

(2005) 12 MP CK 0045

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 2081 of 2002

G.S. Gyani and Company

APPELLANT

Vs

Oriental Electric and Engineering Co. and Another

RESPONDENT

Date of Decision : 05-12-2005

Acts Referred:

Arbitration Act, 1940 — Section 5

Arbitration and Conciliation Act, 1996 — Section 10, 11, 12, 12(1), 12(2)

Citation : (2006) ILR (MP) 80 : (2006) 3 JLJ 271 : (2006) 1 MPHT 354 : (2006) 2 MPJR 198 : (2006) 2 MPLJ 530

Hon'ble Judges : S.S. Dwivedi, J;K.K. Lahoti, J

Bench : Division Bench

Advocate : Shobha Menon and P.L. Shrivastava, for the Appellant;

Final Decision : Allowed

Judgement

This is an appeal u/s 37 of the Arbitration and Conciliation Act, 1996 assailing judgment dated 23-8-2002 passed by the 5th Additional District Judge, Bhopal in Arbitration Case No. 81/2002 b which the objection raised by the respondents in respect of misconduct of the arbitrator sustained and award has been set aside.

Respondents in spite of service have not cause their appearance.

The facts of the case are that there was an agreement between the appellant and respondent No. 1. Para 12 of the contract provides an arbitration clause in respect of any dispute between the parties. Both the parties were entitled for appointment of one arbitrator each. But in case of no consensus, parties were free to approach the Court for appointment of the arbitrator. Appellant filed a Civil Suit No. 61-A/95 before the 5th Additional District Judge, Bhopal for appointment of the arbitrator which was allowed by judgment dated 4-4-2000. Both the parties proposed the name of arbitrator Shri S.N. Johri, Advocate and with the consent of the parties, it was directed that the proceedings shall be held at Bhopal. As both the parties consented for the appointment of Shri S.N. Johri as arbitrator, 5th Additional District Judge, Bhopal while deciding the application

directed to seek consent of Shri S.N. Johri to act as an arbitrator. When Shri Johri was intimated, he submitted his consent vide letter dated 15-5-2000. As this consent letter is important for the decision of the case, entire letter of consent is quoted hereinunder :-

S.N. Johri Bhopal Advocate Dated 15-5-2000 HIG-137/E-7, Arera Colony Consent Letter

I have no objection in being appointed as arbitrator in the civil case Gurudeo Singh Gyani v. Oriental Electrical Pvt. Ltd. provided suitable fee is settled by the Honourable Court. It is however my duty to inform the parties and their advocates" as well as the Hon. Court that I had been appearing as a Counsel for Shri Gurudeo Singh Gyani & Co. before the M.P. Arbitration Tribunal, Bhopal.

Sd/- (15-5-2000) (S.N. Johri)

The Court after receiving the consent letter appointed Shri S.N. Johri as arbitrator. On being appointed as arbitrator, Shri Johri intimated both parties for participation in the arbitration proceedings. Respondent No. 1 in place of appearing before the arbitrator sent a letter to the arbitrator that in the consent letter sent to the Court, arbitrator has intimated to the Court that he is appearing in some of the case on behalf of M/s. G.S. Gyani & Company as an Advocate. He has applied to the Court for appointment of another Advocate as an arbitrator. A copy of the application was enclosed along with the letter and it was telephonically intimated to him to adjourn the hearing of the case. The arbitrator relying on the aforesaid communication adjourned hearing for 10-8-2000 awaiting further orders from the Court. On 22-8-2000, letter dated 14-8-2000 of Shri S.C. Godha, Advocate was taken on record and the arbitrator taking cognizance of Section 13 of the Arbitration and Conciliation Act, 1996 (hereinafter to referred to as the "Act") adjourned the hearing of case for 9-9-2000. On 9-9-2000, the arbitrator again adjourned the hearing for 5-10-2000, awaiting further orders from the Court. On 5-10-2000, nobody appeared on behalf of the respondent nor any communication was received from the Court. So the case was adjourned to 30-10-2000. The aforesaid proceedings were communicated to S.C. Godha, Advocate for respondent by registered A.D. post by the arbitrator. As nothing was received by the arbitrator in respect of the fate of application filed by Shri S.C. Godha, arbitrator proceeded in the matter. Respondent was also proceeded ex parte and after considering the case, arbitrator passed an award for Rs. 6,74,796/- with interest at the rate of 18% per month from the date of filing of the civil suit till full payment is made alongwith Counsel's fee and expenses on 6-12-2000.

Respondent filed an application u/s 34 of the Arbitration and Conciliation Act, 1996 for setting aside the arbitrator award. Before Court, sole ground was agitated that the arbitrator has misconducted and the arbitral award is liable to be set aside u/s 34 of the Act. The sole contention raised before the Court was that Shri S.N. Johri was not entitled to be appointed as arbitrator as he was an

advocate on behalf of the appellant M/s. G.S. Gyani & Company and on knowing this fact, respondent raised this objection before the Court and requested to the arbitrator not to proceed. Because of the strike of the advocates, no action was taken by the Court. After withdrawal of the strike on 7-11-2000, respondent filed an application under s. 12, 13 and 15 of the Act on which the Court on 7-11-2000 directed the arbitrator not to proceed with the arbitration case and to maintain status-quo. The arbitrator without acting on the direction of the Court passed the award on 6-12-2000. At the time when name of Shri S.N. Johri was proposed, the appellant was having knowledge that Shri Johri had been his Counsel but the appellant willfully concealed this fact. Apart from this, Shri Johri ought not to have accepted the proposal on moral ground and he ought to have informed this fact to the appellant or his Counsel. Though the arbitrator has mentioned this fact in the last line of the consent letter but this shows that he concealed this fact. Apart from this, this act of arbitrator falls within the purview of the misconduct. Between 15-10-2000 to 30-10-2000 there was strike of the advocates and the respondent was at Calcutta and could not appear in the arbitration proceedings. The arbitrator knowing it well proceeded ex parte. When the application was filed, the arbitrator passed the award and no notice of proceedings dated 25-11-2000 was sent to the respondent. The respondent could file his complete claim before the arbitrator. The documents which are referred in the arbitral award, how reached to the arbitrator has not been explained. Stamps purchased by the arbitrator belongs to one day prior to the date of award which shows entire arbitration proceedings suspicious. The award has been passed without affording an opportunity to the respondent which also falls within the purview of misconduct. On these grounds the award was sought to be set aside.

Though the arbitrator was made a party to the application but he had not filed any reply.

Appellant contested the case on following grounds :-

(i) That, Shri S.N. Johri at the time of sending consent has disclosed the fact that at one point of time he appeared on behalf of the appellant before the M.P. Arbitration Tribunal, Bhopal. The Court while appointing Shri Johri as arbitrator has noticed this fact.

(ii) That, Shri Johri was appointed with the consent of both the parties. Respondent has not filed an application in accordance with the provisions of Section 13 of the Act and willfully remained ex parte in the proceedings.

(iii) There was no misconduct on the part of the arbitrator nor on the aforesaid grounds, arbitral award can be set aside.

(iv) The Court below considered the sole ground that the arbitrator Shri S.N. Johri was an advocate at one point of time on behalf of the appellant. This fact was brought into his notice by the arbitrator by a written intimation and the appellant at the time of the proposal of the name of arbitrator was aware with

the fact that Shri S.N. Johri had been his Counsel. On this ground, u/s 13 of the Act, arbitrator was not under obligation to stay the arbitration proceedings but he ought to have stayed the proceedings for a reasonable time seeking interim order from the Court, and he has done so.

The Court below considering the objections raised by respondents held that there is a doubt in respect of impartiality of the arbitrator and on the principles of natural justice, arbitral award deserves to be set aside and consequently, the award has been set aside by the Court. This order is under challenge in this appeal.

Learned Counsel for appellant submitted :-

(i) That the arbitrator was appointed with the consent of the parties. Name of Shri Johri was proposed by both the parties by a joint prayer as reflects from the order dated 4-4-2000.

(ii) Shri Johri though appeared at one point of time long back on behalf of the appellant in one case before the M.P. Arbitration Tribunal, Bhopal. But at the time when he was appointed as an arbitrator or thereafter, he was not appearing in any of the cases on behalf of the appellant. The arbitrator in his consent letter dated 15-5-2000 specifically disclosed this fact to the Court that he had been appearing as a Counsel for the appellant before the M.P. Arbitration Tribunal, Bhopal. This fact was within the knowledge of the parties and of the Court that Shri Johri has disclosed this fact in the consent letter and the Court knowing it well had appointed Shri Johri as an arbitrator.

(iii) The arbitrator extended sufficient opportunities to the respondent for challenging appointment of the arbitrator by approaching the Court u/s 13 of the Act. There is provision in Section 13 of the Act to challenge the Arbitral Tribunal before the Court. If no challenge was made or no order was passed by the Court, the arbitrator rightly proceeded with the matter. In these circumstances, there was no misconduct on the part of the arbitrator.

(iv) That a Counsel if at one point of time had appeared on behalf of the party will not be a sole ground to presume some misconduct of arbitrator. Something more about partiality or otherwise has to be shown. At the time of the appointment of arbitrator, this fact was disclosed by the arbitrator and the Court in its wisdom knowing it well approved the appointment of the arbitrator. There is no bar in any enactment in this regard and until and unless there is some bar, merely an Advocate at one point of time appeared on behalf of the parties does not debar him to act as an arbitrator or to appear on behalf of some other party in subsequent litigation. Counsel is engaged in a particular case. He is paid for the case and after completion of that case, he ceases to be an advocate of that party. Thereafter, he is free to appear on behalf of any other party even against that party and that act does not fall within purview of misconduct.

(v) Until and unless respondent No. 1 was able to show some extraneous act or

misconduct of the arbitrator in this regard, arbitral award ought not to have been set aside by the Court merely on this ground. Appellant has placed reliance to the Apex Court judgments in International Airports Authority of India Vs. K.D. Bali and Anr, , Jiwan Kumar Lohia and another Vs. Durgadutt Lohia and others, , Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others, and Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., . Reliance is also placed to a judgment of Sind High Court in Thadomal v. Mengharaj AIR 1930 Sin 190 and page No. 779 of 10th Edition of Laws of Arbitration & Conciliation by N.D. Basu and submitted that this appeal be allowed and order passed by the Court below be set aside.

Before appreciating the contention of the appellant, it will be appropriate to refer aforesaid law laid down by the Apex Court. In International Airport Authority of India, (supra), the Apex Court considering apprehension of bias of arbitrator held that it must be judged from a healthy, reasonable and average point of view. The Apex Court held thus :-

Several points were taken in support of the application for revocation. It was sought to be urged that the petitioner had lost confidence in the sole arbitrator and was apprehensive that the arbitrator was biased against the petitioner. It is necessary to reiterate before proceeding further what are the parameters by which an appointed arbitrator on the application of a party can be removed. It is well settled that there must be purity in the administration of justice as well as in administration of quasi justice as are involved in the adjudicatory process before the arbitrators. It is well said that once the arbitrator enters in an arbitration, the arbitrator must not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. It is not a question of the effect which misconduct on his part had in fact upon the result of the proceeding, but of what effect it might possibly have produced. It is not enough to show that even if there was misconduct on his part, the award was unaffected by it, and was in reality just; arbitrator must not do anything which is not in itself fair and impartial. See Russel on Arbitration, 18th Edition page 378 and observations of Justice Boyd in Re Brien and Brien (1910) 2 IR 84 . Lord O'Brien in King (De Vesci) v. Justices of Queen's County (1908) 2 IR 285, observed as follows: "By bias I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must in my opinion be reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that their vague suspicions of whimsical capricious and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds was reasonably generated and but certainly mere flimsy ground elusively generated and morbid suspicions should not be permitted to form a ground of decision.

(Emphasis supplied)

See Queen v. Rand (1866) 1 QB 230 : Ramnath Prasad Vs. The Collector of Darbhanga and Others, : Queen v. Meyer (1875) 1 QBD 173 and Eckersley v.

Mersey Docks and Harbour Board (1894) 2 QB 667.

In the words of Lord O'Brien, LCJ there must be a real likelihood of bias. It is well settled that there must be a real likelihood of bias and not mere suspicion of bias before the proceedings can be quashed on the ground that the person conducting the proceedings is disqualified by interest. See in this connection Gullapalli Nageswara Rao etc. Vs. The State of Andhra Pradesh and Others, and Mineral Development Ltd. Vs. The State of Bihar and Another, . Recently this Court in a slightly different context in Ranjit Thakur Vs. Union of India (UOI) and Others, , had occasion to consider the test of bias of the Judge. But there must be reasonableness of the apprehension of bias in the mind of the party. The purity of administration requires that the party to the proceedings should not have apprehension that the authority is biased and is likely to decide against the party. But we agree with the learned Judge of the High Court that it is equally true that it is not every suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is biased. The apprehension must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person. While on this point we reiterate that learned Counsel appearing for the petitioner in his submissions made a strong plea that his client was hurt and had apprehension because the arbitrator being the appointee of his client was not acceding to the request of his client which the petitioner considered to be reasonable. We have heard this submission with certain amount of discomfiture because it can not be and we hope it should never be in a judicial or a quasi-judicial proceeding a party who is a party to the appointment could seek the removal of an appointed authority or arbitrator on the ground that appointee being his nominee had not acceded to his prayer about the conduct of the proceeding. It will be a sad day in the administration of justice if such be the state of law. Fortunately, it is not so. Vague suspicions of whimsical, capricious and unreasonable people are not our standard to regulate our vision. It is the reasonableness and the apprehension of an average honest man that must be taken note of. In the aforesaid light, if the alleged grounds of apprehension of bias are examined, we find no substance in them. It may be mentioned that the arbitrator was appointed by the Chief Engineer of the petitioner, who is in the service of the petitioner.

In Jiwan Kumar Lohia (supra), the Apex Court considering the ground of bias and revocation of authority of arbitrator held that the Court should exercise power of revocation sparingly and cautiously on being satisfied that refusal to revoke will result in substantial miscarriage of justice. The Apex Court held thus :-

5. The revocation of the authority of the arbitrator was sought by the respondent applicants before the High Court on the ground of bias on the part of the arbitrator. With regard to bias in relation to a Judicial Tribunal the test that is applied is not whether in fact a bias has affected the judgment but whether a litigant could reasonably apprehend that a bias attributable to a member of the Tribunal might have operated against him in the final decision of the Tribunal

(Manaklal v. Dr. Prem Chand). In *Ranjit Thakur v. Union of India*, this Court has laid down that "the test of likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely" whether the person concerned "was likely to be disposed to decide the matter only in a particular way". These tests would also apply to an arbitrator. But while considering whether there is a reasonable ground for apprehension that the arbitrator will be biased, on an application u/s 5 of the Arbitration Act, 1940, the Court should be satisfied that substantial miscarriage of justice will take place in the event of its refusal of the said application. The discretion to give leave to revoke an arbitrator's authority has to be exercised cautiously and sparingly and while doing so the Court must bear in mind that arbitration is a particular method for the settlement of disputes and parties should not be relieved from a Tribunal they have chosen because they fear that the arbitrator's decision may go against them. (See *Amarchand Lalitkumar v. Shree Ambika Jute Milk Ltd.*)

In *Konkan Railway Corporation Ltd.* (supra), the Apex Court held thus:-

20. It might be that though the Chief Justice or his designate might have taken all due care to nominate an independent and impartial arbitrator, a party in a given case may have justifiable doubts about that arbitrators' independence or impartiality. In that event it would be open to that party to challenge the arbitrator nominated u/s 12, adopting the procedure u/s 13. There is no reason whatever to conclude that the grounds for challenge u/s 13 are not available only because arbitrator has been nominated by the Chief Justice or his designate u/s 11.

In *Narayan Prasad Lohiya* (supra), the Apex Court held thus :-

Even otherwise, under the said Act the grounds of challenge to an arbitral award are very limited. Now an award can be set aside only on grounds of challenge under Sections 12, 13 and 16 provided such a challenge is first raised before the Arbitral Tribunal and has been rejected by the Arbitral Tribunal. The only other provision is Section 34 of the said Act. The only ground, which could be pressed in service by Mr. Venugopal is that provided u/s 34(2)(a)(v). Again Section 34(2)(a)(v) has been extracted hereinabove. According to Mr. Venugopal if the composition of the Arbitral Tribunal or the arbitral procedure, even though it may be in accordance with the agreement of the parties, is in conflict with the provision of the Act from which the parties cannot derogate, then the party is entitled to have the award set aside. He submits that the words "unless such agreement was in conflict with a provision of this part from which the parties cannot derogate" as well as the words "failing such agreement" show that an award can be set aside the agreement is in conflict with a provision of Part I of the said Act or there is no agreement which is in consonance with the provisions of Part I of the said Act. In other words, according to Mr. Venugopal, even if the composition or procedure is in accordance with the agreement of the parties an award can be set aside if the composition or procedure is in conflict with the provisions of Part I of the said Act. According to Mr. Venugopal the words "failing

such agreement" do not mean that there should be no agreement in respect of the composition of the Tribunal or the arbitral procedure. According to Mr. Venugopal, an agreement in respect of the composition of the Arbitral Tribunal or arbitral procedure which is not consonance with the provision of Part I of the said Act would be invalid in law and therefore would be covered by the phrase "failing such agreement". He submits that the words "failing such agreement" mean failing an agreement which is in consonance with a provision of Part I of the said Act. He submits that Section 34(2)(a)(v) entitles the respondents to challenge the award and have it set aside.

In our view, Section 34(2)(a)(v) cannot be read in the manner as suggested. Section 34(2)(a)(v) only applies if "the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties". These opening words make it very clear that if the composition of the Arbitral Tribunal or the arbitral procedure is in accordance with the agreement of the parties, as in this case, then there can be no challenge under this provision. The question of "unless such agreement was in conflict with the provisions of this part" would only arise if the composition of the Arbitral Tribunal or the arbitral procedure is not in accordance with the agreement of the parties. When the composition of the procedure is not in accordance with the agreement of the parties then the parties get a right to challenge the award. But even in such a case the right to challenge the award is restricted. The challenge can only be provided the agreement of the parties is in conflict with a provision of Part I from which the parties cannot derogate. In other words, even if the composition of the Arbitral Tribunal or the arbitral procedure is not in accordance with the agreement of the parties but if such composition or procedure is in accordance with the provisions of the said Act, then the party cannot challenge the award. The words "failing such agreement" have reference to an agreement providing for the composition of the Arbitral Tribunal or the arbitral procedure. They would come into play only if there is no agreement providing for the composition of the Arbitral Tribunal or the arbitral procedure. If there is no agreement providing for the composition of the Arbitral Tribunal or the arbitral procedure and the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with Part I of the said Act then also a challenge to the award would be available. Thus so long as the composition of the Arbitral Tribunal or the arbitral procedure are in accordance with the agreement of the parties. Section 34 does not permit challenge to an award merely on the ground that the composition of the Arbitral Tribunal was in conflict with the provisions of Part I of the said Act. This also indicates that Section 10 is a derogable provision.

Respondents 1 and 2 not having raised any objection to the composition of the Arbitral Tribunal, as provided in Section 16, they must be deemed to have waived their right to object.

In this case, the only question is whether respondent No. 2, who had been an advocate at one point of time on behalf of the appellant was suffering from any

disability from appointing as an arbitrator or he ought to have denied arbitration and accepting arbitration falls within the purview of "misconduct". Respondent No. 2 was engaged as a Counsel in some arbitration matter before the M.P. Arbitration Tribunal for the appellant. Aforesaid case was not pending when the respondent No. 2 was appointed as an arbitrator. It is also stated at the Bar that thereafter respondent No. 2 had not appeared on behalf of the appellant in any case nor any case was pending at the time of his appointment as arbitrator. Both parties consented to the name of respondent No. 2, meaning thereby respondent No. 2 is a man of reputation and was acceptable by both parties. Both parties knowing this fact had consented to his name which reflects from order dated 4-4-2000 by the Court. Thereafter, when the consent of respondent No. 2 was sought, he gave his consent. While giving consent he disclosed the fact that at one point of time he was Counsel for the appellant. This is not a case where arbitrator concealed this fact and accepted appointment. The Court which appointed respondent No. 2 as arbitrator was well aware with the fact at the time of the appointment and issuing the order of appointment of arbitrator that the respondent No. 2 happened to be an advocate on behalf of the appellant at one point of time. With the open eyes and knowing this fact, respondent No. 2 was appointed as an arbitrator. There is no bar under the Advocate Act or under the rules of Bar Council that such an advocate who once appeared in one case on behalf of a particular party shall not appear against that party in subsequent litigation. An advocate is appointed for a particular case. He is paid only for that case and is having relation of advocate and client for that case only. After conclusion of that case, aforesaid relation comes to an end. Until and unless Counsel is having personal interest or some relationship with the litigant, then he suffers from disqualification. But merely at one point of time, he was engaged as an advocate will not debar him to act against that party or to act as an arbitrator. If contrary view is taken then such advocate will be debarred from appearing against that party in any subsequent litigation. Suppose, a party who engaged a Counsel at one point of time files another litigation against some party by engaging another advocate and the defendant of that case if engages that Counsel in subsequent litigation whether an advocate suffers from disqualification for appearing in that case. It is the faith between the client and litigant out of which Counsel is engaged in the case. If in a subsequent case, that advocate loses the case whether defendant can be permitted to say that the Counsel has committed misconduct and may be condemned in this regard without any further allegation, but for the sole ground that he was an advocate at one point of time. The engagement of a Counsel in a particular case comes to an end after completion of the matter and he is free to be engaged by any of the parties in subsequent litigation. If any such limitation is made then the said Counsel will lose his independence, expectation of fair play in subsequent litigation against a party who had engaged him as a Counsel in some case at some point of time. In this case at the time of appointment itself, respondent No. 2 found that he can independently, impartially and without any bias can act as an arbitrator and gave his consent and this fact was specifically disclosed by the

respondent No. 2 that he had been an advocate on behalf of the appellant at one point of time. The case would have been different, if this fact was not disclosed by the respondent No. 2 in the consent letter itself, then the respondent No. 1 may be having a grievance in this regard. But when this fact was disclosed to the Court and parties were aware in this regard from the very inception, no fault can be pointed out in the consent of respondent No. 2. Respondent No. 1 who raised this objection ought to have placed some material apart from the aforesaid allegation in respect of some bias, misconduct or partiality of respondent No. 2. But merely on the aforesaid ground, recording a finding of misconduct on the part of the respondent No. 2 is not justified.

The respondent No. 1 if was not aware at the time of the consent on 4-4-2000 that respondent No. 2 was an advocate at some point of time, he ought to have challenged his appointment by filing an application u/s 13 of the Act on knowing this fact. Aforesaid provision specifically provide that a party who intends to challenge an arbitrator shall within 15 days after becoming aware of the constitution of the arbitral proceedings 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. Sections 12 and 13 of the Act read as under :-

Grounds for challenge.- (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

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

(3) An arbitrator may be challenged only if-

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

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

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

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 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.

Under Section 12, if there are circumstance existed that give rise to justifiable doubts as to independence or impartiality of the arbitrator, appointment of arbitrator may be challenged by a party aggrieved u/s 13 of the Act. But no such action was taken by the respondent No. 1 within specified time as fixed under Sections 12 and 13 and thereafter, if any order was passed or after passing of the arbitral award, respondent No. 1 can not be extended any benefit in this regard.

Respondent No. 1 who was well aware with the aforesaid factum did not file any application before the Court within time period and on 7-12-2000 some order was passed (as reflects from Para 19 of the impugned order while in Para 3 of the impugned order, date has been mentioned as 7-11-2000, but no copy of the order is produced in this case and treating the date as 7-12-2000, as correct, as stated by the appellant, this matter is being decided). In these circumstances, when the award itself was passed on 6-12-2000 and some order was passed on 7-12-2000, it was of without any use. Respondent No. 1 made an application before the arbitration on 14-8-2000 seeking adjournment in the matter but had not taken any steps till 7-12-2000, then he can not blame to the arbitrator. From the perusal of the arbitration proceedings, it is apparent that the arbitrator adjourned the hearing on several occasions granting time to respondent No. 1 to seek orders from the Court. But there is no provision under the Act for staying the proceedings for a unlimited period merely on the aforesaid ground. In *Thadomal* (supra), Sind High Court considering the fact in respect of misconduct of one amongst the arbitrators where both the arbitrators are pleaders, it is held that the mere fact that one of them has appeared for the other in various cases does not show that the latter was under the former's obligation and would, therefore, not take a fair view of the matter under arbitration. In these circumstances, respondent No. 1 ought to have placed some material showing any act of partiality, unfairness or some interest shown by the arbitrator in favour of the appellant. In these circumstances, merely arbitrator happened to be an advocate of appellant at one point of time will not be a case of bias or misconduct on the part of the respondent No. 2, especially when this fact was disclosed by respondent No. 2 in the consent letter.

In these circumstances, the Court below erred in setting aside the award on the aforesaid grounds which are not sustainable under the law.

So far as interest part of the award is concerned, this Court finds that the arbitrator awarded interest on a higher side, which in the opinion of this Court

should not exceed 6% per annum. Consequently, award passed by the arbitrator is directed to be made rule of the Court subject to modification in the interest awarded by the arbitrator which shall be 6% per annum. The appeal is allowed. The order passed by the Court below is set aside, and the application filed by the respondent No. 1 is rejected with the aforesaid modification. No order as to cost.