

‘17. ARBITRATION-

Any dispute or difference which may arise between the partners concerning the partnership affairs or any clause herein contained in this deed or right or liabilities of any partner hereto shall be referred to an ‘ARBITRATOR’ appointed with the consent of all partners and his/her decision shall be final and binding on both of them.’

3. It is brought to the notice of this Court that subsequently, a deed of dissolution of partnership was executed between the parties, which also contained an arbitration clause, which reads as follows:

‘09. This agreement will be binding upon all the parts and their legal heirs and successor, if any dispute arises then will be referred to an arbitrators to be appointed by all the partners and whose decision will be binding on all the parties.’

4. It appears that disputes arose between the parties, as a consequence of which, the respondent sent a notice to the appellants, raising certain claims and he also invoked the arbitration clause, proposing appointment of an advocate as a sole arbitrator. As per the copies of certain documents brought to the notice of this Court on behalf of the respondent, it appears that the appellants refused to accept the said notice.

5. Thereafter, the respondent appointed the said advocate, mentioned in the notice issued to the appellants, as the sole arbitrator, who entered upon reference and issued notice to the appellants. It appears that initially, the appellant No.1 sought adjournments and thereafter, on 20th November, 2015, she raised a specific objection to the appointment of the sole arbitrator, on the ground that she had never consented to such an appointment. The said communication sent on behalf of the appellant No.1 to the arbitrator, referred to the arbitration clause contained in the deed of dissolution. It

appears that the said objection was rejected by the arbitrator and the matter proceeded further, eventually leading to pronouncement of arbitral award dated 19th September, 2016, whereby the claims of the respondent were granted. The appellants were directed to handover possession of half share of shop No.2, failing which, it was directed that the respondent would be entitled to recover Rs.1.85 crores from the appellants.

6. Aggrieved by the said award, the appellants filed an application under Section 34 of the aforesaid Act, raising specific grounds of challenge. In the impugned judgment and award, the District Court recorded the specific objections raised on behalf of the appellants in paragraph No.13 of the judgment and order. All the objections raised on behalf of the appellants were rejected and the application stood dismissed.

7. Aggrieved by the impugned judgment and order passed by the District Court, the appellants filed the present appeal, wherein the respondent appeared through counsel. The appeal was taken up for final disposal with the consent of the learned counsel for the rival parties.

8. Although a prayer was made by the learned counsel for the respondent to permit him to file a detailed reply, since the copies of all the necessary documents were placed before this Court, the appeal was taken up for final disposal.

9. Mr. Bhatt, learned counsel appearing for the appellants submits that the impugned judgment and order of the District Court deserves to be set aside. The application filed under Section 34 of the said Act, deserves to be allowed and the impugned award passed by the sole arbitrator on 19th

September, 2016, deserves to be set aside. The principal ground raised on behalf of the appellants is that in the present case, the above-quoted arbitration clauses found in the partnership deed and the deed of dissolution, would show that the arbitrator was to be appointed by the consent of the parties. The record shows that the respondent had issued notice, proposing the appointment of an advocate as the sole arbitrator. It was further stated that even if the record shows that the notice was refused by the appellants and the agreed procedure for the appointment of arbitrator had failed, the respondent ought to have approached this Court by filing an application under Section 11 of the said Act for appointment of arbitrator. Instead, the respondent unilaterally appointed the sole arbitrator, who proceeded with the matter.

10. It was further submitted that the documents on record do show that even if initially, the appellants simply sought adjournments on the ground that their advocate was unable to appear on specific dates, on 20th November, 2015, the appellant No.1 had specifically raised objection, challenging the jurisdiction of the sole arbitrator to proceed with the matter. It is submitted that the said objection was rejected and it was only in the application filed under Section 34 of the said Act, that the appellants could have raised their grievance in that regard.

11. It was further submitted that according to the appellants, the operative portion of the impugned award was based on the contents of the dissolution deed, a crucial clause of which, was forged by the respondent. On this ground also, it was submitted that the impugned award was rendered unsustainable. It is the case of the appellants that the objection regarding jurisdiction, raised before the District Court, was not dealt with in an

appropriate manner and the impugned award stood confirmed. The learned counsel for the appellants placed reliance on the judgment of the Supreme Court, in the case of *Perkins Eastman Architects DPC and another v/s. HSCC (INDIA) Limited*, [(2020) 20 SCC 760], to claim that such unilateral appointment of the arbitrator was not only in the teeth of the arbitration clause, but it was also hit by Section 12(5) of the aforesaid Act. It was submitted that the respondent, not having approached this Court by filing application under Section 11 of the said Act, rendered the award without jurisdiction, which the District Court failed to appreciate. It was submitted that the appeal deserved to be allowed.

12. On the other hand, Mr. Patil, learned counsel appearing for the respondent submits that all relevant documents were not placed before this Court and an impression was sought to be created, as if the sole arbitrator was unilaterally appointed by the respondent. By inviting attention of this Court to the copies of the relevant documents, it was stated that the appellants had refused to accept the notice issued by the respondent and that in these circumstances, appointment of arbitrator could not be found fault with. It was further submitted that by the conduct of the appellants of participating in the arbitral proceeding and appearing before the sole arbitrator, the appellants had given up their right to challenge the impugned award on the ground of jurisdiction and therefore, the District Court was justified in dismissing the application filed by the appellants. It was further submitted that the allegation regarding forgery, is without any substance and that therefore, the District Court was justified in dismissing the application filed under Section 34 of the said Act, thereby confirming the award passed by the sole arbitrator. The appellants failed to demonstrate any ground available under Section 34, post-amendment in the Act, with effect from

October, 2015 and that therefore, the appeal deserved to be dismissed.

13. This Court has considered the rival contentions in the backdrop of the material placed on record. The material available on record does show that the respondent issued notice for appointment of an advocate as the sole arbitrator, in the backdrop of the disputes that arose between the parties. The copies of documents brought to the notice of this Court by the learned counsel for the respondent, do indicate that the appellants appear to have refused to accept such notice. In such a situation, there could be no doubt about the fact that the agreed procedure between the parties, for appointment of arbitrator under the arbitration clause contained in the partnership deed as well as the arbitration clause contained in the deed of dissolution, had failed. In such a situation, the agreed procedure for appointment of arbitrator having failed, the only option available to the respondent was to file an application under Section 11 of the said Act before this Court, for appointment of arbitrator. It is an admitted position that no such steps were taken on behalf of the respondent. Instead, on 26th August, 2015, the respondent unilaterally addressed a communication to the said advocate, stating that he was appointed as the sole arbitrator for resolution of disputes between the parties. The procedure adopted by the respondent was not only in the teeth of the arbitration clause contained in the partnership deed as well as dissolution deed, but it was also in violation of the provisions of the said Act. The manner in which the respondent proceeded to appoint the sole arbitrator, demonstrates that despite the stipulation in the arbitration clause, regarding appointment of arbitrator by consent of parties, the arbitrator, was unilaterally appointed by the respondent.

14. The documents on record show that the appellant No.1 initially did seek adjournments before the sole arbitrator. In the requests made before the sole arbitrator, the appellant No.1 stated that her advocate was not available. Thereafter, by a subsequent communication dated 20th November, 2015, the appellant No.1 quoted the arbitration clause contained in the deed of dissolution and specifically raised an objection to the appointment of the sole arbitrator. The document on which, the learned counsel for the respondent, has relied, which is dated 23rd March, 2016, shows that the arbitrator recorded the fact that the said objection raised on 20th November, 2015, was rejected. In other words, the arbitrator held against the appellants on the question of jurisdiction. Eventually, the impugned award held in favour of the respondent, as recorded hereinabove.

15. It was only at the stage of the application filed under Section 34 of the said Act that the appellants could have raised their grievance, as to the manner in which, the learned arbitrator proceeded without jurisdiction and also, the manner in which, the request made by the appellants was turned down by the arbitrator. It was for this reason that the District Court, in paragraph No.13, while recording the fundamental objections raised by the appellants herein, stated that the first such objection was that the appellants never consented to the appointment of the sole arbitrator. The impugned judgment and order shows that the District Court proceeded to discuss the first objection in paragraph Nos.14 to 17 and rejected the same. A perusal of the said portion of the impugned judgment and order, shows that the thrust of the submissions made by the appellants, was not even adverted to and surprisingly, the District Court went on to discuss the issue as to whether the arbitration clauses in question warranted appointment of a sole arbitrator or more than one arbitrator. The District Court completely failed to appreciate

the nature of objection raised on behalf of the appellants, thereby committing a grave error in holding against the appellants. The other objections raised on behalf of the appellants were also rejected, as a consequence of which, the application was dismissed.

16. This Court is of the opinion that in the face of the admitted position on facts that the agreed procedure for appointment of arbitrator had failed and the respondent appointed the sole arbitrator unilaterally, the entire arbitral proceeding was vitiated. The only option available to the respondent was to have filed application under Section 11 of the said Act for appointment of arbitrator. The communication dated 26th August, 2015, issued by the respondent to the sole arbitrator, simply states that 'the respondent was hereby appointing the said advocate as the sole arbitrator for resolution of disputes between the parties'. The tenor of the said communication and the fact that there was no consent of the appellants, shows that the nature of appointment of the sole arbitrator in the present case, was unilateral at the behest of the respondent. Such unilateral appointment of arbitrator was clearly hit by Section 12(5) of the said Act, which prohibits such unilateral appointment of arbitrator. It is also an admitted position that proviso to Section 12(5) of the Act would not apply in the present case, for the reason that the parties had not agreed to waive the applicability of the said sub-section.

17. This Court is of the view that merely because the appellant No.1 had sought adjournments, due to non-availability of her advocate, it would not mean that she had consented to the appointment of the sole arbitrator. The appellant No.1 had specifically raised objection as regards jurisdiction of the arbitrator, by communication dated 20th November, 2015, which was rejected

by the arbitrator and it led to the pronouncement of the impugned award. The aforesaid admitted facts show that in the present case, the objection raised by the appellants goes to the very root of the matter, demonstrating that the arbitrator proceeded in the matter, without jurisdiction. Reliance placed by the learned counsel for the appellants, on the judgment in the case of **Perkins Eastman Architects DPC and another v/s. HSCC (INDIA) Limited**, (*supra*) is justified. This Court is convinced that the appellant No.1 has made out a ground for setting aside the arbitral award, although the grounds available for interference in the arbitral awards, post the amendment of the Act in the year 2015, are now limited. By the very same amendment, the ground of patent illegality has been added in the said Act. This Court is of the opinion that the impugned award passed by the sole arbitrator, was rendered patently illegal.

18. The District Court completely failed to appreciate the position of law and its applicability to the present case. This demonstrates that the impugned judgment and order also deserves to be interfered with. The application under Section 34 of the said Act ought to have been allowed by the District Court.

19. In view of the above, the present appeal is allowed. The impugned judgment and order of the District Court is quashed and set aside. The application filed by the appellants under Section 34 of the said Act is also allowed. As a consequence, the impugned award dated 19th September, 2016, is set aside.

20. There shall be no order as to costs.

(MANISH PITALE, J)

Priya Kambli