
(2019) 11 BOM CK 0021

In the Bombay High Court

Case No : Comm. Arbitration Petition No. 376 Of 2017

Maharashtra State Electricity Transmission Co. Ltd

APPELLANT

Vs

Kalpataru Power Transmission Ltd

RESPONDENT

Date of Decision : 08-11-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 12, 12(1), 12(2), 12(3), 12(1)(a), 12(4), 12(5), 13, 14, 14(1), 14(2), 14(1)(a), 34

Citation : (2019) 11 BOM CK 0021

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : A.Y. Sakhare, Abhijeet A. Joshi, Varsha Sawant, Mustafa Doctor, Rahul Lakhiani, Yuvraj K. Singh, Isha Maniar

Final Decision : Disposed Of

Judgement

1. By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Arbitration Act'), the petitioner has impugned the majority arbitral award dated 6th January, 2017 passed by the Arbitral Tribunal allowing the part of the claims made by the respondent. Some of the relevant facts for the purpose of deciding this petition are as under:-

2. The petitioner was the original respondent wherein the respondent was the original claimant in the arbitral proceedings. On 24th October, 2008, the petitioner had issued a tender notice calling upon the bids for the work to be carried out on Sub-Packages LL1-A and LL2-A for carrying out the execution of various 132 KV and 220 KV lines and end-bays. The respondent had submitted its bid pursuant to the said tender notice. The respondent was found successful bidder and was accordingly awarded the contract for the construction of 16 lines LL1-A, the construction of 21 lines LL2-A. On 15th June, 2009 and 8th July, 2009, the petitioner issued two Letters of Intent for package the LL1-A and for package LL2-A respectively. On 27th August, 2009, the petitioner and the respondent executed two Implementation Agreements under the said two

packages on the terms and conditions recorded in the said agreement.

3. On 27th August,2009, the petitioner issued first work order upon the respondent which was accepted by the respondent on 16th September,2009. During the period between 27th August 2009 and 9th June, 2011, the petitioner issued various work orders upon the respondent under the said two packages LL1-A and LL2-A.

4. It is the case of the petitioner that out of 20 work orders issued under Sub-Package LL1-A, the respondent only completed three work orders before the scheduled completion date and out of 24 work orders issued under the sub-package LL2-A, the respondent only completed two work orders before the scheduled completion date. The respondent applied for extension of time to the petitioner. The petitioner did not issue further work orders to the respondent. On 26th August,2012, the said Implementation Agreements executed between the parties expired. On the date of expiry of the said agreements, the respondent had carried out the work under 10 work orders in LL1-A and six work orders in LL2-A.

5. On 11th September, 2012, the respondent requested the petitioner to reduce the security bank guarantee from 5% of the value of the Umbrella Agreement to 5% of the total work orders issued. The respondent reduced the security bank guarantee in LL1-A from Rs.29,99,00,000/- to Rs. 7,18,99,434/- and in LL2-A from Rs.29,28,00,000/- to Rs.9,34,59,710/-. On 7th November,2012, the respondent demanded the work loss compensation under Article 3.5 of the Implementation Agreement from the petitioner on the ground that the petitioner had given a commitment under the said provision to give atleast 60% work from the umbrella value of the agreements with the respondent. The petitioner did not pay the said amount as demanded by the respondent or otherwise.

6. On 17th November,2014, the respondent sought reference to the Steering Committee. On 12th January, 2015, the respondent sent a reminder to the petitioner. The respondent thereafter approached the Indian Council of Arbitration for appointment of the arbitral tribunal. The petitioner was served with the copy of the notice dated 1st December,2015 addressed by the Indian Council of Arbitration. The petitioner recommended the name of Shri Justice A.S.Aguiar, a former Judge of this Court as its nominee. The respondent recommended Shri Ashwin Ankhad, advocate as its nominee in the said arbitral proceedings. Indian Council of Arbitration appointed Shri Justice J. N. Patel, a former Chief Justice of the Kolkata High Court as the presiding arbitrator. The respondent filed statement of claim inter alia praying for recovery of the sum of Rs.35,57,04,610/-. The petitioner filed written statement on 1st February,2016.

7. During the period between 5th April, 2016 and 26th October 2016 the Arbitral Tribunal held various meetings. On 6th January, 2017 Shri Justice J. N. Patel, a former Chief Justice of the Kolkata High Court and Shri Ashwin Ankhad, advocate declared a majority award allowing some of the claims made by the respondent.

Shri Justice A.S.Aguiar, former Judge however rendered a minority award rejecting the claims made by the respondent. The petitioner has impugned the majority award in this commercial arbitration petition.

8. Mr. Sakhare, learned senior counsel for the petitioner submits that the entire majority award rendered by the Arbitral Tribunal was totally vitiated on the ground that Shri Ashwin Ankhad, advocate who was nominated by the respondent as its nominee arbitrator was disqualified to act as arbitrator in view of section 12(5) of the Act read with Fifth and Seventh Schedule. In support of this submission, learned senior counsel submits that the learned arbitrator nominated by the respondent was nominated on 9th February, 2016. No disclosure as contemplated under section 12(1) read with 12(5) was made by the learned arbitrator nominated by the respondent. He submits that in the first week of September 2017 when one of the officer of the petitioner was researching about the arbitrators on the internet, it was noticed by the petitioner that one of the news item was published in Times of India website on 20th April, 2011 and also in India Today on 22nd April, 2011.

9. The said news items stated that son of the arbitrator nominated by the respondent was gifted a flat in Mumbai by the owners of the Kalpataru Group, Mr. Mofatraj P. Munot. The news item also mentioned that the son of the learned arbitrator nominated by the respondent and his wife later became directors of the company known as Shouri Constructions Private Limited which is a subsidiary company of the Kalpataru Group of which the respondent is also a subsidiary company. It is submitted that the Memorandum of Association and Articles of Association of Shouri Constructions Private Limited of the year 2003 showed the signatures of the owners of the Kalpataru Group Mr.Mofatraj P.Munot and Mr.Parag M.Munot. Learned senior counsel placed reliance on the Memorandum of Association and Articles of Association of Shouri Constructions Private Limited and also some of the exhibits annexed to the arbitration petition. It is submitted that Mr.Mofatraj Munot and Mr.Parag M. Munot are also the directors of the respondent company. Mr.Parag M.Munot is also the director of Shouri Constructions Private Limited.

10. It is submitted that the petitioner noticed that Ms.Sonia Ankhad, the daughter-in-law of the learned arbitrator nominated by the respondent was appointed as a director of Shouri Constructions Private Limited on 22nd August,2006 and gave her consent by letter dated 23rd August,2006. Learned senior counsel placed reliance on Form 32 submitted by the daughter-in-law of the learned arbitrator nominated by the respondent submitted to the Registrar of the Company. On 23rd August,2010, Mr. Mofatraj Munot ceased to be a director of the Shouri Constructions Private Limited. In view of his resignation, son of the learned nominee arbitrator of the respondent was thereafter appointed as a director of Shouri Constructions Private Limited on 9th September,2010. The son of the nominee arbitrator of the respondent gave his consent by letter dated 13th September,2010.

11. Learned senior counsel placed reliance on Form 32 submitted by Mr.Mofatraj Munot and a copy of Form 32 showing the appointment of the son of the nominee arbitrator of the respondent as a Director of Shouri Constructions Private Limited. It is submitted that the said son of the nominee arbitrator of the respondent remained director of the Shouri Constructions Private Limited till 22nd August,2006 when he resigned as director. The reliance is placed on the letter of resignation and a copy of the Form DIR-12. The Arbitral Tribunal had already conducted four meetings before resignation of the son of the arbitrator nominated by the respondent. He submits that however the daughter-in-law of the nominee arbitrator of the respondent continued to remain as a director of Shouri Constructions Private Limited till 11th April, 2017 when she resigned as a director. Reliance is placed on the letter of resignation of the daughter-in-law of the nominee arbitrator of the respondent in Form DIR-12.

12. It is submitted that the arbitral proceedings had been already concluded and the award was passed before resignation of the daughter-in-law of the nominee arbitrator of the respondent from Shouri Constructions Private Limited. He submits that it was thus clear that close relatives of the learned arbitrator nominated by the respondent had financial and personal interest in one of the affiliate companies of the respondent. The learned arbitrator nominated by the respondent thus ought to have disclosed these facts to the petitioner and Indian Council of Arbitration at the time of accepting his nomination as arbitrator by the respondent. No such disclosure however was made by the learned nominee arbitrator of the respondent.

13. Learned senior counsel strongly placed reliance on section 12(5) of the Arbitration Act and also explanation (2) of the Seventh Schedule to the Arbitration Act which states that the term "affiliate" "encompasses"all companies in one group of companies including the parent company. It is submitted by the learned senior counsel that under section 12(1)(a) of the Arbitration Act, since the son and the daughter-in-law of the nominee arbitrator of the respondent were the directors of the said Shouri Constructions Private Limited, which was under control of the respondent, it was likely to give rise to justifiable doubts as to his independence or impartiality and since nominee arbitrator of the respondent fell under serial nos. 10, 18 and 19 of the Fifth Schedule to be read with explanation nos. 1 and 2 and serial nos. 10, 18 and 19 of the Seventh Schedule, it was his duty to disclose his interest in writing.

14. It is submitted that the said Shouri Constructions Private Limited is controlled by Mr. Mofatraj Munot and Mr. Parag M. Munot since inception. The said Mr.Mofatraj Munot is the father-in-law of the son of the learned nominee arbitrator of the respondent and was a close relative of the said director. Mr.Parag M.Munot is brother-in-law of the son of the nominee arbitrator of the respondent. Learned senior counsel placed reliance on the Company Master Details of the said company showing the names of Mr. Anuz Amol Munot and Mr. Parag M. Munot as Directors even today. Mr. Mofatraj P. Munot and Mr.Parag M. Munot are

the directors of the respondent company. The respondent has interest in Shouri Constructions Private Limited. The son and daughter-in-law of the nominee arbitrator of the respondent had interest in the Shouri Constructions Private Limited and also thus had interest in the respondent.

15. Learned senior counsel for the petitioner invited my attention to some of the paragraphs of the affidavit in reply filed by the respondent and would submit that the factum of the appointment of the son and daughter-in-law of the nominee arbitrator of the respondent in Shouri Constructions Private Limited as Directors at the relevant time has been admitted in the affidavit in reply. The only case of the respondent in the affidavit in reply is that the son and the daughter-in-law were not the shareholders or beneficiaries of Shouri Constructions Private Limited.

16. It is submitted by the learned senior counsel that in view of the interest of the learned arbitrator nominated by the respondent in the manner aforesaid and in the particulars falling under serial nos. 10, 18 and 19 of Seventh Schedule, the learned nominee arbitrator of the respondent was disqualified to act as arbitrator. He submits that since the nominee arbitrator of the respondent was disqualified who was one of the co-arbitrator along with two other arbitrators forming part of the arbitral tribunal, the award rendered by the Arbitral Tribunal is without jurisdiction and thus deserves to be set aside on this ground alone. He submits that the nominee arbitrator of the respondent who was party to the majority award has decided the matter in favour of the respondent. The impugned majority award thus deserves to be set aside on this ground alone.

17. Learned senior counsel placed reliance on the judgment of Supreme Court in case of HRD Corporation (Marcus Oil and Chemical Division) vs. Gail (India) Limited (formerly Gas Authority of India Limited), (2018) 12 SCC 471 and in particular paragraphs 1, 7, 11, 13 to 18 in support of the submission that the learned nominee arbitrator of the respondent being disqualified, the entire award deserves to be set aside on this ground alone. He submits that if the nominee arbitrator of the respondent would have filed his disclosure, the petitioner could have challenged the appointment of the nominee arbitrator at that time. The pecuniary interest of the family members of the learned nominee arbitrator of the respondent was within the knowledge of the said learned arbitrator when he was approached in connection with his appointment and thus there being conflict of interest, he was bound to disclose such interest not only when he was approached in connection with his appointment initially but thereafter from time to time during the pendency of the arbitral proceedings in view of section 12(2) of the Arbitration Act. In case of the learned arbitrator even subsequently falling under Fifth or Seventh Schedule.

18. Learned senior counsel for the petitioner placed reliance on the judgment of United Kingdom House of Lords in case of Pinochet, In re (2000) 1 AC 119 and in particular paragraphs 1 to 8 in support of the submission that the learned arbitrator appointed by the respondent having not disclosed his interest was

automatically disqualified to act as an arbitrator since he fell under Seventh Schedule of the Arbitration Act.

19. Learned senior counsel for the petitioner placed reliance on the judgment of Supreme Court in case of Rupa Ashok Hurra vs. Ashok Hurra and another, (2002) 4 SCC 388 and in particular paragraph 37 in support of his submission that the judgment of House of Lords in case of Pinochet, In re (supra) was quoted by the Supreme Court with approval in the said judgment and it was held that such person who has not disclosed his interest becomes disqualified automatically. Learned senior counsel placed reliance on the judgment of this court in case of Dr.Arun Subrao Prabhu vs. M/s.Rizvi Builders, (2009) 6 Bom.C.R. 745 and in particular paragraphs 16 to 25.

20. It is submitted by the learned senior counsel that the petitioner was not expected to check on the website about the credentials of the learned arbitrator nominated by the respondent before his appointment as nominee arbitrator on behalf of the respondent. The facts were within the knowledge of the learned arbitrator nominated by the respondent and thus he was bound to disclose about such interest when he was approached in connection with his appointment as nominee arbitrator on behalf of the respondent. It is submitted that the learned nominee arbitrator had thus acted as biased against the petitioner and in favour of the respondent. It is submitted that even if the said Mr.Mofatraj P.Munot had only 14% shareholding in the respondent's company, the extent of shareholding held by the close relatives of the learned nominee arbitrator of the respondent was irrelevant. The fact remains that the shareholding of the close relatives of the learned nominee arbitrator of the respondent and the post of directorship in the said Shouri Constructions Private Limited which was controlled by the respondent herein held by the son and daughter-in-law of the learned arbitrator at the relevant time has not been disputed by the respondent.

21. It is submitted that the learned arbitrator who acts as a judge ought to have disclosed his interest in the subject matter and ought not to have accepted his appointment as a nominee arbitrator for the respondent at the first instance and in any event ought to have recused himself subsequently before rendering an award against the petitioner and in favour of the respondent. Learned senior counsel placed reliance on the explanation "affiliate" defined under explanation II to Seventh Schedule and would submit that the said Shouri Constructions Private Limited was ex-facie affiliate of the respondent company.

22. Without prejudice to his aforesaid submissions learned senior counsel also addressed this court on the merits of the award. He placed reliance on Article 1.2.16 of the Implementation Agreement and would submit that the Agreement has to be read in entirety. Different provisions of the said Agreement have to be read and construed as supplementary to each other and if there is any inconsistency in any parts of the said Agreement, they shall be interpreted in a harmonious manner so as to give effect to each provision. He invited my attention to the Article 2.1 of the Agreement which provides for scope of the

work. He relied upon Article 2.2 which provides the effective date of the said Implementation Agreement. The reliance is also placed on Article 2.2.1 of the said Agreement.

23. Learned senior counsel placed reliance on Article 3.3.3 of the said Agreement and would submit that under the said article, the petitioner was liable to return the bank guarantee to the respondent only upon the respondent commissioning the last project successfully within the time prescribed therein. The respondent did not apply for reduction of the bank guarantee under the said provisions of the Agreement nor submitted any bank guarantee which would show that there was any progress of work on the part of the respondent. He submits that the claim for work loss compensation thus made by the respondent was not at all maintainable. In support of this submission, he invited my attention to Articles 3.5.1 to 3.5.8. He also placed reliance on Articles 4.2(b) and 5.1.3 of the said Implementation Agreement.

24. It is submitted that the petitioner had already complied with its obligation under Article 2.1.3 by providing a project-wise work plan for the project with details, schedule date and commissioning after signatures on the Agreement between the parties to the respondent.

25. Learned senior counsel placed reliance on Article 6.3.1 of the said Agreement and would submit that under the said Article, the respondent was responsible for compiling all commissioning tests results and submitting the same to the petitioner. Only upon receiving such results, the petitioner could inform the electrical inspector and co-ordinate with State Load Dispatch Centre, Kalwa for outage planning.

Learned senior counsel also invited my attention to the Articles 13.1(a) and Article 13.2 which provide for 'Events of Default'. He submits that the case of the respondent did not fall under 'Force Majeure Event' contemplated under Article 13.2.1 of the said contract. It is submitted that even if the petitioner did not exercise its right to take any action against the respondent or to terminate the contract though breaches were committed by the respondent, no adverse inference could be drawn against the petitioner.

26. It is submitted that the interpretation of Article 3.5 by the Arbitral Tribunal in the majority award is totally perverse and not a possible interpretation. The delay caused by the respondent in carrying out the work could not have been brushed aside by the Arbitral Tribunal. The claim for 'Work Loss Compensation' could be granted only if the respondent was in a position to carry out the work within the time prescribed in the contract. There was gross delay in carrying out the work committed by the respondent. He submits that the findings rendered in majority award that the delay could not be connected with 'Work Compensation Loss' is ex-facie perverse. He submits that Article 3.5 has to be read independently. The Arbitral Tribunal did not consider the non-compliance of the reciprocal obligation on the part of the respondent under the said contract.

27. It is submitted that the reduction of security deposit was depending upon the execution of the work. The respondent had not adhered to the time schedule provided under the contract. The Arbitral Tribunal ought to have read Article 3.5 with Article 13(1)(a) of the agreement. Article 3.5 was not at all available to the respondent in the facts and circumstances of this case. He placed reliance on the judgment of this court in case of Dr.Arun Subrao Prabhu vs. M/s.Rizvi Builders, (2009) 6 Bom.C.R. 745.

28. Learned senior counsel submits that the claims made by the respondent were ex-facie barred by law of limitation. He submits that the agreement was admittedly entered into on 27th August,2009. Three years time was completed on 26th August,2012. The right to claim any amount by the respondent thus arose on 26th August, 2012 whereas the respondent filed statement of claim only on 10th November,2015. He submits that the findings rendered by the Arbitral Tribunal on the issue of limitation and in particular paragraph (16) of the majority award are ex-facie perverse. The Arbitral Tribunal could not have excluded 90 days period. On 13th August,2013, the petitioner had already denied its liability to pay any amount to the respondent.

29. In so far as the issue as to whether the learned arbitrator nominated by the respondent was disqualified or not is concerned, Mr.Doctor, learned senior counsel for the respondent submits that though without prejudice to the rights and contentions of the parties, the respondent was agreeable for remand of the entire dispute to another Arbitral Tribunal, the petitioner did not agree for such remand. He submits that even otherwise there is no substance in this objection raised by the petitioner in this arbitration petition. Learned senior counsel invited my attention to the grounds (gg) to (ll) raised in the arbitration petition which were added subsequently on this issue. He submits that there is no reference to the Fifth Schedule made in the additional grounds raised by the petitioner in the arbitration petition. Though there is reference to the Seventh Schedule of the arbitration petition made in the additional grounds raised by the petitioner, no case is made out by the petitioner for invoking Seventh Schedule read with 12(5) of the Arbitration Act.

30. It is submitted by the learned senior counsel that under Section 12(1)(a) of the Arbitration Act, learned arbitrator nominated by the respondent was bound to disclose in writing any circumstances set out in the said provision which was likely to give rise to justifiable doubts as to his independence or impartiality. If according to the learned arbitrator who was approached in connection with his possible appointment as an arbitrator, such ground existed which would give rise to justifiable doubts as to his independence or impartiality then only such disclosure was warranted and not otherwise. He submits that in this case, no such disclosure was warranted. It is submitted that the grounds set out in the Fifth Schedule which give rise to justifiable doubts as to independence or impartiality of the arbitrators provide only as guide and does not make a Member of the Arbitral Tribunal disqualified on those grounds.

31. In so far as the Ground No.10 mentioned in the Seventh Schedule of the Arbitration Act is concerned, it is submitted that no close family member of the arbitrator nominated by the respondent has a significant financial interest in the respondent or an affiliate of the respondent. Though at some point of time, son and Daughter-in-law of the learned arbitrator nominated by the respondent were the Directors of Shouri Constructions Private Limited, they did not have any financial interest in the said Shouri Constructions Private Limited. He submits that no disclosure was made by the respondent before the Registrar of Companies about the respondent being an affiliate of the said Shouri Constructions Private Limited or vice versa. Since neither of them is affiliate of each other, there was no cross holding of shares in other company and vice versa. He submits that the petitioner has not made out a case under Ground No.10 of Seventh Schedule of the Arbitration Act.

32. In so far as the Ground No.18 mentioned in the Seventh Schedule of the Arbitration Act is concerned, it is submitted by the learned senior counsel that no close family member of the arbitrator nominated by the respondent has a significant financial interest in the outcome of the dispute referred to the Arbitral Tribunal and thus the said ground also would not apply to the facts of this case. He submits that similarly Ground No.19 would not apply to the facts of this case since neither the learned arbitrator nominated by the respondent nor his close family member has a close relationship with a third party who may be liable to recourse on the part of the successful party in the dispute. He submits that the petitioner has not disclosed in what manner, it could be said that either the learned arbitrator or any of his close family member has any financial interest in the respondent company or has any financial interest in the outcome of the dispute referred to the arbitral tribunal.

33. In so far as the ground raised in paragraph 3A (c) of the arbitration petition alleging that son of the learned arbitrator nominated by the respondent was gifted a flat in Mumbai by the owner of the Kalpataru Group, Mr.Mofatraj P.Munot is concerned, it is submitted that the said allegation is factually incorrect and thus has been denied by the respondent in the affidavit-in-reply filed to this petition. The petitioner could not produce any material before this Court in support of this ground raised in the arbitration petition. Similarly no material is produced by the petitioner in support of the ground raised in paragraph 3A(m) of the arbitration petition alleging that the close relatives of the learned arbitrator nominated by the respondent had financial and personal interest in one of the affiliate companies of the respondent.

34. Learned senior counsel submits that the factum of Directorships of the son and daughter-in-law nominated by the respondent, at some point of time, has not been disputed in the affidavit-in-reply by his client. He submits that rest of the grounds raised in paragraph 3 are totally vague and without any supporting material. In so far as the definition of "affiliate" in explanation 2 of the Seventh Schedule of the Arbitration Act is concerned, no case is made out by the

petitioner that the respondent is an affiliate of the said Shouri Constructions Private Limited or is one of the Group or parent company of Shouri Constructions Private Limited.

35. Learned senior counsel invited my attention to section 12(4) of the Arbitration Act and would submit that since the petitioner did not raise any objection under section 13 of the Arbitration Act within the time prescribed, the respondent was precluded from raising such objection at later stage. The petitioner has not explained as to why the petitioner was surfing the internet and how the petitioner learnt that the son and daughter-in-law of the learned arbitrator nominated by the respondent were the directors of a company controlled by the respondent. The petitioner has not explained the gross delay for raising this objection for the time time in this petition filed under section 34 of the Arbitration Act.

36. Learned senior counsel placed reliance on the judgment of the Delhi High Court in case of National Thermal Power Corporation Limited vs. Wig Brothers Builders & Engineers Limited, ILR (2009) IV Delhi 663 and in particular paragraphs 40 and 77 in support of the submission that since there was no relationship of the learned arbitrator with the subject matter of the arbitration or with the parties to arbitration giving rise to justifiable doubts as to his integrity or impartiality, the learned arbitrator was not bound to make any disclosure under section 12(1) of the Arbitration Act when he was approached in connection with his appointment. He submits that there is no factual basis of the allegation of impartiality against the learned arbitrator. He submits that only by way of an amendment to the arbitration petition, the petitioner brought these allegations on record about the alleged non-disclosure of the material facts giving rise to justifiable doubts of the integrity of the learned arbitrator nominated by the respondent.

37. Learned senior counsel also placed reliance on paragraph 11 of the judgment of the Supreme Court in case of HRD Corporation (Marcus Oil & Chemical Division) (supra) which was relied upon by Mr.Sakhare, learned senior counsel the petitioner. He submits that the alleged relationship of the respondent in the said proceedings before the arbitral tribunal which would give rise to the justifiable doubts was required to be pleaded and proved by the petitioner which the petitioner failed in this case. He submits that under explanation (I) to Clause 18 of the Seventh Schedule of the Arbitration Act, close family member does not include daughter-in-law and thus the said clause would not be attracted to the facts of this case at all. He also placed reliance on paragraphs 12, 14, 16 and 20 of the said judgment of the Supreme Court in case of HRD Corporation (Marcus Oil & Chemical Division) (supra).

38. It is submitted by the learned senior counsel that the petitioner in this case has placed reliance on specific items of the Fifth and Seventh Schedule in the amended arbitration petition and thus the Court cannot allow the petitioner to expand the scope of challenge and to rely upon other entries in Fifth and

Seventh Schedule or apply general principles.

39. Learned Senior Counsel for the respondent placed reliance on the judgment of the Supreme Court in case of Bharat Broadband Network Limited v/s. United Telecoms Limited (2019) 5 SCC 755 and in particular paragraphs 12, 14 and 17 and would submit that the learned arbitrator nominated by the respondent did not fall under either Fifth Schedule or Seventh Schedule and thus was not required to file any statement of disclosure under Section 12(1) of the Arbitration Act. He submits that no case is made out by the petitioner before this Court that disclosure was required to be made by the learned arbitrator nominated by the respondent, in view of the learned arbitrator allegedly falling in any of the items under those Schedules.

40. In so far as the merits of the claim awarded by the Arbitral Tribunal is concerned, it is submitted by the learned Senior Counsel that there was no dispute about the calculation of the amount payable to the respondent by the petitioner. The liability of the petitioner to make payment to the respondent was not disputed. The petitioner had already agreed to pay the amount guaranteed under the terms of the contract entered into between the parties. He submits that it was the case of the petitioner before the Arbitral Tribunal that in view of the alleged delay committed by the respondent while carrying out the work orders, no fresh work orders could be issued to the respondent, which basis itself was contrary to the terms of the contract. The petitioner could not have withheld the issuance of further work orders on the basis of the respondent having committed delay allegedly in the earlier work orders. The Arbitral Tribunal recorded a finding of fact that no action for alleged delay against the respondent was taken by the petitioner at any stage. It is not the case of the petitioner that the Arbitral Tribunal has rendered any perverse finding in the impugned award.

41. It is submitted by the learned Senior Counsel that the Arbitral Tribunal has considered the evidence and based on a factual basis, awarded the amount to the respondent. No interference is thus warranted with the findings of fact rendered by the Arbitral Tribunal and the conclusion drawn in the arbitral award. He invited my attention to the finding rendered by the Arbitral Tribunal in paragraph 12.9 of the impugned award holding that the respondent had successfully proved that it was entitle to receive the Work Loss Compensation under Clause 3.5 of the Agreement dated 27th July, 2009 in the sum of Rs.17,99,57,598/- under Agreement LL-1A and Rs.17,57,47,012 under Agreement LL-2A.

42. Learned Senior Counsel also invited my attention to the finding rendered by the Arbitral Tribunal in paragraphs 13.1 to 13.4, in so far as the issue no.2 is concerned and would submit that none of the findings of fact rendered by the Arbitral Tribunal being perverse cannot be interfered with by this Court. The appreciation of evidence and interpretation of the terms of contract is within the realm of the powers and jurisdiction of the Arbitral Tribunal. The petitioners has neither pleaded nor proved any alleged perversity in any part of the award.

Learned Senior Counsel also placed reliance on paragraph 42 of the judgment of the Supreme Court in case of Ssangyong Engineering & Construction Co. Ltd. v/s. National Highways Authority of India (NHAI), 2019 SCC OnLine SC 677.

43. In so far as the issue of limitation raised by the petitioner is concerned, learned Senior Counsel submits that the first work order was issued on 26th July, 2009. The right to avail of the further work order from the petitioner arose. No time limit was prescribed for making claims. Three months time was provided to the petitioner to decide whether to accept the claim of the respondent or not. He submits that the period of three years expired on 25th November, 2015. The reference to the Arbitral Tribunal was on 23rd November, 2015. The claims thus made by the respondent were within the period of limitation.

44. In support of the aforesaid submissions on the plea of limitation, learned Senior Counsel placed reliance on paragraphs 3.5.1 to 3.5.4 and 3.5.7 of the contract entered into between the parties and would submit that the claims made by the respondent were within the period of limitation. He also invited my attention to the findings of the Arbitral Tribunal in paragraph 16 while dealing with issue of limitation and would submit that there being no perversity in those findings rendered by the Arbitral Tribunal, no interference with those findings of fact is warranted. He placed reliance on the judgment of the Supreme Court of Judicature Court of Appeal (Civil Division) on Appeal from the Queen's Bench Division delivered on 15th March, 2000 in case of AT&T Corporation Lucent Technologies Inc. v/s. Saudi Cable Company and in particular paragraph 72 and would submit that since the petitioner has failed to prove any partiality or bias on the part of the learned arbitrator nominated by the respondent, no interference with the impugned award is warranted.

45. Mr. Sakhare, learned Senior Counsel for the petitioner submits that the close relatives of the learned arbitrator were the Directors of the Company, which was under control of the respondent when the arbitral proceedings were going on. He submits that even the Judges of this Court in several other Courts in India, have recused from hearing the matter where there may be even slightest apprehension of any bias on their part in the mind of the parties before it or has interest in the subject matter of the proceedings. If the learned arbitrator nominated by the respondent would have disclosed his relations with the parties by filing a statement of disclosure and more particularly that his son and daughter-in-law were the directors of a company which is controlled by the respondent, the petitioner in that event would have opposed the name of the learned arbitrator nominated by the respondent and would have challenged his appointment. He submits that the respondent is obviously the beneficiaries of the award. There was thus a clear case of conflict of interest of the learned arbitrator nominated by the respondent and thus he was disqualified to act as an arbitrator. He submits that independent and impartiality is hallmark in arbitration proceedings. In case of matters in Court, parties have no choice to select a particular Judge to hear his matter, whereas in case of an appointment of

arbitrator, parties may have choice.

46. The learned arbitrator nominated by the respondent thus was bound to make disclosure under Section 12(1) of the Arbitration Act after considering the effect of Schedule Fifth and Seventh of the Arbitration Act. It would have been a different situation if the petitioner would have still accepted the name of the learned arbitrator as nominee arbitrator of the respondent or otherwise after considering the statement of disclosure by waiving its objection in writing. He submits that since the learned arbitrator nominated by the respondent had not disclosed his interest, this Court has to decide whether there was no relationship with or interest of the arbitrator in any of the parties or the subject matter of dispute giving rise to justifiable doubts as to the independence or impartiality of the learned arbitrator.

47. It is submitted that the reasonable apprehension in the mind of the petitioner, which would have affected the case also, has to be considered by this Court even at this stage. He submits that Section 12(1)(a) of the Arbitration Act, mandates filing of statement of disclosure if there exists the relationship of the arbitrator with the parties or the subject matter either direct or indirect in past or present.

The respondent had not disputed at the relevant time that the son and daughter-in-law of the arbitrator nominated by the respondent were the Board of Directors of the company controlled by the respondent. He submits that it was not the case of the respondent that the learned arbitrator nominated by the respondent inadvertently did not make such disclosure. He submits that thus under various entries in Fifth and Seventh Schedule already pointed out by the petitioner, the learned arbitrator nominated by the respondent no.4 was disqualified to act as arbitrator and thus in view of the Arbitral Tribunal comprising of such disqualified arbitrator itself was illegal and did not have jurisdiction to entertain the claims made by the respondent.

48. Mr. Sakhare, learned Senior Counsel for the petitioner once again referred to paragraph 20 of the judgment of Supreme Court in case of HRD Corporation (Marcus Oil and Chemical Division) (supra), in support of his submission that the appointment of the learned arbitrator nominated by the respondent was totally illegal in view of the learned arbitrator not disclosing his interest though had fallen under various entries of Fifth and Seventh Schedule. Learned Senior Counsel distinguished the judgment of Delhi High Court in case of National Thermal Power Corporation Limited (supra) relied upon Mr. Doctor, learned Senior Counsel for the respondent. He invited my attention to the paragraphs 33, 35, 37, 40, 41 and 76 of the said judgment and would submit that the facts of that case before the Delhi High Court in the said judgment were totally different. He submits that this Court shall lift the corporate veil of the respondent while considering the effect of Section 12 of the Arbitration Act.

49. In so far as the submission of Mr. Doctor, learned Senior Counsel for the

respondent on the merits of the claims awarded by the Arbitral Tribunal is concerned, it is submitted by the learned Senior Counsel that all clauses of the contract have to be read together to give proper meaning and to ascertain the intention of parties. He submits that the interpretation of provision of Agreement made by the Arbitral Tribunal being impossible interpretation, this Court has ample power to interfere with such impossible interpretation. He submits that it was a commercial decision of the petitioner not to terminate the contract awarded to the respondent and thus no adverse inference could be drawn on that ground.

REASONS AND CONCLUSION :-

50. I shall first decide the issue whether in the facts and circumstances of this case, the learned arbitrator nominated by the respondent was bound to file statement of disclosure under Section 12(1) read with Fifth and Seventh Schedule of the Arbitration Act or not and if not disclosed the consequence thereof.

51. The Memorandum of Association and Article of Association of Shouri Construction Private Limited in the year 2003 produced on record, showed signatures of the owners of the Kalpataru Group as Mr. Mofatraj P. Munot and Mr. Parag M. Munot. The said Mr. Mofatraj P. Munot and Mr. Parag M. Munot are also the Directors of the respondent company. Mr. Parag M. Munot is also the Director of Shouri Constructions Private Limited. Mrs. Sonia Ankhad, daughter-in-law of the learned arbitrator nominated by the respondent was appointed as a Director of Shouri Constructions Private Limited on 22nd August, 2006 by her consent letter dated 23rd August, 2006.

52. Form 32 submitted by the said Mrs. Sonia Ankhad, daughter-in-law of the learned arbitrator is produced on record, which was submitted to the Registrar of Company. On 23rd August, 2010, Mr. Mofatraj Munot ceased to be a Director of Shouri Constructions Private Limited. In view of his resignation, son of the nominee arbitrator was appointed as Director of the said Shouri Construction Private Limited on 9th September, 2010. The son of the nominee arbitrator gave his consent by letter dated 13th September, 2010 to act as a Director of the said Shouri Constructions Private Limited. Form 32 submitted by Mr. Mofatraj Munot showing the appointment of son of the learned arbitrator nominated by the respondent as a Director of Shouri Constructions Private Limited till 22nd August, 2006 when he resigned as Director of the said company is placed on record. The letter of resignation and the copy of the form DIR-12 signed by the son of the nominee arbitrator of the respondent is also produced on record.

53. The daughter-in-law of the nominee arbitrator of the respondent continued to be a Director of Shouri Constructions Private Limited till 11th April, 2017 when she resigned as a Director. Form DIR-12 signed by the said Mrs. Sonia Ankhad, daughter-in-law of the arbitrator nominated by the respondent is also placed on record. It is not in dispute that prior to the date of resignation of the daughter-in-

law of the learned arbitrator, the Arbitral Tribunal had already declared the arbitral award. The majority arbitrators including Shri Ashwin Ankhad, who was nominated by the respondent and whose son and daughter-in-law were the Directors of the Shouri Constructions Private Limited allowed the claims of the respondent. The learned arbitrator nominated by the respondent, however, admittedly did not disclose his relationship with the two of the Directors of Shouri Constructions Private Limited, who were close family members of the learned arbitrator and with few members of Munot family who were the directors of the respondent.

54. The learned arbitrator also did not disclose that the son of the learned arbitrator was son-in-law of Mr. Mofatraj Munot and brother-in-law of Mr. Parag Munot, who were Directors in both these companies. The respondent though did not deny the relationship of the learned arbitrator nominated by the respondent with the Munot Family, who were the Directors in the Shouri Constructions Private Limited and respondent herein, only raised an issue that the son and daughter-in-law of the learned arbitrator nominated by the respondent were not the shareholders of any of these two companies or did not have any pecuniary interest therein.

55. It is not in dispute that the petitioner had nominated the name of Shri Justice A. S. Aguiar, former Judge of this Court as its nominee. The Indian Council of Arbitration appointed Shri Justice J.N.Patel, former Chief Justice of the Kolkata High Court as a presiding arbitrator. It is the case of the petitioner on the other hand that when the officer of the petitioner was surfing the internet to find out the credentials of the learned arbitrator, the said office came across various news items on the internet about the son and daughter-in-law of the learned arbitrator having been gifted a flat by the Kalpataru Group and that his relatives were the Directors of various companies including the Shouri Constructions Private Limited.

56. Section 12(1) was substituted by Act 3 of 2016 w.e.f. 23rd October, 2015. Under Section 12(1), when a person is approached in connection with the possible appointment as an arbitrator, he is bound to disclose in writing any circumstances about existence as of direct or indirect of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality. Explanation 1 to Section 12 provides that the grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Explanation 2 to Section 12 provides that the disclosure shall be made by such person in the form specified in the Sixth Schedule. Section 12(3) provides that an arbitrator can be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality or he does not possess the qualifications agreed to by the parties.

57. Section 12(4) provides that 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 appointment has been made. Section 12(5) provides that notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator, provided that parties may subsequent to the disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

58. The respondent has disputed the fact that the son and daughter-in-law of the learned arbitrator nominated by the respondent were the Directors of the Shouri Constructions Private Limited and that the said Mr. Mofatraj Munot and Mr. Parag Munot were the father-in-law and brother-in-law respectively of the son of the learned arbitrator nominated by the respondent. Mr. Parag Munot was a director along with another member of Munot family in respondent company. In my view, there was thus direct relation of the learned arbitrator nominated by the respondent with the two of the Directors of the said Shouri Constructions Private Limited and few Directors of the respondent herein. I am not inclined to accept the submission of Mr. Doctor, learned Senior Counsel for the respondent that even if the son and the daughter-in-law of the learned arbitrator nominated by the respondent did not have any shareholding in the said Shouri Constructions Private Limited, though, they were the Directors of the said company, learned arbitrator was not required to file his disclosure statement. I am also not inclined to accept the submission of the learned Senior Counsel for the respondent that the said Shouri Constructions Private Limited did not have any credential or business relations with the learned arbitrator directly or indirectly in past or present when he was appointed as a nominee arbitrator on behalf of the respondent.

59. Supreme Court in case of HRD Corporation (Marcus Oil and Chemical Division) (supra) has held that under Section 12, it is clear that when a person is approached in connection with his possible appointment as an arbitrator, he has to make a disclosure in writing, in which he must state the existence of any direct or indirect present or past relationship or interest in any of the parties or in relation to the subject matter in dispute, which is likely to give justifiable doubts as to his independence or impartiality. Such disclosure is to be made in a form specified in the Sixth Schedule, grounds stated in the Fifth Schedule being a guide in determining whether such circumstances exist. The Fifth, Sixth and Seventh Schedule are important for determination of the present disputes.

60. Supreme Court after considering 2015 Amendment Act and after interpreting Section 12(5) has held that since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that under Section 14(1)(a), he then becomes de-jure unable to perform his functions. In

order to determine whether an arbitrator is de-jure unable to perform his functions, it is not necessary to challenge the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. It is held that on the other hand, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular matter by the Arbitral Tribunal under Section 13.

61. The Supreme Court also considered the 246th Law Commission Report submitted in the month of August, 2014 in relation to the amendments made to Section 12 and the insertion of Fifth and Seventh Schedule. It was considered in the said report that Section 12(5) of the Act and the Fifth Schedule incorporate the categories from the red list of the IBA Guidelines. It was recommended that in the event such ineligible person is purported to be appointed as an arbitrator, he shall be de-jure deemed to be unable to perform his functions, in terms of the proposed Explanation to Section 14. It is held that the enumeration of grounds given in the Fifth and Seventh Schedules have been taken from the IBA Guidelines, particularly from the Red and Orange Lists thereof.

62. It is held that those guidelines consist of three lists. The Red List, consisting of non-waivable and waivable guidelines, covers situations which are "more serious" and "serious", the "more serious" objections being non-waivable. The Orange List, on the other hand, is a list of situations that may give rise to doubts as to the arbitrator's impartiality or independence, as a consequence of which the arbitrator has a duty to disclose such situations. The Green List is a list of situations where no actual conflict of interest exists from an objective point of view, as a result of which the arbitrator has no duty of disclosure.

63. In the said judgment, the Supreme Court also adverted to its earlier judgment in case of Voestalpine Schienen GmbH v/s. DMRC Ltd., (2017) 4 SCC 665 wherein it was held that the independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applies to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration.

64. It is held that the genesis behind this rationale is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular

interest of either parties. It is held that after all, the arbitrator has adjudicatory role to perform and therefore he must be independent of parties as well as impartial. The Supreme Court also adverted to the judgment of Supreme Court of United Kingdom in case of Hashwani v/s. Jivraj, (2011) 1 WLR in which it was held that the dominant purpose of appointment of an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.

65. In the said judgment, the Supreme Court held that every arbitrator shall be impartial and independent of the parties at the time of accepting his/her appointment. Doubts as to the above are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision. This test requires taking a broad commonsensical approach to the items stated in the Fifth and Seventh Schedules. This approach would, therefore, require a fair construction of the words used therein, neither tending to enlarge or restrict them unduly. In my view, the principles laid down by the Supreme Court in case of HRD Corporation (Marcus Oil and Chemical Division) (supra) squarely apply to the facts of this case. I am respectfully bound by the said judgment.

66. The United Kingdom House of Lords in case of Pinochet, In re (supra) has held that if it is not shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure. It is held that no man is to be a Judge in his own case. It is held that in civil litigation, the matters in issue will normally have an economic impact, therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company, in promoting the same causes in the same organisation as is a party to the suit. The principles laid down by the United Kingdom House of Lords, apply to the facts of this case.

67. In this case also admittedly the son and daughter-in-law of the learned arbitrator nominated by the respondent were Directors of the said Shouri Constructions Private Limited. The close relatives of the learned arbitrator were also Directors and Promoters of the said Shouri Constructions Private Limited and the respondent herein. In my view, even if the learned arbitrator has slightest interest in the outcome of the result of the arbitral proceedings by virtue of his relationship with the Directors of the respondent company, the learned arbitrator nominated by the respondent was bound to disclose in writing such

circumstances, which had given rise to his justifiable doubts as to independence or impartiality. The learned arbitrator not having disclosed his relationship with the directors of the respondent and the said Shouri Constructions Private Limited was not eligible to act as arbitrator.

68. If the learned arbitrator would have disclosed about his relationship with the Directors of the respondent company and Shouri Constructions Private Limited and also about the son and daughter-in-law being Directors of the said Shouri Constructions Private Limited, the petitioner in that event would have taken a decision to challenge the appointment of the learned arbitrator nominated by the respondent or not. I am not inclined to accept the submission made by Mr. Doctor, learned Senior Counsel for the respondent that according to the learned arbitrator nominated by the respondent since these facts allegedly did not give any rise to justifiable doubts as to his independence or impartiality, the learned arbitrator was not bound to disclose his past or present relationship with the parties when he was approached in connection with his possible appointment.

69. There is no substance in the submission of Mr. Doctor, learned Senior Counsel for the respondent that there was delay on the part of the petitioner in raising such objection about disqualification of the learned arbitrator nominated by the respondent. In my view, the relationship of the learned arbitrator nominated by the respondent with the Directors and Promoters of the said Shouri Constructions Private Limited, the respondent and that his son and daughter-in-law were also the Directors of the said Shouri Constructions Private Limited was within the knowledge of the learned arbitrator nominated by the respondent when he was approached in connection with his possible appointment as an arbitrator and not within the knowledge of the petitioner. It was thus for the learned arbitrator to disclose these facts in writing in view of such clear facts giving rise to justifiable doubts to his independence or impartiality. It is not the case of the respondent that the petitioner was aware of the relationship of the learned arbitrator nominated by the respondent with the Promoters and Directors of respondent and the said Shouri Constructions Private Limited or that the son and daughter-in-law were also the Directors of the said Shouri Constructions Private Limited when the learned arbitrator was approached in connection with the possible appointment as an arbitrator.

70. Learned Senior Counsel for the respondent did not dispute that such disclosure was not even made under Section 12(2) of the Arbitration Act, at any stage by the learned arbitrator nominated by the respondent. The question of challenging the appointment of such arbitrator under Section 12(3) of the Arbitration Act would arise only if such circumstances exist that give rise to justifiable doubts as to his independence or impartiality and once such disclosure is made by the learned prospective arbitrator. Under Section 12(4) of the Arbitration Act, a party is entitled to challenge an arbitrator appointed by him or in whose appointment, only for the reasons of which he becomes aware after the appointment has been made.

71. The Supreme Court in case of Rupa Ashok Hurra (supra) after adverting to the judgment of House of Lords in case of Ex p Pinochet Ugarte, (1999) 1 ALL ER 577 (HL) has held that the principles that a Judge was automatically disqualified from hearing a matter in his own cause was not restricted to cases in which he had a pecuniary interest in the outcome, but also applied to cases where the Judge's decision would lead to the promotion of a cause in which the Judge was involved together with one of the parties. The principles laid down by the Supreme Court in the said judgment in case of Rupa Ashok Hurra (supra) would apply to the facts of this case.

72. Supreme Court in case of Bharat Broadband Network Limited (supra) after adverting to its earlier judgment in case of HRD Corporation (Marcus Oil and Chemical Division) (supra), Voestalpine Schienen GmbH (supra), TRF Ltd. v/s. Energo Engg. Projects Ltd., (2017) 8 SCC 377 has held that in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de-jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. It is held that where a person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case i.e. a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law de-jure, unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates and he shall then be substituted by another arbitrator under Section 14(1) itself.

73. Supreme Court in case of TRF Ltd. (supra) had considered a situation where the Managing Director of the appointing authority fell in Item 5 of the Seventh Schedule which provided that "if the arbitrator is a Manager or part of the management or has a similar controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration" shall be disqualified. The Supreme Court held that such ineligible person neither could himself act as an arbitrator nor could appoint any arbitrator. The principles laid down by the Supreme Court in case of Bharat Broadband Network Limited (supra) apply to the facts of this case. I am respectfully bound by the said judgment.

74. In this case, the learned Senior Counsel for the petitioner placed reliance on the Grounds 10, 18 and 19 of Fifth and Seventh Schedule in support of a submission that the learned arbitrator nominated by the respondent was de-jure ineligible to perform as an arbitrator under Section 12(5) of the Arbitration Act. It was the submission of the Mr. Doctor, learned Senior Counsel for the respondent that none of these entries relied upon by the petitioner apply to the facts of this case. Ground 10 of Fifth Schedule provides that "A close family member of the arbitrator has a significant financial interest in one of the parties

or an affiliate of one of the parties." Ground 18 provides that "A close family member of the arbitrator has a significant financial interest in the outcome of the dispute." Ground 19 provides that "The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute." Explanation 1 provides that the term "close family member" refers to a spouse, sibling, child, parent or life partner. Explanation 2 provides that the term "affiliate" encompasses all companies in one group of companies including the parent company.

75. Grounds 10, 18 and 19 of Seventh Schedule are also identical to those grounds stated in Fifth Schedule. The respondent has not disputed that the son of the learned arbitrator nominated by the respondent was a Director of Shouri Constructions Private Limited. The term "affiliate" encompasses all companies in one group of companies including the parent company. The respondent as well as the said Shouri Constructions Private Limited were promoted by the same promoters. The term "affiliate" would clearly apply to the facts of this case. The son and daughter in law of the learned arbitrator nominated by the respondent being Directors of the said Shouri Constructions Private Limited at the material time being an affiliate and part of the same group of companies, the learned arbitrator was automatically disqualified to act as arbitrator.

76. In my view, since the learned arbitrator nominated by the respondent was himself ineligible to act as an arbitrator and had failed to disclose his interest or relationship with his close relatives including his son, who was a Director of affiliate company, which clearly gave rise to his justifiable doubts about his independence or impartiality, his appointment being illegal and void ab-initio, the constitution of Arbitral Tribunal comprising of such ineligible arbitrator was also illegal and void ab-initio. The entire arbitral proceedings thus were vitiated on that ground itself. The arbitral award thus rendered by the majority of arbitrators inclusive of the learned arbitrator nominated by the respondent, allowing the claims of the respondent is thus void ab-initio and thus deserves to be set aside on that ground.

77. Since, this court is of the view that the appointment of the learned arbitrator nominated by the respondent itself was illegal and the entire proceedings were void ab-initio and illegal, this Court is not required to go into the arguments advanced by the learned Senior Counsel for the parties on the merits of the claim awarded by the Arbitral Tribunal.

78. I therefore pass the following order:-

a) Impugned majority award dated 6th January, 2017 passed by the Arbitral Tribunal in ICA Case No. AC-2029 in favour of the respondent is set aside.

b) It is made clear that this Court has not decided the merits of the claims awarded in the majority award dated 6th January, 2017.

c) There shall be no order as to costs.

(R.D. DHANUKA, J.)

Mr. Doctor, learned Senior Counsel for the respondent states that his client may file an appeal against this judgment before the Division Bench of this court and states that the bank guarantee already furnished by his client, which is already in force till February 2020, will not be withdrawn before the date of expiry. The petitioner shall not encash the bank guarantee issued in favour of the learned Prothonotary and Senior Master of this court issued by the respondent for a period of six weeks from today.