



C.M.A.No.1586 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 15.09.2022

PRONOUNCED ON:02.11.2022

CORAM

THE HON'BLE Ms.JUSTICE P.T.ASHA

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&

C.M.P.Nos.11672 of 2020 and 8268 of 2021

N.Ramasamy
Proprietor, Sri Thenandal Films,
Old No.19, New No.14, Saraswathi Street,
Mahalingapuram, Nungambakkam,
Chennai - 600034

... Appellant/Respondent/Respondent

Vs.

M/s.Marina Holdings
Represented by its partner
Mr.Rajkumar Sethupathy,
Level 7A, Capital Towers,
555, Anna Salai,
Teynampet, Chennai - 18

... Respondent/Claimant/Applicant



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PRAYER : This Civil Miscellaneous Appeal is filed under Order 37 (2) of the Arbitration and Conciliation Act, 1996 to set aside the impugned interim order dated 28.07.2020 in I.A.No.1/2020 in Arbitration Original Petition No.1/2020 passed by the Sole Arbitrator.

For Appellant : Mr.S.Karthikei Balan

For Respondents : Mr.Ravi for M/s. Rugan and Arya.

J U D G M E N T

The respondent before the Arbitral Tribunal has filed the above appeal challenging the interim order of attachment passed under Section 17 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the A & C Act. The brief facts which has culminated in the filing of this appeal is herein below stated.

Facts leading to the filing of the appeal:-

2. The appellant herein who is a proprietor of a Film Company had borrowed money from the respondent herein. Towards the borrowal and the subsequent extensions, the appellant and the respondent had entered



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into various agreements. The first of which was on 18.01.2017, this agreement was extended by another agreement dated 21.04.2017 followed by other agreements dated 14.06.2017, 21.07.2017, 17.10.2017, 22.01.2018 and 27.03.2019. Under all the above agreements the parties had besides other clauses agreed that in the event of any dispute between the two parties the same would be resolved through arbitration and they had jointly nominated one Mr.V.Bhiman, Advocate as their Arbitrator. The venue for arbitration was fixed at Chennai.

3. Under the agreement dated 22.01.2018, the appellant herein had deposited the original deeds relating to his property with an intent to create an equitable mortgage. That the equitable mortgage had been created is once again confirmed in the subsequent agreement dated 27.03.2019. The appellant herein however failed to make the payment within any of the agreed dates which has in fact led to the execution of the periodic extension agreements. Thereafter the appellant had issued two cheques one dated 27.03.2019 for a sum of Rs.1,01,77,708/- constituting the interest till 31.03.2019 and a cheque for sum of



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Rs.7,50,00,000/- constituting the principal. Both the cheques had been dishonoured compelling the respondent to issue a legal notice dated 12.07.2019. The said notice was returned with the endorsement "Unclaimed". Thereafter the respondent had issued another notice dated 19.07.2019, wherein the respondent had invoked the arbitration clause and nominated the arbitrator agreed upon by both the parties, namely, Mr.V.Bhiman. This notice has been received by the appellant herein on 22.07.2019. However, there was no response to the said notice.

4. The respondent herein had thereafter filed Application No.5210 of 2019 under Section 9 of the A & C Act for a direction to the appellant to furnish security to the tune of Rs.9,21,67,492/- within a date to be fixed by the Court failing which seeking an attachment before judgement of the properties described in the schedule to the Judges summons. The property that has been shown in the schedule to the Judges summons were the properties in respect of which the appellant had created an equitable mortgage in favour of the respondent. This Court by an order dated 29.07.2019 was pleased to direct the respondent to furnish security



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to the tune of Rs.9,21,67,492/- on or before 19.08.2019 failing which the Court had directed that the matter be listed for passing further orders of attachment. Thereafter on 12.03.2020, since the orders for furnishing security had not been complied with, the matter was listed before the Court and the Court had directed an interim order of attachment and had also given a direction that the respondent herein who was the applicant before this Court should initiate arbitration proceedings within a period of 3 months failing which the interim order granted would automatically stands vacated. Since the arbitrator had already been appointed in keeping with the arbitral clauses of the agreement, the applicant had filed a claim statement dated 10.06.2020. Along with the claim statement the respondent had also filed three interlocutory applications i.e; I.A.Nos.1 to 3 of 2020 for the following reliefs respectively:-

"a. direct the Respondent herein to furnish security for a sum of Rs. 10,96,68,057/-, being the sums due to this Applicant, within a certain date to be fixed by this Hon'ble Tribunal failing which to Attach Before Judgment the schedule mentioned properties;



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b. grant an interim order extending the order dated 12.03.2020, already granted by the Hon'ble High Court in A.No.5210/2019, restraining the Respondents/Respondents, their men, agents, and any one claiming under or through them from alienating or otherwise encumbering the schedule mentioned properties in any manner, pending disposal of the Arbitration;

c. grant a temporary injunction restraining the Respondent or anyone claiming under or through him directly or under any name or banner whatsoever from releasing exhibiting or exploiting the said film, "Naan Rudran", produced by the Respondents and directed by Dhanush, starring Nagarjuna, S.J.Suryah, Aditi Rao Hydari and others, in any manner, in any format, not limited to theatrically, via satellite or OTT platforms, anywhere in the World, pending disposal of the arbitration;

5. In the affidavit filed in support of the said application, the respondent had in clear and categoric terms once again stated that the respondent had set in motion the arbitral proceedings by issuing the



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notice dated 19.07.2019 informing the appellant about the intention to refer the dispute for arbitration. The respondent had also set out in the said affidavit that the appellant herein was hugely indebted and the appellant was taking hectic steps to remove the property out of the reach of his creditors. The respondent had also stated that the appellant had deliberately not registered the equitable mortgage deed as it was his intention right from the inception to defeat the right of this respondent. Therefore, the respondent had stated that he had moved this Court by filing Application No.5210 of 2019 and had set out the orders that had been passed on 29.07.2019 and 12.03.2020 and the applicant/respondent had sought for the interim reliefs set out herein above.

6. On 10.06.2020, the respondent herein had forwarded the claim petition with all its attendant documents to the Arbitrator with a copy marked to the appellant herein through e-mail and through post. On 12.06.2020, the learned Arbitrator has passed orders in I.A.Nos.1 to 3 of 2020 in Arbitration Original Petition No.1 of 2020. On the very same day, the said order was forwarded to the appellant as well as to the



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respondent. Thereafter, it appears that the respondent's counsel had been sending WhatsApp messages as well as e-mails to the appellant informing him about the hearing dates. In response to an SMS on 18.06.2020, wherein the appellant was informed that the next date of hearing was 19.06.2020, the appellant had appeared through video conferencing before the Arbitral Tribunal on his mobile number seeking time, since his counsel was out of town. During the video conferencing dated 19.06.2020, the appellant had sought time to settle the issue. The matter was thereupon adjourned to 03.07.2020. Thereafter, the appellant had not appeared for any of the subsequent proceedings. Finally, for the hearing date 20.07.2020, the learned Arbitrator had directed the respondent herein to send a notice to the appellant. The said notice was received at the appellant's address at Mahalingapuram.

8. Thereafter, a legal notice dated 19.07.2020 was issued by the counsel for the appellant wherein for the first time the appellant had contended that the arbitrator had been unilaterally appointed without notice to the appellant. Further, the appellant would deny receipt of the



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notices. The appellant had stated that the respondent had no authority to appoint an arbitrator and the same is in violation of Section 11 (5) of the A & C Act. The passing of the interim order, therefore, was also in violation of Section 18 of the A & C Act, since the respondent was not given an opportunity. The appellant had further contended that the arbitral proceedings would commence with the issue of a request for the appointment of an arbitrator and such a request has not emanated from the respondent. The contention of the appellant was that the application for furnishing security filed before this Court was in violation of Section 21 of the A & C Act. The appellant, therefore, informed the Arbitrator that since he was unilaterally appointed they were opposing the arbitral hearing being presided over by the learned arbitrator and had called upon the arbitrator to drop all proceedings as the same is illegal and unsustainable.

9. The appellant had further stated that they were reserving the right to question the action before the appropriate forum and to challenge the appointment of the arbitrator as also the arbitral proceedings.



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Thereafter, the learned Arbitrator had sent notices informing the appellant about the hearing dates and in the proceedings dated 20.07.2020, the Arbitrator had taken note of the fact that the counsel who had issued the notice refused to represent the appellant, though he had in his notice dated 19.07.2020 stated that he was making those statements on the instructions of his client. The arbitrator had therefore adjourned the proceedings to 22.07.2020. Once again there was no representation. On 22.07.2020, the learned Arbitrator had heard the counsel for the respondent who had also submitted the written submissions and reserved orders. On 28.07.2020, the learned Arbitrator had passed the order allowing the applications in I.A.No.1 and I.A.No.3 of 2020 as regards the I.A.No.2 of 2020, the learned Arbitrator had observed that since the properties were being attached pursuant to the orders in I.A.No.1 of 2020 there was no necessity to pass orders in IA.No.2 of 2020. It is this order in I.A.No.1 of 2020 that is the subject matter of challenge before this Court.



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Submissions:

10. Mr.S.Karthikei Balan, learned counsel appearing on behalf of the appellant would challenge the order on the following grounds that :-

1. There was no advance notice of hearing.
2. Arbitrator has failed to make the declaration as contemplated under Section 12(5) of the A & C Act.
3. The property which has been attached is not the exclusive property of the appellant and that it was a joint family property.
4. The order has been passed after the lapse of 90 days pursuant to the order dated 12.03.2020 in Application No.5210 of 2019.

11. The learned counsel would submit that even as late as on 12.03.2020, the learned Arbitrator had not been appointed which is evident from a reading of the order which states that within 3 months from the date of the receipt of the order, an Arbitrator has to be appointed



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by the respondent herein. He would submit that without issuing a notice under Section 21 of the Arbitration and Conciliation Act informing the appointment of an Arbitrator and seeking the consent from the appellant, the respondent herein had straightway filed a claim petition and the interlocutory applications before the Arbitral Tribunal which has been unilaterally constituted by the respondent herein. He would submit that this is a clear violation of the provisions of Section 11 (5) of the A & C Act, 1996. It is his argument that every Arbitral proceeding commences with the issue of notice appointing an Arbitrator which in the instant case has not taken place. He would submit that the constitution of the Arbitral Tribunal is not in accordance with the orders passed in Application Number 5210 of 2019 dated 12.03.2020.

12. That apart, he would submit that the Arbitrator who has been appointed has not filed the mandatory declaration as contemplated under Section 12(5) of the A & C Act. In support of the said arguments, he would rely upon the judgment reported in *2019 SCC Online SC 1517 - Perkins Eastman Architects DPC and Another Vs. HSCC (India) Ltd.,*



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with emphasis on Paragraph Nos.21 and 30 therein. He would also rely upon the un-reported judgements of the Punjab and Haryana High Court reported as *Arbitration Case No.166 of 2016 (O & M) - Reliance Infrastructure Limited vs. Haryana Power Generation Corporation Limited* relying upon the Paragraphs Nos.28 and 29 therein and the Bombay High Court reported as Commercial Arbitration Petition **(L.)No.23500 of 2021 - Godrej Properties Limited Vs. Goldbricks Infrastructure Private Limited** where the Bench was considering the question as to whether the Arbitrator can pass an ex parte interim order. In this regard he would rely upon Paragraph Nos.8 and 10 therein.

13. Per contra, Mr.K.Ravi, learned counsel appearing on behalf of the respondent would submit that the appeal was not maintainable in as much as the appellant has not challenged the interim order originally passed on 12.06.2020 wherein, the orders of attachment has been passed. He would further submit that the allegation of the appellant that the respondent has not invoked the arbitration clause and the proceedings in the manner known to law is without basis. He would submit that the



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parties have agreed upon a named Arbitrator. The respondent had therefore invoked the Arbitration Clause and submitted the dispute to the Arbitrator so named by consent.

14. He would further submit that by a legal notice dated 19.07.2019 which was received by the appellant on 22.07.2019, the respondent had invoked the arbitration clause. After the notice was issued, the respondent had followed it up with an application for attachment before judgement in Application Number 5210 of 2019. Even in the said application, the respondent has referred to the invocation of the arbitral clause by the respondent herein. He would submit that the observation of this Court in Application Number 5210 of 2019 in the order dated 12.03.2020 is only on account of the fact that both the parties have not brought it to the notice of the Court that Arbitral proceedings in the instant case had already been commenced. He would further submit that even in the order dated 12.03.2020, an interim order of attachment was granted by this Court till such time as the applicant moves the arbitral proceeding. He would therefore submit that the argument that



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Section 21 of the A & C Act has not been complied with is puerile.

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15. As regards the mandatory disclosure under Section 12 (5) of the A & C Act, the learned counsel for the respondent would submit that the declaration is contemplated only with reference to an unnamed Arbitrator who is sought to be appointed. In the instant case, the parties had agreed upon the person who had to be appointed as an Arbitrator and having so agreed the appellant cannot turn around and state that the mandatory declaration under Section 12 (5) of the A & C Act has not been complied with.

16. As regards the argument that the Arbitral Tribunal is not empowered to pass an ex parte interim order, the learned counsel would submit that Section 17 of the amended A & C Act is akin to the provisions of Section 9 of the A & C Act. The respondent herein had filed the claim statement and simultaneously filed the interlocutory applications. The language of Section 17 would clearly indicate that the same is *in pari materia* to the provisions of Section 9 of the A & C Act. The Arbitral Tribunal is given wide powers to grant interim orders during



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the arbitral proceedings or after the award is made but before it is enforced. This Section further reads that in exercising its jurisdiction under Section 17 of the A & C Act, the Arbitral Tribunal is clothed with the very same powers as that of the Court under Section 9. Therefore, it is the contention of the learned counsel that the constitution of the Arbitral Tribunal and the proceedings conducted therein is very much in order.

17. He would further argue that the Arbitral Tribunal has passed the order of attachment giving reasons for the same. He would submit that the conduct of the appellant pending these proceedings before the Court would itself demonstrate that the intention of the appellant is to somehow deprive the respondent, his creditor of its rightful dues. He would submit that despite orders of attachment the appellant has sold the property to a third party and there are separate proceedings initiated in respect of the same.



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Discussions:

18. Heard the counsel and perused the records.

19. The main argument that has been put forward by the appellant is that there is no proper invocation of the arbitral proceedings and the Arbitrator has not made the mandatory declaration, consequently, the orders passed by the Arbitral Tribunal is without jurisdiction and void ab initio. The learned counsel for the appellant has not addressed any arguments with reference to the correctness of the order under appeal except for questioning the same on technical grounds. The records would show that even as early as on 19.07.2019, the respondent herein had invoked the arbitration clause and appointed the named arbitrator. It would be useful to just refer to the arbitration clause which has been incorporated in all the agreements. In the first agreement dated 18.01.2017, clause 8 therein is the relevant clause which would read as follows:-



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" In the event of a dispute the parties herein nominate Mr. V.Bhiman, Advocate, having office at No.330/168, Thambu Chetty Street, Chennai 600001 to be the Sole Arbitrator to decide the dispute in terms of the Arbitration and Conciliation Act, 1996. The Venue of Arbitration shall be Chennai."

20. In the last of the agreement dated 27.03.2019, Clause 8 therein would state that the parties would agree and abide by all the terms and conditions contained in the agreement dated 22.01.2018 including the charge created over the property. Clause 9 of the agreement dated 22.01.2018 is extracted herein below:-

" In the event of a dispute the parties herein nominate Mr. V.Bhiman, Advocate, having office at No.330/168, Thambu Chetty Street, Chennai 600001 to be the Sole Arbitrator to decide the dispute in terms of the Arbitration and Conciliation Act, 1996. The Venue of Arbitration shall be Chennai."

This would show that the very same arbitral clause as provided in the 1st agreement dated 18.01.2017 has been reproduced in this agreement.



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Therefore, it is clear that the parties had consented to refer their dispute to a named arbitrator not once but in all the agreements.

21. That apart in the affidavit filed in support of the application in A.No.5210 of 2019, the respondent herein had made the following statement in Paragraph No.11 therein:

" The Applicant has set in motion arbitral proceedings by issuing a notice dated 19.07.2019 to the respondent. to submit the dispute to the sole Arbitrator name in Clause 9 of the agreement dated 22.01.2018."

The applicant who had entered appearance through counsel in the above matter had not contested the appointment nor denied the above statement.

22. The named Arbitrator has already been agreed upon by both parties. Even assuming without admitting that the procedure contemplated under Section 12 (1) to (4) has not been followed then the appellant herein ought to have filed an application under Section 13 of the A & C Act before the Arbitral Tribunal. The appellant who had appeared in person in the hearing on 19.06.2020 before the learned



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Arbitrator had only sought for time for settling the issue. He had not questioned the constitution of the Arbitral Tribunal. Though in the legal notice issued by the learned counsel for the appellant on 19.07.2020 he has contended that he would be taking out an application to challenge the appointment, such a step has not been initiated by the appellant herein. In fact, in the above notice the counsel had stated as follows:

" My client reserves his rights to question all such action before the appropriate forum and also challenge the appointment of arbitrator and initiation of the present alleged arbitral proceedings as the same is void ab initio."

In fact nowhere in their notice had the appellant raised an issue about the non-filing of the declaration under Section 12 (1) of the A & C Act.

23. Despite making such a categorical statement, steps in this regard has not been initiated and the appellant has allowed the order dated 28.07.2020 to be passed. In fact, in the e-mail dated 20.07.2020, addressed to the Arbitrator and the respondent, the counsel for the appellant has made the following statement.



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" I have not entered any appearance before the arbitrator and it is very strange to receive an email from the arbitrator that I am representing my client in the arbitration. Contents of the trailing email sent by your good self is denied in toto. I have sent a reply legal notice to the advocates only as the same was received by my client."

24. Therefore, the appellant cannot turn around and now question the proceeding before the Arbitrator. In fact, by not questioning the appointment of the Arbitrator in the manner provided under the A & C Act, the appellant has acquiesced to the mandate of the Arbitrator.

25. The Judgement referred to by the appellant are all cases where there was no named arbitrator. In the case of the Hon'ble Supreme Court reported in **(2019) SCC Online SC 1517 - Perkins Eastman Architects DPC and Another Vs. HSCC (India) Ltd.**, the Hon'ble Supreme Court was considering the correctness of the arbitration clause which gave an authority to the Chairman and Managing Director of the claimants to



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appoint a sole arbitrator. While discussing the provisions of Section 12 (5) of the Act, the Bench had stated that there could be situations where the Managing Director could be an Arbitrator or he could nominate another person as an Arbitrator. The Bench had held as follows:-

" 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 recognized by the decision of this Court in TRF Limited."

26. In the instant case, the right to appoint the arbitrator has been exercised by both parties and an Arbitrator has been named by consent. In the judgement of the Punjab and Haryana High Court stated supra, also dealt with the appointment of an Arbitrator by the Respondent/ Corporation where the right to appoint an Arbitrator was vested with the Government of Haryana. The Government of Haryana being a party to



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the arbitral proceedings gets an upper hand over the respondent since the Arbitrator that they would appoint would definitely be a cause of concern to the other side. However, the reading of the provisions of Section 12 of the A & C Act does not make the appointment of an Arbitrator by one party per-se invalid. The Arbitrator would become ineligible only if the person opposing the appointment is able to establish a justifiable doubt as to his independence or impartiality or if the Arbitrator comes within the prohibited limit as shown in the 7th schedule of the A & C Act. In its judgment in ***HRD Corporation vs. GAIL (India) Ltd., [2018 (12) SCC 471]***, the Hon'ble Supreme Court has brought out the distinction between ineligibility as set out in Section 12(5) read with the 7th Schedule and challenge on the ground stated in the 5th Schedule regarding justifiable doubts on his independence and impartiality and the recourse to be adopted by the person offering such appointment as follows :

“12. 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



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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.”



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The need to spell out the reasons for questioning the appointment of the Arbitrator therefore assumes significance to decide as to whether the Court has to treat it as one questioning the very eligibility of the Arbitrator or whether it is a justifiable doubt about his independence or impartiality since the mode of challenge is different for the two. Further, in the case of ineligibility, there can be no deemed waiver but only an express waiver. This position has been laid down in the judgment in ***Broadband Network Ltd., vs. United Telecoms Ltd., [(2019) 5 SCC 755]*** in paragraph 20 as follows :

“20. This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an “express agreement in writing”. The expression “express agreement in writing” refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct.”



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In the case of justifiable doubts as to independence and impartiality, there can be a deemed waiver since the challenge is under Section 12(1) to 12(4) read with Section 13 of the A& C Act. Section 13(2) contemplates a challenge within a period of 15 days from the date of becoming aware of the constitution of the Arbitral Tribunal or after becoming aware of the circumstances referred to in Section 12(3) of the A & C Act. In the case on hand, the Arbitral Tribunal has been constituted under the appointment itself, as the parties have agreed that Mr.Bhiman would be the Arbitrator. Therefore, it was only the reference of the dispute that remained. Such a reference has been made vide the legal notice dated 19.07.2019 and this notice has been received by the applicant on 22.07.2019. Further, as stated earlier, the appellant has not set out his objections to the reference of the dispute to the name Arbitrator. Therefore, the first argument with reference to the appointment of the Arbitral Tribunal is rejected.

27. Once the constitution of the Arbitral Tribunal is upheld, the Court has to only consider the correctness of the order passed. As



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already submitted, no arguments were made in this regard. However, it has been brought to the notice of the Court that despite orders of attachment having been granted by this Court in the earlier proceedings in Application No.5210 of 2019 and the order of the Arbitral Tribunal, the appellant has alienated the property to third parties despite the fact that the attachment has been entered in the register of the registering authority. Consequently, I see no reason to interfere with the orders passed by the Arbitral Tribunal and therefore, the Civil Miscellaneous Appeal fails and is dismissed. No Costs. Consequently, connected Miscellaneous Petitions are closed, if any.

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speaking Order : Yes / No
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V.R.Section,
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Pre-delivery Judgment in
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