2022 INSC 11

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7697 OF 2021

Ellora Paper Mills Limited …Appellant

Versus

The State of Madhya Pradesh …Respondent

J UD G M E N T

M.R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 27.08.2021 passed by the High Court of Madhya Pradesh in A.C. No. 100/2019, by which the application preferred by the appellant under Section 14 read with Sections 11 and 15 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Arbitration Act, 1996') seeking termination of the mandate of originally

constituted Arbitral Tribunal and to appoint a new arbitrator has been dismissed, the original applicant before the High Court has preferred the present appeal.

2. That the respondent herein issued a tender for supply of the cream wove paper and duplicating paper for the year 1993-94. The appellant herein participated in the said tender process and was awarded the contract vide supply order dated 22.09.1993. A dispute arose between the appellant and the respondent. According to the appellant herein, though it supplied 420 MT of cream wove paper and 238 MT of duplicating paper to the respondent, the latter not only did not make the payment of 90% of the amount as per the terms of the contract, but also rejected some consignments without any justification, causing loss to it. The respondent herein vide letter dated 15.11.1993 informed the appellant that the paper supplied by it did not conform to the specification and therefore could not be utilized.

2.1 Thereafter, the appellant herein filed a civil suit in the year 1994 seeking the relief of permanent injunction against the respondent in the Civil Court at Bhopal seeking to restrain it from awarding the supply order to a third party. The respondent, in the meantime, awarded the contract to the third party for the remaining supply. Therefore, the aforesaid civil suit became infructuous.

2.2 The appellant thereafter filed another suit seeking recovery of an amount of Rs.95,32,103/- bearing Civil Suit No. 2-B/1998 before the Civil Court at Bhopal. In the said suit, the respondent preferred an application under Section 8 of the Arbitration Act, 1996 seeking stay of the proceedings on the ground that there exists an arbitration clause in the agreement between the parties. The Civil Court rejected the said application vide order dated 27.02.1999. The respondent filed revision petition No. 1117/1999 before the High Court which came to be allowed by the High Court vide order dated 03.05.2000. The High Court referred the parties to arbitration by the Stationery Purchase Committee comprising of the officers of the respondent.

2.3 Against the order passed by the High Court allowing the revision petition and referring the parties to the arbitration, the appellant herein filed a special leave petition bearing S.L.P.(Civil) No. 13914/2000 before this Court. The same came to be dismissed as withdrawn vide order dated 28.09.2000.

2.4 The Arbitral Tribunal was constituted called as “Stationery Purchase Committee” comprising the officers of the respondent. The appellant filed its objections to the constitution of the Arbitral Tribunal/Stationery Purchase Committee on 12.09.2000. The appellant herein also challenged its jurisdiction by filing an application under

Section 13 of the Arbitration Act, 1996. The Arbitral Tribunal vide order dated 2.2.2001 rejected the said application. Aggrieved thereby, the appellant herein filed a writ petition before the High Court being Writ Petition No. 1824/2001 which came to be dismissed vide order dated 24.01.2017 with liberty to the appellant to raise objections before the appropriate forum.

2.5 Subsequently, the appellant filed the present application before the High Court being AC No. 100/2019 under Section 14 read with Sections 11 & 15 of the Arbitration Act, 1996 seeking termination of the mandate of originally constituted Arbitral Tribunal – Stationery Purchase Committee comprising of officers of the respondent and for appointment of a new arbitrator. Before the High Court, the appellant herein heavily relied upon Section 12(5) of the Arbitration Act, 1996. Relying upon the decision of this Court in the case of *TRF Limited v. Energo Engineering Projects Limited, reported in (2017) 8 SCC 377*, it was submitted on behalf of the appellant that all the five officers constituting the Stationery Purchase Committee, being the employees of the respondent had rendered themselves ineligible to continue as arbitrators. It was submitted that since they had become ineligible to continue as arbitrators, they also could not appoint another person as arbitrator. It was also contended that the original members of the Arbitral Tribunal,

who initiated the proceedings had since ceased to hold their respective offices, in any case, a new Arbitral Tribunal had to be constituted and therefore an impartial and independent arbitrator was required to be appointed in terms of Section 11 of the Arbitration Act, 1996.

2.6 However, after referring to and considering the decisions of this Court in the cases of *Aravali Power Co. Power Ltd. v. Era Infra Engineering, reported in (2017) 15 SCC 32; Indian Oil Corporation Ltd. v. Raja Transport Pvt. Ltd., reported in (2009) 8 SCC 520; ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd., reported in (2007) 5 SCC 304; Union of India v. M.P. Gupta, reported in (2004) 10 SCC 504; Union of India v. Parmar Construction Company, reported in (2019) 15 SCC 682; Union of India v. Pradeep Vinod Construction Company, reported in (2020) 2 SCC 464; and S.P. Singla Constructions Pvt. Ltd. v. State of Himachal Pradesh, reported in (2019) 2 SCC 488*, the High Court has not agreed with the submission(s) on behalf of the appellant. Referring to the aforesaid decisions of this Court, it is observed and held by the High Court that the Amendment Act, 2015 shall be made effective w.e.f. 23.10.2015 and cannot have retrospective operation in the arbitration proceedings already commenced unless the parties otherwise agree and therefore when in the present case the Arbitral Tribunal was constituted much prior to the Amendment Act, 2015 and the Arbitral

Tribunal commenced its proceedings, the Amendment Act, 2015 – Section 12(5) of the Arbitration Act, 2016 shall not be applicable. Observing so, the High Court by the impugned judgment and order has dismissed the application filed by the appellant herein under Section 14 read with Sections 11 & 15 of the Arbitration Act, 1996 and has observed that it would be open for the appellant to participate in proceedings before the Arbitral Tribunal constituted by the respondent as Stationery Purchase Committee.

2.7 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court, the original applicant before the High Court has preferred the present appeal.

3. Shri Sandeep Bajaj, learned Advocate appearing on behalf of the appellant has vehemently submitted that the impugned judgment and order passed by the High Court rejecting the application submitted by the appellant under Section 14 read with Sections 11 & 15 of the Arbitration Act, 1996 is just contrary to the recent decision of this Court in the case of *Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited v. Ajay Sales & Suppliers, 2021 SCC OnLine SC 730*. It is submitted that as held by this Court in the aforesaid decision, in view of the mandate under sub-section (5) of Section 12 read with Seventh Schedule, the Arbitral Tribunal constituted in the present case – Stationery Purchase

Committee consisting of the officers of the respondent has lost its mandate. It is submitted that continuation of such Arbitral Tribunal would be frustrating the object and purpose of the Amendment Act, 2015, by which sub-section (5) to Section 12 read with Seventh Schedule was inserted. It is submitted that as held by this Court, Section 12 has been amended by Amendment Act, 2015 to provide for 'neutrality of arbitrators' and in order to achieve this, sub-section (5) to Section 12 provides that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator.

3.1 It is submitted that in the aforesaid decision, this Court negatived the submission that once the contractor participated in the arbitration proceedings before the Arbitral Tribunal by filing a statement of claim, thereafter it would not be open for him to approach the Court invoking sub-section (5) to Section 12 and pray for appointment of a fresh Arbitral Tribunal. It is submitted that unless and until there is an express agreement in writing to continue with the arbitration proceedings by the earlier Arbitral Tribunal, such an application to terminate the mandate of the earlier Arbitral Tribunal and to appoint a fresh arbitrator would be maintainable.

3.2 It is further submitted by the learned counsel appearing on behalf of the appellant that in the present case, as such, the High Court has committed a grave error in observing and holding that the arbitration proceedings before the Stationery Purchase Committee – Arbitral Tribunal had commenced and that the appellant had participated. It is urged that in the present case, the Stationery Purchase Committee – arbitral Tribunal did not commence the arbitration proceedings in view of the stay granted by the High Court in Writ Petition No. 1824/2001, which was operative from 4.5.2001 to 24.01.2017. It is submitted that in fact the earlier incumbents of the Stationery Purchase Committee – Arbitral Tribunal retired and no steps were taken to constitute a fresh Arbitral Tribunal. It is therefore contended, it cannot be said that any further steps were taken by the earlier Arbitral Tribunal in the arbitration proceedings. It is submitted that in any case in view of the mandate under Section 12(5) read with Seventh Schedule, the members of the earlier Arbitral Tribunal have lost their mandate and are ineligible to continue as members of the Arbitral Tribunal and therefore a fresh Arbitral Tribunal is to be constituted.

4. While opposing the present appeal, Shri Nachiketa Joshi, learned Advocate appearing on behalf of the respondent-State has vehemently submitted that in the facts and circumstances of the case and more

particularly when the Arbitral Tribunal as per the agreement entered into between the parties was constituted in the year 2000, the High Court has rightly refused to appoint a fresh Arbitral Tribunal by holding that Section 12(5) read with Seventh Schedule which has been inserted in the statute by Amendment Act, 2015 w.e.f. 23.10.2015 shall not be applicable retrospectively.

4.1 It is submitted that in the present case, on one ground or the other, and by initiating the proceedings one after another, the appellant did not permit the earlier Arbitral Tribunal to proceed further with the arbitration proceedings.

4.2 It is urged that the impugned judgment and order passed by the High Court is a well-reasoned order after considering catena of decisions of this Court referred to in the impugned order and therefore the same may not be interfered with by this Court.

4.3 Learned counsel appearing on behalf of the respondent has also submitted that in the facts and circumstances of the case, the decision of this Court in the case of *Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited (supra)* is not applicable. It is submitted that in the said case, the arbitrator was appointed after amendment of the Arbitration Act, 2015. However, in the present case, the arbitrator was appointed approximately 20 years prior thereto and thereafter the arbitration

proceedings commenced and even the appellant also participated. It is therefore contended that the amended Section 12(5) of the Arbitration Act which is brought in the statute by way of amendment in 2015 shall not be applicable retrospectively. It is submitted that Section 12(5) of the Arbitration Act shall have to be made applicable prospectively.

5. We have heard the learned counsel for the respective parties at length. Having heard learned counsel for the respective parties and on considering the impugned judgment and order passed by the High Court, the short question which is posed for consideration of this Court is, whether, the Stationery Purchase Committee – Arbitral Tribunal consisting of the officers of the respondent has lost the mandate, considering Section 12(5) read with Seventh Schedule of the Arbitration Act, 1996. If the answer is in the affirmative, in that case, whether a fresh arbitrator has to be appointed as per the Arbitration Act, 1996?

6. It is not in dispute that the High Court earlier constituted the Arbitral Tribunal of Stationery Purchase Committee comprising of officers of the respondent, viz, Additional Secretary, Department of Revenue as President and (i) Deputy Secretary, Department of Revenue, (ii) Deputy Secretary, General Administration Department, (iii) Deputy Secretary, Department of Finance, (iv) Deputy Secretary/Under Secretary, General Administration Department and (v) Senior Deputy

Controller of Head Office, Printing as Members. It may be true that the earlier Arbitral Tribunal – Stationery Purchase Committee was constituted as per the agreement entered into between the parties. It is also true that initially the said Arbitral Tribunal was constituted by the High Court in the year 2001, however, thereafter Stationery Purchase Committee – Arbitral Tribunal could not commence the arbitration proceedings in view of number of proceedings initiated by the appellant. There was a stay granted by the High Court from 4.5.2001 to 24.01.2017 and thereafter in the year 2019, the present application was preferred before the High Court invoking Section 14 read with Sections 11 & 15 of the Arbitration Act, 1996 seeking termination of the mandate of the originally constituted Arbitral Tribunal and to appoint a new arbitrator. It has also come on record that in between, the officers who were members of the Stationery Purchase Committee – Arbitral Tribunal had retired. At this stage, we are not considering whether those persons could have been continued as members of the Stationery Purchase Committee – Arbitral or not. However, the fact remains that after the constitution of the Arbitral Tribunal in the year 2001, no further steps whatsoever have been taken in the arbitration proceedings and therefore technically it cannot be said that the arbitration proceedings by the Arbitral Tribunal – Stationery Purchase Committee has commenced.

7. As observed hereinabove, the Arbitral Tribunal – Stationery Purchase Committee consisted of officers of the respondent-State. Therefore, as per Amendment Act, 2015 – Sub-section (5) of Section 12 read with Seventh Schedule, all of them have become ineligible to become arbitrators and to continue as arbitrators. Section 12 has been amended by Amendment Act, 2015 based on the recommendations of the Law Commission, which specifically dealt with the issue of “neutrality of arbitrators”. To achieve the main purpose for amending the provision, namely, to provide for “neutrality of arbitrators”, 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 is found to be foul with the amended provision, the appointment of the arbitrator would be beyond the pale of the arbitration agreement, empowering the Court to appoint such an arbitrator as may be permissible. That would be the effect of the non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist upon the appointment of the arbitrator in terms of the arbitration agreement. It cannot be disputed that in the present case, the Stationery Purchase Committee -Arbitral Tribunal comprising of officers

of the respondent-State are all ineligible to become and/or to continue as arbitrators in view of the mandate of sub-section (5) of Section 12 read with Seventh Schedule. Therefore, by operation of law and by amending Section 12 and bringing on statute sub-section (5) of Section 12 read with Seventh Schedule, the earlier Arbitral Tribunal – Stationery Purchase Committee comprising of Additional Secretary, Department of Revenue as President and (i) Deputy Secretary, Department of Revenue, (ii) Deputy Secretary, General Administration Department, (iii) Deputy Secretary, Department of Finance, (iv) Deputy Secretary/Under Secretary, General Administration Department and (v) Senior Deputy Controller of Head Office, Printing as Members, has lost its mandate and such an Arbitral Tribunal cannot be permitted to continue and therefore a fresh arbitrator has to be appointed as per Arbitration Act, 1996.

8. An identical question came to be considered by this Court in the case of *Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited (supra)*, and after considering the decisions of this Court in the case of *TRF (supra) and other decisions on the point*, in paragraphs 13, 14 and 15, it is observed and held as under:

> **"13.** 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.* v. *Energo Engineering Projects Ltd.*, (2017) 8 SCC 377; *Bharat Broadband Network Limited* v. *United Telecoms Limited*, (2019) 5 SCC 755; *Voestalpine Schienen GMBH* v. *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 Subsection (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.

14. 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 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:

“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

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.

54. In the Act, the test for neutrality is set out in Section 12(3) which provides -

> **‘12.(3)** “An arbitrator may be challenged only if -
>
> (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality…”

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.

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 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*, (1988) 2 SCC 360; *S. Rajan* v. *State of Kerala*, (1992) 3 SCC 608; *Indian Drugs & Pharmaceuticals* v. *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*, (2012) 2 SCC 759 : 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.

> 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."

15. 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 Section 12(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."

8.1 In the aforesaid decision, this Court also negatived the submission that as the contractor participated in the arbitration proceedings before

the arbitrator therefore subsequently, he ought not to have approached the High Court for appointment of a fresh arbitrator under Section 11 of the Arbitration Act, 1996. After referring to the decision of this Court in the case of Bharat Broadband Network Limited v. United Telecoms Limited, *reported in (2019) 5 SCC 755*, it is observed and held in paragraph 20 as under:

> **"20.** 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 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.

xxx xxx xxx

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."

9. In view of the above and for the reasons stated hereinabove, the impugned judgment and order passed by the High Court is contrary to the law laid down by this Court in the cases of *TRF (supra), Bharat Broadband Network Limited (supra)* and the recent decision of this Court in the case of *Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited (supra)*. It is held that the earlier Arbitral Tribunal – Stationery Purchase Committee comprising of Additional Secretary, Department of Revenue as President and (i) Deputy Secretary, Department of Revenue, (ii) Deputy Secretary, General Administration Department, (iii) Deputy Secretary, Department of Finance, (iv) Deputy Secretary/Under Secretary, General Administration Department and (v) Senior Deputy Controller of Head Office, Printing as Members, has lost its mandate by operation of law in view of Section 12(5) read with Seventh Schedule and a fresh arbitrator has to be appointed under the provisions of the Arbitration Act, 1996. The impugned judgment and order passed by the High Court is therefore unsustainable and deserves to be quashed and set aside.

10. In view of the above and for the reasons stated above, the present appeal succeeds. The impugned judgment and order passed by the High Court of Madhya Pradesh dated 27.08.2021 passed in AC No.

100/2019 is hereby quashed and set aside and the application being AC No. 100/2019 filed by the appellant herein before the High Court is hereby allowed. It is declared that the earlier Arbitral Tribunal – Stationery Purchase Committee comprising of Additional Secretary, Department of Revenue as President and (i) Deputy Secretary, Department of Revenue, (ii) Deputy Secretary, General Administration Department, (iii) Deputy Secretary, Department of Finance, (iv) Deputy Secretary/Under Secretary, General Administration Department and (v) Senior Deputy Controller of Head Office, Printing as Members are ineligible to act/continue as arbitrators in view of sub-section (5) of Section 12 read with Seventh Schedule of the Arbitration Act, 1996 and therefore a fresh arbitrator under the provisions of the Arbitration Act, 1996 is to be appointed to adjudicate upon and resolve the dispute between the parties.

11. Instead of remanding the matter to the High Court to name the arbitrator, we appoint Justice Abhay Manohar Sapre, a former Judge of this Court to act as an arbitrator to adjudicate upon/resolve the dispute between the parties. We hope and trust that the learned arbitrator shall conclude the arbitration proceedings and declare the award at the earliest considering the fact that the dispute between the parties is pending since the year 2000. Both the parties shall appear before the

learned arbitrator, at the first instance, within a period of four weeks from today. A copy of this judgment shall be forwarded to the newly appointed arbitrator.

12. The present appeal is accordingly allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

……..J.
[M.R. SHAH]

NEW DELHI;
JANUARY 04, 2022.

……..J.
[B.V. NAGARATHNA]