

2. It is the case of the petitioner that pursuant to the negotiations between the parties, the respondent no.1 had forwarded a draft agreement to the petitioner on 4th September, 2009 after making certain changes, additions, deletions in the draft agreement. According to the said draft agreement sent by the respondents to the petitioner, seat of the arbitration was Delhi. The respondent no.1 made further

changes in the draft agreement and sent another draft agreement dated 22nd October, 2009.

3. It is the case of the petitioner that ultimately the said draft agreement exchanged between the parties was signed by the respondent no.1 alone. The dispute arose between the parties. On 8th July, 2010, the respondent no.1 invoked the alleged arbitration agreement and proposed the name of the respondent no.2 as the sole arbitrator. The petitioner vide its letter dated 22nd July, 2010 objected to the appointment of the arbitrator nominated by the respondent no.1 as there was no concluded agreement between the parties. On 2nd September, 2010, the respondent no.2 entered upon the reference. On 16th September, 2010, the respondent no.1 filed statement of claim before the learned arbitrator. On 18th September, 2010, the petitioner addressed a letter to the learned arbitrator raising its objection to the appointment of the learned arbitrator. On 20th October, 2010 the petitioner filed an application under section 16(2) of the Arbitration and Conciliation Act inter alia disputing the jurisdiction of the learned arbitrator on various grounds including the existence of the arbitration agreement and also to the appointment of the learned arbitrator unilaterally by respondent no.1.

4. The learned arbitrator passed an order on the said application on 27th July, 2011 and rejected the said application under section 16(2) of the Arbitration Act and held that the reasonings concerning the rejection of the said application would be given in the arbitration award to be passed subsequently after hearing both parties on merits of the disputed matter.

5. On 17th April, 2012, the learned arbitrator rendered the said impugned award and directed the petitioner to pay Rs.19,00,071/- with interest. The said award has

been impugned by the petitioner under section 34 of the Arbitration Act on various grounds.

6. Learned counsel appearing for the petitioner invited my attention to the draft agreement exchanged between the parties and would submit that admittedly the petitioner had not signed any of such draft agreement including the draft agreement relied upon by the respondents. He submits that the respondent no.1 had unilaterally invoked the alleged arbitration agreement by notice dated 8th July, 2010. The petitioner replied to the said notice vide letter dated 22nd July, 2010 and challenged the authority of respondent no.1 to appoint an arbitrator in absence of any agreement between the parties. Learned counsel for the petitioner submits that though the learned arbitrator in the order passed under section 16 had directed that the reasons would be rendered in the final award, the learned arbitrator however has not rendered any reasons in the final award.

7. It is submitted by the learned counsel for the petitioner that since there was no arbitration agreement between the parties, the learned arbitrator had no jurisdiction to adjudicate upon the claims made by the respondent no.1. It is submitted that in any event since the petitioner had refused to appoint an arbitrator and did not agree to the name suggested by the respondent no.1, the respondent no.1 could not have appointed the respondent no.2 unilaterally as an arbitrator. He submits that the respondent no.1 ought to have filed an application under section 11(6) of the Arbitration and Conciliation Act, 1996 before the Hon'ble Chief Justice.

8. Learned counsel appearing for the respondent no.1 on the other hand submits that the learned arbitrator has already rejected the application filed by the

petitioner under section 16 as far back as on 27th July, 2011 and since the petitioner did not challenge the said decision rendered on 27th July, 2011, immediately by filing a petition, the petitioner cannot be allowed to challenge the said decision in the present proceedings.

9. The next submission of the learned counsel for the respondent no.1 is that though the respondent no.1 had given an opportunity to the petitioner to suggest a name for the purpose of appointment of a sole arbitrator, the petitioner did not nominate any arbitrator or did not suggest any other name of the arbitrator, the appointment made by the respondent no.1 of the arbitrator was in order and he was entitled to act as the sole arbitrator.

10. It is not in dispute that the draft agreement relied upon by the respondent no.1 was not signed by the petitioner. In my view, the said draft agreement was not an agreement as defined under section 7 of the Arbitration and Conciliation Act, 1996. The learned arbitrator did not have jurisdiction to adjudicate upon the disputes made by the respondent no.1 on that ground alone.

11. Be that as it may, the fact remains that the petitioner had disputed the authority of the respondent no.1 to appoint any arbitrator for want of existence of the arbitration agreement or even otherwise. Even if there was any arbitration agreement entered into between the parties, the respondent no.1 could not have appointed any arbitrator unilaterally. The respondent no.1 was required to file an application under section 11(6) of the Arbitration and Conciliation Act, 1996 before the Chief Justice of this Court for appointment of an arbitrator. The appointment of the learned arbitrator by the respondent no.1 unilaterally was thus illegal and without jurisdiction. In my view, the entire award thus rendered by the

learned arbitrator is without jurisdiction and nullity.

12. Insofar as submission of the learned counsel for the respondent no.1 that though an opportunity was given by the respondent no.1 to the petitioner to appoint an arbitrator and since the petitioner did not appoint any arbitrator, the respondent no.1 could have appointed an arbitrator unilaterally is concerned, this submission of the learned counsel for the respondent no.1 is totally contrary to section 11 of the Arbitration and Conciliation Act, 1996. A perusal of the so called arbitration agreement in the draft agreement also does not empower the respondent no.1 to appoint an arbitrator unilaterally.

13. Insofar as submission of the learned counsel for the respondent no.1 that since the petitioner ought to have challenged the impugned order passed by the learned arbitrator under section 16 when the said order was passed by filing an arbitration petition and not having challenged, the same cannot be allowed to be challenged at this stage in this petition is concerned, the said contention is totally frivolous and contrary to section 16(5) read with section 16(6) read and section 34 of the Arbitration and Conciliation Act, 1996.

14. Under section 16(5) if an arbitrator rejects the application made by a party raising issue of jurisdiction, he has to continue with the arbitral proceedings and make an arbitral award. Under section 16(6) of the Arbitration Act if such party is aggrieved by such an arbitral award he has to make an application for setting aside the said arbitral award in accordance with section 34. The learned arbitrator has now rendered an award which has been rightly impugned by the petitioner under section 34 of the Arbitration and Conciliation Act, 1996 alongwith the said order. In my view there is thus no merit in this submission of the learned counsel for the

respondent no.1. A perusal of the award indicates that the learned arbitrator has not given any reasons in the impugned award on the issue of jurisdiction.

15. In my view since the arbitration agreement between the parties did not exist and in any event since the appointment of the learned arbitrator was made unilaterally by the respondent no.1 illegally, on that ground the award is set aside. I have therefore not heard the learned counsel for the petitioner on the other issues raised by the petitioner in the arbitration petition.

16. I, therefore, pass the following order :-

- (a) Impugned award dated 17th April, 2012 is set aside.
 - (b) Petition is made absolute in the aforesaid terms.
- There shall be no order as to costs.

[R.D. DHANUKA, J.]