A JAIPUR ZILA DUGDH UTPADAK SAHKARI SANGH LIMITED & ORS.

v.

M/S AJAY SALES & SUPPLIERS

B (Special Leave Petition (Civil) No.13520 of 2021)

SEPTEMBER 09, 2021

[M. R. SHAH AND ANIRUDDHA BOSE, JJ.]

Arbitration and Conciliation Act, 1996 – s.11 and sub-section (5) of s.12 r/w. Seventh Schedule – Appointment of an Arbitrator – C *On 31.03.2015, the respondent and the petitioner-Sahkari Sangh entered into a distributorship agreement for distribution of milk and butter – Dispute arose between the parties – Clause 13 of the distribution agreement contained an arbitration clause, which provided that all disputes and differences arising out of or in any* D *way touching or concerning the agreement, shall be referred to the sole Arbitrator, the Chairman of the petitioner Sangh – The respondent approached the sole Arbitrator-Chairman as per clause 13 of the agreement – During the pendency of the Arbitration proceedings, the respondent approached the High Court for* E *appointment of an Arbitrator u/s.11 of the Act – The High Court appointed the former District and Sessions Judge to act as an arbitrator – Before the Supreme Court, the petitioner submitted that the High Court erred in appointing the arbitrator other than the arbitrator mentioned in clause 13 of the agreement – Held: Sub-section (5) of s.12 read with Seventh Schedule made it clear that if* F *the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes 'ineligible' to act as an arbitrator – Applying the law laid down by the Supreme Court in its various decisions and considering the object and purpose of insertion of sub-section (5) of s.12 r/w. Seventh Schedule to the Act, the Chairman* G *of the petitioner Sangh can certainly be held 'ineligible' to continue as an arbitrator – Though in the Seventh Schedule the word 'Chairman' is specifically not mentioned but at the same time it would fall in the category of clause 1; clause 2; clause 5; clause 12 and hence would become 'ineligible' – Once the sole arbitrator-Chairman is 'ineligible' to act as an arbitrator, he loses mandate to continue*

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as a sole arbitrator – Therefore, the High Court has not committed any error in appointing the arbitrator other than the sole arbitrator.

Dismissing the Special Leave Petitions, the Court

HELD: 1. In the case of Bharat Broadband Network Limited, it is observed that Sub-section (5) of Section 12 read with Seventh Schedule made it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes 'ineligible' to act as an arbitrator. It is further observed that once he becomes 'ineligible', it is clear that he then become dejure unable to perform his functions inasmuch as in law, he is regarded as 'ineligible'. It further is observed in the said decision 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 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e., de jure), unable to perform his functions under Section12(5), being ineligible to be appointed as an arbitrator and this being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator. [Para 7][780-D-G]

2. Now so far as the submission on behalf of the petitioners that in view of Section 58 of the Rajasthan Cooperative Societies Act, 2001, the dispute between the parties is to be resolved by the Registrar only and as per Bye Laws 30 of Rajasthan Cooperative Societies Act, 2001 shall be applicable and therefore no court shall have jurisdiction and therefore the dispute referred to the former District Judge is unsustainable has no substance. It cannot be disputed that Arbitration Act is a special Act. Even Sub-section (5) of Section 12 also states with non obstante clause. In the distributorship agreement dated 31.03.2015, there is a provision to resolve dispute through arbitration. Despite Section 58 of the Rajasthan Cooperative Societies Act, 2001, there is an agreement between the parties to resolve the dispute through arbitrator – Chairman. Parties are bound by the agreement and the arbitration clause contained in the Agreement dated 31.03.2015. Therefore, neither Section 58 of the Rajasthan Cooperative Societies Act, 2001 shall not be applicable at all nor

the same shall come in the way of appointing the arbitrator under the Arbitration Act. [Para 7.1][780-G-H; 781-A-C]

3. Now the next question which is required to consider is whether the Chairman who is an elected member of the petitioner Sahkari Sangh can be said to be 'ineligible' under Sub-section (5) of Section 12 read with Seventh Schedule to the Act or not. It is the case on behalf of the petitioner that in the Seventh Schedule to the Act 'Chairman' is not mentioned and only Manager, Director or part of the Management can be said to be ineligible. The aforesaid has no substance at all. Disqualification/ineligible under Sub-section (5) of Section 12 read with Seventh Schedule to the Act is to be read as a whole and considering the object and purpose for which Sub-section (5) of Section 12 read with Seventh Schedule to the Act came to be inserted. Sub-section (5) of Section 12 read with Seventh Schedule has been inserted bearing in mind the 'impartiality and independence' of the arbitrators. It has been inserted with the purpose of 'neutrality of arbitrators'. Independence and impartiality of the arbitrators are the hallmarks of any arbitration proceedings as observed in the case of *Voestalpine Schienen*. Rule against bias is one of the fundamental principles of natural justice which apply to all judicial proceedings and quasi-judicial proceedings and it is for this reason that despite the contractually agreed upon, the persons mentioned in Sub-section (5) of Section 12 read with Seventh Schedule to the Act would render himself ineligible to conduct the arbitration. [Para 8][781-C-G]

4. Applying the law laid down by this Court in the aforesaid decisions and considering the object and purpose of insertion of Sub-section (5) of Section 12 read with Seventh Schedule to the Act, the Chairman of the petitioner Sangh can certainly be held to be 'ineligible' to continue as an arbitrator. Though in the Seventh Schedule the word 'Chairman' is specifically not mentioned but at the same time it would fall in the category of Clause 1; Clause 2; Clause 5; Clause 12. In that view of the matter, the Chairman who is elected member/Director of the Sangh, can certainly be said to be 'ineligible' to become an arbitrator as per Sub-section (5) of Section 12 read with Seventh Schedule to the Act. [Para 9 and 9.1][783-A-B; 783-D-E]

5. Once the sole arbitrator – Chairman is 'ineligible' to act as an arbitrator to resolve the dispute between the parties in view of Sub-section (5) of Section 12 read with Seventh Schedule to the Act he loses mandate to continue as a sole arbitrator. Therefore, it cannot be said that the High Court has committed any error in appointing the arbitrator other than the sole arbitrator – Chairman as per Clause 13 of the Agreement in exercise of powers, under Section 11 read with Section 14 of the Act. [Para 10][786-A-B]

Bharat Broadband Network Limited v. United Telecoms Limited, **(2019) 5 SCC 755 : [2019] 6 SCR 97;** *Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited,* **(2017) 4 SCC 665 : [2017] 1 SCR 798 – relied on.**

S.B.P. & Co. v. Patel Engineering Ltd. & Anr., **(2005) 8 SCC : [2005] 4 Suppl. SCR 688;** *Trf Ltd v. Energo Engineering Projects Ltd.,* **(2017) 8 SCC 377 : [2017] 7 SCR 409 – referred to.**

Case Law Reference

[2005] 4 Suppl. SCR 688	**referred to**	**Para 4.4**
[2017] 7 SCR 409	**referred to**	**Para 6.3**
[2019] 6 SCR 97	**relied on**	**Para 6.3**
[2017] 1 SCR 798	**relied on**	**Para 6.3**

CIVIL APPELLATE JURISDICTION: Special Leave Petition (Civil) No. 13520 of 2021.

From the Judgment and Order dated 03.03.2021 of the High Court of Judicature for Rajasthan at Jaipur Bench in S.B. Arbitration Application Nos.07, 08, 09, 11 and 12 of 2020.

With

Special Leave Petition (Civil) Nos. 13543, 13663, 13632 and 13870 of 2021.

Gunjan Pathak, Ms. Archana Pathak Dave, Ms. Ishita Rawat, Ms. Vanya Gupta, Parmod Kumar Vishnoi, Advs. for the Appellants.

A The following Judgment of the Court was delivered:

1. Feeling aggrieved and dissatisfied with the impugned orders passed by the High Court of Judicature for Rajasthan at Jaipur allowing the applications under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') and appointing an Arbitrator, B Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd, Jaipur (hereinafter referred to as Sahkari Sangh) and others have preferred the present Special Leave Petitions.

2. For the sake of convenience, the facts in SLP (C) No.13520 of 2021 are narrated and SLP (C) No.13520 of 2021 be treated as a lead C matter.

3. On 31.03.2015, the respondent herein and the Sahkari Sangh entered into Distributorship Agreement for the distribution of milk and butter milk in certain zones in Jaipur, which was for a period of two years. The dispute arose between the parties. Clause 13 of the D distributorship agreement provided for resolution of disputes. Clause 13 contains an arbitration clause and it provides that all disputes and differences arising out of or in any way touching or concerning the agreement, whatsoever shall be referred to the sole Arbitrator, the Chairman, Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. and his decision shall be final and binding for the parties. On 18.08.2018, the E respondent made representation pointing out his grievance/dispute. Vide letter dated 22.08.2018, the respondent herein – original applicant was advised to raise dispute before the Sole Arbitrator/Chairman. That on 19.10.2019, the respondent firm/original applicant approached the Sole Arbitrator as per Clause 13 of the Agreement dated 31.03.2015 i.e. the F Chairman, Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. for settlement of a commercial dispute between the parties. That during the pendency of the arbitration proceedings before the Chairman – Sole Arbitrator, the respondent herein – firm approached the High Court for appointment of an arbitrator in exercise of powers under Section 11 of the Act and invoking the arbitration contained in clause 13 of the Agreement dated G 31.03.2015. The said application was opposed by the petitioners herein. It was submitted that once the respondent – firm approached the Chairman – Sole Arbitrator for resolving the dispute between the parties invoking Clause 13 of the Agreement dated 31.03.2015 and having participated in the arbitration proceedings thereafter it is not open for it to approach the H High Court to appoint an arbitrator under Section 11 of the Act. It was

also submitted on behalf of the petitioners that the Agreement dated 31.03.2015 was prior to the amendment of Section 12/insertion of Section 12 (5) of the Act and the contract was entered into between the parties before insertion of Sub-section (5) of Section 12 by amendment of Act, 2015 read with Seventh Schedule to the Act, Sub-section (5) of Section 12 read with Seventh Schedule to the Act shall not be applicable and the Chairman continues to be the sole arbitrator as per Clause 13. That thereafter by the impugned order and considering the Sub-section (5) of Section 12 read with Seventh Schedule to the Act, the High Court has allowed the said application and has appointed the former District and Sessions Judge to act as an arbitrator. Feeling aggrieved and dissatisfied with the impugned order passed by the High Court appointing a fresh Arbitrator in exercise of powers under Section 11 of the Arbitration Act, Sahkari Sangh has preferred the present petitions.

4. Shri Gunjan Pathak, Learned Counsel appearing on behalf of the petitioners has vehemently submitted that the High Court has materially erred in appointing the arbitrator other than the arbitrator mentioned in Clause 13 of the Agreement dated 31.03.2015.

4.1 It is submitted that first of all Sub-section (5) of Section 12 read with Seventh Schedule to the Act shall not be applicable to the facts of the case on hand more particularly when the agreement between the parties was prior to insertion of Sub- section (5) of Section 12 read with Seventh Schedule to the Act. It is further submitted that even otherwise the 'Chairman' being an elected member shall not come within Seventh Schedule to the Act. It is submitted that 'Chairman' is not included within disqualified/ineligible person to be appointed in Seventh Schedule of the Act.

4.2 It is further submitted that the High Court has erred in relying upon Seventh Schedule to the Act of 2015 for the reason as the Learned Sole Arbitrator/Chairman who is an elected member and is a part of management by virtue of election as a director or has no similar influence, can be said to be disqualified as per the Clause (5) of Seventh Schedule of the Amendment Act, 2015.

4.3 It is further submitted that even otherwise considering Section 58 of the Rajasthan Cooperative Societies Act, 2001, the dispute between the parties was required to be resolved by the Registrar and the decision of the Registrar shall be final. It is submitted that non-obstante clause

A as contained in Section 58 of the Rajasthan Cooperative Societies Act, 2001 supersedes Sub-section (5) of Section 12 of the Amendment Act, 2015 and therefore no court of law shall have jurisdiction to entertain any suit or proceeding in respect of such dispute. It is submitted that as per Clause 30 of the Bye Laws of Sahkari Sangh all disputes of the society shall be dealt with as per Rajasthan Co- operative Societies Act, B 2001. It is submitted that therefore also the impugned order passed by the High Court deserves to be quashed and set aside.

4.4 It is further submitted that the Learned Counsel appearing on behalf of the petitioner that as held by this Court in the ***S.B.P. & Co vs Patel Engineering Ltd. & Anr***., (2005) 8 SCC 618, once the matter C reaches the arbitration tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the Arbitrator or the arbitral tribunal during the course of arbitral proceedings and the party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the D Tribunal. It is submitted therefore once the arbitral tribunal has initiated the proceedings, the High Court ought not to have interfered in such matters. It is submitted that therefore, also the impugned order passed by the High Court appointing an arbitrator is unsustainable.

5. We have heard Learned Counsel appearing on behalf of the E petitioners at length.

6. It is not in dispute that distributorship agreement between the parties was dated 31.03.2015 i.e. prior to the insertion of Sub-section (5) of Section 12 and Seventh Schedule to the Act w.e.f. 23.10.2015. It also cannot be disputed that Clause 13 of the Agreement dated F 31.03.2015 contained the arbitration clause and as per Clause 13, any dispute and differences arising out of or in any way touching or concerning distributorship agreement shall be resolved through arbitration. As per Clause 13 such a dispute shall be referred to the sole Arbitrator – the Chairman, Sahkari Sangh.

G 6.1 By the impugned order the High Court has allowed the application under Section 11 of the Act and has appointed the arbitrator other than the Chairman.

6.2 The submissions of the petitioners are observed and narrated hereinabove.

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6.3 So far as the submission on behalf of the petitioners that the agreement was prior to the insertion of Sub-section (5) of Section 12 read with Seventh Schedule to the Act and therefore the disqualification under Sub-section (5) of Section 12 read with Seventh Schedule to the Act shall not be applicable and that once an arbitrator – Chairman started the arbitration proceedings thereafter the High Court is not justified in appointing an arbitrator are concerned the aforesaid has no substance and can to be accepted in view of the decision of this Court in ***Trf Ltd vs Energo Engineering Projects Ltd,*** (2017) 8 SCC 377**;** ***Bharat Broadband Network Limited vs United Telecoms Limited*****,** (2019) 5 SCC 755; ***Voestalpine Schienen GMBH vs. Delhi Metro Rail Corporation Limited***, (2017) 4 SCC 665. In the aforesaid decisions this Court had an occasion to consider in detail the object and purpose of insertion of Sub-section (5) of Section 12 read with Seventh Schedule to the Act. In the case of ***Voestalpine Schienen GMBH*** *(Supra)* it is observed and held by this Court that the main purpose for amending the provision was to provide for 'neutrality of arbitrators'. It is further observed that in order to achieve this, Sub-section (5) of Section 12 lays down 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, he shall be ineligible to be appointed as an arbitrator. It is further observed that in such an eventuality i.e. when the arbitration clause finds foul with the amended provisions (Sub-section (5) of Section 12 read with Seventh Schedule) the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator as may be permissible. It is further observed that, that would be the effect of non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of the arbitration agreement.

6.4 It is further observed and held by this Court in the aforesaid decision that 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 apply to all judicial and quasi-judicial proceedings. It is further observed that 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

A agreement entered into between the parties, notwithstanding the same non-independence and non- impartiality of such arbitrator would render him ineligible to conduct the arbitration. It is further observed that the genesis behind this rational 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. In paragraphs 16 to 18 it is observed and held as under:

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> **"16.** Apart from other amendments, Section 12 was also amended and the amended provision has already been reproduced above. This amendment is also based on the recommendation of the Law Commission which specifically dealt with the issue of 'neutrality of arbitrators' and a discussion in this behalf is contained in paras 53 to 60 and we would like to reproduce the entire discussion hereinbelow:
>
> **"NEUTRALITY OF ARBITRATORS**
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> 53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators, viz. their independence and impartiality, is critical to the entire process.
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> 54. In the Act, the test for neutrality is set out in Section 12(3) which provides –
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> **'12. (3)** "An arbitrator may be challenged only if –
>
> (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality..."
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> 55. The Act does not lay down any other conditions to identify the "circumstances" which give rise to "justifiable doubts", and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any actual bias for that is setting the bar too high; but, whether the circumstances in question give rise to any justifiable apprehensions of bias.
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> 56. The limits of this provision has been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court (See Executive Engineer, Irrigation

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Division, Puri v. Gangaram Chhapolia, 1984 (3) SCC 627; Secretary to Government Transport Department, Madras v. Munusamy Mudaliar, 1988 (Supp) SCC 651; International Authority of India v. K.D. Bali and Anr, 1988 (2) SCC 360; S. Rajan v. State of Kerala, 1992 (3) SCC 608; M/s. Indian Drugs & Pharmaceuticals v. M/s. Indo-Swiss Synthetics Germ Manufacturing Co.Ltd., 1996 (1) SCC 54; Union of India v. M.P. Gupta, (2004) 10 SCC 504; Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd., 2007 (5) SCC 304) that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in Indian Oil Corp. Ltd. v. Raja Transport (P) Ltd., 2009 8 SCC 520 carved out a minor exception in situations when the arbitrator

"was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute" (SCC p. 533, para 34) and this exception was used by the Supreme Court in Denel (Proprietary) Ltd. v. Govt. of India, Ministry of Defence, AIR 2012 SC 817 and Bipromasz Bipron Trading SA v. Bharat Electronics Ltd., (2012) 6 SCC 384, to appoint an independent arbitrator under section 11, this is not enough.

57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from 18 satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the arbitral tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles – even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is

what the parties agreed. The Commission hastens to add that Mr. PK Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous – and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes.

58. Large-scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators, which the Commission believes is critical to the functioning of the arbitration process in India. In particular, amendments have been proposed to sections 11, 12 and 14 of the Act.

59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his *possible* appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the red and orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed section 12 (5) of the Act and the Fifth Schedule which incorporates the categories from the red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be *ineligible* to be so appointed, notwithstanding any prior agreement to the contrary. In the event such an 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. Therefore, while the *disclosure* is required with respect to a broader list of categories (as set out in the Fourth Schedule,

and as based on the Red and Orange lists of the IBA Guidelines), the *ineligibility* to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the Red list of the IBA Guidelines).

60. The Commission, however, feels that *real* and *genuine* party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to section 12 (5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed section 12 (5) by an express agreement in writing. In all other cases, the general rule in the proposed section 12 (5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of section 12 (1) and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator." (emphasis supplied)

17. We may put a note of clarification here. Though, the Law Commission discussed the aforesaid aspect under the heading "Neutrality of Arbitrators", the focus of discussion was on impartiality and independence of the arbitrators which has relation to or bias towards one of the parties. In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In international sphere, the "appearance of neutrality" is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term "neutrality" used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties. In fact, the term "neutrality of arbitrators" is commonly used in this context as well.

A **18.** Keeping in mind the aforequoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, sub-section (5) of Section 12 lays down 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, he shall be ineligible to be appointed as an arbitrator. In such an eventuality i.e. when the arbitration clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement."

7. In the case of ***Bharat Broadband Network Limited*** *(Supra),* it is observed that Sub-section (5) of Section 12 read with Seventh Schedule made it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes 'ineligible' to act as an arbitrator. It is further observed that once he becomes 'ineligible', it is clear that he then become dejure unable to perform his functions inasmuch as in law, he is regarded as 'ineligible'. It further is observed in the said decision 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 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e., de jure), unable to perform his functions under Section12(5), being ineligible to be appointed as an arbitrator and this being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator.

7.1 Now so far as the submission on behalf of the petitioners that in view of Section 58 of the Rajasthan Cooperative Societies Act, 2001, the dispute between the parties is to be resolved by the Registrar only and as per Bye Laws 30 of Rajasthan Cooperative Societies Act, 2001 shall be applicable and therefore no court shall have jurisdiction and therefore the dispute referred to the former District Judge is unsustainable

has no substance. It cannot be disputed that Arbitration Act is a special Act. Even Sub-section (5) of Section 12 also states with non obstante clause. In the distributorship agreement dated 31.03.2015, there is a provision to resolve dispute through arbitration. Despite Section 58 of the Rajasthan Cooperative Societies Act, 2001, there is an agreement between the parties to resolve the dispute through arbitrator – Chairman. Parties are bound by the agreement and the arbitration clause contained in the Agreement dated 31.03.2015. Therefore, neither Section 58 of the Rajasthan Cooperative Societies Act, 2001 shall not be applicable at all nor the same shall come in the way of appointing the arbitrator under the Arbitration Act.

8. Now the next question which is required to consider is whether the Chairman who is an elected member of the petitioner Sahkari Sangh can be said to be 'ineligible' under Sub-section (5) of Section 12 read with Seventh Schedule to the Act or not. It is the case on behalf of the petitioner that in the Seventh Schedule to the Act 'Chairman' is not mentioned and only Manager, Director or part of the Management can be said to be ineligible. The aforesaid has no substance at all. Disqualification/ineligible under Sub-section (5) of Section 12 read with Seventh Schedule to the Act is to be read as a whole and considering the object and purpose for which Sub-section (5) of Section 12 read with Seventh Schedule to the Act came to be inserted. Sub-section (5) of Section 12 read with Seventh Schedule has been inserted bearing in mind the 'impartiality and independence' of the arbitrators. It has been inserted with the purpose of 'neutrality of arbitrators'. Independence and impartiality of the arbitrators are the hallmarks of any arbitration proceedings as observed in the case of ***Voestalpine Schienen*** (Supra). Rule against bias is one of the fundamental principles of natural justice which apply to all judicial proceedings and quasi-judicial proceedings and it is for this reason that despite the contractually agreed upon, the persons mentioned in Sub-section (5) of Section 12 read with Seventh Schedule to the Act would render himself ineligible to conduct the arbitration. In paragraphs 20 to 22 in the case of ***Voestalpine Schienen*** (Supra) it is observed and held as under:

> **"20.** 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 applied 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. The genesis behind this rational 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. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in Hashwani v. Jivraj in the following words: (WLR p. 1889, para 45)

"45 .. ...the dominant purpose of appointing 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."

21. Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in Consorts Ury, underlined that:

"an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator."

22. Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings."

9. Applying the law laid down by this Court in the aforesaid decisions and considering the object and purpose of insertion of Sub-section (5) of Section 12 read with Seventh Schedule to the Act, the Chairman of the petitioner Sangh can certainly be held to be 'ineligible' to continue as an arbitrator. Though in the Seventh Schedule the word 'Chairman' is specifically not mentioned but at the same time it would fall in the category of Clause 1; Clause 2; Clause 5; Clause 12 which read as under:

> "1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.
>
> 2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.
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> 5. The arbitrator is a manager, director 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.
>
> 12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties."

9.1 In that view of the matter, the Chairman who is elected member/ Director of the Sangh, can certainly be said to be 'ineligible' to become an arbitrator as per Sub-section (5) of Section 12 read with Seventh Schedule to the Act.

10. Now so far as the submission on behalf of the petitioners that the respondents participated in the arbitration proceedings before the sole arbitrator – Chairman and therefore he ought not to have approached the High Court for appointment of arbitrator under Section 11 is concerned, the same has also no substance. As held by this Court in the case of ***Bharat Broadband Network Limited*** (Supra) there must be an 'express agreement' in writing to satisfy the requirements of Section 12(5) proviso. In paragraphs 15 & 20 it is observed and held as under:

> "15. Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non- obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to

A be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.

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20. This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an "express agreement in writing". The expression "express agreement in writing" refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. Here, Section 9 of the Indian Contract Act, 1872 becomes important. It states:

"9. Promises, express and implied.—In so far as a proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."

It is thus necessary that there be an "express" agreement in writing.

This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court as indicating an express agreement on the facts of the case is dated 17.01.2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in TRF Ltd. (supra) which, as we have seen hereinabove, was only on 03.07.2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 07.10.2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in TRF Ltd. (supra) and asking him to declare that he has become de jure incapable of acting as an arbitrator. Equally, the fact that a statement of claim may have been filed before the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such. This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2), and Section 16(2) of the Act to the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also in correct in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate."

A 11. In view of the above and for the reasons stated above once the sole arbitrator – Chairman is 'ineligible' to act as an arbitrator to resolve the dispute between the parties in view of Sub-section (5) of Section 12 read with Seventh Schedule to the Act he loses mandate to continue as a sole arbitrator. Therefore, it cannot be said that the High Court has committed any error in appointing the arbitrator other than the
B sole arbitrator – Chairman as per Clause 13 of the Agreement in exercise of powers, under Section 11 read with Section 14 of the Act.

12. In view of the above and for the reasons stated above all these applications deserve to be dismissed.

C The special leave petitions are dismissed accordingly.

Ankit Gyan SLPs dismissed.