Former employee of one of the party to Arbitration can be an arbitrator in India

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Arbitration scenario in India got a great enthusiasm on 23rd October 2015 because of the amendments brought in to the Arbitration and Conciliation Act,1996 (Herein after "the Act"). One of the major changes brought in by the said amendment was relating to the measures to ensure impartiality and independence of Arbitrators. The Amendment introduced a mandatory declaration by the arbitrators declaring their relationship and connections with the lawyers & parties. The above declaration had to be made in a Format provided under Schedule VI of the Act. While making the above said declaration the potential arbitrator nominee requires to take into consideration, the list of relationships provided in Schedule V of the Act. The said Act in Schedule VII also has provided a list of relationships that are prohibited to be considered as an Arbitrator. The Above said Schedules V & VII are an inspiration from the "*IBA Rules on Conflict of interest in International Arbitrations".*

After the above said amendment, the legal impact of the above said Schedules were considered and interpreted by various Courts in India, including the Supreme Court of India. As of now, the settled law is that the relationships listed in Schedule V are only a guideline for the arbitrators, while making their declaration. The existence of a relationship mentioned in Schedule V does not per se act as a disqualification. Hence the challenging party should challenge the appointment of such an arbitrator by way of a petition filed under S.13 before the Arbitral tribunal only. In the said proceeding the challenging party is required to prove that there are justifiable doubts and reasons to come to a conclusion that the said arbitrator may be biased. In such a case, the said application can be considered by the Arbitral Tribunal and a decision can be taken. In case if the tribunal rejects the said challenge, there is no appeal provided in the Act. The only remedy available to the aggrieved party is to wait for the final arbitration award and it can have "bias of the arbitrator" as an additional ground while filing

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an application under S.34 seeking to set aside the award. But the relationships mentioned in Schedule VII are clear prohibition to be appointed as an arbitrator. In case, one arbitrator falls under any of the relationships mentioned under Schedule VII then the challenging party may approach the Hon'ble High Court under Section 14 of the Act and seek for removal of the said arbitrator.

In India, Government departments and Public Sector under takings normally nominate former officers or employees as their nominee to the Arbitration tribunal. In some cases, the Government departments and Public Sector Undertakings insist that both the parties must choose the arbitrators only from their Panel of Arbitrators. For example, Delhi Metro Rail Corporation had a panel of arbitrators who were former employees of Railways. The said condition was incorporated in the Arbitration clause. But the contractor challenged the said provision on the ground that it is violating S.12 of the Act. But finally, Supreme Court of India in DMRC case, upheld the said Arbitration clause after directing DMRC to include some former Judges, Lawyers and Chartered accountants in the panel and make it a broad-based panel. By allowing the above said panel of Former Railway Employees, the Court held that the Past employment in a parent department shall not be a disqualification to be considered as an arbitrator.

The Schedule VII of the Act prohibits an employment relationship *"The Arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party".* The above said item 1 of Schedule VII prohibits only a current employee from being appointed as an Arbitrator and not a former employee. In the matter of *HRD Corporation Limited Vs GAIL India Limited (2018) 12 SCC 471* the Supreme Court of India held that the professional relationship of giving a legal opinion by a former Judge cannot be taken as a business relationship mentioned Schedule VII. The Supreme Court of India further held that the party challenging the independence and impartiality of an arbitrator based on items mentioned in Schedule V, should challenge under S.13 before the same arbitral tribunal only. Only if any relationship falls under Schedule VII, the aggrieved party can approach the Court under S.14 and seek for removal of the arbitrator.

In a recent case *The Government of Haryana PWD Department Vs G.F.Toll Road Private Limited 2019(1)SCALE 134*, decided by the Supreme Court of India on 03.01.2019, it was held that an employee who worked with the Government 10 years back cannot be removed from the arbitral tribunal on the ground of justifiable reasons for impartiality and independence. Hence, now law relating to appointment of former employees as Arbitrators is settled.

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