* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **OMP (COMM) No. 57/2019**

% ***5th February, 2019***

M/S GAURI SHANKAR EDUCATIONAL TRUST & ORS.

..... Petitioners

Through: Ms. Jasmine Damkewala and Ms. Prabjot Kaur, Advocates (9818311929)

versus

M/S RELIGARE FINVEST LTD. ..... Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

I.A. No. 1766/2019 (Exemption)

1. Exemption allowed subject to just exceptions.

I.A stands disposed of.

I.A. Nos. 1767/2019 (delay in filing) & 1768/2019 (delay in re-filing)

2. For the reasons stated in the applications, delays in filing and re-filing are condoned.

I.As stand disposed of.

OMP(COMM) 57/2019 & I.A. No. 1765/2019 (stay)

3. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter* 'The Act'), filed by the respondents in the arbitration proceedings, impugning the *ex parte* Award of the Arbitration Tribunal dated 08.03.2018, by which the Arbitration Tribunal has passed an Award for a sum of Rs. 12,92,47,390/- along with interest at 12% per annum and costs of Rs. 1,10,000/- in favour of the respondent herein (claimant before the arbitration proceedings) and against the petitioners herein. The amount has been decreed on account of the respondent/claimant having advanced a loan to the petitioners herein, and there taking place defaults in payment of the loan amount.

4. The facts of the case are that pursuant to a Loan Agreement dated 25.05.2016, a loan for a sum of Rs. 12,51,50,000/- was disbursed to the petitioners by the respondent. Petitioners had agreed to repay the loan amount in 96 equated monthly installments of Rs. 18,60,000/- each, but since the payment schedule was not adhered to and the petitioners committed default in paying due installments, therefore, after serving the Legal/Demand Notice dated 28.07.2017 to

the petitioners, the arbitration proceedings were initiated in terms of Clause 21 of the Arbitration Agreement providing for decision of disputes by arbitration, and this Clause 21 reads as under:

> "Arbitration and Jurisdiction:
>
> Any and all dispute, claim, difference arising out of or in connection with this agreement and the Schedule/s attached hereto the performance of this agreement shall be settled by arbitration to be referred to a sole arbitrator to be appointed by the RFL and the award thereupon shall be binding upon the parties to this agreement. The Arbitration shall be held in accordance with the provisions of the Arbitration and Conciliation act 1996 and any statutory amendments thereof. The place of the arbitration shall be in Delhi. The proceeding of Arbitration tribunal shall be conducted in English Language. Each party shall bear the cost of representing its case before the arbitrator. Costs and charges of Arbitrator to be shared equally unless otherwise provided for in the award."

5. The petitioners failed to appear in the arbitration proceedings despite service, and hence they were proceeded *ex parte*. The factum with respect to the service of notice in the arbitration proceedings to the petitioners is recorded in para 6 of the impugned Award dated 08.03.2018 and this para 6 reads as under:

> "6. Notice for appearance was sent to the respondents by post, but the respondent failed to appear on the date fixed. However, communication is received from the respondents wherein it is alleged that they are making efforts to regularize loan account and request was made to adjourn matter. The claimant filed the statement of the claim along with the documents and second notice for appearance along with

the copy of the proceedings was also sent to the respondents on their last known address by post, but the respondents failed to appear and so, there was presumption of service of the respondents. Hence the matter was ordered to be heard as ex parte against the respondents. Reference is made to AIR 2013 Allahabad 61 Smt. Vandana Gulati Vs. Gurmeet Singh wherein it has been observed as under:-

> "The above provision of the Indian Evidence Act, 1872 raises a presumption of fact and that of Section 27 of the General Clauses Act, 1897 a presumption of law. The cumulative effect of both the above provisions is that a letter/notice sent by registered post to the person concerned at the proper address shall be deemed to be served upon him in the due course unless contrary is proved."

6. The respondent has proved its claim in the arbitration proceedings by proving the loan application, loan agreement as well as the demand notice and the statement of account of the amount due, and these aspects are recorded in paras 10 and 11 of the impugned Award as under: -

> "10. Ex.CW1/B is the copy of loan application which shows that the respondents applied to the claimant company for the grant of loan. Ex.CW1/C is the loan agreement executed between the parties which shows that the claimant company, at the request of the respondents, sanctioned loan of Rs. **125510000**/- to the respondents who agreed to repay the same in **96** equated monthly installment of Rs.**1860000**/- each. As per the agreement all the respondents are jointly and severely liable to repay the loan amount.
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> 11. Ex.CW1/D is the copy of demand notice which shows that the notice was sent to the respondents asking them to make the payment of the due amount. The copies of the postal receipts have also been place on record along with document Ex.CW1/D. The claimant has specifically stated in affidavit Ex.CA that the respondents have failed to repay the outstanding due amount. The evidence of the claimant on this

> point is also supported by the documentary evidence. Ex.CW1/F is the copy of statement of account maintained by the claimant company in its official regular course of business. Copy of foreclosure statement has also been filed along with statement of account. These documents show that the respondents have failed to pay the installments of the loan amount as per the agreement and an amount of **129247390**/- including interest is due towards the respondents to be paid to the claimant company. Ex.CW1/G is the copy of the statement of claim. On the basis of the documents referred above it can safely be said to be established on the record that the amount claimed in the claim statement is due towards the respondents to be paid to the claimant and the claimant company is entitled to recover the said amount with future interest from the respondents who are jointly and severally liable."

7. No challenge can be laid on merits to an *ex parte* award in a case such as the present case, where the respondent/finance company has proved its case in the arbitration proceedings. On behalf of the petitioners, however, only one point is argued before this Court for setting aside the impugned Award, and this argument is predicated on para 22 of the Fifth Schedule of the Arbitration and Conciliation Act, and this para 22 reads as under:

> "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."

8. It is argued that the Ld. Arbitrator who has decided the present arbitration proceedings in terms of the impugned Award dated 08.03.2018 is one Sh. Jai Narayan Yadav, Retired District Judge, and

Sh. Jai Narayan Yadav has presided over many proceedings (more than two as an Arbitrator for the respondent) and therefore the impugned Award is liable to be set aside on account of the violation of the provision of para 22 of the Fifth Schedule by the Ld. Arbitrator and the respondent. Attention of this Court is invited to the documents filed, and these documents are the orders passed by different Single Judges of this Court in two cases filed against the respondent herein, and wherein the factum with respect to Sh. Jai Narayan Yadav being incompetent to decide the arbitration proceedings was in issue, resulting in the Ld. Arbitrator, Sh. Jai Narayan Yadav, not continuing as an arbitrator. These are the orders which were passed on 09.07.2018 and 08.10.2018 in ***OMP(T) (COMM) No. 53/2018,*** and Orders dated 17.01.2018 and 03.05.2018 in ***OMP(T)(COMM) No. 4/2018***, and these orders read as under:

> **"Order dated 9.7.2018**
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> **O.M.P. (T) (COMM.) 53/2018, I.A. No.8670/2018 (stay) & I.A. No.8671/2018 (condonation of delay in re-filing)**
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> 1 Issue notice.
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> 2 This is a petition filed under Section 14 (1)(a) of the Arbitration and Conciliation Act, 1996.
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> 3 The petitioner, in effect, seeks to challenge the appointment of the learned Arbitrator on the ground of his purported lack of independence and impartiality. It is the case of the petitioner that there has not been sufficient

disclosure by the learned Arbitrator with regard to his connection with the respondent i.e. the claimant.

4 Renotify the matter on 19.07.2018. 5 In addition, service be effected via private mode as well."

Order dated 8.10.2018 in O.M.P. (T) (COMM.) 53/2018

"1. Mr. Sandeep Sharma, who enters appearance on behalf of the nonapplicant/respondent, says that he has instructions to convey to the Court that since the non-applicant/respondent has initiated proceeding under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002, it would withdraw its claim pending before the learned Arbitrator.

2. To be noted, via the instant petition, the petitioner seeks termination of the mandate of the learned Arbitrator, that is, Mr. J.N. Yadav, former District Judge, Mandi, Himachal Pradesh.

3. In view of the statement made by the counsel for the nonapplicant/respondent, Mr. Mittal, who, appears for the petitioner, says that he would not want to press the captioned matter any further."

4. Accordingly, the captioned petitioner is dismissed as not pressed. 5. Consequently, pending applications shall stand closed."

Order dated 17.01.2018 in OMP(T)(COMM) No. 4/2018

"I.A.No. 732/2018

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

O.M.P.(T) (COMM) 4/2018

Issue notice. The learned counsel for the respondent accepts notice and seeks time to file the reply. Reply be filed within four weeks from today. It is submitted nominee arbitrator has been appointed as an arbitrator in more than 500 similar matters of the respondent. List on 03.05.2018. In the meanwhile, the proceedings before the Ld. Arbitrator shall be kept in abeyance.

Order *dasti."*

Order dated 3.5.2018 in OMP(T)(COMM) No. 4/2018

> "1. The petitioner has filed the present petition under Section 14 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), inter alia, praying that the mandate of the sole arbitrator be terminated and an independent arbitrator may be appointed.
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> 2. At the outset, the learned counsel appearing for the respondents states that the respondents have no objection if an order is passed terminating the mandate of the sole arbitrator and an independent arbitrator is appointed to fill up the vacancy so caused.
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> 3. In view of the above and with the consent of the parties, Mr Rakesh Kapoor, Retd. District & Sessions Judge, Delhi (Mobile No. 9910384621) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties. This is subject to the arbitrator making the necessary disclosure under Section 12 of the Act and not being ineligible under Section 12(5) of the Act.
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> 4. The Arbitrator shall fix his fees in consultation with the learned counsel for the parties and having regard to Schedule IV of the Act. The parties are at liberty to approach the Arbitrator for further proceedings.
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> 5. In view of the above, the petition and the application are disposed of."

9. In my opinion, the argument urged on behalf of the petitioners with reference to para 22 of the Fifth Schedule is without any merit for two reasons. The first reason is that any objection under Section 16 of the Arbitration and Conciliation Act with respect to lack of jurisdiction of the arbitration tribunal has to be taken up at the very first instance in the arbitration proceedings. If no such objection is taken in the arbitration proceedings, then after passing of an award, such an objection cannot be taken. This issue has been dealt with by the Hon'ble Supreme Court in its recent judgment in the case of

Madhya Pradesh Rural Road Development Authority & Anr. v. L.G. Chaudhary Engineers and Contractors, (2018) 10 SCC 826. Therefore, even assuming for the sake of arguments that the petitioners could have raised a valid objection under para 22 of the Fifth Schedule for challenging the jurisdiction of the Ld. Arbitrator, yet this objection is no longer open to the petitioners for the first time in this petition at the stage of challenging the Award under Section 34 of the Act, as no such objection was raised in the arbitration proceedings at the first instance as required by Section 16(2) of the Act. Merely because petitioners chose not to appear in the arbitration proceedings would not mean that the provision of Section 16 will not apply inasmuch as the provision of Section 16 applies to contested arbitration proceedings and also uncontested arbitration proceedings resulting in an *ex parte* Award. Sub-section 2 of Section 16 leaves no doubt of any manner with respect to the issue of the arbitral tribunal lacking jurisdiction and the same has to be necessarily and shall be raised before the submission of the defence, meaning thereby that this objection of lack of jurisdiction of the arbitrator has to be raised immediately on service/appearance in the arbitration proceedings by

the respondents i.e. before filing the statement of defence. Admittedly, since no defence has been raised under Section 16(2) of the Act in the arbitration proceedings, the petitioners therefore now in a Section 34 petition cannot object to the jurisdiction of the Ld. Arbitrator by placing reliance upon para 22 of the Fifth Schedule of the Act.

10. Another reason for holding that the petitioners are not entitled to succeed in the objection raised by placing reliance upon para 22 of the Fifth Schedule of the Act is because para 22 of the Fifth Schedule is only a directory or persuading provision and not a mandatory or absolute provision. Whereas the relevant requirements of the Seventh Schedule are mandatory/absolute requirements, the requirements of Fifth Schedule are only directory/persuasive requirements which are required to be proved in each case. The fact that the requirements of the Seventh Schedule are mandatory and absolutely bars/illegalities/handicaps becomes clear from the language of Section 12(5) of the Act which uses the expression 'shall' which clearly provides that if the requirements of the Seventh Schedule of the Act are not complied with, then the arbitrator becomes ineligible,

of course, with a right of a party to waive the applicability of Section 12(5) by an express agreement in writing. That the requirements of the Fifth Schedule are only directory/persuading as per the facts of a case, becomes clear from the language of Section 12(1) (Explanation I) of the Act which states that the grounds stated in the Fifth Schedule will only act as a guide i.e. the existence of grounds stated in the Fifth Schedule will not automatically lead to the conclusion of justifiable doubts regarding the independence or impartiality of the arbitrator(s). A Ld. Single Judge of this Court in the case of ***Sudesh Prabhakar and Ors. v. EMAAR Constructions Pvt. Ltd., 2018 (2) Arb LR 538 (Delhi)*** has held that para 22 of the Fifth Schedule is only directory and not mandatory. I completely agree with the observations of the Ld. Single Judge in ***Sudesh Prabhakar's case (supra)*** that the requirements as stated in Fifth Schedule of the Act are only directory and not mandatory. The relevant paras of the judgment passed by the Ld. Single Judge in ***Sudesh Prabhakar's case (supra)*** are paras 10 and 11, and these paras read as under:

> "10. Supreme Court in the case of ***HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Ltd.***, 2017 SCC OnLine SC 1024 has considered the effect of Item 24 of the Fifth Schedule of the Act

and the remedy in case such challenge is rejected by the Arbitrator in the following words:

> "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.
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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.

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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 the dispute."

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."

11. A reading of the above judgment would show that the Supreme Court has held that the disqualification contained in item 22 and 24 is not absolute and even an Arbitrator who has been appointed on two or more occasions by the parties or affiliates in the past three years, may yet not to be disqualified on showing that he was independent and impartial on the earlier two occasions. In any case, distinction has to be drawn between ineligibility to be appointed as an Arbitrator for the reason contained in the Seventh Schedule of the Act and the reasons which may give rise to justifiable doubts as to their independence or impartiality as contained in Fifth Schedule of the Act. Where Seventh Schedule gets attracted, party may straightway approach the Court

> under Section 14 of the Act, however, in cases of Fifth Schedule, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge made by the Arbitral Tribunal under Section 13 of the Act. 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 grounds on which such party had sought to challenge the authority of the arbitrator."

11. In the present case, mere bland averments of violation of para 22 of the Fifth Schedule of the Act have been made, but as already discussed above, the mere fact that the Ld. Arbitrator has done more than two arbitration proceedings for a person as an arbitrator, merely because of such fact without anything more, will not lead to the court holding that the Award be set aside on the ground of lack of 'impartiality or independence' of the arbitrator.

12. On behalf of the petitioners, reliance placed on the Orders passed in ***OMP(T) (COMM) No. 53/2018*** and in ***OMP(T)(COMM) No. 4/2018*** is misconceived because in those petitions, a challenge was laid to the jurisdiction of the Arbitrator by filing a petition under Section 4 of the Act, i.e. before the passing of the award, and therefore, the Orders passed in ***OMP(T) (COMM) No. 53/2018*** and in

OMP(T)(COMM) No. 4/2018 will have no bearing while deciding this petition filed under Section 34 of the Act. As stated above, challenge to the jurisdiction of the Arbitrator has to be immediately while entering appearance and before the written defence is filed, and since this has not been done in the present case by the petitioners, the petitioners cannot now after passing of the Award question the jurisdiction of the Ld. Arbitrator by alleging doubts as to the independence and impartiality of the Ld. Arbitrator. Also, and as held above, para 22 of the Fifth Schedule is only directory or persuasive and not absolute or mandatory.

13. In view of the aforesaid discussion, the challenge laid by the petitioners to the impugned Award on the ground of there being justifiable doubts as to the independence and impartiality of the Ld. Arbitrator has to fail and this petition is accordingly dismissed. All pending applications are also disposed of.

FEBRUARY 05, 2019 **VALMIKI J. MEHTA, J**