



Arb.O.P.(Com.Div.) No.407 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.06.2024

CORAM

The Hon'ble Mr.Justice Krishnan Ramasamy

Arb.O.P.(Com.Div.) No.407 of 2023

and

Application No.4490 of 2023

1. Mr.N.Lakshmanan
2. Mr.L.Vinothkumar
3. Mr.L.Kumaresan
- Mrs.L.Vasanthi (deceased).

...Petitioners

Vs.

1. M/s.Five Star Business Finance Ltd.,
rep. By its Authorized Signatory Mr.G.S.Robert,
New No.27, Old No.4, Taylor's Road,
Kilpauk, Chennai – 600 010.
2. Mrs.K.Vanmathi, W/o. L.Kumaresan
No.110, Sivan Koil Street,
Senji Vaillage and Post,
Thiruvallur- 631 203.

.. Respondents

Arbitration Original Petition filed under Section 34 (2) (a) (iii) of the Arbitration and Conciliation Act 1996 to set aside the award dated 30.12.2021 made in Arbitration Case No.ARC/FSBFL/025/2018 on the file of the Arbitrator, Mr.S.S.Mariappan.



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For petitioners : Mr.S.Prabhakaran

For Respondent-1 : No appearance

ORDER

Feeling aggrieved over the award passed by the Arbitral Tribunal dated 30.12.2021, the present Arbitration Original Petition has been filed by the petitioners.

2. The first respondent herein is the claimant before the Arbitral Tribunal. The first respondent/claimant filed a Claim Statement inter alia stating that they are engaged in the business of providing financial facilities in the form of mortgage loan; that the respondents (petitioners) approached the claimant-Company for availing loan; that the claimant sanctioned the loan for a sum of Rs.5,00,000/-; that the respondents, after making some payments committed default in repayment of the loan; that the claimant issued a notice calling upon the respondents to settle the entire dues; that since there was no response from the respondents, the claimant referred the dispute for arbitration.



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2.1 The Arbitral Tribunal vide Award dated 30.12.2021 ordered for recovery of Rs.10,05,320/- along with contractual interest and charges and for recovery of interest at 18% p.a. on the principal amount from 22.04.2018 till payment of entire amount by the respondents and for recovery of costs of Rs.5,000/-.

3. Aggrieved over the said award, the present Arbitration Original Petition is filed by the petitioners/respondents.

4. When the matter was taken up for hearing today in the forenoon session, both Mr.S.Prabhakaran, the learned counsel for the petitioners and learned junior counsel representing the counsel on records for the first respondent appeared and the learned counsel for the petitioners pyramids his arguments by assailing the award on two grounds, firstly, stating that the award has been passed by the learned Arbitrator, who had been appointed unilaterally and secondly, the award is non-est in law, as the same has been passed beyond the period prescribed under the Section 29 A of the Act; that



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this Court having convinced with the said submission, proceeded to hear the submission in furtherance, and the submission made by the petitioner-counsel was heard in full and when the turn comes for the first respondent to putforth his arguments, the learned Junior Counsel for the first respondent sought for a pass over citing the reason that his Senior was held up in other courts and heeding to his request, the matter was passed over and taken up for hearing at pre-lunch session, however, none appeared on behalf of the first respondent, hence, the matter was passed over and taken up at post lunch session, again, there is no representation on behalf of the respondent.

4.1 It was with a fervent hope that the learned counsel for the first respondent would appear and make his submission, this Court passed over the matter twice (i.e. at pre-lunch and post-lunch sessions), and that, despite opportunities have been granted thrice (which is inclusive of the opportunity granted at forenoon session), the learned counsel for the first respondent least bothered to appear before this Court, despite knowing the fact that the case has been passed over for hearing his submission, since learned junior counsel representing the counsel on record for the first respondent, would



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have, perhaps, apprised the respondent-counsel about the the purpose, for which, the case was passed over. Hence, this Court is not inclined to keep the matter pending any more and proceeds to dispose of the same.

5. As noticed above, Mr.S.Prabhakaran, learned counsel for the petitioners assailed the Arbitral Award on two grounds.

5.1 Firstly, the learned counsel contended that the impugned award was passed after termination of the mandate, since, the period prescribed under the mandate already expired on 20.12.2019, whereas, the award was passed on 30.12.2021, and therefore, the same is non-est in law.

5.2 Further, the learned counsel for the petitioner would submit that in terms of provisions of Section 29(3) of the Act, consent has to be obtained before extending the time for completion of Arbitration, for which even, application under Section 29 (A) (4) has to be moved, however, in the present case, no such application was filed seeking the consent of the parties, in the absence of any such application, the award passed on 30.12.2021, is



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not sustainable, as the time for passing award was expired as early as on 20.12.2019. Therefore, the learned counsel submitted that the award has to be held to be unsustainable on this ground alone.

5.3 Secondly, the learned counsel for the petitioners assailed the award by stating the same has been passed by an Arbitrator, who has been unilaterally appointed by this Court.

5.4 The learned counsel for petitioner submitted that as per the Arbitration Clause contained in the Loan Agreement entered into between the petitioners and the first respondent dated 23.06.2024, the dispute between the parties could be resolved by referring the same before an Arbitrator to the nominated by the first respondent-Company, however, the same is subject to the consent obtained from the petitioners, but, in the present case, no such consent was obtained from the petitioners. Therefore, he would contend that in the absence of any such consent, the unilateral appointment of the Arbitrator is null and void and consequently, the award passed by the said Arbitrator is liable to be set aside. Therefore, the learned



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counsel sought for setting aside the award on this ground as well.

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6. I have given due consideration to the submissions made by the learned counsel appearing for the petitioners and perused the entire materials placed on record.

7. The issues that arise for consideration in the Arbitration Original Petition are as follows:-

i) Whether the award passed by the Arbitral Tribunal is liable to be set aside on the ground that the same has been passed by an Arbitrator, who has been unilaterally appointed?

and

ii) Whether the award passed by the Arbitral Tribunal is liable to be set aside for the reason that the same has been passed beyond the period of limitation prescribed under the Act?

Issue No.1

8. Insofar as the first issue is concerned, (viz., the issue that the Arbitrator has been appointed unilaterally) before deciding the same, this



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Court would like to refer to arbitral clause contained in the Loan Agreement entered into between the parties dated 23.06.2014, which reads as follows:-

“All disputes, difference and/or claims arising out of this agreement, whether during its subsistence or thereafter, shall be settled by "Arbitration" in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (Act 26 of 1996) or any statutory amendments thereof and **shall be referred to the Sole arbitration of an Arbitrator, nominated by the Managing Director of the Lender Company and such appointment shall be deemed to be the procedure, agreed upon by all the parties to this agreement.** It is a term of this agreement that in the event of such an arbitrator to whom the matter has been referred to originally dies or being unable or unwilling to act for any reason, then, in such event, the Managing Director, of the Lender Company, shall appoint another person to act as the Arbitrator, such person when appointed as Arbitrator shall be entitled to proceed with the reference, from the stage at which it was left by his predecessor. The venue of the arbitration proceedings shall be at Chennai. ”



8.1 A reading of the above Clause makes it clear that any dispute between the parties, the same shall be referred to the Arbitrator, who shall be nominated by the Managing Director of the Lender Company, viz., the first respondent-Company, provided, the parties to the agreement, gives consent for such Arbitrator to be appointed. But, in the present case, it is clear that the first respondent appointed the arbitrator unilaterally without the consent of the petitioners, inasmuch as, the petitioners have not given any consent for such unilateral appointment of Arbitrator.

8.2 Further, this Court deems it apposite to refer to Section 12(5) of the Act states as follows:

“12. Ground for challenge.-

- (1).....
- (2).....
- (3).....
- (4).....

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the



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applicability of this sub-section by an express agreement in writing.”

8.3 A perusal of the provisions mentioned supra makes it clear that the persons mentioned in Schedule VII of the Act would be ineligible to be appointed as Arbitrator, nor, eligible to nominate any person as arbitrator. De hors the same, there is no express agreement between the parties for providing consent in writing for the unilateral appointment of the arbitrator, in terms of proviso to the said Section also. Hence, the unilateral appointment of the arbitrator made by the first respondent is in violation of provisions of Section 12(5) of the Act.

8.4 At this juncture, it would be appropriate to extract the relevant portion of the judgment rendered by the Hon'ble Supreme Court in the case of “*Perkins Eastman Architects DPC Vs. HSCC (India) Ltd.*” reported in **2019 SCC OnLine SC 1517**, wherein, it is held that, in the event of any unilateral appointment of Arbitrator without the consent of the other party, the same would be non-est in law. For better appreciation, the relevant paragraphs of the said judgment, i.e. paragraph Nos.16, 17, 18 and 20 21 are



extracted hereunder:-

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“16. However, the point that has been urged, relying upon the decision of this Court in Walter Bau AG and TRF Limited, requires consideration. In the present case Clause 24 empowers the Chairman and Managing Director of the respondent to make the appointment of a sole arbitrator and said Clause also stipulates that no person other than a person appointed by such Chairman and Managing Director of the respondent would act as an arbitrator. In TRF Limited, a Bench of three Judges of this Court, was called upon to consider whether the appointment of an arbitrator made by the Managing Director of the respondent therein was a valid one and whether at that stage an application moved under Section 11(6) of the Act could be entertained by the Court. The relevant Clause, namely, Clause 33 which provided for resolution of disputes in that case was under:

“33. Resolution of dispute/arbitration

(a) In case any disagreement or dispute arises between the buyer and the seller under or in connection with the PO, both shall make every effort to resolve it amicably by direct informal negotiation.

(b) If, even after 30 days from the commencement of such informal negotiation, seller and the buyer have not been able to resolve the dispute amicably,



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either party may require that the dispute be referred for resolution to the formal mechanism of arbitration.

(c) All disputes which cannot be settled by mutual negotiation shall be referred to and determined by arbitration as per the Arbitration and Conciliation Act, 1996 as amended.

(d) Unless otherwise provided, any dispute or difference between the parties in connection with this agreement shall be referred to sole arbitration of the Managing Director of buyer or his nominee. Venue of arbitration shall be Delhi, and the arbitration shall be conducted in English language.

(e) The award of the Tribunal shall be final and binding on both, buyer and seller.”

17. In TRF Limited, the Agreement was entered into before the provisions of the Amending Act (Act No.3 of 2016) came into force. It was submitted by the appellant that by virtue of the provisions of the Amending Act and insertion of the Fifth and Seventh Schedules in the Act, the Managing Director of the respondent would be a person having direct interest in the dispute and as such could not act as an arbitrator. The extension of the submission was that a person who himself was disqualified and disentitled could also not nominate any other person to act Arbitration Application No.32 of 2019 Perkins Eastman Architects



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DPC & Anr. v. HSCC (India) Ltd. as an arbitrator. The submission countered by the respondent therein was as under: -

“7.1. The submission to the effect that since the Managing Director of the respondent has become ineligible to act as an arbitrator subsequent to the amendment in the Act, he could also not have nominated any other person as arbitrator is absolutely unsustainable, for the Fifth and the Seventh Schedules fundamentally guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence and impartiality of the arbitrator. To elaborate, if any person whose relationship with the parties or the counsel or the subject-matter of dispute falls under any of the categories specified in the Seventh Schedule, he is ineligible to be appointed as an arbitrator but not otherwise.

18. The issue was discussed and decided by this Court as under:-

50. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes



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ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the “named sole arbitrator” and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. In this regard, our attention has been drawn to a two-Judge Bench decision in *State of Orissa v. Commr. of Land Records & Settlement*. In the said case, the question arose, can the Board of Revenue



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revise the order passed by its delegate. Dwelling upon the said proposition, the Court held: (SCC p. 173, para 25)

“25. We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in *Roop Chand v. State of Punjab*. In that case, it was held by the majority that where the State Government had, under Section 41(1) of the *East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948*, delegated its appellate powers vested in it under Section 21(4) to an “officer”, an order passed by such an officer was an order passed by the State Government itself and “not an order passed by any officer under this Act” within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer in his own right and not as a delegate of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate.” (emphasis in original)



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51. Be it noted in the said case, reference was made to Behari Kunj Sahkari Awas Samiti v. State of U.P., which followed the decision in Roop Chand v. State of Punjab. It is seemly to note here that the said principle has been followed in Indore Vikas Pradhikaran.

52. Mr Sundaram has strongly relied on Pratapchand Nopaji. In the said case, the three-Judge Bench applied the maxim “*qui facit per alium facit per se*”. We may profitably reproduce the passage: (SCC p. 214, para 9)

“9. ... The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim: “*qui facit per alium facit per se*” (what one does through another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the “*pucca adatia*”, or, as the High Court had held, he is clothed with the powers of an ordinary commission agent only.”

53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to the learned counsel for the appellant, ineligibility strikes at the



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root of his power to arbitrate or get it arbitrated upon by a nominee.

54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.”

19.....

20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd⁴, where the Managing Director himself is named as an arbitrator with an additional power to appoint any other



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person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases.

We are conscious that if such deduction is drawn from the decision of this Court in TRF Ltd. all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator.

21. But, in our view that has to be the logical deduction from TRF Limited. Paragraph 50 of the



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decision shows that this Court was concerned with the issue, “whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator” The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, 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 Arbitration Application No.32 of 2019 Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd. 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 recognised by the decision of this Court in TRF Limited.”

8.5 Therefore, the above judgment of the Hon'ble Apex Court makes it clear that the appointment of sole arbitrator unilaterally by one of the parties would be ineligible by operation of law. Thus, in the light of the law



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laid down by the Hon'ble Supreme Court, in the case referred to above, the award impugned has to be set aside, as the same was passed by an Arbitrator, who has been unilaterally appointed.

Issue No.2 :-

9. So far as the second Issue is concerned (viz., the impugned award was passed beyond the period of limitation) admittedly, the Arbitrator issued a notice on 19.05.2018, and the Claim Statement was filed on 13.07.2018, followed by counter claim on 21.12.2018, thereafter, pleadings was completed in terms of the provisions of Section 23(4) of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as 'the Act') on 21.12.2018 and in terms of Section 29 A of the Act, only a period of twelve months' time is prescribed for passing the award right from the date, on which, the Arbitrator enters reference. In the present case, the learned Arbitrator should have passed the award within 12 months, i.e. on or before 20.12.2019, however, the award came to be passed on 30.12.2021. Though as per Section 29(3) of the Act, the parties may, by consent, extend the



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period specified in sub-section (1) for making award for a further period not exceeding six months, in the present case, no such application was filed either by the petitioners or by the first respondent, seeking for extension of the mandate, and thus, in the absence of any such application seeking extension, the award passed on 30.12.2021, is not sustainable, as the time for passing award expired as early as on 20.12.2019. Therefore, it is obvious that the impugned award is unsustainable on this ground as well.

10. Therefore, this Court is of the firm view that the impugned award is liable to be set aside both on the ground that the same was passed by an Arbitrator, who has been unilaterally appointed by the first respondent and secondly, for the reasons that the award was passed after the expiry of the limitation period prescribed under the Act, as already discussed above.

11. Accordingly, this Arbitration Original Petition is allowed and the impugned award is set aside. However, it is made clear that if any application is moved by the first respondent before this Court stating that the award was passed in their absence, the same will not be entertained by this



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Court unless and until, a sum of Rs.1,00,000/- is paid towards costs by them.

No costs. Consequently, connected Application is closed.

12.06.2024

sd

Index : Yes/No

Internet : Yes/No

Speaking Order/Non speaking Order

Krishnan Ramasam,J.,

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