

(1995) 05 CAL CK 0040
In the Calcutta High Court
Case No : Matter No. 301 of 1995

Hindustan Steelworks Construction Ltd.	APPELLANT
Vs	
G.S. Cherra and Company and Others	RESPONDENT

Date of Decision : 05-05-1995

Acts Referred:

Arbitration Act, 1940 — Section 11, 12, 28, 5

Citation : (1996) 1 CALLT 120

Hon'ble Judges : Altamas Kabir, J

Bench : Single Bench

Advocate : K.S. Ray and Avijit Banerjee, for the Appellant; P.K. Roy and Samir Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

Altamas Kabir, J.—This is an application under sections 5, 11 and 12 of the Arbitration Act, 1940, filed by Hindustan Steelworks Construction Ltd. for removal of the Joint Arbitrators nominated by the parties and for orders consequential thereto.

2. The petitioner is a government owned company, having its registered office at No. 1, Shakespeare Sarani, Calcutta-700071. On 24th December, 1980, a letter of Intent was issued by the petitioner company in favour of the respondent No. 1, which carries on the business of civil engineering, for the construction of constructive buildings, theatre hall, conference room, dining hall and kitchens for a training centre complex at Tripoli in Libya. A formal agreement was executed between the parties on 2nd February, 1983, containing an arbitration clause which provided that all disputes and differences arising out of the contract would be referred to Joint Arbitrators, one to be nominated by the petitioner company and the other by the respondent No. 1.

3. It appears that disputes and differences arose between the parties relating to the said contract resulting in Suit No. 271 of 1987 filed by the petitioner

company in this Court. The respondents thereupon filed an application u/s 34 of the Arbitration Act, 1940, and the suit was stayed. The parties, thereafter, referred the disputes to the arbitration of Joint Arbitrators, as provided for in the Agreement of 2nd February, 1983. While the respondent No. 1 nominated one Mr. S.C. Sinha, a learned advocate of this Court, the petitioner company appointed one Brigadier V.K. Sawhney, as Joint Arbitrators, and they, in their turn appointed the Hon'ble Mr. P. N. Bhagwati, former Chief Justice of India, as Umpire.

4. Between 11th July, 1990 and 17th November, 1993, there were 37 meeting before the Joint Arbitrators, where the petitioner was represented by its Law Officer, Mr. J. Singh. On 9th December, 1993, the petitioner was represented by two learned Counsels, along with Mr. J. Singh.

5. It appears that, although, the sittings were to be held on 9th and 10th December, 1993, the arbitration proceedings were adjourned on 9th December, 1993, itself till 27th January, 1994.

6. It may be mentioned here that time for making and publishing the award was extended from time to time by mutual consent, and the last extension was purportedly till 31st December, 1993. There is some controversy as to whether there was any further extension or not.

7. However, on 25th January, 1994, the petitioner wrote to Justice P.N. Bhagwati, as the learned Umpire, to enter upon the reference, since according to the petitioner, the time for making and publishing the award had expired on 31st December, 1993. Copies of the said letter were also endorsed to the Joint Arbitrators. On 27th January, 1994, the Joint Arbitrators did not continue with the arbitration proceedings on the ground that, although, time for making and publishing the award had been mutually extended for a period of four months upon oral consent, the written consent had not been filed on that date.

8. On 1st February, 1994, an application was filed by the respondent No. 1 u/s 28 of the Arbitration Act, 1940, for enlargement of the time for making and publishing the award, wherein the points relating to the alleged misconduct of the Joint Arbitrators were also taken and argued. After a contested hearing, the said application was allowed by a learned Judge of this Court on 25th January, 1995, by a reasoned judgment, and time for making and publishing the award was extended till 31st March, 1995.

9. The petitioner herein preferred a SLP before the Hon'ble Supreme Court against the said order passed on the respondent's application u/s 28 of the aforesaid Act, but the same was dismissed on 2nd March, 1995, with the following observation :-

"We do not find it a fit case for interference with the High Court's order extending time for making the award u/s 28 of the Arbitration Act. Learned A.S.G. then attempted to submit that there were certain allegations of

misconduct against the Arbitrators. Suffice it to say that is not a question for consideration at this stage and if there be any such ground available to the petitioner, it would be open for it to urge at the appropriate stage, in an appropriate proceeding....."

10. Thereafter, the present application was filled for removal of the Joint Arbitrators on the ground that they were biased against the petitioner and had misconducted themselves causing the petitioner to lose confidence in them and particularly in its own nominee. Brigadier Sawhney.

11. Appearing in support of the application, Mr. K.S. Ray urged that the order passed on 25th January, 1995 on the respondent's application u/s 28 of the Arbitration Act could not operate as res judicata in the present application since the findings in the said order were made in a proceeding for extension of time and not in a proceeding u/s 5 of the said Act.

12. Mr. Ray urged further that the above fact had been duly noticed by the Supreme Court which had, therefore, observed while disposing of the SLP that the allegations of misconduct against the Arbitrators was not a question for consideration at that stage, and if any such ground was available to the petitioner, it would be open to urge it at the appropriate stage in an appropriate proceeding.

13. Mr. Ray submitted that the effect of the order passed on the Section 28 application 25th January, 1995 in so far as it related to the allegations of misconduct against the petitioner, was completely nullified by the order subsequently passed by the Supreme Court on 2nd March, 1995 and the said question was kept open for agitation in an appropriate proceeding, namely, a proceeding for removal of the Arbitrators u/s 5 of the Arbitration Act.

14. Mr. Ray then urged that, although, the petitioner had nominated Brigadier Sawhney as its Arbitrator, it gradually began to lose confidence in him in view of the continuous heckling of the petitioner's, Law Officer, Mr. J. Singh, during the period of the proceedings when he alone was handling the matter on behalf of the petitioner company. Mr. Ray urged that, although, as a result of the above, the petitioner was seriously considering moving an application u/s 5 of the aforesaid Act, it decided to wait and see whether appearing in the proceedings through learned counsels, would alter the behaviour and attitude of the Arbitrators towards the petitioner.

15. Mr. Ray submitted that on 9th December, 1993, when learned Counsels appeared for the petitioner for the first time in the arbitration proceedings, the learned Senior Counsel of the petitioner made submissions for over two hours and the matter was, thereafter, adjourned for further hearing till 27th January, 1994, since it became evident that it would not be possible to complete the hearing on 10th December, 1993.

16. Mr. Ray urged that on 9th December, 1993, when the next meeting was fixed

on 27th January, 1994, all the parties lost sight of the fact that the extended time for making and publishing the award was to expire on 31st December, 1993. Only when such fact came to the notice of the petitioner on 25th January, 1994, was a letter sent to the learned Umpire requesting him to enter upon the reference, since the Joint Arbitrators had become functus officio after 31st December, 1993. Mr. Ray urged that, thereafter, on 26th January, 1994, the learned advocate of the respondent No. 1 wrote to the learned Umpire making false and incorrect allegations suggesting mala fide on the petitioner's part, with the sole intention of misleading the Umpire.

17. Mr. Ray next contended that the petitioner was served copies of the minutes of the 38th Meeting held on 9th December, 1993, on 25th January, 1994, and from the said minutes it became apparent that the Joint Arbitrators were completely biased against the petitioner. Without recording the fact that learned Senior counsel for the petitioner had argued continuously for two hours, the minutes merely recorded that since learned counsel had just been briefed to appear, he required some time to prepare himself, and on his prayer the matter was adjourned till 27th January, 1994, for further hearing.

18. Mr. Ray submitted that the Joint Arbitrators had quite evidently not even noted or applied their minds to the arguments advanced by the petitioner's senior counsel for more than two hours, and this incident also caused the petitioner to lose faith in the Joint Arbitrators.

19. Mr. Ray then contended that in view of the succession of events after 9th December, 1993, the Joint Arbitrators were requested by the petitioner not to hold the meeting on 27th January, 1994, but the Joint Arbitrators went ahead with the meeting with the sole intention of filling up the lacuna resulting from the fact that the time for making and publishing the award had not been extended beyond 31st December, 1993.

20. Mr. Ray urged that the minutes of the meeting held on 27th January, 1994, were fabricated and reflect the allegations contained in the letter written by the learned advocate of the respondent No. 1 the previous day.

21. Mr. Ray submitted that the fabrication of the minutes of the meeting held on 27th January, 1994, and the incorrect recording of the events of 9th December, 1993, brought into focus the bias and prejudice of the joint Arbitrators, and caused the petitioner to apprehend the worst.

22. Mr. Ray submitted that upon expiry of time for making and publishing the award, it was the usual practice of the Joint Arbitrators to record extension of time on the mutual consent of the parties, given at time even orally. Mr. Ray submitted that the sudden desire of the Arbitrators to wait for the written consent of the parties for extension of time was, in fact, a departure from the normal practice. Mr. Ray referred to the minutes of some of the meetings, as set out in paragraph 15 of the petition, in support of his said contention, Mr. Ray urged that the same was done to make it appear that consent had been mutually

given by the parties for extension of the time for making and publishing the award beyond 31st December, 1993, for a further period of four months.

23. Mr. Ray submitted that after dismissal of the SLP by the Supreme Court on 2nd March, 1995, the petitioner was served with a letter written by Shri S. C. Sinha, one of the Joint Arbitrators, on 6th March, 1995, informing it that the next meeting in the said arbitration proceedings would peremptorily commence on 15th March, 1995, and would continue from day to day until completion of the hearing, and if any of the parties chose not to appear, the proceedings would continue *exparte*.

24. Mr. Ray then urged that having lost confidence in the Arbitrators in view of the manner in which the proceedings of 9th December, 1993, and 27th January, 1994, were minuted, the petitioner decided to move an application under sections 5 and 11 of the Arbitration Act and, accordingly, on 10th March, 1995, the petitioner's Advocate-on-Record wrote to the Joint Arbitrators requesting that the meeting scheduled for 13th March, 1995, be adjourned as an application under the above provisions had been taken out by the petitioner.

25. Mr. Ray submitted that such request for adjournment was turned down by the Arbitrators and the parties were informed that the meeting of 13th March, 1995, would be held as scheduled and if any of the parties failed to appear, the meeting would be proceeded with *exparte*.

26. Mr. Ray then urged that on 13th March, 1995, the petitioner's prayer for adjournment was renewed on the additional ground that the petitioner's learned Senior Counsel was out of town, but such prayer was again refused and the Arbitrators proceeded to hold the 41st meeting on that date in the petitioner's absence, and the learned Counsel of the respondent No. 1 made his submissions with regard to claim Nos. 1 to 10.

27. Mr. Ray submitted that from the minutes of the meeting of 13th March, 1995, served on the petitioner on 14th March, 1995, at about 11-30 a.m., it transpired that the next meeting had been fixed for 14th March at 2 p.m., although, the normal practice was to commence proceedings at 4 p.m. During each meeting Mr. Ray submitted that no reason was given for departure from the usual practice. However, on 14th March, 1995, the petitioner's Law Officer appeared before the Arbitrators and prayed for adjournment of the meeting on the ground that the petitioner's Senior Counsel was not available at 2.00 p.m. On such prayer, the Arbitrators did not adjourn the meeting for the day, but deferred it till 4.00 p.m.

28. According to Mr. Ray, the petitioner's Junior Counsel appeared before the Arbitrators and renewed the prayer for adjournment on account of the pendency of the instant application, which was to be heard as "New Motion" on 16th March, 1995. Such prayer was rejected and as would appear from the minutes of the meeting held on 14th March, 1995, the learned Counsel of the Respondent No. 1 covered claim Nos. 11 to 56, relating to extra works done by the Respondent No.

1, within a span of two hours. Mr. Ray submitted that, although, the same was pointed out to the Arbitrators by the petitioner's Law Officer, Mr. J. Singh, who was present at the meeting, the petitioner's nominee Arbitrator, Brigadier Sawhney, observed that was nothing strange and it was for the respondents to work out the modalities of their submissions.

29. Mr. Ray urged that the confidence of the petitioner in the Joint Arbitrators, which had been shaken earlier, was completely destroyed thereafter.

30. Mr. Ray submitted that realising that the Respondents and the Arbitrators were in an unseemly hurry to complete the proceedings so that the award could be made immediately thereafter, the petitioner appeared through learned Counsel on 15th March, 1995, and again prayed for adjournment of the proceedings on the ground of pendency of the instant application, which was to be heard the next day. As the Arbitrators were unwilling to grant such adjournment, the petitioner's counsel prayed for being allowed to make submissions under protest and without prejudice to the contentions in the instant application, and for the said purpose the next dates of hearing were fixed on 21st, 22nd and 23rd March, 1995.

31. Mr. Ray urged that nothing would have happened if the meetings fixed on 13th March, 1995, onwards were adjourned till after 16th March, 1995, when the present application was to be heard as a New Motion. But the Arbitrators chose to continue with the proceedings in undue haste, raising suspicions of bias in the petitioner's mind.

32. Mr. Ray then contended that after completion of arguments by the learned Counsel of the Respondent No. 1, when the petitioner's learned Counsels had left, the Arbitrators dictated the minutes in which they recorded that they had taken exception to the incorrect and wild allegations made against them in the letter written by the petitioner's Law Officer, Shri J. Singh, to the Joint Arbitrators.

33. Mr. Ray also contended that it was the usual practice for the petitioner to provide air tickets to its nominee Arbitrator, Brigadier Sawhney, who is a resident of New Delhi, to enable him to attend the sittings which were held in the petitioner's guest house at Ballygunge Circular Road, Calcutta, where arrangements were also made for Brigadier Sawhney's stay during the arbitration proceedings.

34. Mr. Ray urged that when Brigadier Sawhney came to Calcutta for the meetings scheduled in February and March, 1995, he purchased his own air tickets and made his own arrangements for his stay in Calcutta during the arbitration proceedings and did not ask the petitioner to reimburse the expenses incurred by him in that behalf, in complete departure from the usual practice.

35. Mr. Ray urged that this showed seeds of suspicion in the mind of the petitioner, and caused the petitioner to lose complete faith and confidence in its

nominated Arbitrator, Brigadier Sawhney.

36. Mr. Ray submitted that the Arbitrators had already revealed their bias against the petitioner and since the instant application has been taken out for revocation of their authority and their removal, their bias and animosity against the petitioner had crossed all limits,

37. In support of his aforesaid contention, Mr. Ray firstly referred to a decision of the Punjab High Court in the case of Dr. Hardit Singh Jeswant Singh v. Bhagat Jaswant Singh and Ors., reported in AIR 1964 Punjab Page 277. While deciding an application u/s 24 of the Code of Civil Procedure, the Punjab High Court held that transfer of a case must be on the basis of a reasonable apprehension in the mind of a reasonable man that the judge was unduly biased in favour of a particular party. Mr. Ray pointed out that even though such an apprehension was not available in the said case, the same was transferred to the learned District Judge as the evidence had been closed and the case was at the stage of arguments. Mr. Ray urged that, although, the decision was u/s 24 of the Code of Civil Procedure, the principles were the same as those to be applied in an application under sections 5 and 11 of the Arbitration Act, 1940.

38. Mr. Ray then referred to a single Bench decision of this court in Bhuwarka Bros. Ltd. Vs. Fatehchand Murlidhar, wherein while considering a similar application u/s 5 of the Arbitration Act, the learned Judge observed that in an application u/s 5 or section 34, all that is necessary is to show that there is a probability of bias or a reasonable prospect of bias or there is a reasonable apprehension of bias. It was further observed that whether the arbitrator was so biased is immaterial.

39. Mr. Ray also referred to recent decisions of the Supreme Court in this regard in (1) International Airports Authority of India Vs. K.D. Bali and Anr, and (2) Jiwan Kumar Lohia and another Vs. Durgadutt Lohia and others, wherein it was observed that the purity of administration requires that the party to the proceedings should not have any apprehension that the authority is biased and is likely to decide against the party, but such apprehension must be judged from a healthily, reasonable and average point of view and not on mere apprehension of any whimsical person. It was also observed that the test of likelihood of bias is whether a reasonable person, in possession of relevant information would have thought that bias was likely and whether the person concerned was likely to be disposed to decide the matter only in a particular way.

40. In support of his contention that no application had previously been made under sections 5, 8, 11 and 12 of the Arbitration Act, 1940 as the Arbitrators had become functus officio after 31st December, 1993, Mr. Ray referred to a single Bench decision of this Court in Arbn Hindusthan Steel Vs. Appejay Pr. Ltd., , wherein it was held that the authority of an arbitrator cannot be revoked when in law he does not exist and or cannot function.

41. Mr. Ray urged that since the time to make and publish the award was not

extended beyond 31st December, 1993, the Arbitrators became functus officio. Thereafter a formal application of leave to revoke their authority or for their removal was no longer required to be made.

42. On the aforesaid grounds, Mr. Ray submitted that the Joint Arbitrators be removed, or, in the alternative, the petitioner's nominee, Brigadier V.K. Sawhney be removed and another Arbitrator be appointed in his place to function as Joint Arbitrator with Shri S.C. Sinha and to complete the reference and make and publish the award.

43. Opposing the application, Mr. P.K. Roy, submitted that the arbitration proceedings can be broken up into three distinct periods. The first period was till 9th December, 1993; the second period was between 9th December, 1993 and 25th January, 1994, when the respondent's application u/s 20 of the Arbitration Act for enlargement of time for making and publishing the award was allowed; and the third period was after 25th January, 1994, when the arbitration proceedings were recommenced.

44. Mr. Roy submitted that prior to 9th December, 1993, no allegation of bias against the Arbitrators or denial of a proper opportunity of placing its case was raised the petitioner.

45. The problem, according to Mr. Roy, really commenced thereafter, when, after having orally agreed to extend the time for making and publishing the award for a period of four months after 31st December, 1993, the petitioner addressed a letter on 25th January, 1994, to the learned Umpire requesting him to enter upon the reference on the alleged failure of the Arbitrators to publish their award within the extended period which was alleged to have expired on 31st December, 1993.

46. Mr. Roy submitted that it was the petitioner who acted in lack of good faith and the matter had to be set at rest in an application filed by the respondent No. 1 u/s 20 of the above Act on 31st January, 1994. Mr. Roy submitted that all the points sought to be urged on behalf of the petitioner in respect of the events which occurred upto 25th January, 1994, in the instant application, including the question of bias, were also raised by the petitioner herein at the time of hearing of the application u/s 20, and after considering the same, the learned Judge allowed the said application and extended the time for making and publishing the award till 31st March, 1995.

47. Mr. Roy contended that having consented to extension of time till, at least, 31st December, 1993, the petitioner must be held to have condoned any lapses during the arbitration proceedings till that date. Mr. Roy urged that the petitioner was also barred by the principles of res judicata from making any allegation with regard to the period from 31st December, 1993 till 25th January, 1994.

48. Mr. Roy submitted that except for vague allegations, nothing substantial has been revealed by the petitioner which would warrant the removal of the

Arbitrators.

49. On the question of condonation by necessary implication, Mr. Roy relied upon a single Bench decision of the Delhi High Court in Lucky Home Co-operative Group Housing Society Ltd. v. Shanti Developers and Promoters (India) Pvt. Ltd., reported in 1994 (1) A LR 370, wherein the learned Judge held that having consented to enlargement of the time for making and publishing the award, the parties could not be permitted to make any allegation against the Arbitrators for the period prior to the date till when the time was extended.

50. Mr. Roy urged that it was well settled that any of the parties to an arbitration proceeding cannot be permitted to seek leave to revoke the authority of the arbitrator or pray for his removal when he/it apprehends that the award may go against him/it.

51. In support of his said contention, Mr. Roy referred to and relied on the decision of the Supreme Court in (1) Jiwan Kumar Lohia and another Vs. Durgadutt Lohia and others, also relied upon by Mr. K. S. Roy, (2) Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another, and (3) Secretary to Government, Transport Deptt., Madras Vs. Munuswamy Mudaliar and Another, wherein it was reiterated that reasonable apprehension of bias in the mind of a reasonable man can be a good ground for removal of the arbitrator, and that a predisposition to decide for or against one party, without regard to the true events of the dispute, constitutes bias. A note of caution was also introduced to the effect that there must be a reasonable apprehension of such predisposition which must be based on cogent materials.

52. Mr. Roy then referred to the allegations made with regard to the conduct of the proceedings by the arbitrators on 9th December, 1993, and submitted that the events of 9th December, 1993, had been correctly recorded in the minutes prepared by the Arbitrators. Mr. Roy submitted that since the learned Counsels were appearing for the first time in the proceedings, they had sought for an adjournment so that they could prepare themselves properly for the purpose of arguing the petitioner's case. Mr. Roy submitted that the Arbitrators in all fairness adjourned the proceedings till 27th January, 1994, on such prayer, and that is why no meeting was held on 10th December, 1993, as scheduled earlier.

53. Mr. Roy urged that since an adjournment had been sought for and the proceedings had been adjourned till 27th January, 1993, the question of holding any further meeting on 10th December, 1993, did not arise.

54. Mr. Roy submitted that quite often during the arbitration proceedings, the time for making and publishing the award had been extended orally upon mutual consent, subject to written confirmation submitted at a later date.

55. Mr. Roy submitted that it was, therefore, incorrect on the part of the petitioner to say that the time for making and publishing the Award had not been, extended beyond 31st December, 1993, when such extension upon oral

consent had been recorded by the Arbitrators in their minutes of the 39th Meeting held on 27th January, 1994.

56. Mr. Roy submitted that the position with regard to the above was clarified on behalf of the respondents in the letter written to the learned Umpire on 26th January, 1994, in response to the letter written by the petitioner on the previous day, requesting the learned Umpire to enter upon the reference since the Joint Arbitrators had failed to make and publish the Award within 31st December, 1993, Mr. Roy pointed out that the learned Umpire had by his letter dated 30th January, 1994, addressed to the parties wanted to know the correct position since conflicting versions were being given by the parties with regard to the extension of time for making and publishing the Award for a period of 4 months beyond 31st December, 1993.

57. Mr. Roy pointed out that the petitioner did not choose to reply to the said letter of the learned Umpire, which would show that the petitioner was trying to take advantage of the fact that except for recording that the proceedings were being adjourned beyond 31st December, 1993, nothing else had been recorded regarding extension of time upon the oral mutual consent of the parties. Mr. Roy urged that the very fact that the proceedings were adjourned beyond 31st December, 1993, clearly implied that the time for making and publishing the Award had been extended beyond 31st December, 1993.

58. On the question of res judicata, Mr. Roy pointed out that in the order passed by the Supreme Court on 2nd March, 1995, dismissing the SLP filed by the petitioner herein, there is nothing to indicate that the bar of res judicata had been lifted with regard to the findings of the learned Single Judge on the question of bias urged on behalf of the petitioner. Mr. Roy pointed out that it was the petitioner itself which had invited the Court to go into the question of bias in an application u/s 28 of the Arbitration Act, 1940. Mr. Roy urged that having done so, it was no longer open to the petitioner to contend that the findings in the said application u/s 28 would not operate as res judicata in the instant proceedings, Mr. Roy pointed out that the Supreme Court had made it clear that only if grounds of allegations of misconduct were available to the petitioner, it would be open to the petitioner to urge the said ground at an appropriate stage in an appropriate proceeding.

59. Referring to a Bench decision of the Patna High Court in Anand Das v. Ram Bhusan Das, reported in AIR 1993 Pat 566, Mr. Roy submitted that in the said case the Division Bench had observed that in applying its mind to an application for extension of time for the submission of an Award, the Court is entitled and is bound to take all the circumstances of the case into consideration, including allegations of misconduct of Arbitrators, without deciding whether those allegations are true or not, in coming to the conclusion, whether any good could be gained by giving further time or whether the arbitration was to be suspended.

60. Referring once again to the decision of the Supreme Court in Jiwan Kumar

Lohia's case (supra). Mr. Roy urged that it is settled law that while considering whether there was a reasonable ground for apprehension that the Arbitrator would be biased, on an application u/s 5 of the Arbitration Act, the Court should be satisfied that substantial miscarriage of Justice would take place in the event such application was rejected. It was also observed that the discretion to give leave to revoke an Arbitrator's authority has to be exercised cautiously and sparingly, and, while doing so, the Court must bear in mind that arbitration is a particular method for the settlement of disputes, and parties should not be relieved from a tribunal they have chosen because they fear that the Arbitrator's decision may go against them.

61. Mr. Roy submitted that as far as the different cases cited by Mr. K.S. Ray were concerned, the principles laid down therein could not be questioned, but what was important was whether the same were relevant to the facts of the present case, Mr. Roy urged that unless a reasonable apprehension of bias, based on cogent facts, was proved to the satisfaction of the Court, the question of leave to revoke the authority of the Joint Arbitrators or their removal, could not arise.

62. Mr. Roy pointed out that as had been observed by the Punjab High Court in Dr. Hardit Singh Jaswant Singh's case (supra) fanciful ideas, imaginary suspicions and capricious beliefs are no substitute for and cannot be equated with reasonable apprehension that the Court was unduly biased in favour of one of the parties.

63. Mr. Roy submitted that in the instant case there is no material for reasonable apprehension in the mind of any of the parties that the Arbitrators had acted with bias to the prejudice of any of the parties.

64. It was lastly contended by Mr. Roy that the submission made on behalf of the petitioner that since an application had been made for their removal, the arbitrators, even if they were not biased before, would now be biased, was of no substance at all, inasmuch as, if in each and every case a party so wanted, he could made an application for transfer of a case and the mere making of such an application would entitle the concerned party to have his case transferred to some other court.

65. Mr. Roy urged that, although, the time for making and publishing the Award had been extended till 31st May, 1995, since the proceedings had been stayed on account of the instant application, the time for making and publishing the Award should also be correspondingly extended.

66. In reply to Mr. Roy's submissions, Mr. Ray firstly submitted that the question of res judicata did not at all arise in the facts of the present case, since the matter before the learned Judge who had earlier disposed of the application u/s 28 related to extension of time for making and publishing the Award and the question of bias was not in issue in the said application, even if the same had been pleaded and argued by the parties. Mr. Ray contended that the order passed by the Supreme Court on 2nd March, 1995, on the petitioner's SLP had

the effect of lifting the bar of *res judicata*, even if the question in issue in the Instant proceedings were also raised and decided in the earlier proceedings, inasmuch as, leave was given to the petitioner to raise the question of bias at an appropriate stage in an appropriate proceeding, which could only mean an application under Sections 5 and 11 of the Arbitration Act. 1940.

67. On the question as to why the petitioner had waited till the 38th meeting of the Joint Arbitrators to arise the question of bias, Mr. Ray submitted that there was, in fact, no delay in making the present application, since, the petitioner was not materially prejudiced by the happenings prior to 9th December, 1993. It is only after coming to learn of the recording of the minutes of the 38th meeting held on 9th December, 1993, that the petitioner felt that the bias of the Arbitrators was too deeply engrained for a fair adjudication of the disputes raised by the parties. It was at that stage that it was felt that the instant application was required to be made.

68. Mr. Ray submitted that the petitioner had no intention of prolonging the proceedings which would be evident from the fact that petitioner's learned counsel undertook to make his submissions from the stage at which the petitioner's Law Officer, Mr. J. Singh, had concluded his submissions.

69. Mr. Ray urged that the decisions cited on behalf of the respondents were not applicable to the facts of the case since in those cases the facts were totally different. Mr. Ray pointed out that in *Prasun Roy's* case (*supra*) the parties chose to proceed inspite of having knowledge of the disablement of the Arbitrator. Having submitted to the Jurisdiction of the Arbitrator inspite of such known disability, and having participated in the proceeding for a long time, it was no longer open to the parties to challenge the arbitration proceeding on the ground of such disablement.

70. Mr. Ray also pointed out that the case of *International Airport Authority of India v. K.D. Ball* (*supra*) had no application to the facts of the present case inasmuch as, in the said case, the counter-claims raised on behalf of the respondents were yet to be considered by the Arbitrator. It was in such background that the Supreme Court had held that there was no ground for any apprehension of bias.

71. As far as the decision of the Madhya Pradesh High Court in *Ramsahai Sheduram Vs. Harishchandra Dullchandji and Another*, was concerned, Mr. Ray pointed out that it was yet another case of known-disability and could not, therefore, have any application to the facts of this case.

72. Mr. Roy urged that sufficient materials have been brought to light in the Instant case which justified the petitioner's loss of faith on the Arbitrators on account of bias and prejudice and warranted their removal for proper adjudication of the disputes raised and subsisting between the parties.

73. I have carefully considered the submissions made on behalf of the respective

parties and the various decisions cited by their learned Counsels and I am unable to appreciate the case of the petitioner.

74. Although, an attempt was made on behalf of the petitioner to show that the petitioner was not very happy with the conduct of the arbitration proceedings right from its very inception, there is really nothing on record in support of such assertion. There is nothing on record to show that prior to 9th December, 1993, the Arbitrators had misbehaved with the petitioner's Law Officer, Mr. J. Singh, who had been conducting the proceedings right from the very beginning. As is evident from what has been stated herein above, the problems, if any, really began after the learned Counsels entered appearance on behalf of the petitioner at the 38th meeting held on 9th December, 1993.

75. Since there are two different versions of what transpired at the meeting of 9th December, 1993, I am inclined to go by the minutes as recorded by the Arbitrators. There is, however, one point which lends credence to the version of the respondents which is that on 9th December, 1993, itself, the meeting was adjourned till 27th January, 1994, without any explanation as to why the meeting of 10th December, 1993, was not held. There is no reason why if the learned counsel for the petitioner had argued for the full session on 9th December, 1993, the said arguments could not have been continued on the next day and, thereafter, the matter could have been adjourned.

76. Accordingly, it is difficult to attribute bias in the mind of the Arbitrators on the basis of the minutes of 9th December, 1993.

77. As to the minutes of the meeting scheduled for 27th January, 1994, it is a reflection of what allegedly transpired on the question relating to extension of time for making and publishing the award beyond 31st December, 1993. From the Judgement passed in the application u/s 28 on 25th January, 1995, one thing is apparent and that is that the self-same facts regarding apprehension of bias were sought to be pleaded and argued and despite such arguments, the learned judge thought it fit to extend the time for making and publishing the Award till 31st March, 1995. By rejecting the SLP filed by the petitioner herein, the Supreme Court gave its seal of approval to the said Judgement. The observations made by the Supreme Court while dismissing the said application may ensure to the petitioner's benefit in respect of allegations of bias for any period subsequent to the judgment of 25th January, 1995. The earlier allegations and the findings thereupon, in my view, stood concluded by the dismissal of the Special Leave petition, thus attracting the bar of res judicata in respect thereof.

78. We will, therefore, have to confine ourselves to the allegations of bias in respect of events for the period subsequent to the Judgment of 25th January, 1995.

79. It has been submitted on behalf of the petitioner that the meeting of 27th January, 1995, was held only for the purpose of filling up the lacuna caused by the expiry of the time for making and publishing the award which rendered the

Arbitrators functus officio.

80. As against the said version, on behalf of the respondents it has been urged that on 9th December, 1993, when the meeting was being adjourned, both parties mutually agreed, though orally for extension of the time for making and publishing the award for a period of four months after 31st December, 1993. It was also urged that both parties agreed to give their written consent to such extension on 27th January, 1994, which caused the Arbitrators to record in the minutes of the meeting of 27th January, 1994, that despite their assurance, the petitioner herein had failed to appear and file its written consent.

81. As mentioned hereinbefore, learned Counsels for both parties were present at the meeting of 9th December, 1993, and since contradictory versions are being given as to what transpired at the meeting of 9th December 1993, it would be proper for me to rely on the minutes of the proceedings as recorded by the Arbitrators. In any event, since the time for making and publishing the award was extended by the Court, after considering the question of bias relating to the proceedings of the meeting of 9th December, 1993, the allegation of bias taken in the instant proceedings regarding the conduct of the Arbitrators at such meeting becomes irrelevant.

82. As to the events after 2nd march, 1995, when the Supreme Court dismissed the petitioner's Special Leave petition, I fail to see any element of bias which could have caused reasonable apprehension in the mind of the petitioner that the Arbitrators decide the matter in one particular way only.

83. In my view, the conduct of the Arbitrators in wanting to continue with the arbitration proceedings was not unreasonable since a time frame had been fixed by the Court on the respondents application for extension of time and much of the extended period had been lost on account of the SLP filed by the petitioner in the Supreme Court: In these circumstances, the fact that the Arbitrators were impervious to the repeated prayers for adjournment made on behalf of the petitioner, cannot be said to constitute bias, since after the order of the Supreme Court the Arbitrators had very little time left at their disposal to complete the proceedings and to make and publish the award within the extended time.

84. Regarding the alleged fabrication of the minutes by the Arbitrators to suit their actions, I have already expressed my view that I am inclined to accept the version recorded in the minutes, since not the parties, but their learned counsels have given two different versions of what occurred during the different meetings held in connection with the arbitration.

85. I, therefore, read nothing into the expression of indignance by the Arbitrators with regard to the sentiments expressed by the petitioner's Law Officer, Shri J. Singh, in his letter of 15th March, 1995, being Annexure "D" to the Affidavit-in-Reply filed on behalf of the petitioner.

86. The incidents relating to the purchase of air-tickets and accommodation

usually provided for by the petitioner for its nominee, Brigadier Sawhney, for the meetings held in February, and March, 1995 is the only thing that the petitioner can really point to, in order to show that their nominee was no longer willing to accept the petitioner's arrangements for his travel and stay during the arbitration proceedings. But, such conduct would not, ipso facto, raise suspicions or apprehension of bias or prejudice. The petitioner's nominee Arbitrator could have felt uncomfortable and, therefore, hesitant in continuing to accept such arrangements since the Arbitrators were intent on completing the proceedings and publishing their award within the extended period, as against the repeated adjournments sought for on behalf of the petitioner.

87. In the various decisions cited by Mr. K. S. Ray, except for the decision of this Court in the case of Bhuwalka Bro, Ltd. (supra), the Courts have consistently held that an Arbitrator may be removed if there is a reasonable apprehension of bias based on cogent materials and not on mere whims and fanciful notions.

88. In my view, the question of bias has been sufficiently explained by the Supreme Court, and mere apprehension of bias in the absence of any tangible proof of such bias or prejudice cannot be ground for removal of the Arbitrator to whom the parties have wilfully submitted their disputes for adjudication.

89. The decision of the Punjab High Court in the case of Dr. Hardit Singh Jaswant Singh (supra) was in the context of an application u/s 24 of the Code of Civil Procedure, which did not entail willingness of the parties to submit themselves to a particular forum of their own choice. The rigours of an application under sections 5 and 11 of the Arbitration Act would, therefore, be far greater than that of an application u/s 24 of the Civil Procedure Code, though the principles may be similar in both cases.

90. In the circumstances, as detailed hereinabove, the other decisions cited by Mr. K. S. Ray in K. D. Bali's case (supra) and Jiwan Kumar Lohia's case (supra), are not of any assistance to the petitioner.

91. For the reasons aforesaid, I am not inclined to entertain the instant application under sections 5, 8, 11 and 12 of the Arbitration Act, 1940, and the same is, accordingly, dismissed.

92. The petitioner will bear the respondent's cost of this application assessed at 200 gms.

93. Prayer for stay of this judgment is considered and allowed. There will be stay of operation of this order for a fortnight.

94. Since, however, the extended time for making and publishing the award is to expire on 31st May, 1995, the time for the said purpose is further extended till 31st July, 1995.

All parties, including the Arbitrators, to act on a signed copy of the operative part of this judgment.