ODC 2

ORDER SHEET
IA NO:GA/1/2022
In
EC/311/2021
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

POONAWALLA FINCORP LIMITED
VS
PARASNATH DISTRIBUTORS AND ORS.

BEFORE:
The Hon'ble JUSTICE SHEKHAR B. SARAF
Date: 25th August, 2023.

Appearance:
Mr. Paritosh Sinha, Adv.
Mr. Priyankar Saha, Adv.
Mr. K.K. Pandey, Adv.
Ms. Enakshi Saha, Adv.
...for the petitioner

Mr. Rohit Banerjee, Adv.
Mr. Altamash Alin, Adv.
Mr. Aditya Mondal, Adv.
...for the respondent

The Court: Heard counsel appearing on behalf of the parties.

Mr. Priyankar Saha, counsel appearing on behalf of the petitioner in the execution application has conceded the fact that the award though sent to the award-debtor, proof of actual service upon the respondent award-debtor is not available. It appears from the records that in spite of non-service of award, the execution application was filed and an order of attachment was also obtained by the petitioner. Such order of attachment continues till date and the petitioner is suffering for almost six months with such an attachment order. Mr. Priyankar Saha has fairly submitted that the execution application was wrongly filed and wishes to now withdraw the same.

This Court has also observed that the appointment of the Arbitrator was a unilateral appointment and any award that may have been passed by such an Arbitrator who is unilaterally appointed is clearly a nullity and cannot be enforced. This issue has been dealt by me in detail in the judgment delivered in ***Cholamandalam Investment and Finance Company Ltd. vs. Amrapali Enterprises and Another*** reported in *2023 SCC Online Cal 605*. Upon examination of various judgments of the Supreme Court, this Court has laid down the principles that emanated from the same. Paragraph 24 of the said judgment is delineated below:

> *"24. From the analysis undertaken above, the principles that emanated and 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 judgment in Perkins (supra) and/or persons appointed by persons falling under Schedule VII of the Act vide its judgment 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 non-est 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) *The judgment 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."*

It may be further pointed out that this Court in the said judgment had penned an epilogue that is relevant to the law of arbitration and specifically to the reasoning behind the judgment in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd.*** reported in *(2019) 17 SCR 275* passed by the said Supreme Court. The said epilogue is delineated below:

> *"25. The law of arbitration is an alternative dispute resolution mechanism that was brought into the statute books in order to facilitate a quick and efficient method of dispute resolution. The raison d'être of arbitration is to provide liberty to parties wherein they can decide upon various facets of dispute resolution. Ergo, party autonomy is sine qua non of the law of arbitration. However, a virus had emerged wherein finance companies and banks were facilitating appointment of a small cable of arbitrators in hundreds of cases for themselves. The awards passed were soiled and tainted with bias. It was clear that the borrower was the underdog as he had no choice in the matter of appointment of arbitrator and the very concept of impartiality was given a go bye. In order to overcome this issue, the legislative amendments of 2015 and the judicial pronouncements on such amendments by the Apex Court have brought in a level playing field so that no party could have a higher bargaining power in the decision making process for appointment of an arbitrator. Such interpretation, as discussed above, has ensured complete impartiality in such appointments and served the intended*

purpose of saving the 'small guy' while counter-balancing party autonomy. In conclusion, one may say that the apparent impartiality that existed providing power to one of the parties to choose the arbitrator unilaterally has been taken away as the same was fraught with inequalities at the very threshold of the initiation of the arbitration proceedings. However, the proviso to Section 12(5) of the Act allows for waiver but clarifies that the same has to be explicit and in writing.

26. Impartiality as discussed is the paramount principle of arbitral proceedings and something which the Courts have to safeguard at every stage of such proceedings. Even at the stage of execution, the lady of justice cannot turn a blind eye and let one party run over the other. The people vest faith in the Court to safeguard their rights and uphold the principles of natural justice, irrespective of procedural hurdles. Whatever the case may be, including an execution case where Courts are expected to simply enforce the award without further probing, impartiality as a principle cannot be railroaded. Shackles of procedural limitation in such cases will not prevent parties from seeking the immunity of the Court. Parties making such unilateral appointments couch behind procedural technicalities to shield their unlawful act and reap the fruit of their own mischief. Accordingly, even if an award is not set side under the procedure established in section 34 of the Act, the court. at the stage of execution can step in and

> *declare a 'unilateral appointment award' as non-est in law, declare the same as a nullity and direct parties to re-agitate their issues before a new arbitral tribunal constituted in accordance with law."*

In any event, since the petitioner does not wish to proceed with this execution application, the same is dismissed for non-prosecution. However, since the petitioner has wrongfully filed the execution application prematurely and obtained an attachment order against the respondent no.2, this Court is of the view that cost should be imposed upon the petitioner. Accordingly, a cost of Rs.20,000/- is imposed on the petitioner which should be paid to the respondent no.2 within two weeks from date.

Affidavit of compliance to be filed in this Court within three weeks from date.

In light of the above, IA No.GA/1/2022 is treated as disposed of.

(SHEKHAR B. SARAF, J.)

B.Pal