**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO. 11126 OF 2017**
**(ARISING OUT OF S.L.P. (C) NO. 20679 OF 2017)**

HRD CORPORATION (MARCUS OIL AND CHEMICAL DIVISION) …APPELLANTS

VERSUS

GAIL (INDIA) LIMITED (FORMERLY GAS AUTHORITY OF INDIA LTD.) …RESPONDENT

WITH

**CIVIL APPEAL NO. 11127 OF 2017**
**(ARISING OUT OF S.L.P. (C) NO. 20675 OF 2017)**

**J U D G M E N T**

**R.F. Nariman, J.**

1. Leave granted.

2. The present appeals raise interesting questions relating to the applicability of Sections 12 and 14 of the Arbitration and Conciliation Act, 1996, in particular with respect to sub-section (5) of Section 12 added by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) (hereinafter referred to as the 2016 Amendment Act).



3. Briefly stated, the relevant facts necessary to decide this case are as follows. The respondent, GAIL (India), issued a notice inviting

tenders for supply of wax generated at GAIL's plant at Pata, Uttar Pradesh for a period of 20 years on an exclusive basis. The appellant successfully tendered for the said contract and the parties entered into an agreement dated April 1, 1999. Disputes arose between the parties, the appellant claiming that GAIL had wrongfully withheld supplies of wax, as a result of which the appellant invoked the arbitration clause included in the agreement.

4. Three earlier arbitrations have taken place between the parties. The present dispute arises from the fourth such arbitration. For the period 2004-2007, an Arbitral Tribunal consisting of Justice A.B. Rohatgi (presiding arbitrator), Justice J.K. Mehra and Justice N.N. Goswamy published an award on April 8, 2006 in which they directed specific performance of the agreement dated April 1, 1999. This award was never challenged and has since become final.

5. For the period 2007-2010, a second arbitration was held consisting of the same panel as the first arbitration.

6. For the period 2010-2013, the same Arbitral Tribunal was constituted. However, while the proceedings were pending, Justice Goswamy expired and Justice T.S. Doabia was appointed in his place. Justice A.B. Rohatgi resigned on February 17, 2013 as the presiding arbitrator, as a result of which Justice S.S. Chadha was appointed to fill his vacancy. This third arbitration proceeding

culminated into two separate awards, both dated July 22, 2015. The appellant has filed a petition under Section 34 of the Act assailing the said awards, which is pending before the Delhi High Court.

7. In respect of the period from 2016 to 2019, initially, the appellant nominated Justice K. Ramamoorthy as its arbitrator. However, he withdrew from the case on December 14, 2016 and Justice Mukul Mudgal was nominated as arbitrator in his place. The respondent appointed Justice Doabia, and Justice Doabia and Justice K. Ramamoorthy appointed Justice K.K. Lahoti to be the presiding arbitrator, before Justice K. Ramamoorthy withdrew from the case. Two applications have been filed by the appellant under Section 12 of the Act, one seeking termination of the mandate of Justice Doabia and the other seeking termination of the mandate of Justice Lahoti. These two applications were heard and disposed of by an order dated February 16, 2017. Justice Lahoti, with whom Justice Doabia concurred, held that they were entitled to continue with the arbitration. Justice Mukul Mudgal, on the other hand, concurred in the appointment of Justice Lahoti but held that Justice Doabia's appointment was hit by certain clauses of the Fifth and Seventh Schedules to the Act and, therefore, that his mandate has terminated. As against this order, OMP No.22/2017 was filed before a single Judge of the Delhi High Court who then dismissed both the petitions.

8. Shri Shyam Divan, learned senior advocate appearing in civil appeal arising out of SLP(C) No. 20679 of 2017 and Shri Gopal Jain, learned senior advocate, appearing in civil appeal arising of SLP(C) No. 20675 of 2017 have assailed the judgment of the single Judge. According to Shri Divan, the appointment of Justice Lahoti squarely attracted Items 1, 8 and 15 of the Seventh Schedule thereby making him ineligible to act as arbitrator. He also argued that Items 20 and 22 contained in the Fifth Schedule are also attracted to the facts of this case, thereby giving rise to justifiable doubts as to his independence or impartiality. He further argued that if for any reason Justice Doabia's appointment is held to be bad, Justice Lahoti's appointment must follow as being bad as an ineligible arbitrator cannot appoint another arbitrator. He has argued before us that the 2016 Amendment Act, which substituted Section 12(1), read with the Fifth and Seventh Schedules and introduced Section 12(5), has to be read in the context of the grounds for challenge to awards being made narrower than they were under Section 34 of the Act. This being so, it is extremely important that the independence and impartiality of an arbitrator be squarely and unequivocally established, and for this purpose, the grounds contained in the Fifth and Seventh Schedules should be construed in a manner that heightens independence and impartiality. According to learned

counsel, once a Seventh Schedule challenge is presented before the Court, the arbitrator becomes ineligible and consequently becomes *de jure* unable to perform his functions under Section 14 of the Act.

9. Shri Gopal Jain, learned senior advocate appearing in civil appeal arising from SLP(C) No. 20679 of 2017, argued that the object of the 2016 Amendment Act is to appoint neutral arbitrators who are independent and fair in their decision making. According to learned counsel, Justice Doabia was ineligible as he squarely fell within Items 1, 15 and 16 of the Seventh Schedule, the last Item 16 being contrasted with Explanation 3 thereof. According to him, Justice Doabia has not disclosed in writing circumstances which are likely to affect his ability to devote sufficient time to the arbitration and for this reason also, his appointment should be set aside. According to learned counsel, once Justice Doabia's appointment falls, Justice Lahoti's appointment also falls.

10. Ms. Vanita Bhargava, learned counsel appearing on behalf of the respondent, has argued, referring to various provisions of the Seventh Schedule, that neither Justice Doabia nor Justice Lahoti are ineligible to act as arbitrators. According to her, the list in the Fifth and Seventh Schedules is taken from the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, 2014 (hereinafter referred to as IBA Guidelines) and must be read in

consonance therewith. Once that is done, it becomes plain that Item 16 would not apply to Justice Doabia for the simple reason that he should be an arbitrator who has had previous involvement in the very dispute at hand and not in an earlier arbitration. For this purpose, she contrasted Item 16 with Items 22 and 24 of the Fifth Schedule. She also argued that the point regarding non disclosure on grounds contained in Section 12(1)(b) is an afterthought and has never been argued before either the Arbitral Tribunal or the single Judge. According to her, the single Judge is right in holding that Justice Lahoti's appointment is not hit by Item 1 of the Seventh Schedule nor is Justice Doabia's appointment hit by Item 16 of the same Schedule, and the reasoning contained in the judgment being correct need not be interfered with.

11. Having heard learned counsel for both the sides, it is necessary to first set out the statutory scheme contained in Sections 12 to 14 of the Act. These Sections read as under:-

> **"Sec. 12 Grounds for challenge.-**
> (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,-
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> (a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and
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> (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.– The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2. – The disclosure shall be made by such person in the form specified in the Sixth Schedule.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if-

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

**"Sec. 13 Challenge procedure.-**

(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or tinder the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees."

> **"Sec. 14. Failure or impossibility to act. –**
> (1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if-
> (a) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and
> (b) he withdraws from his office or the parties agree to the termination of his mandate.
> (2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.
> (3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12."

12. Under Section 12, it is clear that when a person is approached in connection with his possible appointment as an arbitrator, he has to make a disclosure in writing, in which he must state the existence of any direct or indirect present or past relationship or interest in any of the parties or in relation to the subject matter in dispute, which is likely to give justifiable doubts as to his independence or impartiality.

He is also to disclose whether he can devote sufficient time to the arbitration, in particular to be able to complete the entire arbitration within a period of 12 months. Such disclosure is to be made in a form specified in the Sixth Schedule, grounds stated in the Fifth Schedule being a guide in determining whether such circumstances exist. Unlike the scheme contained in the IBA Guidelines, where there is a non-waivable Red List, parties may, subsequent to disputes having arisen between them, waive the applicability of the items contained in the Seventh Schedule by an express agreement in writing. The Fifth, Sixth and Seventh Schedules are important for determination of the present disputes, and are set out with the corresponding provisions of the IBA Guidelines hereunder:

**"THE FIFTH SCHEDULE**
[See section 12 (1)(b)]

The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators:

| **Fifth Schedule** | **Corresponding provision in the IBA Guidelines** |
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| 1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party. | (Non-Waivable Red List)<br>1.1 There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration. |
| 2. The arbitrator currently represents or advises one of | (Waivable Red List)<br>2.3.1 The arbitrator |

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| the parties or an affiliate of one of the parties. | currently represents or advises one of the parties, or an affiliate of one of the parties. |
| 3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties. | (Waivable Red List)<br>2.3.2 The arbitrator currently represents or advises the lawyer or law firm acting as counsel for one of the parties. |
| 4. The arbitrator is a lawyer in the same law firm which is representing one of the parties. | (Waivable Red List)<br>2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties. |
| 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. | (Waivable Red List)<br>2.3.4 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence in an affiliate of one of the parties, if the affiliate is directly involved in the matters in dispute in the arbitration. |
| 6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself. | (Waivable Red List)<br>2.3.5 The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself. |
| 7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties. | (Waivable Red List)<br>2.3.6 The arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties. |
| 8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his | (Waivable Red List)<br>2.3.7 The arbitrator regularly advises one of the parties, or an affiliate of one of the parties, but |

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| or her firm derives a significant financial income therefrom. | neither the arbitrator nor his or her firm derives a significant financial income therefrom. |
| 9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company. | (Waivable Red List)<br>2.3.8 The arbitrator has a close family relationship with one of the parties, or with a manager, director or member of the supervisory board, or any person having a controlling influence in one of the parties, or an affiliate of one of the parties, or with a counsel representing a party. |
| 10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties. | (Waivable Red List)<br>2.3.9 A close family member of the arbitrator has a significant financial or personal interest in one of the parties, or an affiliate of one of the parties. |
| 11. The arbitrator is a legal representative of an entity that is a party in the arbitration. | (Non-Waivable Red List)<br>1.1 There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party 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. | (Non-Waivable Red List)<br>1.2 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration. |
| 13. The arbitrator has a significant financial interest in one of the parties or the | (Non-Waivable Red List)<br>1.3 The arbitrator has a significant financial or |

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| outcome of the case. | personal interest in one of the parties, or the outcome of the case. |
| 14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom. | (Non-Waivable Red List)<br>1.4 The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom. |
| 15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties. | (Waivable Red List)<br>2.1.1 The arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties. |
| 16. The arbitrator has previous involvement in the case. | (Waivable Red List)<br>2.1.2 The arbitrator had a prior involvement in the dispute. |
| 17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held. | (Waivable Red List)<br>2.2.1 The arbitrator holds shares, either directly or indirectly, in one of the parties, or an affiliate of one of the parties, this party or an affiliate being privately held. |
| 18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute. | (Waivable Red List)<br>2.2.2 A close family member of the arbitrator has a significant financial interest in the outcome of the dispute. |
| 19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute. | (Waivable Red List)<br>2.2.3 The arbitrator, or a close family member of the arbitrator, has a close relationship with a non-party who may be liable to<br>recourse on the part of the |

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| | unsuccessful party in the dispute. |
| 20. The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship. | (Orange List)<br>3.1.1 The arbitrator has, within the past three years, served as counsel for one of the parties, or an affiliate of one of the parties, or has previously advised or been consulted by the party, or an affiliate of the party, making the appointment in an unrelated matter, but the arbitrator and the party, or the affiliate of the party, have no ongoing relationship. |
| 21. The arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter. | (Orange List)<br>3.1.2 The arbitrator has, within the past three years, served as counsel against one of the parties, or an affiliate of one of the parties, in an unrelated matter. |
| 22. The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties. | (Orange List)<br>3.1.3 The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties. |
| 23. The arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator. | (Orange List)<br>3.1.4 The arbitrator's law firm has, within the past three years, acted for or against one of the parties, or an affiliate of one of the parties, in an unrelated matter without the involvement of the arbitrator. |

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| 24. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties. | (Orange List)<br>3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties. |
| 25. The arbitrator and another arbitrator are lawyers in the same law firm. | (Orange List)<br>3.3.1 The arbitrator and another arbitrator are lawyers in the same law firm. |
| 26. The arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration. | (Orange List)<br>3.3.3 The arbitrator was, within the past three years, a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the arbitration. |
| 27. A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties or an affiliate of one of the parties. | (Orange List)<br>3.3.4 A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties, or an affiliate of one of the parties. |
| 28. A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute. | (Orange List)<br>3.3.5 A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute. |
| 29. The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm. | (Orange List)<br>3.3.8 The arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm. |

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| 30. The arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties. | (Orange List)<br>3.4.1 The arbitrator's law firm is currently acting adversely to one of the parties, or an affiliate of one of the parties. |
| 31. The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner. | (Orange List)<br>3.4.2 The arbitrator has been associated with a party, or an affiliate of one of the parties, in a professional capacity, such as a former employee or partner. |
| 32. The arbitrator holds shares, either directly or indirectly, which by reason of number or denomination constitute a material holding in one of the parties or an affiliate of one of the parties that is publicly listed. | (Orange List)<br>3.5.1 The arbitrator holds shares, either directly or indirectly, that by reason of number or denomination constitute a material holding in one of the parties, or an affiliate of one of the parties, this party or affiliate being publicly listed. |
| 33. The arbitrator holds a position in an arbitration institution with appointing authority over the dispute. | (Orange List)<br>3.5.3 The arbitrator holds a position with the appointing authority with respect to the dispute. |
| 34. 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, where the affiliate is not directly involved in the matters in dispute in the arbitration. | (Orange List)<br>3.5.4 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration. |
| Explanation 1.—The term "close family member" refers to a spouse, sibling, child, parent or life partner. | Footnote 3.— Throughout the Application Lists, the term 'close family member' refers to a: spouse, sibling, |

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| | child, parent or life partner, in addition to any other family member with whom a close relationship exists. |
| Explanation 2.—The term “affiliate” encompasses all companies in one group of companies including the parent company. | Footnote 4.— Throughout the Application Lists, the term ‘affiliate’ encompasses all companies in a group of companies, including the parent company. |
| Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above. | Footnote 5.— It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice. |

**“THE SIXTH SCHEDULE**

[See section 12 (1)(b)]

NAME:
CONTACT DETAILS:
PRIOR EXPERIENCE (INCLUDING EXPERIENCE WITH ARBITRATIONS):
NUMBER OF ONGOING ARBITRATIONS:

CIRCUMSTANCES DISCLOSING ANY PAST OR PRESENT RELATIONSHIP WITH OR INTEREST IN ANY OF THE PARTIES OR IN RELATION TO THE SUBJECT-MATTER IN DISPUTE, WHETHER

FINANCIAL, BUSINESS, PROFESSIONAL OR OTHER KIND, WHICH IS LIKELY TO GIVE RISE TO JUSTIFIABLE DOUBTS AS TO YOUR INDEPENDENCE OR IMPARTIALITY (LIST OUT):

CIRCUMSTANCES WHICH ARE LIKELY TO AFFECT YOUR ABILITY TO DEVOTE SUFFICIENT TIME TO THE ARBITRATION AND IN PARTICULAR YOUR ABILITY TO FINISH THE ENTIRE ARBITRATION WITHIN TWELVE MONTHS (LIST OUT):"

**"THE SEVENTH SCHEDULE**
[See section 12 (5)]

**Arbitrator's relationship with the parties or counsel**

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.

3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.

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.

6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party 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.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

**Relationship of the arbitrator to the dispute**

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

**Arbitrator's direct or indirect interest in the dispute.**

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.—The term "close family member" refers to a spouse, sibling, child, parent or life partner.

Explanation 2.—The term "affiliate" encompasses all companies in one group of companies including the parent company.

Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration,

> to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above."

13. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become "ineligible" to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes *de jure* unable to perform his functions inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is *de jure* unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of

fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal.

14. Confining ourselves to ineligibility, it is important to note that the Law Commission by its 246th Report of August, 2014 had this to say in relation to the amendments made to Section 12 and the insertion of the Fifth and Seventh Schedules:

> "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."

15. The enumeration of grounds given in the Fifth and Seventh Schedules have been taken from the IBA Guidelines, particularly from the Red and Orange Lists thereof. The aforesaid guidelines consist of three lists. The Red List, consisting of non-waivable and waivable guidelines, covers situations which are "more serious" and "serious", the "more serious" objections being non-waivable. The Orange List, on the other hand, is a list of situations that may give rise to doubts as to the arbitrator's impartiality or independence, as a consequence of which the arbitrator has a duty to disclose such situations. The Green List is a list of situations where no actual conflict of interest exists from an objective point of view, as a result of which the arbitrator has no duty of disclosure. These guidelines were first introduced in the year 2004 and have thereafter been amended, after seeing the experience of arbitration worldwide. In Part 1 thereof, general standards regarding impartiality, independence and disclosure are set out. General principle 1 reads as follows:

> "**IBA Guidelines on Conflicts of Interest in International Arbitration**
> (1) General Principle:
> Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated."

On “conflicts of interest”, guidelines laid down are as follows:

> **“(2) Conflicts of Interest**
>
> (a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.
>
> (b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator’s impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard 4.
>
> (c) Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.
>
> (d) Justifiable doubts necessarily exist as to the arbitrator’s impartiality or independence in any of the situations described in the Non-Waivable Red List.”

16. In **Voestalpine Schienen GmbH** v. **Delhi Metro Rail Corporation Ltd.**, (2017) 4 SCC 665 at 687-689, in the context of a Section 11 application made under the Act, this Court had occasion to delve into the independence and impartiality of arbitrators and the guidelines that are laid down in the Fifth and Seventh Schedule. This Court stated:

> “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* [*Hashwani* v. *Jivraj*, (2011) 1 WLR 1872 : 2011 UKSC 40] 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* [*Fouchard, Gaillard, Goldman on International Commercial Arbitration* 562 (Emmanuel Gaillard & John Savage eds., 1999) {quoting Cour de cassation [Cass.] [Supreme Court for judicial matters] *Consorts Ury* v. *S.A. des Galeries Lafayette*, Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France)}], 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.

23. It also cannot be denied that the Seventh Schedule is based on IBA guidelines which are clearly regarded as a representation of international based practices and are based on statutes, case law and juristic opinion from a cross-section on jurisdiction. It is so mentioned in the guidelines itself.

24. xxx xxx xxx

25. Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence and impartiality. The amended provision is enacted to identify the “circumstances” which give rise to “justifiable doubts” about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which would attract the provisions of sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empanelled by

the respondent are not covered by any of the items in the said list."

17. It will be noticed that Items 1 to 19 of the Fifth Schedule are identical with the aforesaid items in the Seventh Schedule. The only reason that these items also appear in the Fifth Schedule is for purposes of disclosure by the arbitrator, as unless the proposed arbitrator discloses in writing his involvement in terms of Items 1 to 34 of the Fifth Schedule, such disclosure would be lacking, in which case the parties would be put at a disadvantage as such information is often within the personal knowledge of the arbitrator only. It is for this reason that it appears that Items 1 to 19 also appear in the Fifth Schedule.

18. Shri Divan is right in drawing our attention to the fact that the 246th Law Commission Report brought in amendments to the Act narrowing the grounds of challenge co-terminus with seeing that independent, impartial and neutral arbitrators are appointed and that, therefore, we must be careful in preserving such independence, impartiality and neutrality of arbitrators. In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in **ONGC** v. **Saw Pipes Ltd**, (2003) 5 SCC 705, has been expressly done away with. So has the judgment in **ONGC** v. **Western Geco**

**International Ltd.,** (2014) 9 SCC 263. Both Sections 34 and 48 have been brought back to the position of law contained in **Renusagar Power Plant Co Ltd.** v. **General Electric Co.,** (1994) Supp (1) SCC 644, where "public policy" will now include only two of the three things set out therein, viz., "fundamental policy of Indian law" and "justice or morality". The ground relating to "the interest of India" no longer obtains. "Fundamental policy of Indian law" is now to be understood as laid down in **Renusagar** (supra). "Justice or morality" has been tightened and is now to be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the Court as understood in **Associate Builders** v. **Delhi Development Authority**, (2015) 3 SCC 49. Section 28(3) has also been amended to bring it in line with the judgment of this Court in **Associate Builders** (supra), making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one.

19. Thus, an award rendered in an international commercial arbitration – whether in India or abroad – is subject to the same tests qua setting aside under Section 34 or enforcement under Section 48, as the case may be. The only difference is that in an arbitral award governed by Part I, arising out of an arbitration other than an

international commercial arbitration, one more ground of challenge is available viz. patent illegality appearing on the face of the award. The ground of patent illegality would not be established, if there is merely an erroneous application of the law or a re-appreciation of evidence.

20. However, to accede to Shri Divan's submission that because the grounds for challenge have been narrowed as aforesaid, we must construe the items in the Fifth and Seventh Schedules in the most expansive manner, so that the remotest likelihood of bias gets removed, is not an acceptable way of interpreting the Schedules. As has been pointed out by us hereinabove, the items contained in the Schedules owe their origin to the IBA Guidelines, which are to be construed in the light of the general principles contained therein – that every arbitrator shall be impartial and independent of the parties at the time of accepting his/her appointment. Doubts as to the above are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision. This test requires taking a broad common-sensical approach to the items stated in the Fifth and Seventh Schedules. This approach would, therefore, require a fair construction of the words used therein, neither tending to enlarge or restrict them unduly. It is with these

prefatory remarks that we proceed to deal with the arguments of both sides in construing the language of the Seventh Schedule.

21. Coming to the challenge in the present case, Justice Lahoti's appointment is challenged on the ground that the arbitrator has been an advisor to GAIL in another unconnected matter and, therefore, Justice Lahoti should be removed. In his disclosure statement made on 24.11.2016, Justice Lahoti had said:

> "That on a legal issue between GAIL and another Public Sector Undertaking, an opinion was given by me to GAIL, in the year 2014, but it has no concern with respect to the present matter. I am an Arbitrator in a pending matter between M/s. Pioneer Power Limited and GAIL (India) Limited."

22. Shri Divan has pressed before us that since on a legal issue between GAIL and another public sector undertaking an opinion had been given by Justice Lahoti to GAIL in the year 2014, which had no concern with respect to the present matter, he would stand disqualified under Item 1 of the Seventh Schedule. Items 8 and 15 were also faintly argued as interdicting Justice Lahoti's appointment. Item 8 would have no application as it is nobody's case that Justice Lahoti "regularly" advises the respondent. And Item 15 cannot apply as no legal opinion qua the dispute at hand was ever given. On reading Item 1 of the Seventh Schedule, it is clear that the item deals with "business relationships". The words "any <u>other</u>" show that the first part of Item 1 also confines "advisor" to a "business relationship".

The arbitrator must, therefore, be an “advisor” insofar as it concerns the business of a party. Howsoever widely construed, it is very difficult to state that a professional relationship is equal to a business relationship, as, in its widest sense, it would include commercial relationships of all kinds, but would not include legal advice given. This becomes clear if it is read along with Items 2, 8, 14 and 15, the last item specifically dealing with “legal advice”. Under Items 2, 8 and 14, advice given need not be advice relating to business but can be advice of any kind. The importance of contrasting Item 1 with Items 2, 8 and 14 is that the arbitrator should be a regular advisor under items 2, 8 and 14 to one of the parties or the appointing party or an affiliate thereof, as the case may be. Though the word “regularly” is missing from Items 1 and 2, it is clear that the arbitrator, if he is an “advisor”, in the sense of being a person who has a business relationship in Item 1, or is a person who “currently” advises a party or his affiliates in Item 2, connotes some degree of regularity in both items. The advice given under any of these items cannot possibly be one opinion given by a retired Judge on a professional basis at arm’s length. Something more is required, which is the element of being connected in an advisory capacity with a party. Since Justice Lahoti has only given a professional opinion to GAIL, which has no concern with the present dispute, he is clearly not disqualified under Item 1.

23. Coming to Justice Doabia's appointment, it has been vehemently argued that since Justice Doabia has previously rendered an award between the same parties in an earlier arbitration concerning the same disputes, but for an earlier period, he is hit by Item 16 of the Seventh Schedule, which states that the arbitrator should not have previous involvement "*in the case*". From the italicized words, it was sought to be argued that "the case" is an ongoing one, and a previous arbitration award delivered by Justice Doabia between the same parties and arising out of the same agreement would incapacitate his appointment in the present case. We are afraid we are unable to agree with this contention. In this context, it is important to refer to the IBA Guidelines, which are the genesis of the items contained in the Seventh Schedule. Under the waivable Red List of the IBA Guidelines, para 2.1.2 states:

> "The Arbitrator had a prior involvement in <u>the dispute</u>."

24. On reading the aforesaid guideline and reading the heading which appears with Item 16, namely "Relationship of the arbitrator to the dispute", it is obvious that the arbitrator has to have a previous involvement in the very dispute contained in the present arbitration. Admittedly, Justice Doabia has no such involvement. Further, Item 16 must be read along with Items 22 and 24 of the Fifth Schedule. The disqualification contained in Items 22 and 24 is not absolute, as

an arbitrator who has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties or an affiliate, may yet not be disqualified on his showing that he was independent and impartial on the earlier two occasions. Also, if he currently serves or has served within the past three years as arbitrator in another arbitration on a related issue, he may be disqualified under Item 24, which must then be contrasted with Item 16. Item 16 cannot be read as including previous involvements in another arbitration on a related issue involving one of the parties as otherwise Item 24 will be rendered largely ineffective. It must not be forgotten that Item 16 also appears in the Fifth Schedule and has, therefore, to be harmoniously read with Item 24. It has also been argued by learned counsel appearing on behalf of the respondent that the expression “the arbitrator” in Item 16 cannot possibly mean “the arbitrator” acting as an arbitrator, but must mean that the proposed arbitrator is a person who has had previous involvement in the case in some other avatar. According to us, this is a sound argument as “the arbitrator” refers to the proposed arbitrator. This becomes clear, when contrasted with Items 22 and 24, where the arbitrator must have served “as arbitrator” before he can be disqualified. Obviously, Item 16 refers to previous involvement in an advisory or other capacity in the very dispute, but not as arbitrator. It

was also faintly argued that Justice Doabia was ineligible under Items 1 and 15. Appointment as an arbitrator is not a "business relationship" with the respondent under Item 1. Nor is the delivery of an award providing an expert "opinion" i.e. advice to a party covered by Item 15.

25. The fact that Justice Doabia has already rendered an award in a previous arbitration between the parties would not, by itself, on the ground of reasonable likelihood of bias, render him ineligible to be an arbitrator in a subsequent arbitration. As has been stated in **H.** v. **L & others**, [2017] 1 W.L.R. 2280 at 2288-2289:

> "26. If authority were needed it is to be found in AMEC Capital Projects Ltd v Whitefriars City Estates Ltd [2005] 1 All ER 723. An adjudicator had decided a case without jurisdiction as a result of defects in the procedural mechanism for his appointment. His adjudication was set aside and he was then reappointed to decide the same dispute, between the same parties, and decided it in the same way. At first instance it was held that his second adjudication should be set aside for apparent bias because, amongst other things, he had already decided the same issue. The Court of Appeal reversed the decision. Dyson LJ said:
>
> > "20. In my judgment, the mere fact that the tribunal has previously decided the issue is not of itself sufficient to justify a conclusion of apparent bias. Something more is required. Judges are assumed to be trustworthy and to understand that they should approach every case with an open mind. The same applies to adjudicators, who are almost always professional persons. That is not to say that, if it is asked to re-determine an issue and the evidence and arguments are merely a repeat of what went before, the tribunal will not be

> likely to reach the same conclusion as before. It would be unrealistic, indeed absurd, to expect the tribunal in such circumstances to ignore its earlier decision and not to be inclined to come to the same conclusion as before, particularly if the previous decision was carefully reasoned. The vice which the law must guard against is that the tribunal may approach the rehearing with a closed mind. If a judge has considered an issue carefully before reaching a decision on the first occasion, it cannot sensibly be said that he has a closed mind if, the evidence and arguments being the same as before, he does not give as careful a consideration on the second occasion as on the first. He will, however, be expected to give such reconsideration of the matter as is reasonably necessary for him to be satisfied that his first decision was correct. As I have said, it will be a most unusual case where the second hearing is for practical purposes an exact rerun of the first.
>
> 21. The mere fact that the tribunal has decided the issue before is therefore not enough for apparent bias. There needs to be something of substance to lead the fair-minded and informed observer to conclude that there is a real possibility that the tribunal will not bring an open mind and objective judgment to bear."

27. Those comments apply with as much force to arbitrators in international reinsurance arbitration as they do to adjudicators in building disputes. Just as an arbitrator or adjudicator can be expected to bring an open mind and objective judgment to bear when redetermining the same question on the same evidence between the same parties, it is all the more so where the evidence is different and heard in a reference between different parties.

28. The position in Bermuda Form arbitrations is accurately summarised in a leading textbook, *Liability Insurance in International Arbitration*, 2nd ed (2011), at para 14.32 in these terms:

> "**14.32 Commencing a Bermuda Form Arbitration**
> The decision in Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451, and the foregoing discussion, is also relevant in the fairly common situation where a loss, whether from boom or batch, gives rise to a number of arbitrations against different insurers who have subscribed to the same programme. A number of arbitrations may be commenced at around the same time, and the same arbitrator may be appointed at the outset in respect of all these arbitrations. Another possibility is that there are successive arbitrations, for example because the policyholder wishes to see the outcome of an arbitration on the first layer before embarking on further proceedings. A policyholder, who has been successful before one tribunal, may then be tempted to appoint one of its members (not necessarily its original appointee, but possibly the chairman or even the insurer's original appointee) as arbitrator in a subsequent arbitration. Similarly, if insurer A has been successful in the first arbitration, insurer B may in practice learn of this success and the identity of the arbitrators who have upheld insurer A's arguments. It follows from Locabail and AMEC Capital Projects Ltd v Whitefriars City Estates Ltd [2005] 1 All ER 723 that an objection to the appointment of a member of a previous panel would not be sustained simply on the basis that the arbitrator had previously decided a particular issue in favour of one or other party. It equally follows that an arbitrator can properly be appointed at the outset in respect of a number of layers of coverage, even though he may then decide the dispute under one layer before hearing the case on another layer."

26. We were, however, referred to Russell on Arbitration (23rd edition), in which the learned author has referred to the ground of

bias in the context of previous views expressed by an arbitrator. In Chapter 4-124, the learned author states as follows:

> "In certain circumstances, previously expressed views of an arbitrator, which suggest a certain pre-disposition to a particular course of action, outcome or in favour of a party, can constitute grounds for removal. One of the *Locabail v. Bayfield* applications ([2000] 1 All E.R. 65 at 92-93) against a judge was successful on this basis. The judge had written four strongly worded articles which led the Court to conclude that an objective apprehension of bias may arise on the part of one of the parties. However, a challenge against a sole arbitrator in a trade arbitration which alleged apparent bias because the arbitrator had previously been involved in a dispute with one of the parties failed. The judge found this on the facts to be no more than "an ordinary incident of commercial life" occurring in the relatively small field of trade arbitrations where it was thought the parties and arbitrators were quite likely to have had prior dealing with each other (*Rustal Trading Ltd.* v*. Gill and Duffas SA* [2000] 1 Lloyd's Rep. 14). Similarly, the fact that an insurance arbitrator had previously given a statement in another arbitration (and may have been called to give evidence subsequently) about the meaning of a standard form clause which might have had a tentative bearing on the present arbitration would not give grounds for removal (*Argonaut Insurance Co* v*. Republic Insurance Co* [2003] EWHC 547)."

27. The judgment referred to in Russell is reported in **Locabail** v. **Bayfield,** (2000) 1 All E.R. 65. In paragraph 89 thereof, the Court of Appeal stated:

> "We have found this a difficult and anxious application to resolve. There is no suggestion of actual bias on the part of the recorder. Nor, quite rightly, is any imputation made as to his good faith. His voluntary disclosure of the matters already referred to show that he was conscious of his judicial duty. The views he expressed in the articles

> relied on are no doubt shared by other experienced commentators. We have, however, to ask, taking a broad commonsense approach, whether a person holding the pronounced pro-claimant anti-insurer views expressed by the recorder in the articles might not unconsciously have leant in favour of the claimant and against the defendant in resolving the factual issues between them. Not without misgiving, we conclude that there was on the facts here a real danger of such a result. We do not think a lay observer with knowledge of the facts could have excluded that possibility, and nor can we. We accordingly grant permission to appeal on this ground, allow the defendant's appeal and order a retrial. We should not be thought to hold any view at all on the likely or proper outcome of any retrial."

28. We have not been shown anything to indicate that Justice Doabia would be a person holding a pronounced anti-claimant view as in **Locabail** (supra). Therefore, we are satisfied that there is no real possibility that Justice Doabia will not bring an open mind and objective judgment to bear on arguments made by the parties in the fourth arbitration, which may or may not differ from arguments made in the third arbitration.

29. The appointment of Justice Doabia was also attacked on the ground that he had not made a complete disclosure, in that his disclosure statement did not indicate as to whether he was likely to devote sufficient time to the arbitration and would be able to complete it within 12 months. We are afraid that we cannot allow the appellant to raise this point at this stage as it was never raised earlier.

Obviously, if Justice Doabia did not indicate anything to the contrary, he would be able to devote sufficient time to the arbitration and complete the process within 12 months.

30. It was also faintly urged that the arbitrator must without delay make a disclosure to the parties in writing. Justice Doabia's disclosure was by a letter dated October 31, 2016 which was sent to the Secretary General of the International Centre for Alternative Dispute Resolution (ICADR). It has come on record that for no fault of Justice Doabia, the ICADR, through oversight, did not handover the said letter or a copy thereof to the appellant until November 24, 2016, which is stated in its letter dated November 29, 2016. This contention also, therefore, need not detain us.

31. It was then argued that under Explanation 3 to the Seventh Schedule, maritime or commodities arbitration may draw arbitrators from a small, specialized pool, in which case it is the custom and practice for parties to appoint the same arbitrator in different cases. This is in contrast to an arbitrator in other cases where he should not be appointed more than once. We are afraid that this argument again cannot be countenanced for the simple reason that Explanation 3 stands by itself and has to be applied as a relevant fact to be taken into account. It has no indirect bearing on any of the other items mentioned in the Seventh Schedule.

32. This being the case, we are satisfied that the learned single Judge's judgment requires no interference. The appeals are, accordingly, dismissed.

**……J.**
**(R.F. Nariman)**

**……J.**
**(Sanjay Kishan Kaul)**

**New Delhi;**
**August 31, 2017**