

(2016) 03 AP CK 0048

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 1861 of 2015

Gurcharan Singh Sahney and Others

APPELLANT

Vs

Harpreet Singh Chabbra and Others

RESPONDENT

Date of Decision : 16-03-2016

Acts Referred:

Arbitration Act, 1940 — Section 11(2), Section 12(1), Section 12(2), Section 28, Section 5

Arbitration and Conciliation Act, 1996 — Section 10, Section 11, Section 11, Section 11(4), Section 11(5), Section 11(7), Section 12, Section 12, Section 12

Citation : (2016) 3 ALT 593 : (2016) 4 AndhLD 141 : (2016) 5 ArbILR 65 : (2017) 2 RAJ 587

Hon'ble Judges : Ramesh Ranganathan and S. Ravi Kumar, JJ.

Bench : Division Bench

Advocate : Sandeep Sharma for B. Chandrasen Reddy, for the Appellant; Sunil Ghanu for M. Papa Reddy, for the Respondent

Final Decision : Dismissed

Judgement

Ramesh Ranganathan, J.—1. This petition, under Article 227 of the Constitution of India, is preferred against the order passed by the XXV Additional Chief Judge, City Civil Court, Hyderabad in Arbtn. O.P. No. 2889 of 2014 dated 30.04.2015. Arbitration O.P. No. 2889 of 2014 was filed by the petitioners herein, under Sections 14(2) and 15 of the Arbitration and Conciliation Act, 1996 (hereinafter called the Act), to have the order, passed by the 6th respondent-arbitrator dated 15.11.2014, set aside; to direct the sole-arbitrator to terminate his mandate under Sections 12 and 14 of the Act; and to appoint a Retired District Judge as the Arbitrator to resolve the disputes between the parties.

2. Petitioners 6 and 7, in Arbitration O.P. No. 2889 of 2014, are companies registered under the Companies Act, and are controlled by the family of petitioners 1 to 4. The 5th petitioner is a partnership firm wherein petitioner Nos. 1 and 4 are partners. Petitioners 1 to 4 are all part of one family. Respondents 3 to 5 are companies, registered under the Companies Act, controlled by

respondent Nos. 1 and 2. The 2nd respondent is the wife of the 1st respondent and the sister of the 4th petitioner.

3. Arbitration O.P. No. 2889 of 2014 was filed against the order passed by the Arbitrator dated 15.11.2014 dismissing the application filed by the petitioners under Section 12 of the Act. In the petition filed, in the said O.P. before the Court below, the petitioners stated that the wives of the 6th respondent-Arbitrator and the 4th petitioner are sisters, and the 1st respondent is their brother; while the petitioners are from Delhi, the sole arbitrator and the other respondents reside in Hyderabad; during the years 2007-2010, they had lent around Rs. 20 crores to the respondents; as the said amount was not returned, they instituted proceedings for recovery under Section 138 of the Negotiable Instruments Act; as a counter-blast the respondents filed a police complaint in Cr. No. 59 of 2012, two years after the petitioners had initiated proceedings against them; in their complaint, the respondents concocted a story that they had to recover Rs. 2 crores from the petitioners who had played fraud on them; petitioners 3 and 5 were arrested by the CCS police, Hyderabad and, while in custody, they were forced by the respondents to agree to pay Rs. 9 crores; under duress, the petitioners signed the settlement deed dated 30.04.2012, the letter of guarantee dated 30.04.2012, and the ratification deed dated 03.05.2012; the petitioners were not allowed to read the contents of these documents when they signed it; they were unaware of the contents of the aforesaid documents, including that the sixth respondent was appointed as a named arbitrator therein; after securing bail, and on reading the documents, they were shocked to learn that the 6th respondent was appointed as the named arbitrator; they filed an application, under Section 11(5) and (6) of the Act, which was dismissed by this Court by its order dated 15.03.2013; the petition, filed seeking review thereof, was also dismissed on 13.09.2013; the arbitrator issued notices dated 25.07.2012, and passed orders on 15.03.2013 and 13.09.2013 initiating arbitration proceedings; the petitioners filed an application under Section 12 of the Act before the Arbitrator; in the meanwhile, against the order of the High Court, they filed SLP(Civil) No. CC 4610-4611/2014 which was disposed of by the Supreme Court by its order dated 11.08.2014; during the pendency of the SLP, the petitioners came to know various facts, and filed an amended application under Section 12; parties are not required, in proceedings instituted under Section 12 of the Act, to prove that the sole arbitrator was biased; it would suffice if there are justifiable doubts about his impartiality for his mandate to be terminated; the arbitrator had appointed Sri G.S. Thakur, an Advocate, to assist him; the order of the High Court dated 15.03.2013 only enabled the arbitrator to take the assistance of an Advocate to assess the damages claimed by the parties; the entire proceedings were conducted by Sri G.S. Thakur, and the arbitrator was merely a mute spectator; the day-to-day orders and proceedings were recorded and dictated by the Advocate, and not by the arbitrator; the arbitrator is not capable of conducting proceedings himself; though the petitioners filed an application, the arbitrator dismissed it; the arbitrator's bias is apparent; in some instances Sri

G.S. Thakur refused to record the submissions and arguments raised by the petitioners; the orders drafted by the Advocate are non-operative in the eye of law; the arbitrator passed a non-speaking order without even considering the grounds taken by the petitioners in their application, and the amended application, filed under Section 12; the order is merely a verbatim extract of the application and counters filed by the parties, and reveals non-application of mind; the close association between the arbitrator and the other respondents have created justifiable doubts of his impartiality; this is apparent from the invitation cards of the marriage of the son of the sixth respondent-arbitrator and the son of the first respondent; the petitioners attended neither of the marriages; the arbitrator was listed, in the wedding invitation card of the son of the first respondent as among his near and dear; respondents 1 and 2 hosted the mehendi and cocktail functions of the son of the arbitrator; and these facts substantiate his bias, and his vested interest in the outcome of the arbitration.

4. In their counter-affidavit filed before the Court below, the respondents contended that the O.P, filed under Section 14(2) of the Act, was not maintainable; the dispute related back to the years 2005-2009 when they had advanced money to the petitioners who misused it; on being confronted, the petitioners acknowledged their mistake, and agreed to repay the said amount; the petitioners had, on their free will and consent, entered into the settlement deed dated 30.04.2012, and ratification deed dated 03.05.2012, acknowledging the debt of Rs. 9.00 Crores, and had promised to repay the said amount in full and final satisfaction of the claim of respondents 1 to 5; the petitioners had also acted upon the said settlement, and had paid a part of the amount; for obvious reasons they violated the terms of the settlement, and subsequently dodged repayment of the amounts due; the petitioner did not make out any grounds for seeking termination of the mandate of the arbitrator; while exercising jurisdiction under Section 9 or 14 of the Act, the District Judge lacks authority to terminate the mandate of the arbitral tribunal, especially when the arbitrator is appointed with the consent of the parties; this fact has been confirmed by the High Court in its order in Arbitration Application No. 54 of 2012 which, in turn, was confirmed by the Supreme Court by its order in SLP No. 4610 and 4611 of 2014; an application, seeking termination of the mandate of the arbitral tribunal, cannot be filed during the pendency of arbitral proceedings, and should await passing of the award by the arbitrator; bias, as a ground, is available to the parties only while challenging the award under Section 34 of the Act; the Court is not empowered, in a petition filed under Section 14(2) of the Act, to terminate the mandate of the arbitral tribunal on grounds of bias; having voluntarily referred the dispute to the arbitral tribunal, and having agreed to be bound by the award, the petitioners are estopped from alleging bias against the arbitral tribunal; the petitioners themselves filed A.A. No. 54 of 2012 seeking appointment of the arbitrator, for resolution of their disputes, in terms of the arbitration clause in the settlement deed dated 30.04.2012; the High Court, by its order dated 15.03.2013, appointed the nominated arbitrator for resolution of the dispute;

aggrieved thereby, the petitioners filed SLP Nos. 4610 and 4611 of 2014 which was also dismissed; though appointment of an advocate, to assist the sole arbitrator, is not in dispute, the manner in which the petitioners are trying to interpret the same is not tenable; the petitioners are trying to take advantage of the inadvertent reference to the words assessing the damage caused in the order of the High Court; in A.A. No. 54 of 2012, the petitioners had sought appointment of an arbitrator to have the dispute, regarding the actual payments due to either party, decided by way of arbitration; it is not even their case that they had sought for damages from the respondents, or that the respondents had made a claim for damages against them; during the course of hearing, it was sought to be impressed upon the High Court that the sole arbitrator would require assistance of a competent advocate to conduct arbitration proceedings, and to pass the award; it is only, in such circumstances, that the High Court permitted the sole arbitrator to take the assistance of an advocate/legal counsel/expert, if required; Section 6 of the Act provides for administrative assistance being taken by the arbitral tribunal for conducting the proceedings; on 26.10.2013 both parties and their counsel were informed by the sole arbitrator that he had sought the services of Sri G.S. Thakur, Advocate, to assist him in conducting arbitration proceedings till passing of the award; both the parties had consented thereto; subsequently around 20 sittings were held wherein both the parties and their advocates were present; Sri G.S. Thakur, Advocate was also present to assist the sole arbitrator; all this while, the petitioners were adopting all means to protract the matter seeking adjournments for filing their counter to the claim statement; when the petitioners realised that they could no longer drag on the matter, they came up with an application on 08.11.2014 seeking a direction that Sri G.S. Thakur, Advocate should not assist the sole arbitrator other than for assessing damages; this ground is an after-thought, and a last ditch effort to further protract proceedings; this ground was not raised by the petitioners, in the first instance, when Sri G.S. Thakur, Advocate was appointed to assist the sole arbitrator, or in the application filed by them under Section 12 of the Act; after considering the rival contentions, and assigning reasons, the arbitrator dismissed the said application; the arbitrator had attended the marriages of the children of the 2nd petitioner also; the arbitrator was, in fact, appointed at the instance of the petitioners alone; he was related as a brother-in-law both to the 4th petitioner and the 1st respondent; it is not the case of the petitioners that they were not invited to the wedding of sole arbitrators son, or that they had not attended the same; the 4th petitioner was present, along with the arbitrator, on the stage at his cousin brother-in-laws wedding on 26.12.2013; the photographs would show the proximity between the petitioners, and the sole arbitrator, and in general with the entire family even after the wedding of the son of the arbitrator in the year 2012; mere reference, to the surnames of the hosts, does not give rise to the presumption of involvement of the respondents, or their family members, more than that of the petitioners in the marriage of arbitrators son; on perusal of the docket proceedings, it is evident that the arbitrator had shown undue indulgence to the petitioners in liberally granting them

adjournments, for filing their counter to the claim statement, till 13.12.2014; after giving more than 25 adjournments, the arbitrator was forced to forfeit their right to file the counter; the arbitrator has not directed the parties to be present; the petitioners had, themselves, chosen to appoint a lawyer from Delhi to contest the proceedings; the petitioners are not entitled to have the order dated 15.11.2014, passed by the arbitrator, set aside; the power to appoint an arbitrator, under the Act, is conferred only on the Chief Justice of the High Court, and none else; similar allegations were made even in the Section 11 application, filed by the petitioners before the High Court, attributing bias to the designated sole arbitrator; during the course of hearing, they did not press this issue before the Court; having waived the said allegations, it is not open to the petitioners to now re-agitate this issue before this Court; an application, to terminate the mandate of the arbitrator, cannot be maintained under Sections 14(2) and 15 of the Act during the pendency of arbitration proceedings; the arbitration application, filed by the petitioners under Sections 12 and 13 of the Act, was dismissed; the only recourse available to the petitioners is to challenge the said order in proceedings under Section 34 of the Act after the award is passed; and the O.P. was filed only to further delay and protract arbitration proceedings.

5. I.A. No. 3040 of 2014 was filed by the petitioners herein, in O.P. No. 2889 of 2014, seeking stay of all further proceedings in A.A No. 1 of 2013 pending before the 6th respondent. The 6th respondent (the sole arbitrator) filed his counter affidavit therein denying the allegations as baseless, concocted, vexatious and devoid of truth. He submitted that the petition was neither maintainable in law nor on facts; he was not a party to the settlement deed, the ratification deed and the special power of attorney; they were subject to proof and relevancy in the arbitration proceedings between the parties; the order passed by him, under Section 12 of the Act, was in accordance with law; the contention that he had forced the petitioner to accede to the illegitimate demands of respondents 1 to 5 was not true; there were no merits in the petitioners allegations; as the matter had been referred to him by the High Court he had, with the assistance of Sri G.S. Thakur, Advocate, commenced proceedings on 13.07.2013; the petitioner entered appearance through Counsel; since then, proceedings were being conducted regularly in a fair and transparent manner without favouritism or bias towards any of the parties; 39 sittings have taken place till date, which were mostly attended by the petitioners with their Counsel; the matter is now coming up for marking of documents on behalf of respondents 1 to 5; under Section 6(1) of the Act, the arbitrator is entitled to seek guidance in discharging his legal obligations; in A.A. No. 54 of 2012 dated 15.03.2013, this Court had appointed the 6th respondent as the sole arbitrator for resolution of the disputes; the petitioners Counsel, who appeared in A.A. No. 54 of 2012, had requested that an Advocate/Legal Counsel may be appointed in assessing the damage caused; at the request of the petitioners Counsel, this Court had passed an order appointing him as the sole arbitrator for resolution of the disputes between the parties, i.e., the petitioners and respondents 1 to 5, in terms of the arbitration clause in the

Settlement deed; this Court had directed him to take the assistance of an advocate/legal counsel for assessing damages; the arbitration application, filed by the petitioner, was allowed; proceedings were initiated pursuant thereto, and are being conducted regularly in accordance with law; the recall/review application No. 493 of 2013 was dismissed as misconceived by this Court by its order dated 13.09.2013; it is false to allege that he was biased against the petitioners from the very commencement of arbitration proceedings; the petitioners filed an application under Section 12 of the Act on 23.02.2014, after 17 sittings in which they, along with their Counsel, were present; the allegations made in the Section 12 petition are not true and correct, and were concocted and created only to circumvent arbitration proceedings one way or the other; he has not committed any act detrimental to the interests of both the parties; he has performed the duty assigned to him till date in a fair, clear and transparent manner; the record would speak for itself regarding his fairness in conducting arbitral proceedings; the allegations, made in the Section 12 petition against him, are false; he had rightly passed the order, in the Section 12 petition, on merits and in accordance with law; respondents 1 to 5 filed their claim petition as long back as on 25.01.2014; the petitioners took a number of adjournments to file their claim petition, and to file their objections to the claim petition of respondents 1 to 5; they have not filed it deliberately till date; a copy of the day to day arbitration proceedings were served on the parties, in the presence of their Counsel, after obtaining their acknowledgment; the proceedings were signed by the parties, and their Counsel, who were present on that date; the matter is coming up for marking of the documents of respondents 1 to 5 who are the claimants/petitioners in the arbitration proceedings; the petitioner has not approached the Court with clean hands; they have suppressed true and correct facts, and have filed the Arbitration O.P. with all concocted and created grounds; he is a law abiding citizen and is not biased against any of the parties; the parties on either side are closely related to him; he would not commit any act detrimental to the interests of the parties; he would not show any favouritism to any party, and would act in accordance with the material placed before him; he would pass the award on merits, and in accordance with law; he undertook to comply with the directions, if any, to be passed in the interest of justice; the legal assistance, which was being provided to him by Sri G.S. Thakur, Advocate in the arbitration proceedings, are based on merits and as per law only; and the Advocate has not committed any act against the interest of any party, and is assisting and providing necessary legal advice sought for by him from time to time.

6. In the order under revision the Court below, after framing the following points for consideration--

"(1) Whether the request of the petitioners to terminate the mandate of the Arbitrator can be considered at the stage, if so, whether this Court can appoint another arbitrator as prayed for?

(2) To what relief?,

observed that the petition was filed under Section 14(2) and 15 of the Act with three specific prayers; however, at the time of arguments, the Counsel for the petitioner had not pressed the first relief, and had restricted the claim to the following reliefs: (b) to direct the Sole arbitrator to terminate his mandate as per Section 12 and Section 14 of the Act and (c) to appoint a Retired District Judge as the Arbitrator to resolve the disputes between the parties i.e., the petitioners and respondents 1 to 5; the main grievance of the petitioners, to seek these two reliefs, was the alleged bias of the 6th respondent i.e., the sole arbitrator who was appointed by the order of the High Court, and at the instance of both the parties; the petitioners had claimed that respondent No. 6 was moving closely with the other respondents, and had actively participated in the marriage of the son of the 5th respondent; they had also claimed that all the proceedings had been prepared by the Advocate Sri G.S. Thakur who was appointed to assist the arbitrator; and the said Advocate has also been preparing the orders; the respondent had opposed the petition on various grounds; and they had claimed that the Court had no power to terminate the mandate of the arbitrator, or to appoint a fresh arbitrator, since power was vested with the Chief Justice of the High Court only.

7. The Court below held that, in A.A. No. 54 of 2012 filed by the petitioner, the Chief Justice passed an order on 13.09.2013, under Section 11(5) and (6) of the Act read with the scheme for Appointment of Arbitrator 2000; in the arbitration application, the petitioners had made the same representation that they were arrested in a false case and were forced to sign some documents while they were in judicial custody; the Chief Justice, after considering the objections, had appointed the sole arbitrator by virtue of the powers conferred on him under Section 11(5) and (6) of the Act; the petitioners had moved Application No. 493 of 2013 in A.A. No. 54 of 2012 for appointing a Retired Judge of the High Court or the Supreme Court in substitution of the 6th respondent; the Chief Justice had dismissed the application holding that, when the parties had chosen in the agreement, and the Arbitrator had been accepted by the Court, there was no illegality or infirmity in the order passed by the Court; the Chief Justice had directed the Arbitrator to complete Arbitration proceedings in five months; the petitioners had moved SLP Nos. 14146, 14147 of 2014 against the aforesaid orders; it was represented by them, before the Supreme Court, that they had moved an application under Section 12 of the Act before the Arbitrator; and the SLPs were dismissed with an observation that the arbitrator had to decide the application appropriately.

8. The Court below further held that the arbitrator was a relative of not only the respondents, but also the petitioners; both the parties had selected the 6th respondent as the sole arbitrator, and the same was confirmed by the Court in the proceedings under Section 11(5) and (6) of the Act; the main ground on which the petitioners had sought termination of the mandate of the arbitrator

was his alleged bias; as had been rightly argued by the Counsel for the respondents, that may not be a ground for termination of the mandate of the arbitrator; if really the petitioners felt that the arbitrator was acting in a biased manner, they could challenge the award under Section 34 of Act; the petitioners wanted a relief which they had already sought for in the earlier proceedings, and which was rejected by the High Court; as both parties had close relationship with the 6th respondent, the question of his concealing his association with the respondents did not arise; no ground had been made out for appointment of a substitute arbitrator; the petitioners were not able to show a single instance in support of their claim of bias of the arbitrator; the petitioners had claimed that the 6th respondent had hosted the marriage dinner of the 5th respondents son; it was an admitted fact that the 6th respondent was a close relative of both the parties; simply because he had attended the marriage of one of the parties, it could not be said that he was biased; the petitioners had relied on 2004(3) ARb.LR 146 (Delhi) wherein the arbitrator had failed to complete the proceedings in a fixed period; in the case on hand the arbitrator had commenced proceedings but, in view of the petition on hand, there was no progress; if the petitioners felt that the arbitrator had not acted independently or impartially, or he suffered from bias, it was always open to them to make an application under Section 34 of the Act, and have the award set aside on that ground; in the present petition, the petitioners had sought for termination of the mandate of the Arbitrator who was appointed by the Chief Justice; the parties to the petition had selected the sole arbitrator on their own; once such appointment has been made by the Chief Justice, and when the petitioners are not able to substantiate their plea with regards the alleged bias, the Court cannot appoint a retired District Judge or any other arbitrator; the said power is vested only with the High Court; in view of the orders of the High Court in A.A. No. 54 of 2012, and the SLPs, the Court could not terminate the mandate of the arbitrator; alleged bias is not a ground to appoint another arbitrator; on the said ground, the petitioners can challenge the award under Section 34 of the Act; the petitioners were not able to show that the arbitrator had become de jure or de facto unable to perform his functions, or for other reasons had failed to act without undue delay; their contention that the arbitrator was not conducting proceedings, and an Advocate was appointed to assist the arbitrator, is also not believable in the absence of any proof to that effect; Section 11(7) provides that a decision on a matter, entrusted by Section 11(4), (5) & (6) to the Chief Justice or the person or substitute designated by him, is final; the petitioners were not able to show that the arbitrator was acting in a biased manner; it was not their case that the arbitrator had withdrawn from his office; and the Court could not, therefore, appoint another arbitrator terminating the mandate of the 6th respondent.

9. The Court below opined that this Court in *V.V.S. Constructions v. M/s. IVRCL Infrastructure and Projects Ltd.*, AIR 2011 AP 136 had observed that the competence of the arbitrator had to be decided by the arbitrator himself and, in view of Section 13, an application for removal of the arbitrator already

appointed, and to replace him with a new arbitrator, was not maintainable, and the party could file an application under Section 34 of the Act to set aside the award; the same view was taken in *Progressive Career Academy Pvt. Ltd. v. FIIT JEE Ltd.*, (2011) ILR 4 Delhi 286 wherein it was held that removal of the arbitrator should not be done before publishing of the award, in progress before the Arbitral Tribunal; and hence the petition was liable to be dismissed.

10. Elaborate submissions, both oral and written, have been made by Sri Sandeep Sharma, Learned Counsel appearing on behalf of the petitioners and Sri Sunil Ghanu, Learned Counsel for the respondents. It is convenient to examine the submissions, urged by Learned Counsel on either side, under different heads.

I. IS THIS PETITION, FILED UNDER ARTICLE 227 OF THE CONSTITUTION, MAINTAINABLE?

11. It is necessary, at the very outset, to examine whether the jurisdiction of this Court, under Article 227 of the Constitution of India, can be invoked to challenge the validity of the order passed by the Court below under Section 14(2) of the Act. Sri Sunil Ghanu, Learned Counsel for the respondents, would submit that, while an application can be filed before the Court below under Section 14(2) in the circumstances referred to in Section 14(1)(a), the Act does not provide for a further challenge against the order passed under Section 14(2) thereof; and the present revision is not maintainable in view of Section 5 of the Act which prohibits repeated interference by the Court.

12. On the other hand Sri Sandeep Sharma, Learned Counsel appearing on behalf of the petitioners, would submit that, as the legislature has provided for the intervention of the Court under Section 14(2) of the Act, the petition filed before the Court below is maintainable; and several petitions, under Article 227, have been entertained by the High Court against an order passed by the District Court under Section 14(2) of the Act. Learned Counsel would rely on *Punjab Agro Industries Corporation Ltd. v. Kewal Singh Dhillon*, (2008) 10 SCC 128 and *P. Madhusudhan Rao v. Lt. Col. Ravi Manan* (, 2015 (4) ALD 409 : 2015 (4) ALT 108 in this regard.

13. Chapter IX of the Act relates to appeals, and Section 37 thereunder to appealable orders. Section 37(1) stipulates that an appeal shall lie from the following orders (and from no other) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely, (a) granting or refusing to grant any measure under Section 9; and (b) setting aside or refusing to set aside an arbitral award under Section 34. While Section 37(2) provides for an appeal to a Court from the order of the arbitral Tribunal, Section 37(3) stipulates that no second appeal shall lie from an order passed in appeal under Section 37, but nothing in the said Section shall affect or take away the right to appeal to the Supreme Court. As Section 37(1) does not provide for an appeal, against an order passed by the Court under Section 14(2) of the Act, the petitioners do not have a statutory remedy of an appeal. That does not, however,

disable them from invoking the jurisdiction of this Court under Article 227 of the Constitution of India.

14. The power vested in the High Court under Article 227 of the Constitution, to exercise judicial superintendence over the decisions of all Courts and Tribunals within their respective jurisdictions, is part of the basic structure of the Constitution. (*L. Chandra Kumar v. Union of India* , AIR 1997 SC 1125). Exercise of jurisdiction by the High Court under Article 227 of the Constitution of India, which forms a part of the basic structure of the Constitution, cannot be negated, circumscribed or fettered even by an amendment to the Constitution, much less by legislation plenary or subordinate. Section 37(1) of the Act, which stipulates that an appeal shall lie from the orders mentioned in clauses (a) and (b) thereunder and from no other, cannot be so construed as to disable the petitioners from availing the remedy under Article 227 of the Constitution of India or as prohibiting this Court from entertaining such a petition on its jurisdiction under Article 227 of the Constitution of India being invoked.

15. The jurisdiction under Article 227 cannot be limited or fettered by any Act of the Legislature. The supervisory jurisdiction is wide, and is used to meet the ends of justice. The power must, however, be exercised sparingly, only to keep subordinate courts and tribunals within the bounds of their authority. The power is neither available to be exercised to correct mere errors (whether on facts or law) nor is it a cloak of an appeal in disguise. (*State, through Special Cell, New Delhi v. Navjot Sandhu @ Afshan Guru* , (2003) 6 SCC 641; *Surya Dev Rai v. Ram Chander Rai* , (2003) 6 SCC 675). The supervisory powers of revision under Article 227 cast an obligation on the High Court to keep the inferior Courts and Tribunals within the limits of their authority, and ensure that they perform their duties in accordance with law. A erroneous decision may not be a ground for exercise of the jurisdiction under Article 227 of the Constitution of India, unless the error is referable to the Court or there is dereliction of duty and fragrant abuse of power by the subordinate courts and tribunals resulting in grave injustice to any party (*Ouseph Mathai v. M. Abdul Khadir* , (2002) 1 SCC 319; *P. Madhusudhan Rao* (, 2015 (4) ALD 409 : 2015 (4) ALT 108).

16. In *Kewal Singh Dhillon* , (2008) 10 SCC 128, the Supreme Court held that the only course available to a party was to challenge the order, even if it is a judicial order, by way of a petition under Article 227 of the Constitution of India; and the decision, of the Supreme Court, in *SBP & Co. v. Patel Engineering Ltd.* , (2005) 8 SCC 618, did not bar such a petition.

17. The scope of interference, in proceedings under Article 227 of the Constitution of India, is limited, and the power conferred thereunder should be exercised within certain parameters. That does not, however, mean that a petition under Article 227 of the Constitution of India is not maintainable. While a petition filed under Article 227 of the Constitution of India, against an order passed under Section 14(2) of the Act, is no doubt maintainable, examination of the validity of such an order must be confined within the narrow limits within

which the jurisdiction under Article 227 of the Constitution of India must be exercised. We see no merit in the submission of Sri Sunil Ghanu, Learned Counsel for the respondents, that this petition, filed under Article 227 of the Constitution of India, is not maintainable.

II. SECTION 80 OF THE 1996 ACT : ITS SCOPE:

18. Before considering the main issue as to whether the mandate of the arbitrator should be declared to have been terminated either because of (i) his having become de jure or de facto unable to perform his functions, or (ii) for other reasons, he has failed to act without undue delay, it is necessary to examine the submission of Sri Sandeep Sharma, Learned Counsel appearing on behalf of the petitioners, that, in view of Section 80 of the Act, Sri Ravinder Singh Sarna (the sixth respondent-arbitrator), who had earlier acted as a mediator, cannot arbitrate the dispute between the parties.

19. On the other hand Sri Sunil Ghanu, Learned Counsel for the respondents, would submit that the Petitioners have raised these issues in the Review Petition, i.e., in Application No. 493/2013, which was dismissed; the said order has attained finality; Section 80 starts with the words unless otherwise agreed by the parties; in the instant case, in so far as the agreement dated 30.4.2012 and the ratification deed are concerned, execution thereof is admitted by the Petitioners; and the Petitioners are not entitled to raise the plea of lack of jurisdiction of the arbitrator to arbitrate the dispute, in view of Section 80 of the Act.

20. Clause N of the settlement dated 30.4.2012 relates to the governing law/ dispute resolution/arbitration and, under clause (ii) thereof, any dispute, controversy or claim arising out of or relating to or in connection with the agreement, or the breach or validity thereof, shall be finally settled by the sole arbitrator Sri Ravinder Singh Sarna S/o late Mangal Singh Sarna resident of Hyderabad in accordance with the Indian Arbitration and Conciliation Act, 1996 as in force at the time such arbitration is commenced (the Arbitration Act) at the place of choice of the arbitrator; the sole arbitrator would preferably commence conduct of arbitration proceedings within 30 days of the receipt of the dispute; and subject to jurisdiction of the A.P. High Court.

21. The ratification deed dated 3.5.2012 records that there arose disputes between the petitioners and the respondents with respect to the monetary transactions; all transactions stood settled by way of a settlement deed dated 30.4.2012 between the parties; all issues between the parties had been settled under mediation of friends and relatives more particularly Mr. Ravinder Singh Sarna (6th respondent herein); the parties of the first part (petitioners herein) had stated and declared that they agreed and confirmed the terms and conditions contained in the settlement deed dated 30.4.2012 with free will and consent in its entirety; it shall be taken that the same had been executed in consonance with their desire and will; and the first party (petitioners herein) had ratified the contents of the settlement deed dated 30.4.2012.

22. As noted hereinabove, the settlement deed dated 30.4.2012 contains Clause N(ii) which is the arbitration clause whereby parties agreed to refer any dispute arising out of the agreement to the sole arbitrator (Sri Ravinder Singh Sarna-the sixth respondent). It does appear that the words all issues have been settled under the mediation of friends and Ravinder Singh Sarna, as used in the ratification deed dated 03.05.2012, when read in the light of the other parts thereof, mean settlement in terms of the settlement deed dated 30.04.2012 for, if the issues had already been settled under mediation, the question of the petitioners ratifying the contents of the earlier settlement dated 30.4.2012 would not have arisen. Even otherwise the petitioners, having sought appointment of an arbitrator thereafter, and the named arbitrator (6th respondent) having been appointed as the arbitrator, by the Acting Chief Justice in his order in A.A. No. 54 of 2012 dated 15.3.2012 (which order attained finality on SLP(Civil) No. CC4610-4611/2014 preferred there against being dismissed by order dated 11.08.2014), cannot now be heard to contend that, as the disputes have been settled by mediation, the arbitration proceedings cannot continue.

23. In any event, Section 80 of the Act commences with the words unless otherwise agreed by the parties. It is only where parties have not otherwise agreed, is a mediator/conciliator precluded from acting as an arbitrator. In the present case as the parties have agreed by virtue of settlement deed dated 30.4.2012, the contents thereof having been ratified in the ratification deed dated 30.05.2012, and as the named arbitrator was appointed thereafter by the Acting Chief Justice, by his order in A.A.NO.54 of 2012 dated 15.3.2013, it is not now open to the petitioners to contend that the 6th respondent cannot continue to act as the arbitrator.

III. ALLEGATIONS OF BIAS: WOULD IT FALL WITHIN THE AMBIT OF SECTION 12(3)(a), OR SECTION 14(1)(a), OR BOTH?

24. Sri Sandeep Sharma, Learned Counsel appearing on behalf of the petitioners, would submit that the word shall in Section 14 of the Act can only mean that the mandate of the Arbitrator terminates as soon as he becomes de jure or de facto unable to perform his duties, or if he fails to perform his duties without undue delay; the intention of the legislature, in referring to Section 12(3) in Section 14(3) of the Act, is that the grounds in Section 12(3) are also available under Section 14(3); Sections 12 and 13 are mutually exclusive; the remedy under Section 14 can be availed either before or after the remedy under Section 13 is availed; Section 12 deals with a situation where there are justifiable doubts, whereas Section 14 deals with the power of the Court where the issue raised by a party is confirmed; Section 12 is at the stage of appointment of the arbitrator, and Section 14 is during continuance of arbitral proceedings; Sections 9 and 17 of the Act also show that the intention of legislature is to permit approach to the Court as well as to the arbitrator on the same issue; even if the issue raised in the Section 12 (3) proceedings, is similar to those raised in the Section 14 petition, the remedy under Section 14(2) can be invoked; the proximity of the

arbitrator to the respondents, and his evident bias towards them, is reflected in the wedding cards of the respondents son and the arbitrators son; though he was related to both the parties, he had close affinity towards the respondents, and had actively participated in the wedding function of the son of the respondent and vice-versa; while conducting proceedings, the arbitrator was indulgent and liberal towards the respondents and, when they failed to file their counter, a fine of Rs. 2,000/- was merely imposed, whereas, when the petitioners could not file their counter-written statement, their right was forfeited; the arbitrator posted the matter every week, despite being aware that the petitioners had to travel from Delhi, and it was impossible for them to travel every week as it would exhaust their resources and call upon their time; the affidavit filed by the first respondent before this Court, that the services of Sri G.S. Thakur could be dispensed with and they have no objection thereto, is an admission by them of the circumstance in which the present petition was filed; in view thereof, the mandate of the arbitrator stands terminated as there remains no controversy in terms of Section 14(2) of the Act; in the present case, the issues of time, assistance taken from Sri G.S. Thakur, Advocate, and the counter-affidavit filed by the arbitrator in the Court below, do not fall within the ambit of Section 12 (3); they relate to the de jure inability of the arbitrator to proceed with the matter, as de facto the arbitrator had circumvented, violated and exceeded the directions given by this Court in its orders dated 15.03.2013 and 13.09.2013; pendency or dismissal or non-filing of an application under Section 12 would not bar recourse to Section 14; as proceedings under Section 14 are summary in nature, the Court has only to be satisfied prima facie; the mandate of the arbitrator, on the issue of Sri G.S. Thakur, Advocate, came to an end on 13.07.2013, the issue of time came to an end on 28.02.2014, and filing of the counter-affidavit in the trial court was on 23.3.2015; the issue of bias, with regards the counter-affidavit filed by the arbitrator, could not have been raised in the Section 12 petition, or before the Section 14 stage, or adjudicated by the arbitrator; in the facts of the present case, and in view of the grounds raised by the petitioners, it is evident that the mandate of the arbitrator stood terminated on the date when he became unable to perform his functions either in law or in fact; Section 14 gives a right to the parties to move the Court for a declaration to this effect; and, in the present case, the mandate of the arbitrator must be declared to have been terminated, and removal of Sri G.S. Thakur, Advocate alone would not suffice.

25. On the other hand Sri Sunil Ghanu, Learned Counsel for the respondents, would submit that the petition filed under Section 14(2), in O.P. No. 2889 of 2014 before the Court below, is not maintainable as it is based on allegations of bias of the arbitrator; the petitioners, having followed the challenge procedure prescribed under Section 13 of the Act, are not entitled to maintain an application under Section 14 of the Act on the self-same grounds; the Act was enacted keeping in view the UNCITRAL model law; the remedy provided under Section 13(5) of the Act, against an unsuccessful challenge to the arbitrator, is to

raise the ground of alleged bias while challenging the award in a petition under Section 34 of the Act; Section 5 of the Act specifically prohibits intervention of a judicial authority, except where so provided in Part-I of the Act; the remedy under Section 14 of the Act is not analogous to the remedy provided under Sections 12 & 13 of the Act, and are mutually exclusive; in their notice dated 25.7.2012, the petitioners sought appointment of the arbitrator as the named arbitrator; they later filed a Petition, under Section 11 of the Act, before this Court in A.A. No. 54 of 2012 seeking appointment of the named arbitrator, under the agreement dated 30.4.2012, as the arbitrator; the review petition filed by the Petitioners was dismissed on 13.9.2013; SLP. No. 14146-147 of 2013 preferred there against was also dismissed; as the allegation of bias were dealt with in the review petition, and the said order has been upheld by the Supreme Court, the petitioners cannot re-agitate the same issue again; principles of res-judicata bars the petitioners from re-agitating the same issue again seeking removal of the arbitrator on the very same grounds; these aspects cannot be examined in the present proceedings so as to presume bias against the named arbitrator; while pleading de jure inability of the arbitrator under Section 14(1) (a) of the Act, the petitioners cannot raise a ground of lack of independence and impartiality of the arbitrator; even on facts, there is no substance in the allegation of lack of independence and impartiality or bias of the arbitrator; not only was the agreement dated 30.4.2014 entered into with their free will and consent, but the petitioners had also acted upon it; the arbitrator was closely related to both the parties; the invitation cards and the photographs do not justify any inference regarding affinity of the sole arbitrator towards the Respondent or vice-versa; in one breath the Petitioners were finding fault with the delay on the part of the arbitrator in passing the award and were seeking termination of his mandate, and on the other were claiming that the arbitrator ought not to have proceeded with the matter on a weekly basis as it was eroding their resources and their time; this self- contradictory stand of the Petitioners falsifies the allegation of bias; the minutes of the hearing dated 13.12.2014 show that, after giving several opportunities to the Petitioners to file their written statement, the arbitrator was constrained to pass the said order; the arbitrator had neither misrepresented facts nor was he biased against the petitioners; the arbitrator has been more than fair even when repeated adjournments were sought by the petitioners; in the Section 12 petition, the arbitrator observed that all other allegations as mentioned in the amendment petition have not taken place during the arbitration proceedings; they relate to the other assertions made by the petitioners regarding proceedings being conducted by Sri G S Thakur, Advocate, and the alleged misconduct of the arbitrator; the petitioners contention that the Section 12 petition was dismissed only on the ground of limitation and, therefore, the Section 14 petition is maintainable is incorrect; and the petitioners are not entitled to raise such a plea as they have given up relief (a) in OP. No. 2889/2014 by filing a memo.

26. In the present case, the 6th respondent was appointed as an arbitrator at the

behest of the petitioners herein. The petitioners issued legal notice dated 25.7.2012 to respondents 1 and 2 wherein they stated that they had no option except to invoke the arbitration clause N(ii) of the settlement deed dated 30.4.2012 to refer the dispute to the named arbitrator Sri Ravinder Singh Sarna; and respondents 1 and 2 should take necessary steps to refer the dispute to the said arbitrator. In A.A No. 54 of 2012, filed before the Chief Justice under Section 11(5) and (6) of the Act read with the Scheme for Appointment of Arbitration, 2000, the petitioners sought appointment of a sole arbitrator. In the said application the petitioners referred to their having sent the legal notice dated 25.7.2012 requesting the respondents to co-operate in referring the dispute to the arbitrator as per Clause N(ii) of the settlement deed dated 30.4.2012. They also referred to the fact that the name of the arbitrator was incorporated in the settlement deed as agreed to by both the parties thereto. It was their case that, despite receipt of notice, the respondents did not give any reply and they were not co-operating in referring the dispute to the arbitrator. The petitioners requested this Court to appoint an arbitrator to resolve the disputes between the petitioners and the respondents arising out of the settlement deed dated 30.4.2012.

27. In its order in A.A. No. 54 of 2012 dated 15.3.2013, this Court noted that the counsel appearing on behalf of the respondents had stated that, as per the arbitration clause No. N of the Settlement Deed dated 30.4.2012, both the applicants and the respondents had agreed to appoint the named arbitrator Sri Ravindra Singh Sarna for resolution of the disputes arising out of the settlement deed; and the learned counsel for the applicants, while admitting that Mr. Ravindra Singh Sarna has been appointed as the sole arbitrator for resolution of the disputes, had submitted that an advocate/legal counsel/expert may be appointed to assist the arbitrator in assessing the damages caused. Thereafter, this Court observed:

"..As agreed, the applicants and the respondents shall refer their disputes to Sri Ravindra Singh Sarna, whom they have already appointed as sole arbitrator for resolution of disputes between them, in terms of the arbitration clause in the settlement deed. The arbitrator so appointed is at liberty to take the assistance of an advocate/legal counsel/expert, if required, for assessing the damage caused. He is at liberty to fix his fee as also that of the fee of the advocate/legal counsel/expert, if he so chooses to take his or her assistance, for assessing the damage caused."

28. Subsequently the petitioners herein filed Review Application No. 493 of 2013 in A.A. No. 54 of 2012 seeking recall/review of the order passed in A.A. No. 54 of 2012 dated 15.3.2013, and to appoint a retired Judge of the High Court or the Supreme Court, in substitution of Sri Ravinder Singh Sarna, to decide the disputes between the parties arising out of the settlement dated 30.4.2012. In this application the petitioners contended that, in the format of the application, they did not show the name of any named arbitrator; their application was only

to appoint an arbitrator; they wanted an arbitrator, other than the named arbitrator, to be appointed; the respondents wanted the named arbitrator alone to conduct the proceedings; and there were some circumstances which gave rise to justifiable doubts as to the independence and impartiality of Mr. Ravinder Singh Sarna, the named arbitrator.

29. By his order, in Application No. 493 of 2013 in A.A. No. 54 of 2012 dated 13.9.2013, the Chief Justice dismissed the said application holding that the application for review was thoroughly misconceived; there was no dispute that the arbitration agreement was valid and subsisting; there was no allegation that the consent recorded by the Court was not correct; the consent recorded earlier by the Court was not required to be set at naught; and when the parties had chosen in the agreement an arbitrator, and the same arbitrator had been accepted by this Court, there was no illegality or infirmity in the order passed by the Court.

30. While the orders passed by the Acting Chief Justice in A.A. No. 54 of 2012 dated 15.03.2013, under Section 11(5) and (6) of the Act appointing the 6th respondent as the sole arbitrator, has attained finality, it does not mean that the petitioners cannot question the independence and impartiality of the arbitrator in proceedings under Section 12(3)(a) read with Section 13(2) & (3) of the Act, or to invoke the jurisdiction of the Court under Section 14(2) of the Act, if a controversy remained on whether the mandate of the arbitrator stood terminated in the circumstances referred to in Section 14(1) of the Act. While Section 11(5) & (6) confer power on the Chief Justice of the High Court to appoint a person as the arbitrator, any dispute after the arbitrator has commenced arbitral proceedings, including whether the mandate of an arbitrator stood terminated, can only be declared by the Court in an application made under Section 14(2) of the Act. Use of the words become in Section 14(1)(a) shows that the circumstances referred to therein are those which arise after an arbitrator has been appointed, and not prior thereto. As questions regarding whether circumstances exist which give rise to justifiable doubts regarding the independence and impartiality of the arbitrator, or whether the arbitrator has become de-jure or de-facto unable to perform his functions, could not have been examined in proceedings under Section 11(5) & (6) of the Act, whereunder power is conferred on the Chief Justice of High Court only to appoint an arbitrator, reference in the Section 11 petition, to the contentions raised herein, do not bar the present petition on the principles of res-judicata.

31. Section 2(e) of the Act defines Court to mean the principal Civil Court of original jurisdiction in a district, and includes the High Court, in the exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any Civil Court of a grade inferior to such Principal Civil Court, or any Court of small causes. As the High Court at Hyderabad, for the States of Telangana and Andhra Pradesh, does not exercise

ordinary original civil jurisdiction, and as Section 2(e) specifically excludes a Civil Court inferior to the Principal Civil Court or the Court of Small Causes, the Court referred to in Section 2(e) of the Act, to decide on the termination of the mandate of the arbitrator under Section 14(2) of the Act, is only the Principal Civil Court of original civil jurisdiction in the District which is the Court of the Chief Judge, City Civil Court, Hyderabad.

32. In its order, in Arbitration O.P. No. 2889 of 2014 dated 30.04.2015, the Court below has erred in holding that, since the petitioners were seeking a relief which they had already sought in the earlier proceedings before the High Court in A.A. No. 54 of 2012 and the same was rejected, the Civil Court could not terminate the mandate of the arbitrator. The jurisdiction to declare that the mandate of the arbitrator stands terminated has been conferred, under Section 14(2) of the Act, only on the Principal Civil Court in a district, and not on the High Court. The mere fact that the petitioners, in their applications before the High Court and in the Special Leave Petitions before the Supreme Court, had raised pleas which fall within the ambit of Sections 12 and 14 of the Act, does not mean that such pleas were rejected by the High Court and the Supreme Court as the only question which fell for consideration in those proceedings was regarding the appointment of the sixth respondent as an arbitrator. As the jurisdiction exercised by the Chief Justice, under Section 11(5) and (6) of the Act, is only to appoint an arbitrator, the Principal Civil Court of the District is not barred from exercising jurisdiction under Section 14(2) of the Act to decide whether or not the mandate of the arbitrator stood terminated.

33. Let us now examine the scope of Sections 12 to 14 of the Act and whether or not the allegations made by the petitioners, in the Section 14(2) petition filed before the Court below, necessitated termination of the mandate of the 6th respondent-arbitrator. The Arbitration and Conciliation Act, 1996 is based on the UNCITRAL Model law on International Commercial Arbitration, 1985 (model law for short). The preamble to the Act refers to the adoption of the model law by the United Nations Commission on International Trade Law (UNCITRAL for short) in the year 1985; the recommendation of the General Assembly of the United Nations that all countries give due consideration to the said model law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of International Commercial arbitration practice; adoption by the UNCITRAL of the UNCITRAL Conciliation Rules, 1980; recommendation of the General Assembly of the United Nations to use the said Rules in cases where a dispute arises in the context of international commercial relations, and the parties seek an amicable settlement of that dispute by recourse to conciliation; the significant contribution made by the model law and Rules to the establishment of a unified legal frame work in the fair and efficient settlement of disputes arising in commercial relations; and that it was expedient to make a law respecting arbitration and conciliation taking into account the aforesaid model law and the Rules.

34. While the Act is largely based on the model law, Parliament has deviated therefrom in certain aspects. As the scope of Sections 12, 13 and 14 of the Act arise for consideration in these proceedings, it is useful to read the aforesaid provisions of the Act in juxta-position with the relevant Articles of the model law.

UNCITRAL Model Law, 1985

Arbitration and Conciliation Act, 1996

Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. 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.

Article 13. Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14. Failure or impossibility to act

(1) If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party

may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

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

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

(3) An arbitrator may be challenged only if-(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or (b) he does not possess the qualifications agreed to by the parties.

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

Section 13. Challenge procedure:-(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days of becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

Section 14. Failure or impossibility to act:-(1) The mandate of an arbitrator shall terminate if---

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

35. Article 12(1) of the model law is similar to Section 12(1) &(2) of the Act, and Article 12(2) of the model law is identical to Section 12(3)&(4) of the Act. Likewise Articles 13(2) is similar to Section 13(2) & (3) of the Act. While Article 13(3) of the model law enables the unsuccessful party to request the Court to decide on the challenge, Parliament has consciously deviated therefrom and has, in Sections 13(4) & (5), stipulated that, if a challenge under Section 13(2) is not successful, the arbitral tribunal should continue arbitral proceedings and make an award leaving the party, challenging the arbitrator, to make an application later, along with the application to set aside the arbitral award, in accordance with Section 34 of the Act. Sections 13(4) & 13(5) of the Act have consciously deviated from Article 13(3) of the Model Law, and Parliament has specifically excluded the remedy of approaching the Court, on failure of the challenge to an arbitrator before the arbitral tribunal itself, that was made available under Article 13(3) of the model law. When Parliament has consciously excluded the remedy, Courts cannot introduce such a remedy by any rule of interpretation. (*Chennai Metro Rail Limited v. M/s. Lanco Infratech Ltd.* , 2014(2) ARBLR 341 (Madras)). A departure from the UNCITRAL Model Law cannot but be read as the Parliament's resolve to ordain its own and distinct arbitral regime. (*Progressive Career Academy Pvt. Ltd.* , (2011) ILR 4 Delhi 286). Parliament has chosen to deviate from the model law in this regard evidently in view of Section 5 of the Act which stipulates that interference of Courts should be minimal. (*OPBK Construction P. Ltd. v. Punjab Small Industries and Export Corporation Ltd.* , 2008 (3)Arb. LR 189 (P&H)). Section 13(5) of the Act, which provides a challenge to be made by way of objections to the final award under Section 34 of the Act, indicates Parliaments resolve not to brook interference by the Court till after the Award is published (*Progressive Career Academy Pvt. Ltd.* , (2011) ILR 4 Delhi 286), and not to clothe Courts with the power to annul an arbitral tribunal at an intermediate stage. Courts should give full expression and efficacy to the words of Parliament especially where they are unambiguous and unequivocal, and

should not deviate from the rule of literal interpretation unless such an exercise would result in absurdity. (Progressive Career Academy Pvt. Ltd. , (2011) ILR 4 Delhi 286).

36. Section 11(2) of the Arbitration Act, 1940 (the 1940 Act for short) enabled the Court to remove an arbitrator who had misconducted himself or the proceedings. Section 12(1) of the 1940 Act provided for the consequences of an arbitrator being removed by the Court before he had entered upon the reference. Section 12(2) of the 1940 Act provided for the consequences of removal by the Court of an arbitrator who had already entered upon the reference. The 1940 Act enabled the jurisdiction of the Court to be invoked either before the arbitrator entered upon the reference or thereafter. It is this mischief which the 1996 Act seeks to remedy to further the object of Section 5 of the Act which is to minimize judicial intervention to ensure early completion of arbitral proceedings. The legislature found mischief in various provisions of the Arbitration Act, 1940 which enabled a party to approach the Court time and again during the pendency of arbitration proceedings resulting in needless delays. (Progressive Career Academy Pvt. Ltd. , (2011) ILR 4 Delhi 286; Dharam Prakash v. Union of India , 138 (2007) DLT 118 (DB) : , 2007(1) Arb. LR 308(Del.) (DB); Union of India v. Harnam Singh , (1993) 2 SCC 162).

37. Ambiguity, if any, in a statutory provision can be removed applying the Heydons Rule. The Heydons Rule is that, for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered: (1) what was the common law before the making of the Act; (2) what was the mischief and defect for which the common law did not provide; (3) what remedy the legislature has resolved to cure; and (4) the true reason of the remedy. The Court is always to make such construction as shall: (a) suppress the mischief and advance the remedy; and (b) suppress subtle inventions and evasions for the continuance of the mischief pro privato commodo (for private benefit); and (c) add force and life to the cure and the remedy according to the true intent of the makers of the Act pro publico (for the public good). The Heydons rule is applied in order to suppress the mischief which was intended to be remedied as against the literal rule which could have otherwise covered the field. (Parayankandiyal Eravath Kanapraavan Kalliani Amma v. K. Devi , (1996) 4 SCC 76; Goodyear India Ltd. v. State of Haryana , (1997) 116 PLR 252; Ameer Trading Corpn. Ltd. v. Shapoorji Data Processing Ltd., , (2004) 1 SCC 702; Halsburys Laws of England, Vol. 44(1), 4th Reissue, para 1474, pp. 906-07; Bengal Immunity Co. Ltd. v. State of Bihar , (1955) 2 SCR 603 : AIR 1955 SC 661; In re Mayfair Property Company (1898) 2 Ch 28; Eastman Photographic Material Company v. Comptroller General of Patents, Designs and Trade Marks (1898) AC 571; National Insurance Co. Ltd. v. Baljit Kaur , (2004) 2 SCC 1).

38. The Heydon's rule itself is sometimes stated as a primary cannon of construction, sometimes as secondary (i.e available in the case of an ambiguity).

(Maxwell on Interpretation of Statutes; 12th Edn (1969); Craies on Statute Law; 7th Edn (1971), pp 94, 96). The rule is available at two stages. The first task of a court of construction is to put itself in the shoes of the draftsman-to consider what knowledge he had and, importantly, what statutory objective he had-if only as a guide to the linguistic register. Here is the first consideration of the "mischief". Being thus placed in the shoes of the draftsman, the Court proceeds to ascertain the meaning of the statutory language. In this task the first and most elementary rule of construction is to consider the plain and primary meaning, in their appropriate register, of the words used. If there is no such plain meaning (ie if there is an ambiguity), a number of secondary canons are available to resolve it. Of these one of the most important is the Heydon's Rule. Here, then, may be a second consideration of the "mischief". (Maunsell v. Olins (1975) 1 All ER 16).

39. It is to remedy the mischief in the 1940 Act, which enabled intervention by the Court at different stages of arbitral proceedings i.e., before, during and after completion of arbitral proceedings, was Section 5 introduced in the 1996 Act. The object of Section 5 of the Act is to restrict judicial interference, and allow arbitral proceedings to be concluded at the earliest. (Hasmukhlal H. Doshi v. Justice M.L. Pendse , 2001 (1) ARBLR 87). The non-obstante clause, in Section 5 of the Act, gives it overriding effect over any other law in force and, therefore, except where so provided under any provision of Part I of the Act, no judicial authority can intervene during the progress of arbitral proceedings. Sections 12 to 14 of the Act are in Part I of the Act. While Section 14(2) provides for judicial intervention if a controversy remains concerning any of the grounds in Section 14(1)(a), Section 13(5) prohibits judicial intervention immediately after an unsuccessful challenge to an arbitrator on the grounds mentioned in Section 12 (3), and requires the person, who mounted such a challenge, to await passing of an award and thereafter, in accordance with Section 13(5), to challenge the arbitrator along with the award in proceedings under Section 34 of the Act. Widening the scope of Section 14(1)(a) needlessly, (and to include therein matters which fall under Section 12(3)(a)), would contravene Section 5 of the Act which is to minimize intervention of the Court. (Priknit Retails Ltd. v. Aneja Agencies , 2013(2) ARBLR 35 (Delhi)).

40. Articles 13 and 14 of the UNCITRAL model law provided two independent tracks, one relating to the very appointment, and the other relating to the continuation of the arbitrator. While Section 13(2) of the Act stands at the threshold, Section 14(2) stands after the entry point. (Imaging Solutions Pvt. Ltd. v. Hughes Communications India Ltd. , 2013(1) ARB LR 433 (P&H)). The challenge, contemplated under Section 13(2) read with Section 12(3) of the Act, is to the very appointment, while the remedy under Section 14 is to the continuance of the Arbitrator. (Chennai Metro Rail Limited , 2014(2) ARBLR 341 (Madras)).

41. When a situation arises under Article 14 of the model law, the party has no

remedy to go before the arbitral tribunal and the remedy is only to go before the Court. (Chennai Metro Rail Limited , 2014(2) ARBLR 341 (Madras)). Like Article 14(1) of the model law, Section 14(2) of the Act also enables a party to apply to the Court to decide on the termination of the mandate, if a controversy remains concerning any of the grounds referred to in Section 14(1)(a) of the Act. While both Articles 13(3) and 14(1) of the model law enable an unsuccessful party to immediately invoke the jurisdiction of the Court, Parliament, while choosing to adopt the very same procedure as is stipulated in Article 14(1) of the model law also in Section 14(2) of the Act, has consciously deviated from Article 13(3) which enables an unsuccessful party to mount a challenge immediately before the Court, and has stipulated that the unsuccessful party should await passing of the award, and to mount a challenge to an arbitrator, along with a challenge to the award, only under Section 34 of the Act.

42. Section 14 is an independent provision, not controlled either by Section 12 or Section 13. (Himadri Chemicals & Industries Ltd. v. Steel Authority of India Ltd. (, 2012) 3 CALLT 339). Sub-sections (1), (2) and (3) of Section 14 envisage a situation where the arbitrator may, on his own, recuse himself on objection being taken qua his functioning as an arbitrator, or where both the parties agree to his mandate being terminated. (Bharat Heavy Electricals Ltd. v. CN Garg , 2000(3) ARBLR 674(Del)). Section 14 (1) perceives an automatic termination of the mandate of the arbitrator. In the prescribed eventualities, there is a statutory termination of the arbitrator's mandate. If the facts constituting the eventualities in Section 14(1) are neither in dispute nor demand any proof to be established, termination of the mandate of the arbitrator takes place on statutory prescription. Where there is a controversy regarding the grounds, which entails the termination of the mandate, the party has to invariably approach the Court to decide on the termination of the mandate. The word "controversy", appearing in Section 14(2), only denotes a requirement to establish any of the grounds in Section 14(1). Adjudication by a Court may be necessary if the ground (s) urged, challenging the arbitrator, are required to be established by adducing evidence. (State of Arunachal Pradesh v. Subhash Projects & Marketing Ltd. , 2007(1) Arb.LR 564 (Gauhati) (DB)).

43. The Court does not terminate the mandate of an arbitrator. It stands terminated on the happening of anyone of the events referred to in Section 14(1), and the Court only declares it. (Ram Chandra Rungta v. Ram Swarup Rungta , AIR 2015 Cal 24). Use of the word "or" between the kinds of eventualities in Section 14(1)(a) show that they are disjunctive. The mandate of the arbitrator would terminate by the occurrence of anyone of the events prescribed in sub-clause (a) which is either (i) his becoming de jure or de facto unable to perform his functions or, (ii) for other reasons, he fails to act without delay. (Priknit Retails , 2013(2) ARBLR 35 (Delhi)). While deciding a petition under Section 14(2) of the Act, all that the Court does is to declare whether termination of the mandate of the arbitrator ipso jure has taken place or not. To that extent, the order of the Court under Section 14(2) of the Act is merely

declaratory, and is not in the nature of a mandatory or perpetual injunction restraining a person from acting as an arbitrator. A declaration that the mandate of the arbitrator stands terminated does not amount to his removal by the Court. (Alcove Industries Ltd. v. Oriental Structural Engineers Ltd. , 2008 (1) ARBLR 393 (Delhi)).

44. The allegations of bias, levelled against the 6th respondent-arbitrator by the petitioners herein, relate mainly to his taking the assistance of Sri G.S. Thakur, Advocate; his proximity to the respondents; and his having filed a counter in the Section 14 petition filed before the Court below. What does bias mean? Bias may be defined as a pre-conceived opinion or a pre-disposition or pre-determination to decide a case or an issue in a particular manner, so much so that such pre-disposition does not leave the mind open to conviction. (State of West Bengal v. Shivananda Pathak (, 1998(3) SCALE 411). The rule against bias includes the absence of prejudice or partiality on the part of the decision-maker. (Judicial Review of Administrative Action: de Smith, Woolf & Jowell : Fifth Edition; Sridhar Lime Products v. Deputy Commissioner of Commercial Taxes¹). Disqualification for bias may exist where a decision-maker has an interest in the issue by virtue of his identification with one of the parties, or has otherwise indicated partisanship in relation to the issue. (Sridhar Lime Products¹). The likelihood of bias may arise on account of proprietary interest or on account of personal reasons, such as hostility to one party or personal friendship or family relationship with the other. (Ashok Kumar Yadav v. State of Haryana , (1985) 4 SCC 417).

45. Bias vitiates the entire arbitration process and renders the entire judicial proceedings nugatory. This equally applies to arbitrators as statutorily provided in Sections 12 and 13 of the Act. (Sharma Enterprises v. National Building Constructions Corporation Ltd. , 2008 (3) ARBLR 456 (Del); National Highways Authority of India v. K.K. Sarin , 159 (2009) DLT 314; Shivananda Pathak (, 1998(3) SCALE 411). Bias may be found in a variety of situations and each case, where bias of the adjudicator is alleged, has to be seen in the context of its own facts, and a fanciful apprehension of bias is not enough. (Ladli Construction Co. Ltd. v. Punjab Police Housing Corp. Ltd. , AIR 2012 SC 1580).

46. In deciding the question of bias, human probabilities and ordinary course of human conduct has to be taken into consideration. (A.K. Kraipak v. Union of India , AIR 1970 SC 150; Dr. Tera Chinnapa Reddy v. The Govt. of A.P. , 2014(2) ALT (CrI.) 299 (AP)). A pre-disposition to decide for or against one party, without proper regard to the true merits of the dispute, is bias. There must be reasonable apprehension of that predisposition, and it must be based on cogent material. The test for bias is whether a reasonable intelligent man, fully apprised of all the circumstances, would feel a serious apprehension of bias. (Ladli Construction Co. Ltd. , 159 (2009) DLT 314; Mustill and Boyd, Commercial Arbitration, 1982 Edition, page 214. Halsbury's Laws of England, Fourth Edition, Volume 2, para 551, page 282). What has to be seen is whether there is

substantial possibility of bias animating the mind of the Tribunal against the aggrieved party. (Union of India v. Sanjay Jethi , (2013) 16 SCC 116). Section 12(3)(a) of the Act enables a challenge to an arbitrator only if circumstances exist that give rise to justifiable doubts as to his independence and impartiality. The word independence means freedom from control or influence of another or others. The word impartiality means treatment of different views or opinions equally and fairly. Failure of the arbitrator to be free from the influence, of the parties to the arbitral process, constitutes bias, and falls within the ambit of Section 12(3)(a) of the Act.

47. Let us now take note of the judgments of this Court and other High Courts which have either held that the arbitrators bias would fall within the ambit of Section 14(1)(a) or that they do not.

48. In Subhash Projects & Marketing Ltd. , 2007(1) Arb.LR 564 (Gauhati) (DB), a Division bench of the Gauhati High Court held that the independence and impartiality of an arbitrator, being inseverable attributes to vest him with legal authority to adjudicate the difference between the parties in an arbitration exercise, he would be de jure disqualified from discharging his functions once he renounces the above qualities is the mandate of Sections 12, 13 and 14 which form a complete scheme with the underlying objective of securing the sanctity and probity of an arbitration proceeding; if the circumstances envisaged in Section 12(3) of the Act exist, a party failing to raise a challenge based thereon under Section 13(2), cannot be debarred from availing a remedy otherwise available to him under the Act; failure of such a party to file an application under Section 13(2), on the grounds under Section 12(3) of the Act, would not act as an estoppel against him; the grounds specified in Section 34, only on which an arbitral award is assailable, do not contemplate possible bias or partiality of the arbitrator as a ground of impeachment of the award; to shut out such a party in the above premise from resorting to any other legally permissible remedy would connote that the malaise of bias would not only remain unresolved during the arbitration process but also remain unimpugned at the post award stage as well; Section 14 has a role and relevance independent of Section 13 of the Act; the two provisions are not mutually exclusive; a party, unsuccessful in his challenge under Section 13, would be debarred from carrying the same to any other forum resting on some other provision of the Act except to the extent permissible under Section 34; and such an impediment does not stare at a party omitting and/or failing to question the independence and impartiality of the arbitrator under Section 13(2) within the time prescribed.

49. In Alcove Industries Ltd. , 2008 (1) ARBLR 393 (Delhi), the Delhi High Court held that an arbitrator, with regard to whom there is a reasonable apprehension of bias, renders himself de jure unable to perform his functions; a petition under Section 14 of the Act lies on the ground of bias; one cannot read into Sections 12 and 13 a limitation on the right of one or the other party to move the Court under Section 14 of the Act; the Act does not contemplate an election of one or

the other remedy by the aggrieved party to choose between the remedy under Sections 12 and 13 on the one hand, and under Section 14 on the other; invocation of one remedy by a party does not restrict that party from invoking the other remedy; these remedies appear to constitute a single scheme, wherein the aggrieved party would first be expected to challenge the arbitrator under Sections 12 and 13 and if that fails, and the party is still aggrieved and can make out a case of de jure or de facto inability of the arbitrator to act, to move the Court under Section 14; a party alleging bias is required to first follow the procedure in Sections 12 and 13 and, if unsuccessful, has the choice of either waiting till the stage of Section 34 or, if he feels that bias can be summarily established or shown to the Court, approach the court immediately under Section 14, after the challenge is unsuccessful.

50. In *Sharma Enterprises*, (1985) 4 SCC 417; *K.K. Sarin*, 2008 (3) ARBLR 456 (Del), and *Delhi Chemical & Pharmaceutical Works Pvt. Ltd. v. Himgiri Realtors Pvt. Ltd.*, 181 (2011) DLT 504, the Delhi High Court held that the scheme of the Act is that a challenge has to be first made before the arbitrator in accordance with Section 13 of the Act and, upon such challenge being unsuccessful, the challenging party has the remedy of either waiting for the award and, if it goes against him, to apply under Section 34 of the Act or to immediately, after the challenge is unsuccessful, approach the Court under Section 14 of the Act; on its jurisdiction being invoked under Section 14 of the Act, the Court should examine whether the case can be decided in a summary fashion; if it can be, and if it finds that a case of de jure inability owing to bias is established, the Court would 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; 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 whereunder leading of evidence is permissible; Section 14, however, does not permit any opportunity to the Petitioner to furnish proof; and all complicated questions, requiring trial or appreciation of evidence in support of a plea of bias, are to be decided in a petition under Section 34 of the Act.

51. In *KK Sarin*, 2008 (3) ARBLR 456 (Del), it was held that, if the arbitrator is biased, he is de jure unable to perform his functions within the meaning of Section 14; if the court, without any detailed enquiry, is able to reach a conclusion that the arbitrator, for reason of bias, is unable to perform his functions, it can, without requiring the parties to go through lengthy costly arbitration, hold that the mandate of the arbitrator stands terminated; and the power under Section 14 should be exercised sparingly, and only when a clear case of bias is made out or else it should leave this question to be adjudicated at the stage of Section 34.

52. In *Himadri Chemicals & Industries Ltd.* , (2012) 3 CALLT 339, the Calcutta High Court held that an application, under Section 14 of the Act, can be maintained on the very rare occasions where the arbitrator is found to be under such disability that he is unable to give his decision on the application under Sections 12 and 13 of the Act.

53. In *Imaging Solutions Pvt. Ltd.* , 2013(1) ARB LR 433 (P&H), the Punjab and Haryana High Court held that it would be futile to go through the whole exercise of arbitration proceedings leading to the final award, and then challenging it under Section 34 of the Act; on the contrary, if the arbitrator becomes de jure unable to perform his functions, then his mandate is liable to be terminated under Section 14 of the Act; in the instant case, the arbitrator became de jure unable to perform his functions because of his being a director of the first respondent, which fact was not earlier known to the petitioner; and, consequently, this ground squarely fell within the parameters of Section 14 of the Act for termination of the mandate of the arbitrator, without resorting to Section 34 of the Act read with Section 13(5) thereof.

54. In *Yashwitha Constructions (P) Ltd. v. M/s. Simplex Concrete Piles India Ltd.* , 2008(4) ALT 266, one of us (RR,J) held that a party, not raising a challenge under Section 13 of the Act, would not be excluded from availing a remedy under Section 14 even if the ground(s) urged is/are within the prescribed parameters of the said provision; an arbitrator, with regard to whom there is a reasonable apprehension of bias, renders himself de jure unable to perform his functions; and only a well founded and justifiable doubt about the arbitrator, covered by Sections 12 to 14 of the Act, can be made a ground for terminating the mandate of an arbitrator.

55. On the other hand the Madras High Court, in *Chennai Metro Rail Limited* , 2014(2) ARBLR 341 (Madras), held that neither the Division Bench of the Gauhati High Court in *Subhash Projects & Marketing Ltd.* , 2007(1) Arb.LR 564 (Gauhati) (DB), nor the Delhi High Court in *Alcove Industries Ltd.* , 2008 (1) ARBLR 393 (Delhi), had taken note of the UNICITRAL Model Law; the concern expressed by the Division Bench of the Gauhati High Court, in *Subhash Projects & Marketing Ltd.* , 2007(1) Arb.LR 564 (Gauhati) (DB), was that, if the arbitrator was biased and the party aggrieved by his appointment failed to make a challenge within 15 days, would he forfeit his right at all and would he get justice at the hands of the Tribunal?; the answer to the question could be found in Section 34(2)(a)(v); if a party challenges an arbitrator under Section 13(2), and suffers an order of rejection by the arbitral tribunal, he can include it as one of the grounds of challenge to the final award in terms of Section 13(5); independent of Section 13(5), Section 34(2)(a)(v) enables a party to seek to set aside the award on the ground that the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties; and Sections 13 and 14 are mutually exclusive as per the scheme of the Act.

56. In *CN Garg* , 2000(3) ARBLR 674(Del), the Delhi High Court held that Section

13(5) implies that a challenge to the award is permitted even on grounds of bias and partiality of the arbitral tribunal; applying the doctrine of incorporation", this ground must be read into Section 34; provisions of Section 13(5) and Section 34 are to be read harmoniously; and a right conferred upon an aggrieved party under Section 13(5) of the Act cannot be taken away by a narrow and pedantic interpretation of Section 34 of the Act.

57. The first limb of Section 14(1)(a) of the Act stipulates that the mandate of the arbitrator shall terminate if he becomes *de jure* or *de facto* unable to perform his functions. What do the words *de jure* or *de facto* mean? P. Ramanatha Aiyar's *Advanced Law Lexicon*, Volume 2, page 1215 defines "*de facto*" to mean, in fact; actually; frequently used in contra-distinction to *de jure* meaning rightful, legitimate, lawful; antithetical to *de jure*; *de facto* signifies a thing actually done; that is done in deed; actual; existing in fact; having effect even though not formally or legally recognized; and by virtue of existence, rather than any legal right. (OPBK Construction Pvt. Ltd. , 2008 (3)Arb. LR 189 (P&H)). The word "*de jure*" has been defined in Black's Law Dictionary 5th Edition as descriptive of a condition in which there has been total compliance with all requirements of law, of right; legitimate; lawful; by right and just title. Ramanath Iyer - *The Law Lexicon* defines the word "*de jure*"-as of right; by law; legitimate; lawful; by right and just title. By use of the word *become*, Section 14(1)(a) has been made applicable only to a situation arising after the arbitrator has been appointed to resolve the dispute between the parties. The word *unable* means incapable, ineffective, useless. Section 14(1)(a) is attracted only when an arbitrator becomes incapable, either in law or in fact, of performing his functions.

58. The distinction between Sections 12 and 13 on the one hand and Section 14 on the other, in immediately invoking the jurisdiction of the Court, is based on the ability or the capacity of the arbitrator to continue arbitral proceedings. The challenge to an arbitrator under Section 12(3)(a) of the Act, even if unsuccessful, does not disable or incapacitate the arbitrator from continuing arbitration proceedings. Section 14(1)(a) of the Act, however, relates to the inability/incapacity of the arbitrator to perform his functions, or where his performance is such as to needlessly delay early completion of arbitration proceedings. While the *de jure* or *de facto* inability of the arbitrator to perform his functions results in bringing arbitral proceedings to a grinding halt, needless delay in the early completion of arbitral proceedings is also a reflection of the arbitrators inability to complete arbitration proceedings expeditiously. It is for this reason that, unlike Section 13, Section 14 of the Act provides for the termination of the mandate of the arbitrator.

59. The incapacities, referred to in Section 14 (1) (a) of the Act, are such as to have a direct nexus with the inability of the arbitrator to perform his functions. This incapacity or disability should occur to the arbitrator himself so that he becomes, as a matter of law or fact, unable to perform his functions. (Priknit Retails Ltd. , 2013(2) ARBLR 35 (Delhi)). The *de jure* impossibility, referred to in

Section 14(1)(a), is the impossibility which occurs due to factors personal to the arbitrator, and de facto inability occurs due to factors beyond the control of the Arbitrator. (Shyam Telecom Ltd. v. ARM Ltd. , 2004 (3) ARBLR 146 Delhi; Priknit Retails Ltd. , 2013(2) ARBLR 35 (Delhi)). Examples would be the death of the arbitrator or his health problems etc. (Priknit Retails Ltd. , 2013(2) ARBLR 35 (Delhi)). Mere legal disability is not a condition precedent for invocation of Section 14. The de jure inability must relate to his ability to function. (Priknit Retails Ltd. , 2013(2) ARBLR 35 (Delhi)).

60. The mandate of an arbitrator automatically terminates on the death of the arbitrator or his physical incapacity to proceed with the mandate. De jure incapacity refers to an arbitrator's legal incapacity to perform his functions under the law, for instance, bankruptcy, conviction for a criminal offence, etc. Defacto incapacity relates to factual inability, which includes factual situations in which the arbitrator is physically unable to perform his functions for instance, continuous ill-health, etc. (Shyam Telecom Ltd. , 2008(4) ALT 266). If an arbitrator is genuinely lacking in physical or mental ability to discharge his obligations, or is found to have left his last known address without intimation and is untraceable for quite some time, or has been detained for custodial interrogation for a substantial period of time for his having committed an offence and there is uncertainty regarding his release from custody, and the Court is of the opinion that the arbitrator has acquired de facto inability and hence cannot act without undue delay, an order, terminating the mandate of the arbitrator, may be passed. Similarly, if the arbitrator becomes de jure unable to function as such, for any reason other than manifestation of lack of independence or impartiality for which he may have been approached to give his ruling, approach under Section 14 is not barred. (Himadri Chemicals & Industries Ltd. , (2012) 3 CALLT 339).

61. In interpreting a Statute, the Court has to ascertain the will and policy of the legislature as discernible from the object and scheme of the enactment and the language used therein. (Chern Taong Shang v. Commander S.D. Baijal , (1988) 1 SCC 507). The fairest and most rational method to interpret the will of the legislature is by exploring its intention at the time when the law was made, by signs most natural and probable. And these signs are the words, the context, the subject matter, the effect and consequence, or the spirit and reason of the law. (Blackstone Commentaries on the Laws of England (Facsimile of 1st edn. 1765, University of Chicago Press 1979 Vol. 1 at 59; Doypack Systems (P) Ltd. v. Union of India , (1988) 2 SCC 299). The object sought to be achieved by the restriction placed, on a challenge to an arbitrator, by Section 13(5) of the Act is to avoid needless interference by Courts in arbitral proceedings, and to ensure its early completion.

62. Reliance placed by Sri Sandeep Sharma, Learned Counsel for the petitioner, on Juggilal Kamlatpat v. General Fibre Dealers Ltd. , AIR 1962 SC 1123, is misplaced. In Juggilal Kamlatpat , (1988) 2 SCC 299, the scope of Rule 10, of the

Rules of the Chamber relating to the appointment of Arbitral Tribunals, was in issue. The said rule stipulated that, if any appointed arbitrator becomes incapable of acting, the Registrar shall substitute and appoint a new arbitrator, and the Court so reconstituted shall proceed with the arbitration. It was contended before the Supreme Court that the words becomes incapable of acting apply only to physical inability to act; and it should be read with the following words dies. It is in this context that the Supreme Court held that the word incapable" must refer to some incapacity arising after the date of the appointment, or not known to the parties on that date; if, after his appointment, the arbitrator acquires an interest in the subject-matter of the dispute, he must be held to have become incapable of acting even though there is no question of any physical incapacity on his part; the words becomes incapable of acting cannot take their colour from the word dies, they are a separate category by themselves and must be interpreted on their own; generally speaking an arbitrator may become incapable of acting because of some physical cause, for example, he may fall ill or may go mad and so on; and these words not only refer to physical incapacity, they refer to any kind of incapacity, which may supervene after the appointment of the arbitrator, even to an incapacity from before but which was not known to the parties.

63. Every statement in a case should be understood with due regard to its facts, the true question that arose for determination and the answer furnished to that question or the ratio decidendi or the principles enunciated which alone is the declaration of law. A contention can neither be based nor accepted solely on a reading of one sentence, that too out of context. (H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur etc. v. Union of India , AIR 1971 SC 530; Visvarama Hotels Ltd. v. Anjuman-e-Imamia , ILR 1983 Karnataka 223 : 1984 (2) KarLJ 185). There is always peril in treating the words of a judgment as though they are words in a legislative enactment. Judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between the conclusion in two cases. (Padmasundara Rao v. State of T.N. , AIR 2002 SC 1334; Herrington v. British Railways Board (1972) 2 WLR 537).

64. While acquisition of interest in the subject matter of the dispute may well result in the arbitrator becoming incapable of acting, it must be borne in mind that the 1996 Act, in two different provisions, prescribes not only the cause for discontinuing the arbitrator but also provides for two different and distinct remedies for a challenge thereto. The cause under Section 12(3)(a) is where circumstances exist that give rise to justifiable doubts as to the independence or impartiality of the arbitrator, and the remedy therefor is provided firstly under Sections 13(2) & (3) and, on an unsuccessful challenge, under Section 13(5) of the Act. The cause for termination of the mandate of an arbitrator under Section 14(1)(a) is either his de jure or de facto inability to perform his functions or, for other reasons, he fails to act without undue delay. The remedy, on a controversy remaining, is provided in Section 14(2) of the Act. As Parliament has provided for

two different and distinct remedies, the Court cannot presume the cause in Section 12(3)(a) and 14(1)(a) to be the same, nor can it equate the expressions give rise to justifiable doubts as to the independence or impartiality with becomes de jure or de facto unable to perform his functions. If both the expressions were to mean the same, it was unnecessary for Parliament to provide for it in two different provisions as one would have sufficed.

65. When two different expressions are used by the same statute, one has to construe these different expressions as carrying different meanings. (Kailash Nath Agarwal v. Pradeshia Industrial & Investment Corpn. of U.P. Ltd., , (2003) 4 SCC 305). Different use of expressions in two provisions of a statute is for a purpose. If the field of the two provisions were to be the same, the same expression would have been used. (B.R. Enterprises v. State of U.P., , (1999) 9 SCC 700 : AIR 1999 SC 1867). When two expressions of different import are used in a statute in two consecutive provisions, it would be difficult to maintain that they are used in the same sense, and the conclusion must follow that the two expressions have different connotations. (Member, Board of Revenue v. Arthur Paul Benthall , AIR 1956 SC 35 : (1955) 2 SCR 842). When the legislature has taken care of using different phrases in different sections, normally different meaning is required to be assigned to the language used by the legislature. If, in relation to the same subject-matter, different expressions of different import are used in the same statute, there is a presumption that they are not used in the same sense. (Arthur Paul Benthall , (1999) 9 SCC 700 : AIR 1999 SC 1867; Oriental Insurance Co. Ltd. v. Hansrajbhai V. Kodala , (2001) 5 SCC 175 : AIR 2001 SC 1832). If the legislative intent was not to distinguish and, while stating that circumstances exist that gives rise to justifiable doubts as to his (arbitrators) independence or impartiality, it was intended to convey the idea of the arbitrator becoming de jure or de facto unable to perform his functions; there would have been no necessity of expressing the position differently. When the situation has been differently expressed the legislature must be taken to have intended to express a different intention. (CIT v. East West Import and Export (P) Ltd., , (1989) 1 SCC 760).

66. As continuance of arbitral proceedings, despite acquisition of an interest in the subject matter of the dispute, would give rise to justifiable doubts as to the independence or impartiality of an arbitrator, it must necessarily mean that, as these circumstances fall within the ambit of Section 12(3)(a), they would not fall within the ambit of the first limb of Section 14(1)(a) of the Act. The de jure or de facto inability of an arbitrator to perform his functions would, therefore, exclude circumstances which give rise to justifiable doubts as to the independence or impartiality of the arbitrator falling within the ambit of Section 12(3)(a) of the Act.

67. While the arbitrators bias towards one of the parties before him, would give rise to justifiable doubts as to his independence or impartiality, attracting Section 12(3)(a) of the Act, it would not result in his becoming de jure or de facto unable

to perform his functions. If both these expressions were indeed synonymous, or the latter was wide enough to include the former also, there was no need either for the UNCITRAL or Parliament to provide for such a contingency in two different provisions (when one would have sufficed), and for Parliament to provide two different remedies to an unsuccessful challenge thereto.

68. The contention, urged on behalf of the petitioners, that both relate to bias of an arbitrator, is incongruous. If the challenge to the arbitrator on grounds of bias under Section 12(3)(a) of the Act is unsuccessful, and the only remedy is under Section 13(5) of the Act, the aggrieved party must then await an award being passed, and only then mount a challenge to the arbitrator, along with a challenge to the award, under Section 34 of the Act. If, on the other hand, he were to be held entitled to challenge the mandate of the arbitrator under Section 14(1)(a) also, on the very same ground of bias, he would then, on his challenge being unsuccessful under Section 13(3), have the remedy of immediately approaching the Court under Section 14(2) of the Act; and, even if the Court were to reject his request for termination of the mandate under Section 14(2) of the Act, the unsuccessful party could exercise his remedy under Section 13(5) and, after an award is passed, again challenge the arbitrator, along with a challenge to the award, under Section 34 of the Act to the very same Court. Would the Court, hearing the challenge to the arbitrator along with award under Section 34 of the Act, not be required to adhere to the earlier order passed by it under Section 14(2)? If so, would the remedy under Section 13(5) read with Section 34 of the Act not be illusory as a challenge thereunder can have no other result? If, on the other hand, the Court hearing the application under Section 13(5) read with Section 34 of the Act, were not to be bound by its earlier order under Section 14(2) of the Act, no useful purpose would be served by passing an order under Section 14(2) of the Act as any such order would be ineffective.

69. The Court should presume that the legislature does not enact absurd or meaningless laws. The Parliament has used different expressions i.e. circumstances exist that give rise to justifiable doubts as to his independence or impartiality in Section 12(3)(a), and becomes de jure or de facto unable to perform his functions in Section 14(1)(a) only because these provisions provide for two different consequences. While an unsuccessful challenge, on the grounds mentioned in Section 12(3)(a), would require the arbitrator to continue arbitral proceedings and pass an award, an unsuccessful challenge under Section 14(1)(a) would enable the Court immediately thereafter to terminate the mandate of the arbitrator, and the proceedings under Section 14(2) of the Act need not await an award being passed.

70. The contention that the challenge under Section 13(2) r/w. Section 12(3) on the one hand, and Section 14(1) and (2) on the other, are in the alternative is also flawed. Accepting this submission would mean that, for an act which falls within the ambit of Section 12(3)(a), a party to the agreement has the choice of either invoking the remedy under Section 13(2) or 14(2) but not both. If a party

were to approach the arbitrator under Section 14(1) alleging that his bias has resulted in his de-jure or de-facto inability to perform his functions, and the arbitrator fails to withdraw, the aggrieved party would then have the remedy of invoking the jurisdiction of the Court under Section 14(2) of the Act. In such an event, Section 13(5) would become redundant and the object of minimizing judicial intervention under Section 5 of the Act, to ensure early completion of the arbitral proceedings, would be defeated.

71. That such a reading of Sections 12 to 14 is impermissible is also clear from a reading of Section 16 of the Act. Under Section 16(1) and (2) a plea, that the arbitral tribunal does not have jurisdiction, can be raised before the arbitral tribunal which can rule on its own jurisdiction. An unsuccessful challenge to the jurisdiction of the tribunal must await a further challenge only after an arbitral award is passed. Section 16(6) stipulates (similar to Section 13(5) of the Act) that a party, aggrieved by such an arbitral award, may make an application for setting aside the arbitral award under Section 34 of the Act. The very object of prohibiting judicial intervention, except where it is so provided in Part-I of the Act (Sections 2 to 43), would be defeated if the circumstances which give rise to justifiable doubts as to the independence or impartiality of an arbitrator under Section 12(3)(a) is understood to mean de-jure and de-facto inability to perform his functions under Section 14(1)(a) of the Act.

72. The scheme of the Act makes it clear that the legislature did not intend (i) either to provide multiple remedies; (ii) or to provide mutually exclusive concurrent remedies. Section 13 operates in a field that is completely different from Section 14. One has no connection with the other. This is why both Sections stipulate both the right as well as the remedy. Section 13 is a complete code in that (i) it confers a right to challenge an arbitrator; (ii) it indicates the grounds on which such challenge could be made, by referring to Section 12(3); (iii) it prescribes the forum where such a challenge can be made (viz., the arbitral tribunal); and (iv) it also indicates the remedy available to a party whose challenge under Section 13(2) fails. Section 13(5) contains the remedy. (*Chennai Metro Rail Limited* , 2014(2) ARBLR 341 (Madras)). In view of the express language of Section 13(2) a challenge to an arbitrator, on the grounds specified in Section 12(3), has to be made only before the Arbitral Tribunal. Similarly, a controversy concerning the de jure or de facto inability of the arbitrator to perform his functions, or a controversy concerning the failure of the arbitrator to act without undue delay in terms of Section 14(1)(a), can be agitated only before the Court under Section 14(2). Section 14 is not wide enough to include a challenge to an arbitrator on the grounds specified in Section 12(3). (*Chennai Metro Rail Limited* , 2014(2) ARBLR 341 (Madras)).

73. The submission of Sri Sandeep Sharma, that the opinion expressed in *Yashwitha Constructions (P) Ltd.* , 181 (2011) DLT 504, should be followed, is not tenable. A precedent ceases to be a binding precedent when it is rendered per incuriam. (*Commissioner of Income-tax v. B.R. Constructions* , (1993) 202 ITR

222 (AP) (FB)). The Latin expression *per incuriam* means through inadvertence. (Punjab Land Development and Reclamation Corporation Ltd., Chandigarh v. Presiding Officer, Labour Court, Chandigarh , (1990) 3 SCC 682). *Incuria* literally means carelessness. In practice *per incuriam* appears to mean *per ignoratium*. English courts have developed this principle in relaxation of the rule of *stare decisis*. The quotable in law is avoided and ignored if it is rendered in *ignoratium* of a statute or other binding authority. (Young v. Bristol Aeroplane Co. Ltd. (1944) KB 718). This principle has been accepted, approved and adopted by the Supreme Court while interpreting Article 141 of the Constitution of India which embodies the doctrine of precedents as a matter of law. (State of U.P. v. Synthetics and Chemicals Ltd. , (1991) 4 SCC 139).

74. A decision should be treated as given *per incuriam* when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. A judgment delivered without argument and without reference to the relevant statutory provisions is not binding. (Municipal Corporation of Delhi v. Gurnam Kaur , (1989) 1 SCC 101). Where, by obvious inadvertence or oversight, a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of a binding precedent. (Mamleshwar v. Kanahaiya Lal , AIR 1975 SC 907; Morelle v. Wakeling (1955) 2 QB 379).

75. In *Yashwitha Constructions (P) Ltd. , 181 (2011) DLT 504*, one of us (RR,J) failed to notice the distinction between the expressions used in Sections 12(3)(a) and 14(1)(a) of the Act; and that, while Section 12(3)(a) relates to the failure of the arbitrator to act in accordance with what has been stipulated therein, Section 14(1)(a) does not relate to his failure, but to his inability to act. The said judgment, in *Yashwitha Constructions (P) Ltd. , 181 (2011) DLT 504*, must therefore be held to be a decision rendered *per incuriam*.

76. Eminent Judges have shown the path making it easier for others, far less equipped, to follow. In *Distributors (Baroda) P. Ltd. v. Union of India , AIR 1985 SC 1585*, P.N. Bhagwati J held that his earlier decision, in *M/s. Cloth Traders (P) Ltd. v. Additional Commissioner of Income-Tax , AIR 1979 SC 1691*), must be regarded as wrongly decided; and the view taken in that case, in regard to the construction of Section 80-M, must be held to be erroneous and should be corrected. In *Hotel Balaji v. State of A.P. , AIR 1993 S.C.1048 : 1993 Supp (4) SCC 536*, S. Ranganathan, J had no hesitation in accepting the point of view, presented before the Supreme Court, which appealed to him as more realistic, appropriate and preferable, particularly when he saw that the view, one way or the other, would affect the validity of a large number of similar legislations all over India, merely because it may not be consistent with the view he took in *Good Year India Ltd. , (1997) 116 PLR 252* as consistency, for the mere sake of it, was no virtue. Similarly, in *Ganga Reddy M v. State of Andhra Pradesh (, 1996 (3) ALT 53*, P. Venkatrami Reddy J, speaking for the Division Bench of this Court, held that the view expressed by him, speaking for the Division Bench in the

earlier two Division Bench decisions in *Prasad & Co. v. Superintending Engineer*, 1995(3) ALT 537 (DB) and *State of A.P. v. P.L. Raju & Co.*, 1996(1) ALT 144, must be taken to be decisions rendered per incuriam in so far as the arbitrator's power to award interest was concerned.

77. To quote P.N. Bhagawati J, in *Distributors (Baroda) P Ltd.* (1955) 2 QB 379,:-

"To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. In this, we derive comfort and strength from the wise and inspiring words of Justice Bronson in *Pierce v. Delameter* (AMY at page 18) a Judge ought to be wise enough to know that he is fallible and, therefore, ever ready to learn: great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead: and courageous enough to acknowledge his errors."

(emphasis supplied).

78. While the arbitrators bias would, undoubtedly, fall within the ambit of Section 12(3)(a), as it would then give rise to justifiable doubts of the arbitrators independence or impartiality, bias would not fall within the ambit of Section 14(1) (a), and de jure or de facto inability of the arbitrator would mean the inability of the arbitrator to actually discharge his functions, and not his failure to discharge his functions independently or impartially.

79. Appearance of bias would suffice to vitiate proceeding and ordinarily, on a clear case of bias being made out, the arbitrator is expected to withdraw, as he must not only be independent and impartial, but must also be seen to be independent and impartial. In those rare cases where, despite a clear case of bias having been made out and yet the arbitrator chooses not to withdraw, Parliament has placed greater emphasis on the need to continue arbitral proceedings, leaving it open to the aggrieved party to mount a challenge to the arbitrator before the Court, under Section 34 of the Act, after an award is passed. While continuance of arbitral proceedings in such cases may well require the unsuccessful party to undergo the ordeal of participating in such proceedings, the legislative emphasis is on minimising judicial intervention, and thereby ensure early completion of arbitral proceedings. The object sought to be achieved, by postponing the remedy under Section 13(5) till after an award is passed, is to avoid frivolous challenges to the independence and impartiality of the arbitrator, and the consequent delays in early completion of arbitral proceedings. The Court can always, in a petition under Section 34 of the Act, examine whether a case of bias, falling within the ambit of Section 12(3)(a), is made out and, if it is so satisfied, to set aside the award. While the unsuccessful party, in the Section 13(3) exercise, would no doubt have to incur needless expenditure in continuing to participate in such arbitration proceedings, the other party, even if an award is passed in his favour later, would also run the risk of the entire arbitration proceedings, including the award, being set at naught in proceedings under Section 34 of the Act.

80. Reliance placed by Sri Sandeep Sharma, Learned Counsel for the petitioners

on Sections 9 and 17 of the Act, to contend that alternative remedies for the same circumstance are also provided therein, is misplaced. It is true that both Sections 9 and 17 confer power for taking interim measures of protection, the former on the Court and the latter on the arbitral tribunal. While Section 9 confers power on the Court at any time before, during or after an arbitral award is passed (but prior to execution of the award), the power conferred under Section 17(1) is only during arbitral proceedings and not prior thereto or thereafter. An appellate remedy is provided under the Act both against an order of the Court under Section 9, and the order of the arbitral tribunal under Section 17 of the Act. While Section 37(1)(a) provides for an appeal to the Court, authorized by law to hear appeals from original decrees of the Court passing the order, granting or refusing to grant any measure under Section 9, Section 37(2) (b) provides for an appeal to the Court from the order of the arbitral tribunal granting or refusing to grant an interim measure under Section 17. Unlike an unsuccessful challenge to the arbitrator under Section 12(3) r/w. Section 13(2), Section 17 specifically provides for judicial intervention under Section 37(2)(b) of the Act.

81. Section 14(3) of the Act provides for the consequences of an arbitrator withdrawing from his office. It is in this context that the Section refers both to Section 14 and 13(3) of the Act. On a challenge to the arbitrator under Section 13(2), for the grounds mentioned in Section 12(3), the arbitrator may withdraw from his office under Section 13(3) of the Act. Similarly Section 14(1)(b) provides for the termination of the mandate of the arbitrator on his withdrawal from his office. All that Section 14(3) stipulates is that, either under Section 14(1) (b) or under Section 13(3), when an arbitrator withdraws from his office, or the parties agree to the termination of his mandate, it shall not imply acceptance by the arbitrator of the truth of any of the allegations made either under Section 14(1) or under Section 12(3) of the Act.

82. The submission that Section 12(3)(a) of the Act is attracted where there are justifiable doubts, and Section 14(1)(a) is attracted when the issue raised by a party is confirmed, also necessitates rejection. Allegations of bias need not be established beyond reasonable doubt. In general, the rule against bias looks at the appearance or risk of bias rather than bias in fact, in order to ensure that justice should not only be done, but should manifestly and undoubtedly be seen to be done. (*Ratan Lal Sharma v. Managing Committee, Dr. Hariram (Co-education) Higher Secondary School* , AIR 1993 SC 2155; *Tilakchand Magatram Obhan v. Kamala Prasad Shukla* , 1995 Suppl. (1) SCC 21; *Judicial Review of Administrative Action: De Smith, Woolf & Jowell : Fifth Edition*). If there are clear indicators that the process may have been compromised by bias, actual or apparent, this may lead to a decision, that has been reached, being challenged and nullified. The principal issue is not whether the decision itself is legitimate but whether the decision maker ought to have taken the decision in the first place, as the possibility of bias would undermine its credibility. (*Sridhar Lime Products*¹).

83. There must exist circumstances from which reasonable men would think it probable or likely that the arbitrator will be prejudiced against one of the parties. The Court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision. (Sanjay Jethi , 2014(2) ALT (Cri.) 299 (AP); S. Parthasarathi v. State of Andhra Pradesh , (1974) 3 SCC 459; Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant , (2001) 1 SCC 182; Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon (1968) 3 WLR 694 (WLR at p. 707)). The test for bias is whether a reasonable intelligent man, fully appraised of all the circumstances, would feel a serious apprehension of bias (R. v. Moore, ex parte Brooks (1969) 2 OR 677 : (6 DLR (3d) 465; Halsbury's Laws of England, Fourth Edition, Volume 2, paragraph 551; Sanjay Jethi , 2014(2) ALT (Cri.) 299 (AP)).

84. It would suffice, for a successful challenge to an arbitrator, if there are justifiable doubts to the independence or impartiality of the arbitrator. What Section 12(3)(a) stipulates is not a mere doubt as to the arbitrators independence or impartiality, but a doubt which is justifiable. The word justifiable, which qualifies the word doubt, means capable of being justified. The doubt, regarding the independence or impartiality of the arbitrator, must be such as to be capable of being justified. As the circumstances mentioned in Section 12(3) of the Act, are not repeated in Section 14(1), the artificial distinction sought to be made, between justifiable doubts and confirmation, necessitates rejection.

IV. CAN THE ARBITRATOR BE PERMITTED TO TAKE THE ASSISTANCE OF AN ADVOCATE:

85. Sri Sandeep Sharma, Learned Counsel appearing on behalf of the petitioners, would submit that the arbitrator was a mere spectator, and the entire proceedings were being conducted by Sri G.S. Thakur, Advocate in the presence of both the parties; questions were asked, queries were raised, and the orders were dictated by Sri G.S. Thakur, Advocate; the respondents were misinterpreting the order of the High Court; there is a tacit admission by the respondents that the arbitrator was taking the opinion of, and guidance from, Sri G.S. Thakur in deciding the matter; the letter of the arbitrator dated 12.9.2015, and his admission in the counter-affidavit filed before the Court below, show that he was taking legal advise from Sri G.S. Thakur in conducting arbitration proceedings in violation of the Supreme Court order dated 11.08.2014 which required him to decide the Section 12 application without being influenced by the order passed by the High Court; the arbitrator took the assistance of Sri G.S. Thakur in passing a 100 page order; and, therefore, the mandate of the arbitrator should be declared to have terminated.

86. On the other hand Sri Sunil Ghanu, Learned Counsel for the respondents, would submit that the respondents, in their counter in OP.2889/2014, had submitted that there was no substance in the allegations of bias; a disjointed

reading of the counter filed by the arbitrator, especially para 8 thereof, is uncalled for; if the sentence is read in context it is clear that the arbitrator had not stated that the petitioners had appeared at the hearing held on 13.7.2013, but he had stated that, in the proceedings held on 13.7.2013, the petitioners had entered appearance through their counsel, and since then proceedings were being conducted regularly in a full and transparent manner; the petitioners never raised any objection from October 2013 to 2.9.2014 i.e., for 19 hearings regarding the presence or role of Mr. G.S. Thakur, Advocate in assisting the arbitrator; the petitioners never raised any objection to his role in participation or in providing assistance; such a plea was raised only in the Section 12 petition filed on 23.1.2014; and subsequently in November 2014 while filing the amended Section 12 petition; such a plea cannot, thereafter, be raised in the Section 14 petition; from the order passed in A.A. No. 54 of 2012 dated 15.3.2013, it is evident that assistance of Mr. G.S. Thakur, Advocate was taken at the instance of the petitioners themselves; the inter-se disputes between the parties did not involve any claim for damages, much less assessment thereof; reference in the order of the Court, that such assistance was being provided for assessment of damage, is an apparent inadvertent mistake/error and a misnomer; reference to assistance, in the order passed in the Section 11 application, must be held to be assistance by a legal expert as contemplated under Section 26 of the Act; the arbitrator, a businessman, is not a legal expert; the arbitration is at a nascent stage; as only pleadings are complete, no prejudice can be said to have been caused to the petitioners; the petitioners have finally filed their counter written statement to the claim statement filed by the respondents, and issues are yet to be framed by the arbitrator; the respondents have confirmed, in the affidavit filed before this Court, that they never felt that any such assistance was necessary, and the same be dispensed with; the petitioners cannot seek termination of the mandate of the arbitrator on this ground; the contention that the sole arbitrator is merely a mute spectator, and it is Mr. G S Thakur, Advocate who was conducting the entire proceedings, is incorrect; directions can be issued by this Court that the arbitrator should personally record the evidence, and should not assign the work of recording evidence to an agent or assignee; and the petitioners merely intend to protract arbitration proceedings on one pretext or the other.

87. The petitioner raised the plea, regarding assistance of Sri G.S. Thakur, Advocate being taken by the arbitrator regularly, in the Section 12 application filed by them before the arbitrator on 24.2.2014 wherein they stated that Shri Ravinder Singh Sarna (i.e., the arbitrator) was not qualified and competent to adjudicate an arbitration; he neither understood nor could he interpret the provisions of the Act; he got the proceedings, on every hearing, finalized and dictated through the Advocate; and the arbitrator was not competent to adjudicate the arbitration. Later the petitioners filed an amended application on 8.11.2014 referring to how G.S. Thakur was, in fact, conducting proceedings which was not only barred in law, but was also contrary to the order dated

13.07.2013 passed by this Court. Despite the fact that a specific objection, with regards G.S. Thakur, Advocate was taken both in the Section 12, and the amended Section 12 application, the arbitrator failed to adjudicate upon the said issue, and the application was rejected on the ground of limitation.

88. This Court, while hearing the present petition, asked Sri Sunil Ghanu, Learned Counsel for the respondent, to ascertain whether the arbitrator was inclined to recuse himself in the light of the allegations made against him, and whether he would dispense with the assistance of Sri G.S. Thakur, Advocate. Sri Sunil Ghanu, Learned Counsel for the respondent, addressed a letter dated 08.09.2015 to the arbitrator asking him (a) whether he was still inclined to continue to act as the arbitrator for adjudication of the above dispute or whether he would like to recuse himself keeping in view the various allegations made by the petitioners; and (b) whether he would like to dispense with seeking any further assistance of Sri G.S. Thakur, Advocate in adjudicating the dispute between the claimant and the respondents, in view of the objections raised on behalf of the petitioners. In his reply letter dated 12.9.2015, the sixth respondent-arbitrator informed Sri Sunil Ghanu, Learned counsel for the respondent, that he kept open the option of seeking any clarification on any legal complexity from the legal assistant permitted to be engaged by him as per the order of the High Court dated March 15th, 2013; however, he left it to the High Court to decide whether to continue with the legal assistance of Mr. G.S. Thakur or not. On their being asked to make their stand clear, regarding continuance of Sri G.S. Thakur, Advocate to assist the arbitrator, the respondents filed their affidavit dated 23.09.2015. Sri Sunil Ghanu, Learned Counsel appearing on their behalf, informed this Court that the respondents did not want the arbitrator to take the assistance of Sri G.S. Thakur, Advocate in conducting arbitration proceedings.

89. The fact that Sri G.S. Thakur, Advocate was present on all the dates of hearing, from 13.07.2013 onwards, is not in dispute. In the counter-affidavit filed by them, before the Court below in A.O.P. No. 2889 of 2014, respondents 1 to 5 stated that the first hearing before the arbitrator took place on 26.10.2013 and both the parties and their counsel along with Sri G.S. Thakur, Advocate, were also present, and they also signed the proceedings; both the parties were informed on the very same day, by the learned Arbitrator, that he had sought for the services of Sri G.S. Thakur, Advocate, to assist him in conducting arbitral proceedings till passing of the award; and that both the parties had consented for the same. The proceedings dated 26.10.2013 do not show that the petitioners had consented to the arbitrator taking the assistance of Sri G.S. Thakur, Advocate. The admission by respondents 1 to 5, in the counter-affidavit filed by them before the court below, does show that the arbitrator had taken the assistance of Sri G.S. Thakur, Advocate in conducting arbitral proceedings.

90. It is also admitted, by the sixth respondent-arbitrator himself, that he was taking the assistance of Sri G.S. Thakur, Advocate. In the counter-affidavit filed

by him, on 28.03.2015 before the Court below, in I.A. No. 3040 of 2014 in Arb.O.P. No. 2889 of 2014, the 6th respondent-arbitrator stated that, as the matter had been referred to him by the High Court, he, with the assistance of the lawyer Sri G.S. Thakur, started proceedings on 13.07.2013; as per Section 6(1) of the Act, he is entitled to seek guidance of a legal expert to discharge his legal obligations; at the request of the petitioners Counsel, the Chief Justice had directed him to take the assistance of an advocate/legal expert for assessing the damages caused; the legal assistance, which was being provided to him by the legal assistant Sri G.S. Thakur in the arbitration proceedings, was based on merits, and as per law; he had not committed any act against the interests of any party; and he was assisting and providing legal assistance sought by the arbitrator from time to time.

91. We find no merit in the submission, urged on behalf of the respondents, that the arbitrator was taking the assistance of the Advocate Sri G.S. Thakur only in compliance with the order passed in A.A. No. 54 of 2012. The order, in A.A. No. 54 of 2012 dated 15.03.2013, gave liberty to the arbitrator to take the assistance of an Advocate/Legal Counsel/expert, if required, for assessing the damages caused; and he was also given liberty to fix his fee, as also that of the fee of the Advocate/Legal counsel/expert, if he so chose to take his or her assistance for assessing the damage caused. The liberty given to the arbitrator, to take the assistance of an Advocate, was only to assess the damages caused. It is not the case of either of the parties that the arbitrator was called upon to assess any damages, nor could it have been so contended as neither of the parties have sought damages in these arbitral proceedings. In the absence of damages being claimed, the question of assessing damages does not arise. The day to day proceedings of the arbitration record the presence of the advocate Sri G.S. Thakur at every hearing from 13.07.2013 onwards.

92. From the counter-affidavit, filed by the 6th respondent before the Court below, it is evident that he took the assistance of Sri G.S. Thakur even on merits. While the submission of Sri Sandeep Sharma, Learned Counsel for the petitioner, that the arbitrator was a mute spectator and it was the Advocate who conducted day to day proceedings and recorded the minutes, cannot be said to be without merit, it would not be appropriate for this Court to examine these aspects as they would require re-appreciation of the evidence on record which exercise this Court would not, ordinarily, undertake in proceedings under Article 227 of the Constitution of India.

93. There does not appear to be any dispute, however, that the arbitrator took the assistance of Sri G.S. Thakur, Advocate, other than for assessing damages. The submission urged, on behalf of the respondents, by Sri Sunil Ghanu, Learned Counsel, is that the words assess damages in the order in A.A. No. 54 of 2012 is a typographical error. While the respondents could have sought correction of the said order, if their claim of a typographical error had any basis, it is not open to them to raise such a contention in subsequent revision proceedings filed before

this Court against the order rejecting an application made under Section 14(2) of the Act. From the order in A.A. No. 54 of 2012 dated 15.3.2013, it is clear that the liberty granted by the Acting Chief Justice, for the arbitrator to take the assistance of an Advocate, was only at the behest of the petitioners themselves. That does not, however, justify the arbitrator taking the assistance of an Advocate other than to assess damages as the liberty granted by this Court to the arbitrator was only to take his assistance in this regard, and not for any other purpose.

94. Reliance placed by Sri Sunil Ghanu, on Section 6 of the Act, is also misplaced. Section 6, which relates to administrative assistance, stipulates that, in order to facilitate the conduct of arbitration proceedings, the parties, or the arbitral Tribunal with the consent of the parties, may arrange for administrative assistance by a suitable institution or a person. The power conferred on the arbitrator, under Section 6 of the Act, is to make arrangements, for administrative assistance, only with the consent of the parties. It is not even the case of the respondents herein that the petitioners had consented for administrative assistance to be arranged for the arbitrator. In the absence of any such consent, by the petitioners in this regard, the arbitrator could not have taken the assistance of Sri G.S. Thakur, Advocate. The presence, and participation of the Advocate on all the days of hearing, is neither in accordance with the order in A.A. No. 54 of 2012 dated 15.03.2013, nor with Section 6(1) of the Act.

95. The arbitrator must exercise his judgment, and cannot delegate his right to make an award. When people go to arbitration, they bind themselves to abide by a decision of the arbitrator of their own choice. They do not bargain for a decision of their disputes by a stranger in whom they may have no confidence. A delegation by the arbitrator to a stranger is entirely invalid. (*Ramtaran Das v. Adhar Chandra Das* , AIR 1953 Cal 646; *Punjab Province v. Dr. Lakhmi Dass* , AIR 1944 Lah 149). An arbitrator is not entitled to delegate his powers practically to another person. The decision must, ultimately, be his own judgment in the matter. (*Nanjappa v. Nanja Rao* , 16 Ind. Cas. 478 : , 23 M.L.J. 290 : , 12 M.L.T. 133 : , (1912) M.W.N. 1091; *Juggobundhu Saha v. Chand Mohan Saha* , 31 Indian Cases 33).

96. The allegation, that the arbitrator has delegated his authority to a stranger and the award is, in essence, not his act but of that person, is a serious charge of judicial misconduct; and, if established, would invalidate the award for the arbitrator has no authority to delegate his functions, except possibly the performance of ministerial acts. (*Lingood v. Eade* (1742) 2 Atk. 501 : 26 E.R. 702; *Emery v. Wase* (1801) 5 Ves. 846 : 31 E.R. 889 : 5 R.R. 181 : on appeal 8 Ves. 505 : 7 R.R. 109 : 32 E.R. 451; *Little v. Newton* (1841) 9 D.P.C. 437 : 2 Scott. (N.R.) 159 : 2 Man. & G. 351 : 10 L.J.C.P. 88 : 5 Jur. 246 : 133 E.R. 627 : 58 R.R. 436; *Tandy, In re* (1841) 9 D.P.C. 1044 : 5 Jur. 726; *Whitmore v. Smith* (1861) 7 H. N. 509 : 31 L.J. Ex. 107 : 8 Jur. (N.S.) 514 : 5 L.T. 618 : 10 W.R.

253 :126 R.R. 551; Eads v. Williams (1854) 4 De G.M. G. 674 : 24 L.J. Ch. 531 : 1 Jur. (N.S.) 193 : 43 E.R. 671 : W.R. 98 : 102 R.R. 326). When a charge of judicial misconduct, that the arbitrator has delegated his authority to another, is made against the arbitrator, it should be ascertained whether the allegation is well founded or not. (Amir Begam v. Budruddin Husain 23 Ind. Cas. 625 : 18 C.W.N. 755 : 19 C.L.J. 494 : 36 A. 225 : I.O. L.J. 249 : 12 A.L.J. 537: 17 O.C. 120 : 16 Bom. L.R. 413 : (1914) M.W.N. 172 : 16 M.L.T. 35 : 27 M.L.J. 181 : 1 L.W. 1015; Juggobundhu Saha , 16 Ind. Cas. 478 : , 23 M.L.J. 290 : , 12 M.L.T. 133 : , (1912) M.W.N. 1091).

97. Yet another feeble submission, made on behalf of the respondents, is that Section 26 of the Act permits such assistance to be taken. Section 26 of the Act relates to the expert appointed by the Arbitral Tribunal. Section 26(1)(a) enables the arbitral Tribunal, unless otherwise agreed by the parties, to appoint one or more experts to report to it on the specific issues to be determined by it. It is only on a specific issue, required to be determined by him, can the arbitrator call for a report from an expert unless agreed to by the parties. In the present case, the sixth respondent-arbitrator has not even framed the issues which necessitate determination. It is also not his case, or that of the other respondents herein, that the arbitrator had sought a report from Sri G.S. Thakur, Advocate, as an expert, on any specific issue. The record of arbitral proceedings, placed before this Court, does appear to support the submission of Sri Sandeep Sharma, Learned Counsel for the petitioner, that the arbitrator took the assistance of Sri G.S. Thakur, Advocate on each day when the arbitration proceedings were held. The minutes, of each day of the arbitration proceedings, contain the signature of Sri G.S. Thakur, advocate. The assistance taken by the arbitrator, from Sri G.S. Thakur, Advocate, does not appear to be on any specific issue.

98. While the arbitrator could not have taken the assistance of Sri G.S. Thakur, Advocate, except to assess damages or as an expert on any specific issue, the question which necessitates examination is whether this aspect falls within the ambit of Section 14(1)(a) of the Act. If, as is now contended before us, the assistance provided by Sri G.S. Thakur, Advocate to the 6th respondent-arbitrator is a circumstance that gives rise to justifiable doubts as to the independence or impartiality of the arbitrator, or that it is a serious charge of judicial misconduct, both of which fall within the ambit of Section 12(3)(a), the only remedy available to the petitioners was to challenge the arbitrator under Section 13(2) & (3) of the Act and, as such a challenge was unsuccessful, to make an application later, after an award is passed, in terms of Section 13(5) of the Act.

99. For the assistance taken by the arbitrator, from Sri G.S. Thakur, Advocate to fall within the ambit of Section 14(1)(a) of the Act, the petitioners were required to plead and prove, and the Court below was required to hold, that, without the assistance of Sri G.S. Thakur, Advocate, the arbitrator has become, either in law or in fact, unable to perform his functions. It is only if the arbitrator is not in a

position even to conduct arbitral proceedings, without the assistance of the Advocate, can it be said that he has become de jure or de facto unable to perform his functions. No such plea has been taken by the petitioners in the application filed by them under Section 14(2) of the Act, nor has the Court below recorded any such finding. The issue of the arbitrator, having taken the assistance of Sri G.S. Thakur, Advocate, cannot, therefore, be a ground to declare that the mandate of the 6th respondent arbitrator stands terminated.

100. It would not be open to us, in the present proceedings arising out of a challenge to an order made by the Court below under Section 14(2) of the Act, to examine whether such a circumstance gives rise to justifiable doubts as to the independence or impartiality of the arbitrator as the statutory procedure prescribed under Section 13(5) of the Act would require the petitioners herein to wait till the award is passed and thereafter challenge the arbitrator, along with a challenge to the award, in proceedings under Section 34 of the Act. The statutorily prescribed procedure must be adhered to. When a procedure has been laid down, the authority must act strictly in terms thereof. (*Taylor v. Taylor* (1875) Ch.D.426)). If a statute has conferred a power to do an act, and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any manner other than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. (*State of U.P. v. Singhara Singh* , AIR 1964 SC 358; *Dhananjaya Reddy v. State of Karnataka* , (2001) 4 SCC 9; *Ramchandra Murarilal Bhattad v. State of Maharashtra* , (2007) 2 SCC 588; and *State of Gujarat v. Shantilal Mangaldas* , AIR 1969 SC 634).

101. In *Neeru Walia v. Inderbir Singh Uppal* , 160 (2009) DLT 55 : 2009 Supp (2) Arb LR 343, it was contended that the arbitrator was not recording proceedings, and had asked for recording of evidence by an Advocate. The Delhi High Court held that the Arbitrator had to arbitrate, and could not appoint his agent to conduct arbitration proceedings. The Arbitrator was directed to record all proceedings of arbitration in the presence of the parties, to get the order-sheets signed by them, to record evidence himself, and not to assign the work, of recording the evidence or any other arbitration work to his agent or assignee. It is wholly unnecessary for us to issue any such directions, as the respondents in their affidavit filed before this Court, and Sri Sunil Ghanu, Learned Counsel appearing on their behalf, have stated that they do not want the arbitrator to take the assistance of Sri G.S. Thakur, Advocate. As both the petitioners and the respondents, (parties to the arbitration agreement), agree that the arbitrator should not take the assistance of Sri G.S. Thakur, Advocate, the sixth respondent-arbitrator shall, henceforth, desist from taking the assistance of Sri G.S. Thakur or any other Advocate in conducting arbitral proceedings or in passing the award. It is made clear that this order shall not preclude the petitioners from questioning the action of the arbitrator in taking the assistance of Sri G.S. Thakur, in the arbitration proceedings conducted so far, in proceedings under Section 34 of the Act after an award is passed.

V. CAN ALLEGATIONS OF BIAS, RELYING ON THE CONTENTS OF THE COUNTER-AFFIDAVIT FILED BY THE ARBITRATOR IN THE SECTION 14(2) PETITION, BE EXAMINED FOR THE FIRST TIME IN PROCEEDINGS UNDER ARTICLE 227 OF THE CONSTITUTION?

102. Sri Sandeep Sharma, Learned Counsel appearing on behalf of the petitioners, would submit that, in reply to the Section 14 petition, the arbitrator filed a detailed counter-affidavit in the Court below, wherein he dealt at length with the issue on merits, and has revealed his mind clearly indicating his decision on the merits of the case; the arbitrator has used certain derogatory and unacceptable words therein such as deliberately, the petitioner has not approached this Hon'ble Court with clean hands, suppressing the true and correct facts, concocted and created grounds, which indicate his wrongful conduct; notwithstanding the petitioners contention of having been forced and pressurized to enter into the settlement deed dated 30.4.2012, the arbitrator has observed that the settlement deed dated 30.4.2012 was entered into between both the parties voluntarily in consultation with each other, and without any reservation; and this clearly shows his bias.

103. On the other hand Sri Sunil Ghanu, Learned Counsel for the respondents, would submit that repeated reference to the counter filed by the sole arbitrator, and reading stray sentences therein in a disjointed manner, does not justify a presumption of bias or for termination of the mandate of the arbitrator on this ground.

104. In *J.K. Enterprise v. Win Medicare Ltd.* , 1998 (45) DRJ 96, the Delhi High Court held that the arbitrator, a quasi judicial authority, should not take sides in proceedings before the Court, and should generally leave such matters to be decided by the Court; the contention that, since the arbitrator did not file any reply and his failure to file a reply should be deemed to be an admission of the allegations in the plaint, would require Order 8 Rule 3 CPC to be stretched too far; and if the arbitrator contests and disputes the allegations, and makes counter allegations, it would cause not only unnecessary delays, but a question of bias might also arise.

105. In *Ladli Construction Company (P) Ltd.* , 159 (2009) DLT 314, while dealing with the submission that bias is also reflected from the fact that the arbitrator had contested the appeal and had filed the affidavit in opposition, the Supreme Court held that, as the arbitrator had been personally impleaded as a respondent in the appeal, and allegations of bias had been made against him, he was left with no choice but to rebut the allegations by filing his affidavit; and the arbitrator did what any other person in his place would have done in the circumstances.

106. In any event the question whether bias can be inferred, from the contents of the counter-affidavit filed by the arbitrator in I.A. No. 3040 of 2014 in Arb.O.P. No. 2889 of 2014, cannot be examined in the present proceedings as this Court

would not don the robes of the Court, exercising jurisdiction under Section 14(2) of the Act, to adjudicate on this issue. This contention that the averments in the counter-affidavit, filed by the arbitrator in I.A. No. 3040 of 2014 in Arb.O.P. No. 2889 of 2014, amounts to bias, would also fall within the ambit of Section 12(3) (a) of the Act for which the remedy, under Section 13(5) of the Act, is to await completion of arbitral proceedings and, thereafter, to challenge the arbitrator, along with a challenge to the award, in proceedings under Section 34 of the Act.

VI. FAILURE OF THE ARBITRATOR TO ACT WITHOUT UNDUE DELAY UNDER SECTION 14(1)(a) OF THE ACT : CAN THIS ISSUE BE EXAMINED FOR THE FIRST TIME IN PROCEEDINGS UNDER ARTICLE 227 OF THE CONSTITUTION?

107. Sri Sandeep Sharma, Learned Counsel appearing on behalf of the petitioners, would submit that the arbitrator was directed by this Court to conclude proceedings within 5 months; in view of the judgment of the Supreme Court, in NBCC v. J.G. Engineering , (2010) 2 SCC 385, and the judgments of various High Courts, the time fixed by the Court cannot be extended except if the agreement provides that the parties can, by mutual consent, extend the time; all the judgments relied upon by the respondents deal with a situation where the agreement provides for a time limit to complete arbitration proceedings and, in those circumstances, reference is made to Section 4 (b) of the Act regarding waiver; in the present case there is no time fixed in the agreement for conclusion of the proceedings; the contention, regarding the conduct of the petitioner, is found only in one line to the effect that the petitioner has delayed arbitration proceedings by filing one application after another; the respondents admit that, from the inception of the arbitration proceedings, the petitioners did not want the present arbitrator to proceed; the arbitrator did not move this court for extension of time after 28.2.2014; against the order dated 13.9.2013, the petitioner approached the Supreme Court; ground S of the SLP was that fixation of five months time by the High Court was uncalled for, and should be set aside; the same was opposed by the respondents in the SLP; the order, fixing time of five months, has become final and binding on both the parties as also on the arbitrator; the mandate of the arbitrator stood terminated with the expiry of 5 months; the time fixed, by the order of this Court dated 13.9.2013, cannot be said to have been waived by the petitioners; in the present case, there is no time fixed by the agreement, and the petitioners have opposed the arbitrator from the date of his appointment itself; they have also not willingly participated in the proceedings conducted by the arbitrator; once time is fixed, and proceedings are not concluded, the only way time can be extended is if the agreement provides for extension of time by mutual consent; if the agreement does not so provide, then time cannot be extended at all; after lapse of the agreed time, the arbitrator loses jurisdiction and the defect is incurable; during arguments in the Section 14 petition before the Court below, a specific contention was raised that the arbitrator had failed to pass an award within the five month period stipulated by this Court in its order dated 13.09.2013; the written submissions, filed by respondents before the court below, deals with the issue of expiry of five

months; the respondents have not raised any objection against the said ground in their reply before this Court; the petitioners have raised the ground, of expiry of five months resulting in termination of the mandate of the arbitrator, before the court below, and the learned Judge had also dealt with and decided the said issue; even otherwise, the arguments relating to time can be raised in proceedings under Article 227 as it is a legal issue; while deciding any matter, the Court should endeavor to find out the truth; such power should be exercised with the object of serving the cause of justice and public interest; a Judge in the Indian system has to be regarded as failing to his jurisdiction if, under the guise of remaining neutral, he opts to remain passive to the proceedings before him; the petitioners are victims of circumstances and, with time, they have now raised their voice against the fraud, ill treatment and harassment that they have faced; they do not belong to Hyderabad; they have faced immense problems from the inception even while dealing with their lawyers; principles of natural justice, and the life and personal liberty of the petitioners, have been violated; this Court should decide the matter on the basis of the facts placed before it; and, in these facts and circumstances, the mandate of the sixth respondent should be declared to have been terminated.

108. On the other hand Sri Sunil Ghanu, Learned Counsel for the respondents, would submit that as this contention, of expiry of the five month period stipulated by this Court resulting in termination of the mandate of the arbitrator under Section 14(1) of the Act, has not been raised in O.P. No. 2889 of 2014, the petitioners are precluded from raising it in the present revision petition; the mere fact that, in the order passed in O.P. No. 2889 of 2014 the trial court has referred to the judgments in this regard is of no consequence; there are no pleadings in OP.2889/2014 regarding delay; any amount of evidence let in, or contentions put forth subsequently during the course of arguments, is of no consequence; the petitioners are estopped from raising such a ground in this revision petition; the petitioners contention, that the time fixed by this Court is on par with the time fixed in the arbitration agreement, is not tenable as arbitration proceedings arise only out of the arbitration agreement; as the time fixed in an agreement can be said to have been waived, in view of the conduct of the complaining party, the same principles would apply to cases where time is fixed by the Court; the concept of waiver would apply to circumstances where the complaining party's conduct is found to be wanting; the petitioners have protracted the matter on one pretext or the other; they never asserted, before the arbitrator, that they were adhering to a time schedule, nor did they ever insist on due compliance thereof; in spite of the caution administered by the arbitrator to expedite proceedings, they continued to delay proceedings; as the petitioners themselves were guilty of protracting proceedings, they cannot insist upon the prescribed time schedule; they are estopped from raising such pleas; in ground S of the SLP filed before the Supreme Court, (S.L.P. No. 14146-147/2014), the petitioners, themselves did not want any time schedule or for adherence thereto; they cannot approbate and reprobate; and these submissions were being made

without prejudice to the objection that the said plea, not having been raised in O.P. No. 2889 of 2014, cannot be raised in the revision petition.

109. By his order, in Application No. 493 of 2013 in A.A. No. 54 of 2012 dated 13.09.2013, the Chief Justice directed the arbitrator to proceed with the arbitration proceedings, and complete the same within five months from the date of communication of their order. In the Special Leave Petition filed before the Supreme Court, against the order passed in Application No. 493 in A.A. No. 54 of 2012 dated 13.09.2013, the petitioners contended that the High Court had wrongly directed the arbitrator to conclude arbitration proceedings between the parties within five months from the date of communication; the High Court had failed to appreciate that the dispute between the parties involved huge stakes, and therefore needed a fair and proper adjudication to provide justice to the parties; it would be unjust if the arbitrator, without application of mind, just rushed to comply with the directions of the High Court; looking into the complex issues of fact and law involved in the matter, fixing of a time limit had seriously prejudiced the case of the petitioners, and they did not apprehend justice; and it was inconvenient for the petitioners to move from Delhi to Hyderabad nearly every week, and make appropriate submissions under pressure and paucity of time. The Special Leave Petition Nos. 14146-14147 of 2014 was dismissed by the Supreme Court by its order dated 11.8.2014.

110. In his orders dated 13.01.2014, 07.02.2014 and 16.02.2014 the arbitrator has taken note of the fact that time has been fixed by the High Court by its order dated 13.9.2013, and after 28.2.2014 he would be left with no authority to proceed with the proceedings. These Orders, to the extent relevant, read thus:-

"13.01.2014

As such the arbitrator is bound by order of the Hon"ble High Court of Andhra Pradesh dated 13.9.2013 and is to complete the proceedings within 5 months from the date of communication of the said order vide order dated 13.9.2013. I find no reason to terminate the proceedings as prayed by the Delhi parties in their memo dated 21.12.2013 as it is thoroughly misconceived in view of High Court orders and termination of the proceedings by this Arbitral Tribunal without completing the task assigned to it as per the orders amounts to contempt of court where by it will be crystal clear that this Tribunal has intentionally and willfully disobeyed the orders of High Court of Andhra Pradesh dated 15.3.2013 and 13.9.2013 and the said orders are binding not only on this Tribunal but as well as on both the Delhi and Hyderabad parties.

7.2.2014:

both the parties are directed to cooperate with this arbitral tribunal to complete the work assigned to the arbitrator by the end of this month otherwise the Tribunal will have to get the time enlarged by getting fresh order from the Honorable High Court for extending time to complete the enquiry or to complete the enquiry within a short period after 28.2.2014.

16.2.2014:

...Keeping in mind the order passed by the Hon"ble Chief Justice of Andhra Pradesh High Court on dated 13.9.2013 to complete the proceedings within 5 months, as such the Delhi parties are called upon to cooperate with the Arbitral Tribunal in completing the proceedings within the specified time to the maximum possible extent."

111. Before examining the rival submissions under this head, it is useful to take note of the consequences of a stipulation of a time period, for completion of the arbitral proceedings, either in the arbitration agreement or pursuant to an order of the Court. Though the Court does not have the power to extend time under the 1996 Act, unlike Section 28 of the 1940 Act, it can do so in the exercise of its inherent power on the application of either party. Where, however, the arbitration agreement itself provides the procedure for enlargement of time, and the parties have taken recourse to it and have consented to the enlargement of time by the arbitrator, the Court cannot exercise its inherent power in extending the time fixed by the parties in the absence of the consent of either of them. (NBCC Ltd. , 1998 (45) DRJ 96; Hindustan Wires Limited v. R. Suresh , 2013 SCC Online Bom. 547).

112. An agreement which stipulates time for making the award would, in the absence of consent implied or explicit, terminate the mandate of the arbitrator on expiry of such time. Failure of the arbitrator to make the award within the agreed time would fall within the ambit of Section 14 (1) (a) for termination of the mandate i.e. for failure to act without undue delay. (Sh. Surender Pal Singh v. Hindustan Petroleum Corporation Ltd. (2006) 4 ARBLR 109; Shyam Telecom Ltd. , 2008(4) ALT 266). When the agreement contains a clause containing a time period for making the award, or for enlargement of time by consent of the parties, time can only be enlarged by consent of the parties. (Ram Chandra Rungta , AIR 2015 Cal 24). The arbitrator ceases to have authority after the time-limit fixed by the parties has expired, and one of the parties does not give consent to extension of time for publishing the award. (NBCC Ltd. , 1998 (45) DRJ 96).

113. In NBCC Ltd. , 1998 (45) DRJ 96, the High Court had directed the appointing authority of the appellant-company to appoint a new arbitrator who was required to conclude proceeding and pass an award within six months from the date of his appointment; the arbitrator was unable to comply with the time fixed by the High Court; the arbitration clause in the contract enabled the arbitrator to extend the time for making and publishing the award by mutual consent of the parties; the parties mutually agreed to extend the time for making and publishing the award, which was further extended; the respondent did not give consent thereafter for extension of time; they moved the High Court to terminate the mandate of the arbitrator; and the High Court terminated the mandate of the arbitrator on account of his failure to publish the award within the time fixed by the parties. It is in this context that the Supreme Court held

that the arbitrator had no power to further enlarge the time to make and publish the award; his mandate had automatically terminated after expiry of the time fixed by the parties to conclude proceedings; neither the arbitrator nor the parties had approached the Court for extension of time to conclude arbitration proceedings; the condition precedent, for enlargement of time, was the agreement of the parties for such enlargement; if consent was not given by the parties, the authority of the arbitrator would automatically cease to exist after expiry of the time-limit; the arbitrator becomes *functus officio* in the absence of extension of time to make and publish the award; and, after the said date, the arbitrator had no authority to continue arbitration proceedings.

114. In *Jayesh H. Pandya v. Subhtex India Ltd.*, 2008 (5) MHLJ 749 the Bombay High Court held that, where a party intends to assert a rigid adherence to the time prescribed by the arbitration agreement, it must, at the earliest opportunity, make its intention known to ensure compliance with the rigid standard as to time; to hold otherwise would be to encourage a lack of candour on the part of the parties in their dealings before the Arbitrator; the Arbitrator was justified in coming to the conclusion that the petitioners had, by their conduct, waived their objection to enforce a punctilious observance of the time schedule of four months; and to adopt any other construction would frustrate the object and the purpose of arbitral proceedings and bring the whole machinery provided by the Act, to facilitate an efficacious recourse to arbitration, into grave peril.

115. In *Mascon Multiservices and Consultants Pvt. Ltd. v. Bharat Oman Refineries Ltd.*, 2008 (6) BomCR 611 : 2008 (110) BOMLR 2784, the Bombay High Court held that an inquiry on facts, to find out whether the parties had waived the condition of termination of arbitration by efflux of time, is permissible; the strength of indication of waiver is not necessarily directly proportional to the number of meetings attended; it is the nature of the meeting, and the nature of the conduct, which is important; and the conduct should be such that waiver can be clearly inferred. In *R. Suresh*, (2010) 2 SCC 385, the Bombay High Court held that, in view of the consent of both the parties for enlargement of time to complete arbitration proceedings and to make an award, the mandate of the arbitrator had not come to an end; the arbitrator did not cease to have jurisdiction to proceed with the matter and to make an award; and, even by the conduct of both parties, the time to complete arbitration proceedings, and to make an award, was extended.

116. In *Snehdeep Auto Centre v. Hindustan Petroleum Corporation Ltd.*, (2012) 4 ABLR 361 (Bom; and *R. Suresh*, (2010) 2 SCC 385, the Bombay High Court held that, in *N.B.C.C Ltd.*, 1998 (45) DRJ 96, the Supreme Court did not lay down an absolute proposition that the moment the award is made, after the stipulated period, it must be set aside; the observation of the Supreme Court, that the arbitrator was bound to make and publish his award within the time mutually agreed to by the parties unless the parties consented to further enlargement of time, did not rule out a contingency where the conduct of the

parties could be implied with certainty to mean that they had consented not to insist on the mandatory time limit; no unambiguous stand was taken that the arbitrator cannot proceed to declare the award as his mandate had come to an end; and this conduct amounted to waiver of the objection of time limit, being a mandatory requirement for pronouncement of the award.

117. In *Union of India v. U.P. State Bridge Corpn. Ltd.* , (2015) 2 SCC 52, the Supreme Court held that a peremptory order was passed by the High Court granting extension of three months to pass the award; the Arbitral Tribunal remained unaffected, and took the directions of the High Court in a cavalier manner; and the order of the High Court, terminating the mandate of the Arbitral Tribunal, was flawless. In *Bharat Oman Refineries Ltd. v. Mantech Consultants* , 2012 (2) ArbLR 482 (Bom) the award was not passed within two years, or even within the extended time provided in the arbitration agreement. The Bombay High Court held that the action of respondent, in having provided stamp paper or in entering into a telephone conversation with the arbitrator, could not be treated as an act of waiver or construed as an active participation in the arbitral proceedings; it could not be said that the respondent had waived its right as there was inordinate delay after conclusion of argument; the doctrine of "waiver" or "deemed waiver" or "estoppel" is based on the facts and circumstances of each case, conduct of the parties, and the agreement entered into between them; the Supreme Court, in *NBCC Ltd.* , 1998 (45) DRJ 96, recognized the importance of imposition of a time limit for conclusion of arbitration proceedings; after lapse of the agreed time the arbitrator loses jurisdiction; and implied consent cannot confer jurisdiction.

118. In *Ram Chandra Rungta* , AIR 2015 Cal 24 the Calcutta High Court held that the judgments, in *Jayesh H. Pandya* (2006) 4 ARBLR 109 and *Shyam Telecom Ltd.* , 2008(4) ALT 266, did not apply to the facts of the case before them; in both these cases the arbitration was continuing, the parties were regularly appearing before the respective arbitrators, they had applied for extension of time to file their pleadings, for adjournment etc; in both the cases it was held that a clear intention had been evinced by the parties that they had waived their right to insist on the time limit contained in the respective arbitration agreements for making and publishing the award; and, hence, the Bombay and Delhi High Courts, in the special facts of those cases, had held that there was waiver, of the stipulation in the arbitration agreement for publication of the award, within a specific period of time, by the parties.

119. In *Haryana Packaids Pvt. Ltd. v. Indian Oil Corporation Ltd.* , 218 (2015) DLT 760 : 2015 (2) ARBLR 242 (Delhi), the six (6) month period granted by the Court to pass an award came to an end; parties by mutual consent, at the hearing held later, extended the period by one (1) month to enable the arbitrator to render a decision qua the reference; and, even according to the arbitrator, this period came to an end on 15.10.2010 as recorded by him in the hearing held on 23.10.2010. The Delhi High Court held that, in these circumstances, one could

only conclude that the arbitrator had become functus officio on 15/16.10.2010; and the arbitrators mandate ought to be terminated.

120. Before examining whether the law declared by the Supreme Court and various High Courts in the aforesaid judgments, on the termination of the mandate of the arbitrator for his failure to act without undue delay under Section 14(1)(a) of the Act, would necessitate the mandate of the 6th respondent arbitrator being set aside, it is necessary to first consider whether the Court below had erred in not examining this question in the absence of any pleadings in this regard.

121. Ground (s) of the Section 14 petition filed before the Court below, on which reliance is placed to contend that a plea has indeed been taken, is only that the petitioners would raise additional grounds at the time of arguments. The contention, regarding expiry of time limit of five months stipulated by this Court to pass an award resulting in termination of the mandate of the arbitrator, appears to have been raised only during the course of arguments. In the order under revision, the Court below observed :-

"They have relied upon another judgment vide , 2004(3) Arb.LR. 146 (Delhi) wherein the Arbitrator has failed to complete the proceedings in the fixed period. But in the case on hand, the Arbitrator has commenced the proceedings but in view of the petition on hand there was no progress.

The Petitioners have relied upon the judgments reported in , 2008 (1) ARBLR 393, 2013 (2) ARBLR 35, 2004 (3) LR 146, , (2015) 2 SCC 52 and , 198 (2013) DLT 233"

122. It is no doubt true that the judgments in Shyam Telecom Ltd. , 2008(4) ALT 266 and U.P. State Bridge Corporation Ltd. (2012) 4 ABLR 361 (Bom) relate to termination of the mandate of the arbitrator on the expiry of the period stipulated in the agreement/order. Would this Court, while exercising jurisdiction under Article 227 of the Constitution of India, be justified in examining contentions, not urged in the Section 14(2) petition filed in Arb.O.P. No. 2889 of 2014, but put forth during the course of arguments in the said O.P.?

123. Section 14 (1)(a) of the Act relates to termination of the mandate of an arbitrator if, for other reasons, he fails to act without undue delay. The word delay is qualified by the word undue. Undue delay, and not mere delay, would alone justify the Court declaring that the mandate of the arbitrator stands terminated. The word undue means unjustified, unwarranted, unreasonable, excessive, inordinate. In order to declare that the mandate of the arbitrator stands terminated, the Court must be satisfied that the delay, on the part of the arbitrator, is unjustified, inordinate or unwarranted. For the Court, exercising jurisdiction under Section 14(2) of the Act, to declare that the mandate of the arbitrator stands terminated, the petitioner was not only required to plead but also to prove that the arbitrator had failed to act without undue delay. The word fail means neglect, go wrong or fall short of what is expected. What the

petitioner was required to plead and prove is that the arbitrator had neglected to act without excessive or inordinate delay.

124. Pleadings are meant to give to each side intimation of the case of the other so that it may be met to enable Courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take. The question before a Court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the respondent had no opportunity to show that the relief proposed by the Court should not be granted. When there is no prayer for a particular relief, no pleadings to support such a prayer, and the defendant has no opportunity to resist or oppose such a relief, it will lead to miscarriage of justice if the Court considers and grants such a relief. (*Bachhaj Nahar v. Nilima Mandal* , (2008) 17 SCC 491). The petitioners have failed to plead, let alone prove, that the arbitrator had failed to act without undue delay.

125. Even if there was delay on the part of the arbitrator in completing arbitral proceedings, and to pass an award, it was open to the parties to waive their right to object. Under Section 4 of the Act, a party who knows that (a) any provision of this Part from which the parties may derogate, or (b) any requirement under the arbitration agreement, has not been complied with, and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

126. What does the word waived in Section 4 of the Act mean?. Where a party, by his conduct, makes a promise not to insist on his legal rights, and that promise is intended to be binding and to be acted upon, and has, in fact, been acted upon, he cannot go back on it afterwards. Having been lenient, and having waived the initial expressed time, he has thereby prevented himself from ever insisting on a reasonably quick compliance. Whether it be called waiver or forbearance on his part, or an agreed variation, or a substituted performance does not matter. It is a kind of estoppel. (*Charles Richards Ltd. v. Oppenheim* 1950 (1) All ER 420; *Ram Chandra Rungta* , AIR 2015 Cal 24; *Professor Ansons Law of Contract* 28th Edition pg 523 to 527). Waiver is deemed to have taken place when a party, knowing that an irregularity has been committed, does not object and, instead, participates in the arbitration proceedings without protest. Section 4 of the Act corresponds to Article IV of the model law. The right to object to the continuance of proceedings, on the ground of expiry of the stipulated period, is one which falls in Part I of the Act, and which is derogable. (*K.S.R.T.C. v. M. Keshava Raju* AIR 2005 Karnataka 109; *Mascon Multiservices and Consultants Pvt. Ltd.* 2008 (5) MHLJ 749).

127. Section 4 is based on the general principles of "estoppel" or "venire contra factum proprium". If there is non-compliance of any non-mandatory provision of Part I, or of any requirement of the arbitration agreement, by a party of which

the other party, having knowledge of such non-compliance, does not object without undue delay, or if a time limit is provided for stating that objection and no objection is taken within that period of time, such a party can neither raise an objection later about non-compliance of any provision of Part I nor any requirement of the Arbitration agreement since such party must be deemed to have waived their objection. (M. Keshava Raju 1950 (1) All ER 420; Mascon Multiservices and Consultants Pvt. Ltd. 2008 (5) MHLJ 749).

128. In Mascon Multiservices and Consultants Pvt. Ltd. 2008 (5) MHLJ 749) the Bombay High Court held that parties, that raise questions as to jurisdiction, must be held to have given a go by to the stipulation as to time within which an award is to be made; if a party attends a number of meetings, after the time for making the award has expired, it would be a strong indication of waiver; the strength of an indication of waiver is not necessarily directly proportional to the number of meetings attended by a party, but is the nature of the meetings; and the conduct of a party is as, if not more, important.

129. While Sri Sunil Ghanu, Learned Counsel for the respondents, has contended before us that the petitioners had waived their right to insist that the arbitrator ought to have passed an award within the five month period fixed by this Court, such a contention cannot also be examined in the absence of any such plea in the counter filed by them in O.P. No. 2889 of 2014. It is only if the petitioners had pleaded that the arbitrator had failed to act without undue delay in not passing an award within the five month period stipulated by this Court, can the respondents be faulted for not pleading waiver in their counter. In the absence of any plea in this regard, would this Court be justified in examining such a contention in proceedings under Article 227 of the Constitution of India?

130. The questions whether there is undue delay on the part of the arbitrator because he had neglected to act, i.e., whether such delay is unwarranted or inordinate; and whether any of the parties to the arbitration agreement have waived their right to object, to the continuance of arbitral proceedings under Section 4(a) and (b) of the Act, are questions of fact which, in case of any controversy between the parties, the Court below was required to examine. It is only if such facts were pleaded, in the petition filed before it under Section 14(2) of the Act, was it possible for the Court below to examine whether or not the delay, on the part of the arbitrator to act, was undue, in the sense that such a delay to act was unwarranted, excessive or inordinate.

131. A court must no doubt discharge its functions whether discretionary or obligatory according to law as it is the duty of the Court not only to render justice but also to ensure that justice is done. (Mohanlal Shamji Soni v. Union of India 1991 Supp (1) SCC 271; Maria Margarida Sequeira Fernandes v. Erasmo Jack de Sequeira , (2012) 5 SCC 370). It needs no emphasis that Court should exercise their jurisdiction only with the object of sub-serving the cause of justice and public interest, and to uphold the truth (Ritesh Tewari v. State of U.P. , (2010) 10 SCC 677; Maria Margarida Sequeira Fernandes 1991 Supp (1) SCC

271 and that Courts should find out where in fact the truth lies. (Maria Margarida Sequeira Fernandes 1991 Supp (1) SCC 271). But would this justify this Court taking upon itself the task of examining factual disputes in proceedings under Article 227 of the Constitution of India?

132. Article 227 confers power of superintendence on the High Court over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. The discretionary power conferred by Article 227 is extra-ordinary, and is distinct from ordinary statutory powers. The power of superintendence, conferred on the High Court, is to keep the inferior courts and tribunals within the limits of their authority, ensure that they do not cross the limits, they perform their duties in accordance with law, and function within the ambit of the enactments whereby they were created. (Ouseph Mathai , (2002) 1 SCC 319).

133. If the Court/Tribunal does not consider the material on record having a bearing on a finding of fact, and records a finding of fact, such a finding arrived at, without consideration of the relevant material on record, cannot be sustained in law and the High Court, in such circumstances, can interfere. (Achutananda Baidya v. Prafulla Kumar Gayen , AIR 1997 SC 2077 : (1997) 5 SCC 76). It may also interfere in cases of erroneous assumption of, or acting beyond its, jurisdiction by a Tribunal, or its refusal to exercise jurisdiction, or for an error of law apparent from the record as distinguished from a mere mistake. Interference may also be necessary in cases of arbitrary or capricious exercise of authority or discretion or a patent error in procedure. (Achutananda Baidya (2010) 10 SCC 677). If the evidence on record, in respect of a question of fact, has not been taken into consideration and, without reference to such evidence, a finding of fact is arrived at by the inferior court or tribunal, such finding must be held to be perverse and lacking in factual basis. In such circumstances, in the exercise of its jurisdiction under Article 227, the High Court may quash such perverse findings of fact. (Achutananda Baidya (2010) 10 SCC 677).

134. The power of superintendence, conferred by Article 227, is to be exercised sparingly, and only in appropriate cases, in order to keep the subordinate Courts within the bounds of their authority and not for correcting mere errors, (Waryam Singh v. Amarnath , AIR 1954 SC 215 : 1954 SCR 565; Ouseph Mathai , (2002) 1 SCC 319; and Nagendra Nath Bose v. Commr. of Hills Division , AIR 1958 SC 398 : 1958 SCR 1240), unless such errors are as a result of grave dereliction of duty and flagrant abuse of power by the subordinate Courts and Tribunals, and have caused grave injustice to any party. (Ouseph Mathai , (2002) 1 SCC 319). The power of superintendence of the High Court, under Article 227 of the Constitution, is not confined to superintendence alone, but includes within its sweep the power of judicial review. (Achutananda Baidya (2010) 10 SCC 677).

135. The High Court would not, while exercising jurisdiction under Article 227, convert itself into a Court of appeal, even in cases where the Legislature has not conferred a right of appeal under a Statute. (Bhahutmal Raichand Oswal v. Laxmibai R. Tarta , (1972) 74 BomLR 214; Ouseph Mathai , (2002) 1 SCC 319).

In the exercise of its jurisdiction under Article 227, the High Court would decline to interfere with a finding within the jurisdiction of the inferior tribunal except where such findings are perverse, and are not based on any material evidence or it has resulted in manifest injustice. (Chandavarkar Sita Ratna Rao v. Ashalata S. Gurnam , 1986 (4) SCC 447; R v. Northumber Land Compensation Appeal Tribunal, Exparte Shaw (1952 (1) All ER 122; Ouseph Mathai , (2002) 1 SCC 319). The High Court would not examine questions which require appreciation of evidence or where two views are possible or to prefer one view to another on appreciation of the evidence on record. (Chandavarkar Sita Ratna Rao (1972) 74 BomLR 214; Ouseph Mathai , (2002) 1 SCC 319). The High Court would not quash an erroneous finding of fact recorded by the Court/Tribunal. It would, however, interfere if the subordinate court came to the conclusion without any evidence or upon manifest misreading of the evidence thereby indulging in improper exercise of jurisdiction. (Achutananda Baidya (2010) 10 SCC 677).

136. Reliance placed by Sri Sandeep Sharma, on Nathubhai v. Bhakubhai , AIR 1963 Gujarat 305, to contend that this contention can be examined, in proceedings under Article 227 of the Constitution of India, does not merit acceptance. On the question, whether a contention can be taken up in a revision when it has not been taken up before the Court below, the Gujarat High Court, in Nathubhai (1952 (1) All ER 122, held that, if a ground is not stated in the memorandum of appeal or, with the permission of the Court, is not taken in the arguments advanced, it cannot be taken up in revision, as the Court below cannot be said to have acted with material irregularity in not considering an objection which was not urged before it; but if an objection is raised before the Court below and, in support of it, three arguments are urged, while in the revisional Court fourteen are urged in support of the same ground, all the fourteen arguments must be considered notwithstanding that only three out of them have been urged in the Court below; the grounds must, however, be based on questions of law, if they are to be entertained by the revising Court; if any of the arguments urged before the revising Court depend on a finding of fact, the revising Court would refuse to entertain those arguments, because they involve a finding of fact on which the Court below has not given any finding; and it is not proper for a revising Court to give a finding of fact for the first time in revision when no such finding is given by the Court below.

137. As held by the Gujarat High Court, in Nathubhai (1952 (1) All ER 122, it is only a question of law, raised for the first time in revision proceedings, which can be examined; and the High Court would neither entertain arguments which involve findings of fact on which the Court below has not given a finding, nor would it record a finding of fact for the first time in revision proceedings. We must express our inability to agree with the submission of Sri Sandeep Sharma, Learned Counsel for the petitioners, that the question, whether there has been undue delay on the part of the arbitrator in completing arbitration proceedings, is a pure question of law which can be examined for the first time in proceedings under Article 227 of the Constitution of India.

138. This contention, regarding undue delay on the part of the arbitrator to act i.e., to complete arbitral proceedings within the stipulated time of five months, was raised for the first time during the course of arguments before the Court below and a passing reference is made thereto, and to a few judgments cited by the petitioners in this regard, in the impugned order. The Court below could not have recorded any finding on facts such as whether the delay of the arbitrator to act was undue or not; and, if so, whether the petitioners had waived such a right. It would be wholly inappropriate for us, therefore, to examine the rival contentions urged by Learned Counsel on either side on the question of undue delay on the part of the arbitrator to complete arbitration proceedings or, for that matter, whether the petitioners can be said to have waived their right to object, to the arbitral proceedings being continued, having participated therein for a certain length of time. Suffice it to make it clear that, as these questions have not been raised in the petition filed under Section 14(2) of the Act before the court below, the order now passed by us shall not preclude the petitioners, if they choose, from agitating these questions in accordance with law.

VII. CONCLUSION:

139. Viewed from any angle, the mandate of the 6th respondent-arbitrator cannot be terminated, on the basis of the contentions urged by the petitioners, in the petition filed by them before the Court below under Section 14(2) of the Act. Suffice it to make it clear that the order now passed by us shall not preclude the petitioners herein from agitating their claim of undue delay on the part of the arbitrator, in concluding arbitration proceedings and in passing the award, in appropriate legal proceedings; or to raise all the contentions urged before this Court, on whether circumstances exist that give rise to justifiable doubts as to the arbitrators independence or impartiality, in proceedings under Section 34 of the Act, after an award is passed. Subject to the observations made hereinabove, the Civil Revision Petition fails and is, accordingly, dismissed. The Miscellaneous Petitions, if any pending, shall also stand dismissed. No costs.

1(Judgment of the Division Bench of the A.P. High Court in W.P. 13970 of 2005 dated 19.08.2005)