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

+ O.M.P. (COMM) 336/2024 & I.As. 35738-39/2024.

KONARK METAL AND WIRE
CONDUCTORS PRIVATE LIMITED

.....Petitioner

versus

LIVFIN INDIA PRIVATE LIMITED

.....Respondent

+ O.M.P. (COMM) 276/2024 & I.As. 32823-24/2024.

GLADIOLUS MICRO SERVICES PRIVATE
LIMITED

.....Petitioner

versus

LIVFIN INDIA PRIVATE LIMITED

.....Respondent

+ O.M.P. (T) (COMM.) 73/2024 & I.A. 35496/2024.

ALLIED SALES AGENCIES & ANR.

.....Petitioners

versus

LIVFIN INDIA PRIVATE LIMITED

.....Respondent

Appearances:

Mr. Animesh Kumar, Mr. Nishant Kumar, Dr. Sumit Kumar, Mr. Ayush Kumar, Ms. Aprajita, Advocates for petitioner in item Nos. 38 and 21 [8826307748].

Mr. Mojahid Karim Khan, Advocate for petitioner in item No. 25.

Mr. Mayank Mahajan, Mr. Rohit Kumar, Advocates for respondent with Mr. Raj Shekhar Pandian, A.R.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN



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ORDER
12.08.2024

1. These three petitions raise a common question, as to the validity of arbitral proceedings conducted by an arbitrator unilaterally appointed by the respondent herein, and of awards rendered in such proceedings.

2. The respondent is a non-banking financial company and entered into separate “Master Facility Agreements” with the petitioners. The dates of the agreements in the three cases are as follows:

Petition No.	Name of the petitioner(s)	Date of the Agreement
O.M.P. (COMM) 336/2024	<i>Konark Metal and Wire Conductors Pvt. Ltd.</i>	31.05.2023
O.M.P. (COMM) 276/2024	<i>Gladiolus Micro Services Pvt. Ltd.</i>	18.05.2023
O.M.P. (T) (COMM.) 73/2024	<i>Allied Sales Agencies; Mr. Deepak Gupta</i>	11.09.2023

3. All the agreements contained arbitration clauses, which provided for resolution of disputes by the arbitration of an arbitrator appointed by the respondent alongwith a co-lender – Shri Ram Finance Ltd. Shri Ram Finance Ltd. was not a party to the arbitration proceedings, which were instituted by the respondent herein above, against each of the petitioners. Two of the proceedings have resulted in arbitral awards, dated 27.05.2024 (which is under challenge in O.M.P. (COMM) 276/2024) and



an award dated 24.05.2024 (which is under challenge in O.M.P. (COMM) 336/2024). The arbitral proceedings are still in progress in O.M.P. (T) (COMM.) 73/2024. This petition has been filed under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 [“the Act”] for termination of the mandate of the learned arbitrator.

4. The factual position that the learned arbitrator was unilaterally appointed by the respondent herein is undisputed. The legal consequence thereof also does not admit of ambiguity. The judgments of the Supreme Court in *TRF Limited v. Energo Engineering Projects Limited* [(2017) 8 SCC 377] and *Perkins Eastman Architects DPC & Anr. v. HSCC (India) Limited* [(2020) 20 SCC 760], make it clear that the appointment of an arbitrator unilaterally by one of the parties, is impermissible under Section 12 of the Act, and that the provisions can be waived only by an express agreement in writing. To that effect, reference may be made in this connection to the judgment in *Bharat Broadband Network Ltd. v. United Telecoms Limited* [(2019) 5 SCC 755] [“Bharat Broadband”].

5. Several Division Bench judgments of this Court have also considered the position. In *Ram Kumar v. Shriram Transport Finance Co. Ltd.* [2022 SCC OnLine Del 4268] and *Govind Singh v. Satya Group Pvt. Ltd.* [2023 SCC OnLine Del 37], the Division Bench has held that an award rendered by a unilaterally appointed arbitrator is void *ab initio* and a nullity. The judgments in *Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat* [2023 SCC OnLine Del 3148], and *Babu Lal & Anr. v. Cholanandalam Investment & Finance Co. Ltd. & Anr.*, [2023 SCC OnLine Del 7239], also make it clear that such an award is incapable of enforcement, even if it was not challenged under Section 34 of the Act.



6. On the question of waiver, Mr. Mayank Mahajan, learned counsel for the respondent, submits that notice in each of these cases was issued to the petitioners, but the petitioners failed to respond to the same and, thus, must be taken to have waived the objection. Such omission, however, is inadequate for the purposes of waiver under Section 12(5) of the Act. *Bharat Broadband (supra)* makes it clear that waiver has to be express and in writing. It is also clear from the judgment of this Court in *Delhi Buildtech (P) Ltd. v. Satya Developers (P) Ltd.*, [2021 SCC OnLine Del 4785], that the question of waiver by conduct cannot arise.

7. Having regard to this position, all three petitions are liable to succeed. Consequently, the awards dated 27.05.2024 (which is under challenge in O.M.P. (COMM) 276/2024) and the award dated 24.05.2024 (which is under challenge in O.M.P. (COMM) 336/2024) are set aside. The mandate of the learned arbitrator, who is in *seisin* of disputes between the parties in O.M.P. (T) (COMM.) 73/2024 dated 11.09.2023 is also terminated.

8. At the request of learned counsel for the parties in all three cases, the disputes are referred to arbitration of Hon'ble Ms. Justice Asha Menon, former Judge of this Court [Tel: 9910384664].

9. The statements of claims filed by the respondent herein before the erstwhile arbitrator will be placed before the learned arbitrator appointed today. The petitioners may file their statements of defence within two weeks from today or immediately upon the learned arbitrator entering upon the reference, whichever is later. Further procedural directions will be made by the learned arbitrator.

10. The learned arbitrator is also requested to furnish a declaration



under Section 12 of the Act, prior to entering upon the references. The arbitration proceedings will be held under the aegis of Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi [“DIAC”], and will be governed by the Rules of DIAC, including as to remuneration of the learned arbitrator.

11. As the agreements in questions are similar, a common arbitrator has been appointed. However, the petitioners are all unrelated parties. It is, therefore, made clear that all the three arbitrations will be conducted separately and independently of each other.

12. All rights and contentions of the parties on merits of the disputes are left open for adjudication before the learned arbitrator.

13. All the petitions, alongwith pending applications, stand disposed of with these observations.

PRATEEK JALAN, J

AUGUST 12, 2024

‘Bhupi’/