearance

Mr. T.B. Thapa, Senior Advocate with Mr. Ashok Kumar Shahi, Mr. Ranjan Chettri and Mr. Khem Raj Sapkota, Advocates, for the Petitioner.

Mr. Karma Thinlay, Central Government Advocate, for the Respondent No.1.

Mr. Thupden Youngda, Government Advocate, for the Respondent No.2.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The Petitioner calls into question the appointment of the Secretary-cum-Relief Commissioner, Land Revenue and Disaster Management Department, Government of Sikkim, as an Arbitrator, on 08.07.2016 by Respondent No.1, prior to the Petitioner's application, dated 30.05.2018, seeking such appointment. Maintaining that the appointment is bereft of the eligibility criteria laid down in Section 12 read with the Fifth, Sixth and Seventh Schedules of the Arbitration and Conciliation Act of 1996, as amended in 2015, (hereinafter the "Act of 1996"), with no communication of such appointment being made to the Petitioner, he seeks rescission of the Order *supra* and issuance of a Writ of Mandamus or any other applicable Writ,

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directing the Respondent No.1 to appoint a new sole Arbitrator in conformity with the requisite legal provisions.

2. To comprehend the matter, we may briefly advert to the facts as put forth by the Petitioner. Land belonging to the Petitioner on a stretch from kilometre 51.870 to kilometre 53.900 on the National Highway, Rangpo Sub Division, was acquired by the Ministry of Road Transport and Highways, Government of India, in the year 2016, under the National Highways Act, 1956, for widening of the "National Highway 10." This intention was notified in the Gazette of India on 13.04.2016 and on receipt of the Report of the Competent Authority, a Declaration under Section 3D(1) of the National Highways Act, 1956, (hereinafter the "N.H. Act"), was notified on 09.07.2016. After such Declaration, the Petitioner submitted details to the designated Competent Authority about the reasonableness of the price, based *inter alia* on sale of land in the proximity, in the preceding years. The Competent Authority, Respondent No.2, however, ignoring the Petitioner's submissions, served a cheque of Rs.10,92,04,010/- (Rupees ten crores, ninety two lakhs, four thousand and ten) only, to the Petitioner, drawn on the AXIS Bank, Tadong Branch, Gangtok, Sikkim, as compensation. Although the cheque was received by him on 13.01.2017, under protest and without prejudice to his legal rights, nevertheless, aggrieved with the compensation, the Petitioner moved the Respondent No.1 through the Respondent No.2 on 17.01.2017, for appointment of an Arbitrator for determination of fair compensation, under Section 3G(5) of the N.H. Act. When no

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communication of appointment of Arbitrator for over ninety days was received, the Petitioner filed a Petition under Section 11(4), (5) and (6) of the Act of 1996, before this Court on 24.04.2017, being Arbitration P. No. 01 of 2017, for appointment of an Arbitrator. During the Court proceedings, the Respondent No.1 for the first time, informed this Court that the Secretary-cum-Relief Commissioner, Land Revenue and Disaster Management Department, Government of Sikkim, (hereinafter "Secretary, LR&DM Department"), was appointed as an Arbitrator by the Respondent No.1 on 08.07.2016. This appointment was made prior to the date of Declaration and Notification, issued by the Respondent No.1, dated 09.07.2016, for acquisition of the land. Vide its Judgment dated 05.07.2017, this Court appointed an Arbitrator, as prayed. Aggrieved by the Judgment, the General Manager (Projects), National Highways and Infrastructure Development Corporation Limited (hereinafter "NHIDCL") (the Respondent No.2 in the Arbitration P. No. 01 of 2017), was before the Hon'ble Supreme Court, who, by its Order dated 16.05.2018, set aside the Order of this Court with the observation that, an application under Section 11 of the Act of 1996, for appointment of an Arbitrator to determine fair compensation does not apply under the N.H. Act. It was further held that if a demand is made for appointment of an Arbitrator and the Central Government does not appoint an Arbitrator within a reasonable time, the remedy thereof is by way of a Writ Petition or a Suit. Pursuant to the Order dated 16.05.2018 (*supra*), the Petitioner, vide his letter dated 30.05.2018, requested the Central Government to appoint an Arbitrator in

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terms of Section 3G(5) of the N.H. Act, in place of the Secretary, LR&DM Department, whose appointment did not meet the requirements of the Act of 1996, as the Arbitrator is required to be impartial and independent of the Central or State Government and the land owner. Hence, the prayers as detailed hereinabove.

3. Vide Interlocutory Application (I.A.) No.1 of 2019, the Petitioner placed on record a copy of the letter addressed to him by the Respondent No.1, dated 05.09.2018 as also a copy of the Petitioner's related response, dated 02.01.2019. In the said application, the fact of submission of letter dated 30.05.2018, was reiterated. It was averred in response thereto, that the Respondent No.1 issued letter dated 05.09.2018 to the Petitioner, erroneously conveying that the Hon'ble Supreme Court in its Order dated 16.05.2018 has upheld and allowed continuation of the appointment of the Secretary, LR&DM Department as the Arbitrator under Section 3G(5) of the N.H. Act, by the Central Government. In reply, the Petitioner on 02.01.2019, pointed out that no such opinion had been expressed by the Hon'ble Supreme Court in its Order.

4. The Respondent No.1, in his Counter-Affidavit, would state that this Court vide the impugned Judgment, dated 05.07.2017, had appointed Justice A.P. Subba, retired Judge of the High Court of Sikkim, as the Arbitrator on grounds that the Central Government had failed to take steps for such appointment within the prescribed time. The question in respect of neutrality, impartiality and independence of Arbitrator was not

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found relevant to the issue while disposing of the application as being premature. It was also averred that the Hon'ble Supreme Court, in its Order had observed that the argument of Counsel for the Respondents therein (Petitioner herein), that the Arbitrator had now been appointed under Section 11 of the Act of 1996 and therefore no prejudice would be caused if allowed to continue, ignored the fact that Section 11 of the Act of 1996 does not apply and that under Section 3G of the N.H. Act, the Central Government alone can appoint an Arbitrator. Thus, the Petitioner is now estopped from raising the same issue pertaining to the appointment of an Arbitrator. That, in view of the said Order of the Hon'ble Supreme Court, the Writ Petition is barred by *res judicata*, as the issue involved between the said parties has already been decided therein. That, the appointment of an independent and impartial Arbitrator as raised in Paragraph 21 of the instant Writ Petition had been raised before the Hon'ble Supreme Court in the said Civil Appeal and the Court had rejected the same.

5. The Respondent No.2 had no Counter-Affidavit to file and the Petitioner declined Rejoinder to the Counter-Affidavit of Respondent No.1.

6. Learned Senior Counsel for the Petitioner, while deprecating the inaction of the Respondent No.1 with regard to appointment of an Arbitrator despite the Petitioner's letter dated 30.05.2018, contended that the appointment of the Secretary, LR&DM Department is vitiated, being prior in time to any application made by the Petitioner, and an Officer superior in line in the hierarchy to the District Collector, East Sikkim

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(Respondent No.2). The Respondent No.2 is the Competent Authority designated under Section 3A of the N.H. Act and the appointment of the Secretary, LR&DM Department, thereby flouts the spirit of Section 12 and the related Schedules of the Act of 1996. Besides, the Secretary, LR&DM Department, is an Indian Administrative Service ("IAS") Officer and an employee of the Central Government, his service conditions being governed by the Central Government Rules and thus subject to the control of the Central Government. He, therefore, cannot be held to be independent of the Central Government and remain impartial throughout the arbitral proceedings. While urging that the neutrality of Arbitrators is of pivotal concern, strength was drawn from the ratiocination in ***M/s. Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd.***¹. That, the Judgment, while examining Section 12(5) of the Act of 1996 observed that the test of neutrality is not whether, given the circumstances, there is any actual bias but whether the circumstances in question give rise to any justifiable apprehensions of bias. That, in the instant matter, there is indeed a justifiable apprehension of bias in view of the position of the Secretary, LR&DM Department, as posited *supra*, hence the requirement for appointment of an independent and impartial Arbitrator. To further augment his submissions, succour was garnered from ***TRF Limited v. Energo Engineering Projects Limited***². Reliance was also placed on ***Bharat Broadband***

¹ AIR 2017 SC 939

² (2017) 8 SCC 377

Network Limited v. United Telecoms Limited³, wherein the conditions for eligibility of an Arbitrator have been enumerated.

7. In vehement repudiation, learned Counsel Mr. Karma Thinlay for the Respondent No.1, while reiterating the averments in his Counter-Affidavit, would canvass that only the Central Government has the prerogative of appointing an Arbitrator in terms of Section 3G(5) of the N.H. Act, in pursuance to which, an Arbitrator has already been put in place by the Central Government on 08.07.2016. Although this may be prior in time to the Petitioner's application but this was in consideration of the circumstance that it was not only the Petitioner's land that was acquired but also lands of several others being acquired for the selfsame purpose. That, no law debars the Central Government from appointing an Arbitrator prior in time to a petition being filed by an aggrieved party. That, the apprehensions of bias are unsubstantiated and the relevant provisions of law have not been flouted. Contending that the Petitioner ought to appear before the Arbitrator to settle any grievance, it was reasoned by learned Counsel that the Hon'ble Supreme Court has not set aside the appointment of the Arbitrator made on 08.07.2016. While placing reliance on ***Suganthi Suresh Kumar v. Jagdeeshan***⁴, learned Counsel for the Respondent No.1 contended that the High Court cannot override the decision of the Hon'ble Supreme Court. Contending that the matter was already settled by the Orders of the Hon'ble Supreme Court, he drew the attention of this Court to ***Anil Kumar Neotia and Others v. Union of India and***

³ AIR 2019 SC 2434

⁴ (2002) 2 SCC 420

Others⁵ wherein it has been ruled out that once a question is settled by the Hon'ble Supreme Court, it is no longer open for agitation by the Petitioners. Reliance was also placed on **Sabia Khan and Others v. State of U.P. and Others**⁶ to press the argument that the Order of the Hon'ble Supreme Court has not been understood in its correct perspective by the Petitioner insofar as the appointment of the Appellant is concerned. That, the Petitioner cannot question the correctness of the Order of the Court through a petition under Article 226 of the Constitution of India, before this Court when it is settled that there is no irregularity in the appointment of the Arbitrator made on 08.07.2016. Thus, the petition be dismissed.

8. The rival contentions were heard at length, considered and all documents on record duly perused as also the citations made at the Bar.

9. I deem it essential to first refer to the Order of the Hon'ble Supreme Court dated 16.05.2018 in Civil Appeal No. 5250 of 2018 (Arising out of S.L.P. (C) No. 20049 of 2017). This Order came to be pronounced in a challenge to a Judgment of this Court appointing an Arbitrator under Section 11 of the Act of 1996, dated 05.07.2017, in Arb. P. No.01 of 2017 between the Petitioner herein and the Respondents No.1 and 2, and the General Manager (Projects), NHIDCL (as Respondent No.2 in the said petition). Setting aside the Judgment dated 05.07.2017, the Hon'ble Supreme Court in its Order *supra*, considered Section 3G

⁵ (1998) 2 SCC 587

⁶ (1999) 1 SCC 271

of the N.H. Act dealt with Sub Sections 5 and 6 of Section 3G and *inter alia* held as follows;

"A cursory reading of sub-section (5) shows us that appointment of the arbitrator under the said sub-section is only in the hands of the Central Government. Sub-section (6) begins with the important expression "subject to the provisions of this Act", the provisions of the Arbitration and Conciliation Act, 1996 shall apply.

Having heard learned counsel for the parties, we are, therefore, of the view that a Section 11 application under the 1996 Act cannot be made as the Central Government alone is to determine who is to be an arbitrator under Section 3-G (5) of the National Highways Act. If a demand is made for the appointment of an arbitrator, and the Central Government does not appoint an arbitrator within a reasonable time, the remedy that is to be availed of is a writ petition or a suit for the said purpose, and not Section 11 of the Arbitration and Conciliation Act, 1996.

A similar provision contained in Section 86 (1)(f) of the Electricity Act, 2003 specifically gives the State Commission power to refer any dispute for arbitration. In this view of the matter, this Court in Gujarat Urja Vikas Nigam Ltd. vs. Essar Power Ltd., (2008) 4 SCC 755, held as under:

"28. Section 86(1)(f) is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating companies. It is well settled that the special law overrides the general law. Hence, in our opinion, Section 11 of the Arbitration and Conciliation Act, 1996 has no application to the question who can adjudicate/arbitrate disputes between licensees and generating companies, and only Section 86(1)(f) shall apply in such a situation."

We respectfully agree with the ratio of the said judgment. Likewise, Section 3-G of the National Highways Act is a special provision which will be given effect insofar as the appointment of an arbitrator is concerned.

Learned counsel appearing on behalf of the respondents has, however, argued that an arbitrator has now been appointed under Section 11 of the Arbitration and Conciliation Act, 1996 and, that, therefore, no prejudice will be caused if he is allowed to continue. This argument ignores the fact that Section 11 of the Arbitration and Conciliation Act does not apply and that, under Section 3-G, the Central Government alone can appoint an arbitrator.

Accordingly, the impugned Judgment is set aside and the appeals are allowed. ..."

The Hon'ble Supreme Court has thus spelt out that Section 3G of the N.H. Act is a special provision which will be effected insofar

as appointment of an Arbitrator is concerned. The provisions of Section 3G(5) and (6) of the said Act, have been lucidly explained as also the legal position that it envisages.

10. For convenience, Section 3G (5) and (6) of the N.H. Act is extracted hereinbelow;

"3G. Determination of amount payable as compensation. – (1) ...
 (2) ...
 (3) ...
 (4) ...
 (5) If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount shall, **on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government.**
 (6) Subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act.
 ..."

(emphasis supplied)

Section 3G(5) *supra* specifically provides that should the compensation determined by the Competent Authority be unacceptable to either of the parties, an Arbitrator shall determine the amount on an application by either of the parties. The Arbitrator is to be appointed by the Central Government. In my considered opinion, the Section provides with clarity that appointment of an Arbitrator shall be subsequent to an application made by either of the parties, on dissatisfaction of either party of the amount of compensation determined by the Competent Authority. At this juncture, it may suitably be noted that the application for appointment of an Arbitrator was made by the Petitioner on 30.05.2018 while the Notification of intention of acquisition was published on 13.04.2016 and Declaration of acquisition notified on 09.07.2016, by the Respondent No.1. Curiously, despite the above position, the

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Arbitrator was appointed on 08.07.2016 itself, even before the Declaration of 09.07.2016, was notified. The Respondent No.1 has failed to satisfy this Court as to which provision permits such a step and allows them to bypass or circumvent the provisions of the statute. The law does not envisage putting an Arbitrator in place preceding an application of any aggrieved party or for that matter, before publication of notification of Declaration.

11. That having been said, Section 12 of the Act of 1996, has to be given due consideration in tandem with the Fifth, Sixth and Seventh Schedules of the Act. Section 12, it may be stated, provides for grounds of challenge to the appointment of an Arbitrator, which, to prevent prolixity, are not extracted herein. The provisions of the Fifth and Seventh Schedules of the Act of 1996, relied on by the Petitioner, provides as follows;

"THE FIFTH SCHEDULE
[See section 12(1)(b)]

The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators:

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.
2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.
3. ...
4. ...
5. ...
6. ...
7. ...
8. ...
9. ...
10. ...
11. ...
12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.
13. ...
14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

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Relationship of the arbitrator to the dispute

15. ...
16. The arbitrator has previous involvement in the case."

"THE SEVENTH SCHEDULE
[See section 12(5)]

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.
2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.
3. ...
4. ...
5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.
6. ...
7. ...
8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.
9. ...
10. ...
11. ...
12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.
13. ...
14. ...

Relationship of the arbitrator to the dispute

15. ...
16. The arbitrator has previous involvement in the case."

A bare perusal of the provisions extracted hereinabove prohibits appointment of a person as an Arbitrator, should the conditions enumerated therein be fulfilled. Apart from the above two Schedules, the Sixth Schedule requires the Arbitrator to disclose 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 the Arbitrator's independence or impartiality. It is the Petitioner's case that no such disclosure

was made by the Arbitrator who is a Central Government employee.

12. We may, thus, examine whether the appointment of the Arbitrator stands vitiated on account of non-compliance of the mandate of the statutes. In this context, we may appositely refer to ***Bharat Broadband Network Limited (supra)***. The Hon'ble Supreme Court was considering an Appeal filed by Bharat Broadband Network Limited against the United Telecoms Limited. The Appellant floated a tender dated 05.08.2013 for installation of certain equipments. The Respondent was the successful bidder. The conditions of Contract provided for arbitration. As disputes and differences arose between the parties, the Respondent invoked the Arbitration Clause vide letter dated 03.01.2017 and called upon the Appellant's Chairman and Managing Director to appoint an independent and impartial Arbitrator. One K.H. Khan was appointed as the sole Arbitrator on 17.01.2017. In the meanwhile, on 03.07.2017, the Hon'ble Supreme Court vide its Judgment in ***TRF Limited (supra)*** held that since a Managing Director of a Company, which was one of the parties to the arbitration was himself ineligible to act as Arbitrator, such ineligible person could not appoint an Arbitrator and any such appointment would have to be held null and void. Consequently, the Appellant, Bharat Broadband Network Limited, itself having appointed the aforesaid sole Arbitrator, referred to the Judgment *supra* and stated that being a declaration of law, appointments of Arbitrators made prior to the Judgment are not saved. Thus, the prayer before the sole

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Arbitrator was that since he is *de jure* unable to perform his function as Arbitrator, he should withdraw from the proceedings to allow the parties to approach the Hon'ble Court for appointment of a substitute Arbitrator in his place. Shri Khan on 21.10.2017, rejected the Appellant's application after hearing both sides sans reasons. The petition thus came to be filed before the Hon'ble High Court of Delhi on 28.10.2017 under Sections 14 and 15 of the Act of 1996 stating that the Arbitrator had become *de jure* incapable of acting as such and a substitute Arbitrator be appointed. The Hon'ble High Court of Delhi, vide the impugned Judgment dated 22.11.2017 rejected the petition stating that the very person who appointed the Arbitrator is estopped from raising a plea that such Arbitrator cannot be appointed after participating in the proceedings. It was also pointed out that under the proviso to Section 12 (5) of the Act of 1996, the Appellant had appointed Shri Khan while the Respondent had filed a statement of claim without any reservation in writing, which would amount to an express agreement in writing and, therefore be a waiver to the applicability of Section 12 (5) of the Act of 1996. In Appeal, the Hon'ble Supreme Court, discussed the ratiocinations in ***Voestalpine Schienen GMBH (supra)***, ***HRD Corporation v. GAIL (India) Ltd.***⁷ and ***TRF Ltd. (supra)***, which had dealt with Section 12(5) of the Act of 1996, the Fifth and Seventh Schedules of the Act of 1996, as also the indispensable requirement of impartiality

⁷ (2018) 12 SCC 471

and neutrality in an Arbitrator. The Hon'ble Supreme Court concluded as hereinbelow;

"14. From a conspectus of the above decisions, it is clear that Section 12(1), as substituted by the Arbitration and Conciliation (Amendment) Act, 2015 ["Amendment Act, 2015"], makes it clear that when a person is approached in connection with his possible appointment as an arbitrator, it is his duty to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence and impartiality. The disclosure is to be made in the form specified in the Sixth Schedule, and the grounds stated in the Fifth Schedule are to serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. ...

15. Section 12(5), on the other hand, is a new provision which relates to the *de jure* inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non-obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a personal falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. ..."

Resultantly, the Appeals were allowed, the impugned Judgment set aside and the High Court was to appoint a substitute Arbitrator with the consent of both parties.

13. It would be worthwhile to notice that in ***Voestalpine Schienen GMBH (supra)***, the Hon'ble Supreme Court held as follows;

"23. It also cannot be denied that the Seventh Schedule is based on IBA guidelines which are clearly regarded as a representation of international based practices and are based on statutes, case law and juristic opinion from a cross-section on jurisdiction. It is so mentioned in the guidelines itself."

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"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 competent 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 person empanelled by the respondent are not covered by any of the items in the said list."

In **HRD Corporation v. GAIL (India) Ltd.**⁸, it was held as hereinbelow;

"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 **TRF Ltd.** (*supra*) the Hon'ble Supreme Court held as under;

"50. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the

⁸ (2018) 12 SCC 471

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Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. ...”

14. More recently, on 27.08.2019, the Hon’ble Supreme Court, in ***National Highways Authority of India v. Sayedabad Tea Company Ltd. and Ors.***⁹, while agreeing with the legal position expounded in ***General Manager (Project), National Highways and Infrastructure Development Corporation Ltd. v. Prakash Chand Pradhan & Ors.*** and discussing Section 3G(5) of the N.H. Act, would also elaborate as follows;

“**16.** ... It is a comprehensive code and a special enactment which provides an inbuilt mechanism not only in initiating acquisition until culmination of the proceedings in determining the compensation and its adjudication by the Arbitrator to be appointed by the Central Government and if still remain dissatisfied, by the Court of law.

17. In compliance of the mandate of Sections 3A to 3F of the Act, 1956, after the land is acquired, there shall be paid an amount of compensation which shall be determined by an order of the competent authority under sub-sections (1) or (2) of Section 3G of the Act, 1956 and any person who is aggrieved by the amount so determined by the competent authority or what being determined is not acceptable to either of the parties, on an application being filed by either of the parties, has to be determined by the Arbitrator to be appointed by the Central Government in terms of sub-section (5) of Section 3G of the Act, 1956.”

This Judgment postulates with clarity that if the amount determined by the Competent Authority is not to the satisfaction of any aggrieved person, on an application being filed by either of the parties, the Central Government is to appoint an Arbitrator for determination of the compensation amount, in

⁹ Civil Appeal No(s).6958-6959 of 2009

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terms of Sub Section 5 of Section 3G of the N.H. Act. The appointment of an Arbitrator it emanates, is obviously to be followed by an application filed by any aggrieved party.

15. On the bedrock of these precedents, in the matter at hand, it goes without saying that the Arbitrator i.e. the Secretary, LR&DM Department, is an IAS Officer. The Respondent No.1, is the Secretary, Ministry of Road Transport and Highways. Both are part and parcel of the Central Government, IAS Officers being Central Government Officers working under the State Governments. These Officers are recruited and trained by the Central Government and then allotted to different State cadres. In the same thread, the District Collector, East District, Respondent No.2, being a Government servant, is subordinate to the Respondent No.1. Even assuming that the District Collector belongs to the State cadre, he is subordinate to the Secretary, LR&DM Department. The parties in dispute must have the confidence that they would be meted out even handed justice by the Arbitrator on the edifice of the presumption that he is independent and impartial. Should there be existence, either direct or indirect, of a relationship of the sole Arbitrator with any of the parties, professional or otherwise, as envisaged in the Fifth and Seventh Schedules of the Act of 1996, this is likely to give rise to justifiable doubts as to his independence or impartiality. A cursory reading of the provisions of the Fifth and Seventh Schedules of the Act of 1996, would indicate that these provisions have clearly been circumvented by the Respondent

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No.1, as also the Sixth Schedule of the Act. Besides which, the appointment of the Secretary, LR&DM Department, has been made prior in time to the application of the Petitioner.

16. To address the argument of the Respondent No.1 that the question of neutrality, impartiality and independence of the Arbitrator was not found relevant, in the impugned Judgment of this Court dated 05.07.2017, it would be relevant to point out that the Court has qualified the statement by adding that,

"The appointment of the Arbitrator made by the Central Government before 08th July 2016 is found as invalid. In such view, the Court is not inclined to examine this issue at this stage as it is premature."

17. The further contention of the Respondent No.1 that the Petitioner is estopped from raising the issue pertaining to appointment of Arbitrator in view of the Order of the Hon'ble Supreme Court dated 16.05.2018 is unfathomable and appears to be an incorrect interpretation of the said Order. The Order clearly spells out as follows;

"... Learned counsel appearing on behalf of the respondents has, however, argued that an arbitrator has now been appointed under Section 11 of the Arbitration and Conciliation Act, 1996 and, that, therefore, no prejudice will be caused if he is allowed to continue. This arguments ignores the fact that Section 11 of the Arbitration and Conciliation Act does not apply and that, under Section 3-G, the Central Government alone can appoint an arbitrator. ..."

One of the Respondents before the Hon'ble Supreme Court, is the Petitioner in the instant petition. Obvious reference was being made to the appointment of Justice A.P. Subba as the Arbitrator, vide the impugned Judgment of this Court, dated 05.07.2017. On this question, the Hon'ble Supreme Court has clarified that this argument of the Respondents therein (the

Petitioner here), ignores the fact that Section 11 of the Act of 1996 does not apply as under Section 3G of the N.H. Act, the Central Government alone can appoint an Arbitrator. It clarifies the position of law that the appointment of an Arbitrator under Section 11 of the Act of 1996 is inapplicable to matters as the instant one. The merits of the appointment of Secretary, LR&DM Department, as an Arbitrator on 08.07.2016, as sought to be made out by Respondent No.1, in its correspondence dated 05.09.2018, has not been discussed by the Hon'ble Supreme Court. Neither does the Order observe that such appointment is upheld by the Hon'ble Supreme Court. It is undisputed that the Respondent No.1 is clothed with the powers to appoint an Arbitrator but this is in compliance to the provisions of Section 3G(5) of the N.H. Act, and not otherwise. Therefore, in my considered opinion, the Order of the Hon'ble Supreme Court has been misconceived and misinterpreted by the Respondent No.1. No question of the Petitioner being estopped from raising the issue pertaining to appointment of Arbitrator arises.

18. The averment of the Respondent No.1 that the Hon'ble Supreme Court had rejected the contention of the Petitioner seeking appointment of an independent and impartial Arbitrator, is shorn of any truth, and is to say the least, a ludicrous interpretation. The ratiocinations discussed hereinabove clearly reflects the stance of the Hon'ble Supreme Court on this aspect and it has been expounded without any ambiguity that neutrality, independence and impartiality, are the hallmark of an Arbitrator which has to be maintained. This Court is by no stretch of the imagination making any effort to go

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beyond the Order of the Hon'ble Supreme Court, being well aware of the sanctity of Article 141 and Article 144 of the Constitution, thus, the Judgments relied on by learned Counsel for the Respondent No.1, in this context, are of no assistance to his case.

19. In view of the discussions that have ensued hereinabove, the Writ Petition is allowed and disposed of, with the following directions;

- (i) The Order dated 08.07.2016 issued by the Respondent No.1 stands rescinded;
- (ii) The Respondent No.1 is hereby directed to appoint a new sole Arbitrator in terms of Section 3G(5) of the N.H. Act duly conforming with the provisions of Section 12 of the Act of 1996, as amended in the year 2015, and adhering with the Fifth, Sixth and Seventh Schedules of the said Act.

20. No order as to costs.

(Meenakshi Madan Rai)

Judge
29.08.2019