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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ O.M.P. (COMM) 509/2022 & I.A. 21754/2022

M/S SUPREME GOLD THROUGH PROPRIETOR MR
PAWAN KUMAR AGRAWAL

.....Petitioner

Through: Ms. Mohna M. Madanlal, Ms.
Geetali Hazarika and Mr. Ashwini
Singh, Advocates

versus

THE HANDICRAFTS AND HANDLOOMS EXPORTS
CORPORATION OF INDIA LIMITED

.....Respondent

Through: Mr. Shoumendu Mukherjee, SPC
with Mr. Rishabh Rana, Mr.
Akshay Dev, Ms. Megha Sharma
and Ms. Akanksha Gupta,
Advocates

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

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24.07.2024

I.A. (to be numbered) (vide diary No. 2348227/2024)

1. The respondent – The Handicrafts and Handlooms Exports Corporation of India Limited, has filed this application for waiver of costs of Rs. 20,000/- directed against the respondent, by order dated 08.07.2024, on account of non-appearance on the said date.
2. Although the application is not listed today, a copy has been handed up in Court. The Registry is directed to number the application, which is taken on Board.
3. The ground taken in the application is that there was a change in the management of the respondent, which is a public sector undertaking, and a reshuffle of cases amongst panel counsel. The counsel entrusted



with this case, was also travelling and could not attend the matter on the last date of hearing.

4. While these grounds are inadequate for waiver of costs as sought, in view of the fact that the respondent is effectively represented today, the application is allowed and costs imposed by order dated 08.07.2024, are waived.

O.M.P. (COMM) 509/2022

1. The petitioner seeks setting aside of an arbitral award dated 29.11.2019, by which, disputes between the parties under an agreement dated 12.10.2010, were adjudicated by a learned sole arbitrator.

2. The main ground raised by learned counsel for the petitioner is that the learned arbitrator was unilaterally appointed by the respondent, by a communication dated 23.08.2018. Although Clause 13.1 of the agreement in question provided for appointment of the arbitrator by the respondent alone, the impermissibility of such an appointment has been categorically underscored in the judgments of the Supreme Court in *TRF Limited vs. Energo Engineering Projects Limited*¹ and *Perkins Eastman Architects DPC vs. HSCC (India) Limited*².

3. Following the aforesaid decisions, several judgments of Division Benches of this Court, including in *Ram Kumar vs. Shriram Transport Finance Co. Ltd.*³ and *Govind Singh vs. Satya Group Pvt. Ltd.*⁴ hold that an award arising from proceedings before unilaterally appointed arbitrator is null and void *ab initio*. In fact, this Court has held that even in the

¹ (2017) 8 SCC 377.

² (2020) 20 SCC 760

³ 2022 SCC OnLine Del 4268.

⁴ 2023 SCC OnLine Del 37.



abscense of an application for setting aside, an award rendered by an arbitrator appointed by one of the parties is unenforceable. Reference may be made to the Division Bench decisions in *Kotak Mahindra Bank Ltd. vs. Narendra Kumar Prajapat*⁵ and *Babu Lal vs. Cholamandalam Investment & Finance Co. Ltd.*⁶.

4. In the present case, a letter dated 01.09.2018, issued by the learned arbitrator, itself states that she was appointed by a letter of the respondent's Chairman-cum-Managing Director. This is also reflected in paragraph 2 of the impugned award. There is no document on record to demonstrate that the petitioner has waived its rights under Section 12(5) of the Arbitration and Conciliation Act, 1996 ["the Act"], in the manner required by the judgment of the Supreme Court in *Bharat Broadband Network Ltd. vs. United Telecoms Ltd.*⁷ and the judgments which follow the said line of authority.

5. Learned counsel for the respondent draws my attention to the decision of a Division Bench in *Arjun Mall Retail holdings vs. Gunocent Inc.*⁸, which appears to hold to the contrary. However, the prior judgments of Division Benches were not brought to the attention of the Court. I have had occasion to consider the matter in another judgment, in *Airports Authority of India vs. TDI International India Pvt. Limited*⁹. The present respondent [Airports Authority of India] was the petitioner therein. It has been held as follows:

⁵ 2023 SCC OnLine Del 3148.

⁶ 2023 SCC OnLine Del 7239.

⁷ (2019) 5 SCC 755.

⁸ 2024 SCC OnLine Del 428.

⁹ Judgment dated 28.05.2024 in O.M.P. (COMM) 573/2020 & connected matters.



“25. Mr. Mohan, however, draws my attention to a judgment in *Arjun Mall*,¹⁰ wherein the Division Bench has taken the view that this ground cannot be raised for the first time in a petition under Section 34 of the Act, if it was not raised in arbitral proceedings. It may first be noticed that the prior judgments of the Division Bench of this Court in *Govind Singh*,¹¹ *Ram Kumar*,¹² *Kotak Mahindra*,¹³ and *Babu Lal*¹⁴ do not appear to have been brought to the attention of the Bench in *Arjun Mall*.¹⁵ It may also be noticed that the Division Bench relied upon the decision of the Supreme Court in *Delhi Airport Metro Express (P) Ltd. v. DMRC*,¹⁶ which has specifically been set aside by the Supreme Court in Curative Petition Nos. 108-109/2022.

26. The question before this Court is, therefore, whether to follow the earlier judgments in *Govind Singh*,¹⁷ *Ram Kumar*,¹⁸ *Kotak Mahindra*,¹⁹ and - *Babu Lal*,²⁰ or the later view taken in *Arjun Mall*.²¹ This question is answered by reference to the judgment of the Supreme Court in *Sundeeep Kumar Bafna v. State of Maharashtra*,²² which holds that, in the event of mutually irreconcilable decisions of the Supreme Court being cited before the High Court, “the inviolable recourse is to apply the earliest view.” No authority to the contrary has been cited before me, and I see no reason to depart from this principle when it comes to mutually irreconcilable decisions of the Division Bench, placed before a Single Judge.

27. This, in fact, appears also to be the procedure which has been followed by a coordinate bench in *M/s Upper India Trading Co. Pvt. Ltd. v. M/s Hero Fincorp Ltd.*²³ An award was set aside on the ground of unilateral appointment, following the judgments in *TRF Limited and Perkins Eastman*²⁴ and the Single Bench judgment in *Geeta Poddar v. Satya Developers Private Limited*,²⁵ even though a similar objection was raised by the respondent therein on the basis of *Arjun Mall*.²⁶”

¹⁰ Supra (note 8).

¹¹ Supra (note 4).

¹² Supra (note 3).

¹³ Supra (note 5).

¹⁴ Supra (note 6).

¹⁵ Supra (note 8).

¹⁶ (2022) 1 SCC 131.

¹⁷ Supra (note 4).

¹⁸ Supra (note 3).

¹⁹ Supra (note 5).

²⁰ Supra (note 6).

²¹ Supra (note 8).

²² (2014) 16 SCC 623.

²³ Judgment dated 23.02.2024 in OMP (COMM) 399/2022.

²⁴ Supra (note 1).

²⁵ Judgment dated 31.08.2022 in ARB. P. 133/2019.

²⁶ Supra (note 8).



6. In view of the above, the impugned award is unsustainable, and is set aside.
7. At the request of learned counsel for the parties, Hon'ble Mr. Justice S. Ravindra Bhat, former Judge, Supreme Court of India [Tel: 9818000160], is appointed as the arbitrator to adjudicate the claims in this petition. The arbitration proceedings will be held under the aegis of Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi ["DIAC"] and subject to the Rules of DIAC, including as to remuneration of the learned arbitrator.
8. The learned arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference.
9. The statement of claims filed by the respondent will be placed before the learned arbitrator, who is requested to give further directions as required in the facts and circumstances of the case. The respondent is at liberty to take its remedies in accordance with law, to reagitate the claims raised in this petition. In such an event, exclusion of time spent in the first round of arbitral proceedings and before this Court, may be sought before the learned arbitrator.
10. All rights and contentions of the parties on merits are left open for adjudication by the learned arbitrator.
11. The petition, alongwith pending application, is disposed of.

PRATEEK JALAN, J

JULY 24, 2024
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