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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **OMP (ENF.) (COMM.) 15/2021**
MAHINDRA AND MAHINDRA FINANCIAL SERVICES

.....Decree Holder

Through: Ms. Sonali Joon, Mr. Mayank Singh,
Advs.

versus

SEEMA GUPTA & ANR.

.....Judgement Debtors

Through: Mr. Tanmay Mehta, Mr. Vijay
Kasana, Mr. Chirag Verma, Mr. Ankit
Kumar, Advs.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

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15.10.2024

1. This is a petition filed under Section 36 of the Arbitration and Conciliation Act, 1996 (*"Act of 1996"*) seeking enforcement of the Arbitral Award dated 03.10.2019 wherein the claims of the decree holder have been allowed for a sum of Rs. 2,13,08,029/- along with interest at the rate of 18% and a cost of Rs. 10,000/-.
2. The parties herein entered into an Agreement dated 21.07.2016 which is post 2015 amendment made in Act of 1996.
3. The said Agreement between the parties is not on record, however, the paragraphs 8-10 of the Award dated 03.10.2019 reads as under:-

"8. That, whereas as per terms mentioned in the Clause of the aforementioned Agreement, all disputes, differences and/or claims and questions; whatsoever; arising out of the said Agreement are to be settled through sole arbitration of a person to be appointed by M/s. Mahindra & Mahindra



Financial Services Ltd (Claimant) in accordance with the provisions of the Arbitration and Conciliation Act, 1996, or any statutory amendments thereof.

9. That, whereas as per terms mention in the Clause of the said agreement provides that any notice to be given by the Claimant shall be effective and deemed to have been duly and sufficiently served on the Borrower and guarantor, three days after the same shall have been delivered to the post office /courier properly addressed at the address given themselves by the borrower/guarantor in the said Agreement. In these proceeding, it is clear from the copy of the notice dated: 09.03.2018 & 06.03.2019 sent by the claimant to the Respondents under Speed Post/ Regd. Ad. Post/ Regd. Post, expressing therein their desire/ intention to refer the matter to Sole arbitration of adjudication. Proof has been provided by the Claimant for sending the notice dated:09.03.2018 & 06.03.2019 by Speed Post/ Regd. Ad. Post/ Regd. Post. There being sufficient compliance of the provisions of law by the claimant before making the reference to me, I accepted the reference made to me by their letter of reference dated: 06.04.2019.

10. That, I, having entered in the Reference posted the case for appearance of parties on 07.05.2019 at Sadhana House, 02nd Floor, 570, P. B. Marg, Worli, Mumbai-400018 at 12.00 PM Accordingly, Notice dated:12.04.2019 was duly sent under Speed Post/ Regd. Ad Post/ Regd. Post to all the



parties at their latest known addresses. All parties were advised to attend the said meeting on 07.05.2019 at Sadhana House, 02nd Floor, 570, P. B. Marg, Worli, Mumbai-400018 at 12.00 PM at the venue stated above.”

(Emphasis added)

4. On perusal of the above paragraphs, it is clear that the learned Sole Arbitrator who has passed the Award dated 03.10.2019 which is under enforcement was unilaterally appointed by the decree holder.

5. It is settled position of law that unilateral appointment of Arbitrator is barred under section 12(5) read with Seventh Schedule of Act of 1996 and hence, the whole arbitration proceedings are *non-est* in law. Reliance is placed on ***Perkins Eastman Architects DPC vs. HSCC (India) Ltd., (2020) 20 SCC 760*** wherein the Hon’ble Supreme Court in paragraph 21 observed as under:-

“21. But, in our view that has to be the logical deduction from TRF Ltd. Para 50 of the 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 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 (3 of 2016) and recognised by the decision of this Court in TRF Ltd. .”

6. In somewhat identical circumstances, my attention has been drawn to a judgment rendered by the Division Bench of this Court in **“Kotak Mahindra Bank vs. Narendra Kumar Prajapat, 2023:DHC:3705-DB”**. Paragraphs 1 and 3 of the said judgment records factual matrix, which read as under:-

“1. The appellant has filed the present appeal impugning an order dated 23.11.2022, passed by the learned Commercial Court whereby the appellant’s application for enforcement of an exparte arbitral award dated 21.07.2021, passed by Shri C. Prasanna Venkatesh, Sole Arbitrator in favour of



D.H. Finance Company, was rejected.

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3. In terms of the Arbitral Award, the sum of ₹4,66,103.3/- alongwith interest @ 18% per annum was awarded in favour of the D.H. Finance Company which was a claimant before the Arbitral Tribunal. The learned Commercial Court had found that the Arbitral Award was rendered ex-parte by an Arbitrator who was unilaterally appointed by D.H. Finance Company without any recourse or consent of the respondent. The Court had also found that the learned Arbitrator was ineligible for being appointed as an Arbitrator in terms of Section 12(5) of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act')."

7. The operative portion of the said judgment reads as under:-

"14. This Court finds no infirmity with the aforesaid view. A person who is ineligible to act an Arbitrator, lacks the inherent jurisdiction to render an Arbitral Award under the A&C Act. It is trite law that a decision, by any authority, which lacks inherent jurisdiction to make such a decision, cannot be considered as valid. Thus, clearly, such an impugned award cannot be enforced."

(Emphasis added)

8. At this juncture, Ms. Joon, learned counsel for the decree-holder states that the arbitration proceeding before the learned Sole Arbitrator was pending since 2019 and the judgment-debtor chose not to appear and hence the judgment debtors were proceeded ex-parte.



9. She further states that the learned counsel for the judgment debtors appeared in Court on 16.03.2021 but did not file a petition under Section 34 of Act of 1996 and has only filed the objections in the present matter.

10. The argument of the learned counsel for the decree holder is rejected on the ground that the non-appearance of the respondent before the Arbitral Tribunal cannot be construed as “consent” provided under proviso to section 12(5) of Act of 1996. Section 12(5) of Act of 1996 is clear in its ambit and the language of the said section clearly mandates that the “consent” can only be in writing. In the present case, there is no such “consent” by the respondent in writing.

11. Further, non-filing of a petition under section 34 of Act of 1996 need not detain the Court as the Award dated 03.10.2019 passed by the learned Sole Arbitrator who was unilaterally appointed by the decree-holder, to my mind, is impermissible as hit by Section 12(5) read with Seventh Schedule of Act of 1996. Such an Award is a nullity in the eyes of law and cannot be enforced. In addition, the objections filed by the respondent in present enforcement petition under section 36 of Act of 1996 can be entertained in view of ***Kotak Mahindra Bank (Supra)***.

12. For the said reasons, the present petition seeking enforcement of Award dated 03.10.2019 cannot be entertained. Hence, the present petition is dismissed.

13. The petitioner is at liberty to initiate any/all action as available in accordance with law.

JASMEET SINGH, J

OCTOBER 15, 2024/NG