
(2006) 07 GAU CK 0026
In the Gauhati High Court

State of Arunachal Pradesh	Vs	APPELLANT
Subhash Projects and Marketing Ltd. and Another		RESPONDENT

Date of Decision : 19-07-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 12, 13, 14, 16
Constitution of India, 1950 — Article 14, 226, 227

Citation : (2007) 1 ARBLR 564 : (2006) 3 GLR 939 : (2006) 4 GLT 165

Hon'ble Judges : B. Sudershan Reddy, C.J.; Amitava Roy, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Amitava Roy, J.—Being aggrieved by the verdict of the learned Single Judge sustaining the challenge of the respondent No. 1 to the maintainability of the proceedings in the court of the Deputy Commissioner, Papumpare District, Arunachal Pradesh, registered on applications lodged by the State appellant u/s 14(1)(a) of the Arbitration and Conciliation Act, 1996 (hereafter referred to as the Act) as well as restraint orders passed therein interdicting the related arbitral proceedings, the State is in appeal. Though by the common judgment and order assailed seven writ petitions corresponding to equal number of proceedings before the learned Court below had been disposed of on the same determination appeals only in WP(C) 609/04 (WA 264/04) and WP(C) 9953/03 (WA 265/04) have been preferred.

2. We have heard Mr. C.K. Sharma Baruah, Advocate General, Arunachal Pradesh assisted by Mr. S. Shyam, Advocate for the appellant and Mr. P.C. Markanda and Mr. G.N. Sahewalla, Senior Advocates, assisted by Mr. Rajesh Markanda, Advocate for the respondent No. 1.

3. It would be essential to first lay the prefatory facts. Following a tender process initiated by the State of Arunachal Pradesh for awarding the works of installing six Micro Hydel Power Projects on turn key basis at different locations, the respondent No. 1 having been adjudged to be most suitable, was settled with the

contracts therefor. In addition thereto, the respondent-Company was also awarded the construction works of a water supply scheme in Naharlagun Township in the State. This was in the year 1993. Disputes and differences having arisen between the parties out of the related contracts, the respondent-company approached this Court u/s 11(6) of the Act for appointment of an Arbitrator for resolution thereof. This Court after hearing the parties appointed the respondent No. 2 as the sole Arbitrator in all the cases. On such appointment, the Arbitrator embarked on the reference. Names and particulars of the Projects and Arbitration Proceedings for ready reference are extracted herein below.

Sl. No. NAME OF PROJECT ARBITRATION CASE NO.

1. Water Supply Scheme of Naharlagun Township 2/20/99 of 2001 2. Sipit Micro Hydel Project (2 ? 1 MW) 21/97 of 2001 3. Sidip Micro Hydel Project (3 ? 1 MW) 4/22/99 of 2001 4. Liromoba Micro Hydel Project (2 ? 1 MW) 5/23/99 of 2001 5. Mukto Micro Hydel Project (1 ? 3 MW) 6/24/99 of 2001 6. Kitpi Micro Hydel Project (3 ? 1 MW) 7/25/99 of 2001 7. Nuranang Micro Hydel Project (3 ? 2 MW) 8/26/99 of 2001

4. In course of the Arbitral Proceedings on the prayer of the respondent-company in Arbitration Case No. 3/21/1999 of 2001 and 4/22/1999 of 2001 pertaining to Sipit Micro Hydel Project and Sidip Micro Hydel Project, the learned Arbitrator passed interim awards on 8.12.2001 awarding a sum of Rs. 2.10 crore and Rs. 3.5 crore respectively in favour of the Contractor, however, subject to the furnishing of Bank Guarantee of the like amounts and on the condition of completing and commissioning the Power Plants within the dates mentioned therein. Accordingly the Bank Guarantees having been furnished by the respondent-company, the State Government deposited the amounts of the interim award with the Arbitrator through a cheque dated 4.10.2002 and a demand draft dated 13.1.2003 both drawn in the name of the Arbitrator. The Bank Guarantees so furnished were initially for a period upto 31.3.2002 and extended thereafter till 28.2.2003.

5. Contending that inspite of such payment the respondent-company had neither shown any progress in the work nor any inclination therefor, the State Government filed two separate applications in the arbitration cases in which the interim awards were passed for extension/invocation of the Bank Guarantees on which the learned Arbitrator did not pass any specific order for which the same lapsed and, therefore, the amounts of the interim awards were rendered unsecured. Instead, the learned Arbitrator proceeded with the hearing of the cases. The State Government also took exception of the receipt of the payment of the amount of the interim awards by cheque/demand draft issued in the name of the Arbitrator. It further fell aggrieved by the permission granted by the Arbitrator to the respondent-company to introduce additional documents in one of the arbitration proceedings, i.e., 26.8.1999 of 2001 pertaining to Nuranang Micro Hydel Project. Situated thus, the State Government asserting that: the

above conduct and actions of the learned Arbitrator were opposed to the fundamental essentials of impartiality and neutrality of an Arbitral Tribunal filed separate applications u/s 14(1)(a) the Act in all the seven cases in the court of the learned Deputy Commissioner, Papumpare, being the principal civil court of original jurisdiction of the District. Noticeably six of such applications were filed on 13.11.2003 and the one pertaining to Arbitration case No. 2/20/99 of 2001 on 22.12.2003.

6. The learned court below entertained all the applications and by orders dated 13.11.2003 and 22.12.2003, after admitting the same stayed the related proceedings before the learned Arbitrator and injected him from passing any award therein. Dissatisfied and aggrieved by the judicial intervention as above, the respondent-company impugned the maintainability of the said proceedings as well as the orders passed therein by filing separate applications in all the cases under Article 226/227 of the Constitution of India registered as WP(C) 9948/03, WP(C) 9949/03, WP(C) 9950/03, WP(C) 9951/03, WP(C) 9952/03, WHO 9953/03 and WP(C) 609/04. To reiterate WP(C) 9953/03 relate to arbitration case Nos. 3/29/99 of 2001 and WP(C) 609/04 to Arbitration Case No. 2/20/1999 of 2001. Notwithstanding a brief outline of the facts leading to the filing of the writ petitions before this Court as above, it would be essential, before adverting to the rival arguments to have a glimpse of the pleaded versions of the parties.

7. According to the respondent-company, the works under the Contract could not be completed within time due to the lapses on the part of the State Government and, therefore, noticing the lack of will on its part to either fulfil its reciprocal promise or complete the project, the respondent-company invoked the arbitration clause in the contract. It has asserted that the Hon"ble Chief Justice by order dated 16.3.2001 appointed the respondent No. 2 as the sole arbitrator on the consensus of the parties. After the learned Arbitrator entered upon the reference, the respondent-company filed its claim statement. Along therewith, it in Arbitration Case Nos. 3/21/99 of 2001 and 4/22/99 of 2001 also prayed for an interim award alleging that huge amounts of its bills have been illegally and arbitrarily withheld by the State Government. Following a conciliation between the parties as suggested by the Arbitral Tribunal, the Secretary (Power), Government of Arunachal Pradesh, conveyed the consent of the State Government to the passing of an interim award in the interest of expeditious completion of the project. Thereafter on 8.12.2001, the learned Arbitrator passed interim awards in the above two cases and fixed a period of 15 days for payment on the submission of Bank Guarantees. The amount awarded was belatedly paid though the respondent-company had submitted the Bank Guarantees in time. It, however, in order to establish its bona fide, started the works at the site by making its own investments.

8. While the matter rested at that, applications were filed on behalf of the State Government before the learned Arbitrator in the above two cases praying for invocation of the Bank Guarantee in Case No. 3/21/99 and revalidation of the

one in case No. 4/21/99 which were to expire on 28.2.2003. The learned Arbitrator by order dated 27.2.2003 restrained the respondent-company from withdrawing the money deposited in the Bank which had issued the Bank Guarantees, pending disposal of the applications. The proceedings before the Arbitrator, however, continued and the hearing was concluded in respect of Arbitration Case Nos. 3/21/99, 4/22/99, 5/23/99, 6/24/99 and 7/25/99 on 5.8.2003 and were thus closed for the final award.

9. According to the respondent-company, the applications u/s 14(1)(a) of the Act are misconceived and that the learned court below lacked jurisdiction in taking cognizance thereof. The above constitutes the respondent-company's assertions in WP(C) 9953/03.

10. In WP(C) 609/04, it has been asserted that the contract for execution of water supply scheme at Naharlagun awarded to the respondent-company could not be completed in time due to the omission and commission of the State Government. In view of the perceived indifference on its part, both to complete the project and fulfil its reciprocal promises, the respondent-company invoked the arbitration clause and, while submitting its statement of claim also, prayed for an interim, award. The learned Arbitrator rejected the prayer for interim award and thereafter the issues were framed. In the meantime, the contract was terminated by the State respondent. While the proceedings before the Arbitrator were pending the State Government filed an application u/s 14(1)(a) of the Act on which the learned Deputy Commissioner, Papumpare, passed the order dated 22.12.2003 referred to above. A similar challenge has been raised against the proceedings before the learned Court below and the order passed therein.

11. In its counter filed in WP(C) 9953/03, the State questioned the maintainability of the writ petition contending that no case had been made out for interference. While admitting in general, the facts relating to the settlement of the contracts pertaining to the 7 projects named hereinabove, it was asserted that though the respondent-company, under the respective contract agreements was required to commission the same within the dates stipulated therein, they failed to do so in total breach thereof. On the other hand, to cover up its laches, it registered unreasonable and exorbitant demands falsely alleging laches on the part of State and the same having been rejected, the respondent-company purportedly invoked the arbitration clause where after the respondent No. 2 was appointed as the sole Arbitrator by the hon'ble the Chief Justice of this Court on applications filed u/s 11(6) of the Act. It was admitted that the respondent-company filed applications for interim awards and though in the attendant facts, it was not entitled to any further payments, the State Government being prompted by the concern for expeditious installation of the Hydel Projects and the public interest in general, did not raise any serious objection to such prayer on the condition of execution of Bank Guarantee considering the express assurance of the respondent-company to commission the projects within the mutually agreed date.

12. Though in terms of the interim award dated 8.12.2001 payments were made, the respondent-company failed to live up to the promise and did not complete the work not to speak of commissioning the project. As the Bank Guarantees were scheduled to expire on 28.2.2003, left with no alternative, the State Government filed applications on 24.2.2003 before the learned Arbitrator-praying for invocation and/or extension of the validity thereof. Though in the interim award, the learned Arbitrator had granted leave to the State Government to approach the Arbitral Tribunal for recovery of the amount awarded in the event of the failure on the part of the respondent-company to complete the project within the date fixed, no order was passed on the applications dated 24.2.2003 as a result whereof, the Bank Guarantee lapsed on 28.2.2003. An total amount of Rs. 5.6 crore in all had been directed to be paid by the interim award for the two projects Sipit Micro Hydel Project and Sidip Micro Hydel Projects covered by Arbitration case Nos. 3/21/99 of 2001 and 4/22/1999 of 2001. Contending that the inaction on the part of the learned Arbitrator to pass an appropriate order on the applications dated 24.2.2003 amounted to deliberate omission on his part allowing the respondent-company to illegally and fraudulently misappropriate the awarded amount, the State Government also alleged lack of fairness on the part of the Arbitrator to its prejudice. In its counter, it further asserted that the learned Arbitrator admitted certain documents in spite of strong objections on its behalf in Arbitration Case No. 8/26/99 of 2001 pertaining to Naharlagun Micro Hydel Projects though the same were neither submitted in the proper format nor at the appropriate stage of the proceedings. The objections raised on behalf of the State were totally ignored to its detriment. It was further averred that, the receipt of the amount of the interim awards by way of: account payee cheque/ demand draft in his name and the collection thereof by him through his account was also an index of undue association of the learned Arbitrator with the respondent-company. The State Government, therefore, alleged high degree of, bias against the Arbitrator in favour of the respondent-company. According to it, therefore, it was left with no other alternative but to file applications u/s 14(1)(a) of the Act for a declaration that the mandate of the respondent No. 2 to act as the sole Arbitrator had terminated in all the arbitration cases.

13. The filing of the applications before the learned Deputy Commissioner, Papumpare, was justified by asserting that it was the principal civil court of original jurisdiction of the concerned District. The maintainability of the applications under Articles 226/227 of the Constitution of India was assailed on the ground of non-exhaustion of alternative remedy before the learned court below contending that any decision on the merits of the contentions raised in the writ proceedings would amount to prejudging the issues subjudice before the learned lower court.

14. To buttress the assertion bearing on the lack of impartiality of the Arbitrator, the State appellant has also brought on record the fact that within a couple of days of the judgment and order impugned in these appeals, awards amounting to Rs. 36,78,570 have been passed in five of the arbitration cases, namely, case

Nos. 3/21/99, 4/22/99, 5/23/99, 6/24/99 and 7/24/99 in favour of the respondent-company. It has been averred that applications u/s 34 of the Act have in the meantime been filed challenging the awards and the same are presently pending in the court of the Deputy Commissioner, Papumpare. It has been clarified that the present appeals relate to the other two arbitration cases being Nos. 2/20/99 of 2001 and 8/26/99 of 2001 which are still pending before the learned Arbitrator.

15. The learned Single Judge has held that notwithstanding the language and expression deployed in the applications u/s 14(1)(a) of the Act, the contention in sum and substance being that the learned Arbitrator by his conduct and actions pertaining to invocation/extension of Bank Guarantee and the receipt of the amounts has displayed a conduct giving rise to a justifiable doubt as to his impartiality and independence, it is the Arbitrator under the scheme of the Act who is the appropriate forum to decide the said question. It held the view that the "de jure" inability contemplated by Section 14 of the Act would cover instances other than the inability occasioned due to the reasons enumerated in Sections 12 and 13 and thus a specific forum having been provided by the Act to take care of a certain situation any interference by the court by extending the concept of de jure inability would be doing violence to the statute. The learned Single Judge, therefore, held that as u/s 13 the Arbitrator has been empowered to decide on a challenge made with regard to his independence and impartiality, Section 14 cannot, be stretched to confer powers on the court to decide on such a challenge brought before, if on grounds contemplated by Section 12 of the Act. Having held so, the learned Single Judge interfered with the proceedings pending before the learned Deputy Commissioner, Papumpare, as well as the orders dated 13.11.2003 and 22.12.2003 passed therein.

16. The learned Advocate General, Arunachal Pradesh, has emphatically urged that the writ petitions having been preferred against interim orders passed by the learned court below, the same ought not to have been entertained more particularly in view of availability of alternative remedy to the respondent-company. According to him, bearing in mind, the issues raised in the applications u/s 14(1)(a) of the Act adjudication whereof warranted investigation into the questions of facts; the court below was the appropriate forum and, therefore, the writ petitions on this ground alone ought to have been rejected. This is more so as the challenge raised in the proceedings before the learned court below was not against the arbitration but the conduct and actions of the learned Arbitrator.

17. Mr. Baruah referring to the sworn Statements in the pleadings of the State and the supporting documents argued that the same unerringly reveal lack of independence and impartiality of the learned Arbitrator rendering him de jure disqualified to continue with the Arbitration Proceedings. The inaction of the learned Arbitrator to invoke/ extend Bank Guarantees besides being unjustified in the face of the overwhelming materials on record, receipt of the amounts of the interim award in his name and permission to introduce documents not offered in

the prescribed format at a much belated proceeding in case No. 8/26/99 of 2001 exhibited a conduct evincing want of neutrality and fairness imperatively required of an independent arbiter of disputes, he urged. According to the learned Counsel, the accompanying facts and circumstances exhibited demonstrable bias of the arbitrator vitiating the proceedings before him. Referring to Section 11(8) of the Act, the learned Advocate General argued that the Arbitrator having, by his conduct, shed the traits of independence and impartiality indispensably essential for being appointed as an Arbitrator thereunder, his mandate got terminated as comprehended u/s 14(1)(a) of the Act. He maintained that a composite reading of Sections 12, 13 and 14 of the Act, would manifest that an application u/s 14(1)(a) of the Act is maintainable if in course of the Arbitration proceedings, the conduct and actions of the Arbitrator proclaim that he had lost his independence and impartiality vis-a-vis the parties and/or the issues involved. The conditions prescribed for applicability of Sections 12 and 13 of the Act do not proprio vigore exclude the operation of Section 14 in such an eventuality, he contended. According to him, for initiating a proceeding u/s 14(1)(a) of the Act by a party in an arbitration proceeding, no prior notice to the other side is called for. In support of his submissions Mr. Baruah placed reliance on the decision of the Apex Court in *Manak Lal Vs. Dr. Prem Chand*, *Ranjit Thakur Vs. Union of India (UOI)* and *Others*, *Bhatia International Vs. Bulk Trading S.A.* and *Another*, .

18. Mr. Markanda as against this has argued that the applications u/s 14(1)(a) being wholly misconceived and legally unsustainable in the facts and circumstances of the case, the learned court below acted without jurisdiction in passing the impugned order warranting intervention of this Court in the exercise of its supervisory powers under Article 226/227 of the Constitution of India. According to the learned senior Counsel having regard to the foundational facts forming the basis of the allegations levelled against the Arbitrator, the remedy available to the said appellant was only as prescribed by Section 13 of the Act. It having failed to invoke the said provision of law within the time frame of 15 days ordained thereby, it was debarred from availing the remedy u/s 14. Emphasizing upon the statutory constraints on the supervisory role of courts in proceedings of arbitration under the Act, by referring to the statement of objects and reasons thereof, Mr. Markanda underlined that the mandate of Section 13 of the statute conferred exclusive jurisdiction on the Arbitrator to decide on the challenge pertaining to the grounds u/s 12. According to him, remedy u/s 14 of the Act was not available for any one of the more of the eventualities contemplated u/s 12 and that instances rendering an Arbitrator de-jure and de facto unable to perform his duties comprehended situations different from those as visualized in Section 12, The underlying objective of the enactment being to obviate avoidable delays, remedy u/s 14 of the Act is statutorily excluded in fact situations envisioned in Section 12 wherein, the Arbitrator has been bestowed with the exclusive authority to adjudicate on the assailment of his independence or impartiality. As the State appellant, considering the grounds of challenge were

fully aware of the constituent facts much before 15 days prior to the filing of the application u/s 14(1)(a), they having abstained from questioning the independence and impartiality of the Arbitrator u/s 13 within the time prescribed, it was estopped in law as well from invoking the said statutory provision, he urged.

19. He maintained that in any view of the matter, the State appellant at no point of time having preferred to express its reservation before the respondent-company about the lack of independence and impartiality of the Arbitrator, no controversy thereon subsisted and, therefore, the conditions precedent for applying Section 14 of the Act being non-existent, the proceedings before the learned court below are per se unsustainable in law. Mr. Markanda, therefore, urged that the learned Deputy Commissioner, Papumpare, under no circumstances could have entertained the applications u/s 14(1)(a) and stayed the proceedings before the Arbitrator in absence of any power therefor. Section 9 of the Act being exhaustive qua the circumstances in which interim measures can be provided by the court, it lacked jurisdiction in issuing the interim directions in the cases in hand.

20. Adverting to the facts, the learned senior Counsel contended that the Arbitrator having been proposed by the State appellant and accepted by the respondent-company, it (State) was estopped from questioning his fairness and neutrality. According to the learned senior Counsel, the interim award was passed as consented to by the Secretary of Power Department, payment whereunder was much delayed to the detriment and prejudice of the respondent-company who in the meantime had invested money and materials for furthering the works. Criticizing the State appellant of having adopted a non-cooperative attitude, Mr. Markanda urged that it did not lie in its mouth to allege bias and want of impartiality having approached the Arbitrator for extension and/or invocation of the Bank Guarantees on the eve of the expiry thereof. The learned senior Counsel, amongst others, referred to the letter dated 20.12.2002 (Annexure 9 to the WP(C) 9953/03) to apprise this Court that the amount under the interim award as mentioned therein had in fact been received by the respondent-company.

21. The learned Counsel asserted that having regard to the stipulations in the Bank Guarantee, it was open to the State appellant to invoke the same within the period of validity thereof and that no order or leave of the Arbitrator therefore was essential. Mr. Markanda brushed aside the ground of admitting documents as demonstrative of the Arbitrator's bias by submitting that the allegation was unfair besides being ex-fade untenable. The Arbitrator u/s 19(4) of the Act being empowered to determine on the admissibility, relevance, materiality and weight of any evidence, such a vague asseveration ought not to be, entertained. The Arbitrator having passed the final awards in five arbitration cases, namely, case Nos. 3/21/99, 4/22/99, 5/20/99, 6/24/99 and 7/24/99? the question of termination of his mandate does not arise. The proceedings before

the learned court below in the factual premise being patently impermissible in law have been rightly interfered with by the learned Single Judge, he urged. The plea that the court of the Deputy Commissioner, Papumpare, is not the principal civil court of original jurisdiction, however, was not pressed. In support of his arguments, Mr. Markanda has placed his reliance on the following decisions: M. Mohan Reddy v. Union of India and Ors. 2000 (1) Arb LR 39 (AP) , Shyam Telecom Ltd. v. Arm Ltd. 2004 (3) Arb LR 146 (Delhi), State Bank of India Vs. Ram Das and Another, , Bhatia International Vs. Bulk Trading S.A. and Another, , Surya Dev Rai Vs. Ram Chander Rai and Others, .

22. We have bestowed our thoughtful consideration to the competing arguments. The key issue seeking adjudication being one bearing on the maintainability of the proceedings u/s 14(1)(a) before the learned court below, it would be expedient to deal with the same at the threshold.

23. Before the enactment of the Act, i.e. Arbitration and Conciliation Act, 1996, the law on arbitration in India was substantially contained in three legislations, namely, Arbitration Act, 1940, The Arbitration (Protocol and Convention) Act, 1937, and the Foreign Awards (Recognition and Enforcement) Act, 1961. It being felt that the 1940 Act, in face of the necessities of time, had become outdated, the Law Commission of India and several representatives of Trade and Industries and Experts in the field of Arbitration proposed amendments thereto to be more responsive to the contemporary exigencies. The United Nations Commission on International Trade Law (for short UNCITRAL) adopted in 1985, the Model Law on International Commercial Arbitration and the General Assembly of the United Nations recommended that all countries give due consideration to the said Model Law in view of the desirability of uniformity in the law of arbitral procedures and specific needs of international commercial arbitration practice. Accordingly the Arbitration and Conciliation Bill, 1995, was introduced in Parliament to consolidate and amend the law relating to the domestic arbitration, international commercial arbitration, enforcement of foreign arbitral award and to define the law relating to conciliation in the framework of the UNCITRAL Model Law and Rules.

24. The statements of objects and reasons of the Act highlights the main objectives thereof which, inter alia, are to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of specific arbitration, to ensure that the Arbitral Tribunal remains within the limits of its jurisdiction and to minimize the supervisory role Of courts in the arbitral process. The preamble of the Act illustrates that it is a legislation to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.

25. The relevant provisions pertaining to domestic arbitration are contained in Part I of the Act. Following the definition section, the provision relevant for our purpose is Section 4, which deals with waiver of right to object. Thereunder a

party who knows that any provision of that Part from which the parties may derogate or any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or within the time prescribed, he would be deemed to have waived his right to so object. In substance, if a party though conscious of any derogation of any provision of the Act under Part I or breach of any requirement of arbitration agreement proceeds with the arbitration without raising any objection therefore either without undue delay or within the time provided therefore, he would be deemed to have waived his right to object. Section 5 underlines the restrictive scope of judicial intervention except to the extent sanctioned by the Act. The interim measures invocable by a court before or during the arbitral proceedings or at any time after the making of an arbitral award are comprehended in Section 9. The procedure for; appointment of arbitrators is laid down in Section 11 whereunder in given eventualities referred to therein, the Chief Justice of a High Court or his designate may make appointment of an Arbitrator. Sub-clause (8) of Section 11 mandates that the Chief Justice or the person or the institution designated by him in appointing an Arbitrator shall have due regard to any qualification(s) required of the! Arbitrator by the agreement of the parties and other consideration is as are likely to secure an appointment of an independent and impartial arbitrator. Section 12 which specifies the grounds of challenge to the appointment and continuance of an arbitrator enjoins on a person approached in connection with his possible appointment, as such to disclose in writing the circumstances likely to give rise to justifiable doubts as to his independence and impartiality. An obligation is also cast on the arbitrator to disclose to the parties on his appointment and through out the arbitral proceedings such circumstances. Section 12(3) mandates that an Arbitrator may be challenged in existing circumstances that may give rise to justifiable doubts as to his independence or impartiality or if he does not possess the qualifications agreed to by the parties. Sub-section (4) permits a party to challenge an Arbitrator appointed by him or in whose appointment he had participated only for the reasons of which he becomes aware after the appointment has been made. The procedure for such challenge is outlined in Section 13. In absence of any agreement on such procedure, a party who intends to challenge an Arbitrator shall within fifteen days after becoming aware of the constitution of the arbitral tribunal or of any circumstance referred to in Sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the Arbitral Tribunal. Unless the arbitrator thereafter withdraws from his office or the other party agrees to the challenge, he would decide on the challenge. If the assailment fails, the Arbitral Tribunal would continue with the proceedings and make an Arbitral Award whereafter the party challenging the arbitrator may make an application for setting aside such an award in accordance with Section 34. Section 14 ordains termination of the mandate of an Arbitrator if he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay or withdraws from his office or the parties agree to the termination of his mandate. If, however, a controversy

remains, concerning the grounds as above, a party may unless otherwise agreed to by the parties, apply to the court to decide on the termination of the mandate. Sub-section (3) of Section 14 clarifies that in case on being challenged, an arbitrator withdraws from his office as contemplated in Section 13(3) or a party agrees to the termination of his mandate, it shall not be suggestive of the acceptance of any ground referred to in Sections 12 or 14 appertaining thereto.

26. Section 34(2) sets forth the grounds only on which the arbitral award may be set aside by the court. Though an application therefore would not be entertained after three months of the receipt of the arbitral award or disposal of any request made u/s 33 of the Act, provision for condonation of delay is available to the applicant. The rival assertions have to be evaluated in the above legislative paradigm.

27. Though much emphasis has been laid on behalf of the respondent-company on the constricted role of courts, in the interest of expeditious furtherance of the arbitral process, it cannot be gainsaid that wherever judicial intervention is statutorily permissible, the play and purport of the related provision ought not be unnecessarily scuttled. Minimization of supervisory role of courts though indubitably one of the primary objects of the Act, the restraint cannot logically be conceded a primacy to override the provisions permitting judicial intervention in the interest of ensuring a fair, efficient and capable arbitral procedure. The life purpose of the provisions of the part of the Act under scrutiny being to guarantee inexpensive, expeditious and a fair arbitration process, an over rigid approach qua the supervisory role of courts would be against the underlying legislative intendment. Section 5 of the Act being a part of the scheme cannot be read in isolation to overreach the other provisions of the Act or to render the same otiose.

28. As it is, there is a legally acknowledged presumption against ouster of a court's jurisdiction unless excluded clearly or by unnecessary implication. Though u/s 4, an embargo on a party omitting to raise an objection to any contravention of a provision of the Act or breach of a requirement of the arbitration agreement without undue delay or within the time prescribed, is construable as a waiver of his right to do so subsequently, the same cannot in any view of the matter be made to operate as an estoppel against law in absence of any bar either explicit or by necessary implication. Section 4 contemplates a situation witnessing a breach of any provision of Part I of the Act or any stipulation in the agreement only to disqualify a party acquiescing to it from raising any objection beyond the time prescribed. In any case, there has to be a contravention, of the Act or, the agreement and a conscious abandonment of the objection by the party concerned against the same. The breach comprehended is by a party to the arbitration agreement and does not envisage a violation by the arbitrator defiling the very authenticity of the arbitral proceedings. In the facts and circumstances of the case there is no breach as contemplated in Section 4 and the State Appellant cannot be held to have intentionally condoned the

conduct and actions of the Arbitrator questioned before the learned court below. Considering the charges levelled against the learned Arbitrator, we cannot persuade ourselves to hold that the State appellant in the facts and circumstances of the case was debarred from seeking termination of the mandate of the arbitrator in the teeth of Section 4 of the Act. Application of the bar of Section 4 against challenge to the mandate of the arbitrator would be mutilative of the basic feature of the Act.

29. The quintessence of an arbitral procedure is fairness and of course expedition. Impartiality is an essential attribute of fairness. It is, therefore, not enough to provide just any arbitration, not even a speedy arbitration but also an impartial one. The promise of a fair and just award in future ought not to be the only assurance. The certitude of a fair and impartial arbitration is of utmost significance. This pristine rule of adjudicative ethics rest on the premise that the arbitral tribunal permitted by the law to try cases and controversies must not only be unbiased but also must avoid even the appearance of bias. An arbitrator is an arbiter of disputes and differences between the parties concurring in his appointment. His installation as the judge of their cause is not by any institutional fiat. He earns the prerogative of conducting the proceedings by the confidence he commands. Fairness, impartiality, independence and neutrality are, therefore, the indispensable qualities of an arbitrator. It is, therefore, that while making an appointment u/s 11(8), the Chief Justice of the High Court or any person or institution designated by him is statutorily required to have due regard to the considerations to affirm the appointment of an independent and impartial arbitrator recognizing the cardinality of the said essentials.

30. The Legislature in its wisdom incorporated Sections 12, 13 and 14 in the Act to terminate the mandate of an arbitrator challenged for want of his independence or impartiality and de jure and de facto inability to perform his functions. A plain reading of Section 13 of the Act, which prescribes the procedure for raising such challenge on the grounds enumerated in Section 12(3), does not demonstrate any interdiction on, judicial intervention, if no challenge contemplated therein is made within a period of 15, days prescribed. Noticeably the said provision does not permit any request for condonation of delay by the defaulter party willing to question the independence or impartiality of the arbitrator thereunder. Section 13 does not prohibit per se, the party in default, though willing to assail the continuance of the arbitrator, to avail any other, remedy provided under the Act including the one u/s 14 thereof.

31. The legislative concern manifested in Section 12 requiring a prospective arbitrator to disclose any circumstance likely to give rise to justifiable doubts as to his independence and impartiality is of utmost significance. This coupled with the obligation of the appointed arbitrator to make such disclosure even during the arbitral proceedings proclaim the unambiguous legislative disapproval of the appointment or continuance of a person against whom circumstances exist giving rise to justifiable doubts as to his independence or impartiality. The lawmakers

while casting the said duty and permitting a challenge to the independence or impartiality of an arbitrator recognized neutrality and fairness to be the hallmark of an arbitral tribunal absence whereof would vitiate the proceedings striking at the validity authenticity and the bona fide thereof.

32. While there is a conceivable logic to permit continuance of the arbitral proceedings following an unsuccessful challenge to the arbitrator, there is no apparent rationale to exclude the invocation of any other provision of the Act for redress to a party in default in a fact situation justifying the same. In other words/if circumstances envisaged in Section 12(3) of the Act exist, a party failing to raise the challenge based thereon u/s 13(2), in our considered opinion, cannot be debarred from availing a remedy otherwise available to him under the Act. To put it differently, failure of such a party to file an application u/s 13(2) on the grounds u/s 12(3) of the Act would not act as an estoppel against him. We are fortified in our view by the fact that the grounds specified in Section 34 only on which an arbitral award is assailable do not contemplate possible bias or partiality of the arbitrator as a ground of impeachment of the award. To shut out such a party in the above premise from resorting to any other legally permissible remedy would connote that the malaise of bias would not only remain unresolved during the arbitration process but also remain unimpugned at the post award stage as well.

33. The Apex Court in *Bhatia International v. Bulk Trading S.A.* and *Anr. supra*, while dilating on the elemental principles of interpretation of statutes and the role of courts in the process held that while examining a particular provision of a statute/legislation to find out whether the jurisdiction of a court is ousted or not the principle of universal application is that ordinarily the jurisdiction may not be ousted unless the very statutory provision explicitly indicates or an inferential conclusion of ouster is the only possible deduction. It emphasized that the conventional principle is that judges are to expound and not to legislate and that the judicial art of interpretation and appraisal is imbued with creativity as well as realism. If a language used is capable of bearing more than one construction, in selecting the true meaning, regard must be had to the consequences, resulting from adopting the alternative constructions. It underlined that in selecting out of different interpretations, a court would adopt that which is just, reasonable and sensible rather than that which is none of those as it may be presumed that the legislature should have used the word in that interpretation which least offends our senses of justice. It quoted with approval the following observation of Lord Shaw in *Shannon Realities Ltd. v. Ville de St. Michel* 1924 AC 185 : 93 KLJPC 81.

Where words of a statute are dear, they must, of course, be followed, but in their Lordships' opinion where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system.

34. Maxwell in his celebrated work "Interpretation of Statutes" 12th Edition, while dwelling on the maxims of interpretation *ut res magis valeat quam pereat* (any construction which tends to reduce a statute to a futility to be avoided) noticed the elucidation of law on the subject made by Viscount Simon L.C. in *Nokes v. Doncaster Amalgamation Collieries Ltd.* 1940 AC 1014 as herein below.

If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.

Craies in his "Treatise on Statute Law" approved the following course of judicial interpretation if a literal adherence to the words of the enactment had the potential of producing absurdity or injustice:

The courts will not lightly impugn the wisdom of the Legislature, and if any alternative construction, although not the most obvious, will give a reasonable meaning to the Act and obviate the absurdities or inconveniences to the Act and obviate the absurdities or inconveniences of an absolute literal construction, the court deems themselves free to adopt it.

The following extracts from *Principles of Statutory Interpretation* (8th Edition, 2001) by Justice GP Singh also provide the beacon light.

In selecting out of different interpretations "the court will adopt that which is just reasonable and sensible rather than that which is none of those things", as it may be presumed "that the legislature should have used the word in that interpretation which least offends our sense of justice". (p. 113).

The courts strongly lean against a construction which reduces the statute to a futility. A statute or any enacting provision therein must be so construed as to make it effective and operative "on the principle expressed in the maxim : *ut res magis valeat quam pereat*". (p 36)

If the language used is capable of bearing more than one construction, in selecting the true meaning regard must be had to the consequences resulting from adopting the alternative constructions. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results. (p. 112-113).

35. It is now time to turn to Section 14. Sub-section (1) perceives an automatic termination of the mandate of the arbitrator if he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay and if he withdraws from his office or the parties agree to the termination of his mandate. In the prescribed eventualities as above, there is a statutory termination, of the arbitrator's mandate. If the facts constituting the

eventualities in Sub-section (1) of Section 14 are neither in dispute nor demand any proof to be established, termination of the mandate of the arbitrator takes place on statutory prescription. However, if one or more of the circumstances enumerated hereinabove, requires to be established, a party may unless otherwise agreed to by the parties, apply to the court to decide on the termination of the mandate. Considering the scheme of Chapter III of the Act dealing with the composition of an arbitral Tribunal and challenge to the appointment and continuance of an arbitrator, we are of the view that Section 14 has a role and relevance independent of Section 13 of the Act. The applicability thereof, therefore, is not contingent on Section 13. The width and amplitude of Section 14 having regard to the precepts thereof are more comprehensive. Two provisions are not mutually exclusive so much so that a party not raising a challenge u/s 13 of the Act would be excluded from availing a remedy u/s 14 even if the ground(s) urged is/are within the prescribed parameters of the said provision. To reiterate, though a party unsuccessful in his challenge u/s 13 would be debarred from carrying the same to any other forum resting on some other provision of the Act except to the extent permissible u/s 34, such an impediment does not stare at a party omitting and/or failing to question the independence and impartiality of the arbitrator u/s 33(2) within the time prescribed.

36. The expression "de jure" which concern us has been defined in Blacks Law Dictionary, 5th Edition as "de jure" - descriptive of a condition in which there has been total compliance with all requirements of law, of right; legitimate; lawful; by right and just title.

The Law Lexicon defines the word as "de jure" - of right; by law; legitimate; lawful; by right and just title.

The word, therefore, encompasses conceptually all that is legitimate, lawful and of right.

37. Axiomatically, the de jure inability referred to in Section 14 has to necessarily comprehend all conceivable legal shortcomings existing or acquired by an arbitrator disqualifying him to discharge the role assigned under the Act. Bearing in mind, the avowed purpose of an arbitration proceeding, the modalities whereof have been statutorily ordained by the Act to ensure unbiased, expeditious, inexpensive resolution of disputes, any restrictive interpretation on the above expression would emasculate the legal provision of its efficacy and purpose. The instances of de jure inability cited by the learned Counsel for the respondent-company drawing sustenance from Syam Telecom Ltd., supra, are essentially illustrative and not exhaustive by any means. It is incomprehensible that in a given fact situation exhibiting justifiable doubts about the independence and impartiality, of the arbitrator his mandate would continue and the challenge to his authority would have to wait till the completion of the process only because the party aggrieved had failed to act in terms of Section 13(2) within the period prescribed. It is not unlikely that in such an eventuality, irreversible consequences may follow, a situation neither statutorily conceived nor

countenanced. Understandably such a view cannot enjoy judicial imprimatur as well. We, therefore, hold that a party who had either abstained from or omitted to raise a challenge to the independence or impartiality of an arbitrator u/s 13(2) of the Act would not be debarred from invoking Section 14 contending that the arbitrator had become de jure unable to perform his functions. Independence and impartiality of an arbitrator being inseverable attributes to vest him with the legal authority to adjudicate the differences between the parties in an arbitration exercise, he would be de jure disqualified from discharging his functions once he renounces the above qualities. This according to us is the mandate of Sections 12, 13 and 14 which form a complete scheme with the underlying objective of securing the sanctity and probity of an arbitration proceeding.

38. The word "controversy", appearing in Sub-section (2) of Section 14, according to us, only denotes a requirement to establish any of the grounds catalogued in Sub-section (1) of Section 14. It, however, does not signify an inter-party debate on the issue as an essential precondition for approaching the court to decide on the termination of the mandate. Neither any notice to the other party nor his consent to such course of action is a sine qua non for invoking the jurisdiction of this Court u/s 14(2). The edict of Section 14(3) to the effect that withdrawal of an arbitrator or agreed termination of his mandate would not imply the acceptance of the validity of the grounds referred to in Section 12(3) or Section 14 reinforces the above view. Whereas on the agreement of the parties the mandate of an arbitrator is terminated, adjudication by a court would be necessary if the ground(s) urged challenging the arbitrator are required to be established adducing evidence. Insistence for a reference of the issue to the other party soliciting his response as a condition precedent for approaching the court would, however, amount to burdening Section 14 with a prescription, legislatively not intended.

39. In the case in hand in view of the stand taken by the respondent-company, it is clear that the allegations against the arbitrator have been refuted. The plea based on "controversy" suggesting an inter party exercise on the proposed grounds of disqualification as a condition precedent for an application u/s 14 of the Act, therefore, does not appeal to us. In view of the above narrative and the determinations, we are of the unhesitant opinion that in the facts and circumstances of the cases, having regard to the grounds of challenge to the independence and impartiality of the Arbitrator, the applications u/s 14(1)(a) of the Act, before the learned court below are maintainable in law. For the reasons recorded hereinabove, we respectfully differ from the conclusions to the contrary arrived at by the learned Single Judge.

40. The other authorities cited at the Bar deserve a brief reference.

41. The decision of the Andhra Pradesh High Court in Mohan Reddy in our view does not advance the case of the respondent. The question which fell for consideration in that case was whether denial of a right of appeal to a party unsuccessful in his challenge u/s 13(4) or Section 16(5) of the Act is

discriminatory and violative of Article 14 of the Constitution of India, in the face of such remedy, being sanctioned u/s 37(1)(a) to a party who tins suffered an order upholding such challenge. Speaking for the court, one of us (Hon''ble the Chief Justice) ruled as follows.

The Intelligible differentia stares at us in providing such an appeal at the threshold, as without deciding the competence first, it is not desirable that Arbitrator should proceed with the enquiry and once the Arbitrator rules that he has got jurisdiction to deal with the matter, the party subjected to arbitration is not left remediless, but he has to wait and invoke Section 34 for Setting aside the award, if he feels aggrieved. On the other hand, if the party subjected to arbitration is given an appeal at the threshold, as is given to the party seeking arbitration, entire proceedings will be stalled and it may take year to finally decide the same because of the authorities and if ultimately it is held that the Arbitrator has competence to deal with the matter/the proceeding have to restart, which will certainly entail in delay.

42. In Hasmukhlal H. Doshi and Anr. *supra*, it was held that once a challenge to the independence and impartiality is negatived by the Arbitrator u/s 13(2), a court would not consider and decide on the issue of termination of his mandate u/s 14(1)(a). That was a case where an application was filed u/s 13(2) which came to be rejected. The Bombay High Court in the contextual facts had clarified that the issue as to whether in a case where the arbitrator does not decide the challenge or a case where the parties had participated in the proceedings or the objections are decided without hearing the parties have not been dealt with therein. This decision is, therefore, not an authority on the point that party not applying u/s 13(2) would be debarred from invoking Section 14 on any one or more of the grounds enumerated in Section 12(3) of the Act to contend that the Arbitrator having lost his impartiality or independence have rendered himself *de jure* unable to conduct the arbitration proceedings.

43. In Shyam Telecom Ltd., *supra*, the Delhi Court held that an arbitrator would render himself unable to perform his functions on his failure to render award within the time limit prescribed by the arbitration agreement. It held the view that the arbitrator would be rendered *de jure* unable to continue with the proceedings with the expiry of the said period resulting in terminations of his mandate unless the parties agree to extend the period or a party waives his right to object thereto. While dwelling on the expression *de jure*, it was held that it signified arbitrator''s legal incapacity to perform his functions under the law and comprehended circumstances under which the arbitrator was barred from continuing in office, for instance incapacity, bankruptcy, conviction for a criminal offence, etc. It is apparent on a plain reading of the relevant portion of the said decision that the above list of eventualities is only illustrative and in no manner exhaustive and rightly so.

44. In view of our decision on the issue with regard to the maintainability of the proceeding before the learned court below, in elaborate discussion of the rival

submissions on the aspect of bias is not called for. We would however deal with the decisions cited on the issue. In *Manak Lal*, supra, the Apex Court held that it is well settled that every member of a Tribunal who is called upon to try issues in judicial or quasi judicial proceedings must be able to act judicially and that it is of the essence of judicial decision and judicial administration that judges should be able to act impartially, objectively and without any bias. It ruled that the test is not whether in fact a bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the Tribunal might have operated against him in the final decision of the Tribunal. It reiterated the oft quoted maxim that justice must not only be done but must also appear to be done.

45. While pithily reiterating the above view, the Apex Court in *Ramit Thakur*, supra, ruled that the test of real likelihood of bias is whether a "reasonable person, in possession of relevant information, would have thought that bias was likely to decide the matter only in a particular way. It was of the view that what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. It quoted with approval extracts of the renderings in *Allinson v. General Council of Medical Education and Registration and Metropolitan Properties Co. (F.C.G.) Ltd. v. Lannon* (1894) 1 QB 750, which we feel apt to extract herein below.

The question is not, whether in fact he was or was not biased. The court cannot inquire into that.... In the administration of justice, whether by a recognized legal court or by persons who, although not a legal public court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biased.

46. Lord Denning in *Metropolitan Properties Co. (F.C.G.) Ltd. v. Lannon* (1969) 1QB 577, expressed himself on the subject as hereunder.

...In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression, which would be given to other people. Even if he was as impartial as could be, nevertheless if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit.

47. Bias, therefore, is a preconceived opinion or predisposition to decide a case or an issue in a particular manner. It is essentially a condition of the mind, which at times eludes an actual proof thereof. Bias may possibly be determined by evaluating facts and circumstances of the case or by applying the test of real likelihood of bias or reasonable suspicion of bias. What is decisive is not the perception of the judge or the authority conducting the proceedings but the

reasonableness of the assessment of the party in doubt about the likelihood of the decision being influenced by a possible bias of the adjudicating authority in favour of one to the prejudice of the other.

48. In any view of the matter, having regard to the contesting stands of the parties on this aspect of the lis, we feel that it is neither called for nor desirable for this Court to appraise and appreciate the relevant facts by resorting to an investigative probe therein in the exercise of its extraordinary jurisdiction under Article 226 of the constitution of India. It would be open to the parties to assert their pleas before the learned Court below which would decide the issues on merit before it being not influenced by any observation made in this decision.

49. No discussion on the scope and ambit of the jurisdiction of the court under Article 226/227 of the Constitution of India to deal with a challenge against an interlocutory order passed by a Subordinate Court or Tribunal in the above premise is called for.

In the wake of the above, the appeals are allowed. The impugned judgment and order so far as it relates to WP(C) 9953/03 and WP(C) 609/04 is set aside. The related proceedings stand remitted to the learned court below, i.e., the court of the Deputy Commissioner, Papumpare, for disposal on merits. There would be no order as to costs.