

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
COMMERCIAL DIVISION
ORIGINAL SIDE

Present:

The Hon'ble Justice Shekhar B. Saraf

EC 137 of 2023

SREI EQUIPMENT FINANCE LIMITED

VERSUS

SADHAN MANDAL

For the Petitioner

:

Mr. Anik Banerjee, Adv.

Mr. Rajib Mullick, Adv.

Ms. Sonia Mukherjee, Adv.

For the Respondent

:

Mr. Priyankar Saha, Adv.

Last Heard On: March 30, 2023

Judgment On: April 11, 2023

Shekhar B. Saraf, J.:

1. The instant application has been filed under Section 36 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') by SREI Equipment Finance Limited (hereinafter referred to as the ('petitioner/award holder') seeking execution of an arbitral

award dated August 27, 2021 passed by the Sole Arbitrator Mr. Samrat Mukherjee whereby Mr. Sadhan Mandal ('respondent/award debtor') was directed to pay a sum of INR 65,41,583.12/- (Sixty Five Lakhs Forty One Thousand Five Hundred Eighty Three Rupees Twelve Paise Only) to the petitioner.

2. On July 15, 2018, a Master Lease Agreement was entered into by and between the award holder and the award debtor. By virtue of the said agreement, an amount of INR 87,83,410/- (Eighty Seven Lakhs Eighty Three Thousand Four Hundred Ten Rupees Only) was advanced by the award holder to the award debtor in order for the award debtor to hire on lease assets in the form of two vehicles namely Mahindra Balzo 31 Model Vehicles bearing i) Engine No. EDJZD13898 having registration No. WB-53C-1396, and ii) Engine No. ECJZG18865 having registration No. WB-53C-1495 along with their necessary accessories.
3. On grounds of the alleged failure of the award debtor to pay either the due amount or make over the possession of the assets, the award holder invoked arbitration on January 24, 2020 and appointed Mr. Samrat Mukherjee as the Sole Arbitrator in terms of the following arbitration clause contained in the agreement between the parties –

“18. n) Any disputes or differences arising out of or in connection with the agreement during its subsistence or

thereafter between the parties including any disputes and differences relating to the interpretation of the agreement or any clause thereof shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and rules framed thereunder and any amendment, modification, statutory enactment thereto from time to time and shall be referred to the sole Arbitration of an independent Arbitrator appointed by Lessor on its own or upon request of the Lessee and/or guarantors in writing upon intimation to all parties to this agreement.”

4. It is clear as a summer day from the submissions made by the parties and available materials on the record that the award holder unilaterally appointed the Sole Arbitrator, in terms of the aforementioned arbitration clause. The Sole Arbitrator so appointed proceeded to conduct the arbitral proceedings and subsequently also deliver an *ex-parte* award on August 27, 2021.
5. Normally, the Court would proceed to execute an arbitral award in the execution proceedings. But in a case like the instant one where the arbitral award is given by an arbitrator who has been unilaterally appointed by a party, the arbitral proceedings and the award itself stands vitiated as the arbitrator lacked inherent jurisdiction to adjudicate disputes between the parties. In fact, it is a settled principle of law that an arbitral award rendered by a person who is ineligible to act as an arbitrator cannot be considered as a valid arbitral award as the ineligibility of the said arbitrator goes to the root of his jurisdiction.

6. The Supreme Court in **Perkins Eastman Architects DPC & Anr. -v- HSCC (India) Ltd.** reported in **[2019] 17 S.C.R. 275** judicially expanded Schedule VII of the Act to include arbitrator(s) unilaterally appointed by one of the parties. The relevant paragraphs have been reproduced below :-

“15. We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd. where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Ltd., all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator.”

16. But, in our view that has to be the logical deduction from TRF Limited. Paragraph 50 of the decision shows that this Court was concerned with the issue, “whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator” The ineligibility referred to

therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited.”

Emphasis Added

7. I have dealt in detail with the fate of arbitral awards passed by unilaterally appointed arbitrators in the case of **Cholamandalam Investment and Finance Company Ltd. -v- Amrapali Enterprises and Another** reported in **2023 SCC OnLine Cal 605** wherein after examination of the Supreme Court’s pronouncements in **HRD Corporation -v- GAIL** reported in **(2018) 12 SCC 471**, **TRF Limited -v- Energo Engineering Projects Limited** reported in **(2017) 8 SCC 377**, **Perkins Eastman Architects DPC -v- HSCC (India) Ltd. (supra)** and **Bharat Broadband Network Ltd. -v- United Telecoms Ltd.** reported in

(2019) 5 SCC 755, I had concluded that arbitral awards passed by unilaterally appointed arbitrators do not carry the privilege of existence before the eyes of law and should be regarded as a nullity. In other words, there is *nothing* to execute in an execution application seeking enforcement of an arbitral award which has been passed by a unilaterally appointed arbitrator. I have delineated below the relevant paragraph of my judgment :-

“22. From the analysis undertaken above, the principles that emanated are extracted below:

a) As held in HRD Corp (supra), arbitrators falling under Schedule VII of the Act are ineligible as they lack inherent jurisdiction. Such ineligibility was extended to persons appointed by persons falling under Schedule VII of the Act in TRF Limited (supra). This ineligibility was ultimately extended to persons who are unilaterally appointed by one of the parties to the arbitration in Perkins (supra).

b) The Apex court has judicially expanded the Schedule VII of the Act to include persons unilaterally appointed by one of the parties vide its judgement in Perkins (supra) and/or persons appointed by persons falling under Schedule VII of the Act vide its judgement in TRF Limited (supra).

c) It is a settled principle of law that compliance with Section 12(5) read with Schedule VII is sine qua non for any arbitral reference to gain recognition and validity before the Courts. An arbitral reference which begins with an illegal act vitiates the entire arbitral proceedings from its inception and the same cannot be validated at any later stage. Thus, it would be a logical inference to consider such arbitral proceedings as void ab initio.

d) Awards passed by a unilaterally appointed arbitrator are nonest in the eyes of law. While Section 47 of the CPC is not directly applicable, guidance has to be sought from the jurisprudence of the Apex Court vis-à-vis decrees passed while lacking inherent jurisdiction. Such decrees do not exist in the

eyes of law and similarly awards passed while lacking inherent jurisdiction can be said to have never existed. Therefore, the parties would be free to re-agitate the matter.

e) This judgement is applicable to awards wherein the arbitral proceeding commenced post the 2015 amendment to the Act. It does not deal with proceedings having been initiated pre the 2015 amendment and concluding post the 2015 amendment.”

Emphasis Added

8. The petitioner/ award holder placed reliance on the judgement of a coordinate bench of this Court delivered in **McLeod Russel India Limited and Another -v- Aditya Birla Finance Limited and Others** reported in **2023 SCC OnLine Cal 330** to argue that not all unilateral appointments are invalid unless the arbitrator falls within the Seventh Schedule of the Act. The operative portion of the judgment is as follows :-

64. After discussing the import of section 12(5) read with the proviso, this Court finds and accordingly holds that section 12(5) is not applicable to this case since the alleged disqualification does not breach any one or more of the conflict-protections in the Entries of the Seventh Schedule. Even if it is assumed that the Arbitrator became ineligible by reason of the Seventh Schedule, the petitioners waived such disqualification by their express writings, conduct and agreement as envisaged under the proviso to section 12(5) of the Act.

9. However, to my mind, the said judgment does not apply to the factual situation in the instant case as the said decision was pronounced in an application seeking termination of the arbitrator under Section 14 of the Act; whereas this Court is dealing with an

execution application under Section 36 of the Act. In addition to this, the coordinate bench in the aforesaid case concluded that the petitioner therein had accorded waiver under Section 12(5) of the Act and had specifically affirmed the arbitrator's jurisdiction. One need not join issue with this conclusion as I am of view that the question of waiver and affirmation does not arise in the instant case due the arbitral award being *ex-parte*. Therefore, in my view, the decision in that case bears no ramifications on the instant one.

10. In light of the aforesaid discussions, EC/137/2023 is hereby dismissed. There shall be no order as to the costs.
11. The parties shall be at liberty to re-agitate their claims/counter-claims in properly constituted arbitration proceedings.
12. Urgent photostat-certified copy of this order, if applied for, should be readily made available to the parties on compliance with the requisite formalities. सत्यमेव जयते

(Shekhar B. Saraf, J.)