OD-102

ORDER SHEET

APOT/330/2024
IA NO: GA/1/2024

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

M/S. SUNRISE INDUSTRIES
VS
M/S. ELECTRONICA FINANCE LTD. AND ANR.

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date : 3rd October, 2024.

Appearance:
Mr. Amit Sinha, Adv.
Mr. Niladri Bhattacharjee, Adv.
Mr. Aditya Chaturvedi, Adv.
Mr. Pratik Acharjee, Adv.
Mr. Deepak Sharma, Adv.
...for the appellant

Mr. Sayan Ganguly, Adv.
Ms. Sneha Dutta, Adv.
...for respondent no.1

The Court: Affidavit of service filed in Court today be kept on record.

Learned counsel for the petitioner challenges the impugned interim order passed in an arbitral proceeding between the parties primarily on three counts.

First, it is contended that in terms of the arbitration clause i.e., Clause 11.4 of the agreement between the parties, the venue of the arbitration was to be Pune or such other place that the lender may in its sole discretion determine and Courts in Pune or such other place shall have exclusive jurisdiction. As such, the Arbitrator, who passed the impugned order taking up the matter in Kolkata, did not have territorial jurisdiction to take up the same.

Secondly, it is contended that as per the arbitration clause i.e., Clause 11.4, the sole Arbitrator was to be appointed unilaterally by the lender/respondent. However, the said provision being violative of several judgments of the Supreme Court including *Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.* reported in *AIR 2020 SC 59* as well as *TRF Limited v. Energo Engineering Projects Ltd.* reported in *(2017) 8 SCC 377*, the said portion of the arbitration clause is vitiated by law. It is argued that in the instant case, the Arbitrator was appointed unilaterally by the respondent without referring the matter to the appellant. Hence, such unilateral appointment itself vitiates the jurisdiction of the arbitral tribunal to take up the matter or to pass the impugned order.

Thirdly, on July 10, 2024, which was a date fixed for the arbitral proceeding, the petitioner's representative went to the venue but found that the venue was closed. Accordingly, a telephone call was made to the Arbitrator, who informed that the proceeding had been deferred. The above facts were put down in an email sent to the Arbitrator on the self-same date i.e., on July 10, 2024 at 5.26pm by the petitioner. On the same date, a photograph was taken of the venue, which is also annexed along with the email to the present application, which indicates that the venue was indeed closed on the said date. However, in the interim award, the very first sentence records that the learned advocate for the claimant appeared on July 10, 2024 and filed the statement of claim, which is obviously incorrect. Hence, on facts also, the impugned order should go.

Learned counsel appearing for the respondent/claimant submits that the petitioner did not challenge the jurisdiction of the arbitral tribunal at the relevant juncture before the tribunal itself. As such, the said challenge cannot be taken up for the first time in the present appeal under Section 37 of the 1996 Act.

It is further submitted that the property in question was sold in terms of the impugned interim order on September 16, 2024 whereas the present appeal has been filed only on September 18, 2024. As such, the prayers made in the appeal are infructuous.

Upon considering the submissions of the parties, the Court comes to the following conclusions:

The Supreme Court, in no uncertain terms, in *Perkins Eastman Architects (Supra)* as well as *TRF Limited* and also subsequently in *Glock Asia-Pacific Limited vs. Union of India,* reported at *(2023) 8 SCC 226,* consistently held that a unilateral appointment of Arbitrator is vitiated by illegality. By necessary implication, unilaterality in appointment has been incorporated by legal fiction by the judgments of the Supreme Court into the ambit of Section 12 (5) of the Arbitration and Conciliation Act, 1996. Unilateral appointment hits the jurisdiction of the Arbitrator at the root and as such, irrespective of whether any challenge is taken before the Arbitrator on such count, the assumption of jurisdiction by the Arbitrator appointed unilaterally is itself void *ab initio*. The question of *kompetenz-kompetenz* principle as envisaged in Section 16 of the 1996 Act cannot be borrowed in case of the unilateral appointment, since the very competence of the Arbitrator to decide his competence is also vitiated in view of the appointment being unilateral. Thus, the impugned order is palpably bad and patently illegal, being vitiated by lack of inherent jurisdiction of the Arbitrator to assume jurisdiction.

However, insofar as territorial jurisdiction is concerned, I do not agree with the submission of the petitioner. In the arbitration clause itself, Pune has been fixed as the *venue* as opposed to the *seat* of arbitration. Although Courts in Pune or such other place have been said to have exclusive jurisdiction, the expression "or such other place" clearly dilutes the exclusivitiy of Pune Courts in that regard.

Also, the venue of the arbitration has been designated in the arbitral clause to be not only Pune but also "such other place that the lender may determine". As such, under no stretch of imagination can it be said that the seat of arbitration was fixed exclusively at Pune. Thus, it cannot be said that the Arbitrator did not have territorial jurisdiction to take up the matter.

The merits of the matter are not being entered into, also with regard to the question as to whether on July 10, 2024 actually any sitting had taken place before the learned Arbitrator.

In view of it being held above that the Arbitrator lacks inherent jurisdiction, the merits of the matter need not be gone into further.

Since the Arbitrator did not have jurisdiction *ab initio*, the impugned order is automatically vitiated and must be set aside.

Accordingly, APOT/330/2024 is allowed on contest, thereby setting aside the impugned order dated July 12, 2024. Consequentially, the direction to conduct the sale contained in the said order is also set aside.

However, it is beyond the jurisdiction of the Section 37 Court to pass consequential follow-up directions by setting aside the sale itself, for which the petitioner is required to approach the jurisdictional Court under Section 9 of the 1996 Act and/or approach the competent Arbitrator, as and when appointed in accordance with law, under Section 17 of the 1996 Act. However, till any order is passed by a competent arbitral tribunal and/or a Section 9 Court, the respondent is restrained from parting with the sale proceeds of the assets, since the respondent admits that the sale has already been confirmed and the sale proceeds are now with the respondent.

GA/1/2024 is also disposed of in terms of the above order.

There will be no order as to costs.

(SABYASACHI BHATTACHARYYA, J.)

R.Bhar