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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **O.M.P. (COMM) 24/2016****VINEET DUJODWALA & ORS.Petitioners**Through: Mr Manik Dogra, Ms. Aarushi
Tiku and Mr. Prabhav Bahuguna, Advs

versus

PHONEIX ARC PVT. LTD. & ANRRespondentsThrough: Mr Arun Aggarwal, Mr.
Shivam Saini & Mr. Praflil Rawat, Advs.**CORAM:****HON'BLE MR. JUSTICE C. HARI SHANKAR****JUDGMENT (ORAL)**

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23.08.2024

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996¹ has been filed for setting aside an arbitral award dated 22 September 2015.

2. Petitioners and Respondent 1 are borrowers and lenders under the Facility Agreement dated 31 October 2013 respectively. Respondent 2 is the official liquidator of M/s Dujodwala Paper Chemicals Ltd², appointed by the Hon'ble Bombay High Court. The said company was one of the borrowers under the Facility Agreement.

3. On 25 October 2013, the petitioners and DPCL approached Respondent 1 to avail a loan against an immoveable property situated

¹ "the 1996 Act" hereinafter

² "DPCL" hereinafter



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at Flat No. 201 on 20th Floor, C wing, Nepean Sea Road, Mumbai - 400006³ which was owned by Petitioners 2 to 4. *Vide* letter dated 31 October 2013, Respondent 1 sanctioned the loan.

4. Thereafter, the Petitioners, DPCL and Respondent 1 entered into a Facility Agreement whereby Respondent 1 agreed to lend the petitioners and DPCL an amount of ₹ 8,00,00,000/- to be secured by equitable mortgage by way of deposit of title deeds of the flat. The facility amount, along with 15% floating interest, was to be repaid by DPCL and the Petitioners by way of 120 Equated Monthly Installments⁴ of ₹ 12,90,680/- each. 36 post dated cheques and 18 undated cheques were also handed over to the Respondent 1 towards payment of EMIs.

5. Thereafter, Respondent 1 sent a demand notice on 17 June 2014 alleging failure of the Petitioners and DPCL to pay the EMIs and thereby commission of breach of the terms and conditions of the Facility Agreement. The said notice called upon the Petitioners and the DPCL to repay the entire facility amount along with interest within a period of seven days, failing which Respondent 1 threatened to initiate recovery proceedings and enforce the Mortgage.

6. Respondent 1 invoked arbitration in terms of Clause 10 of the Facility Agreement *vide* a notice dated 15 December 2014 issued under Section 21 of the 1996 Act. The notice appointed Mr. Lalit Kumar as the sole arbitrator to adjudicate the disputes between the

³ "the flat" hereinafter

⁴ EMIs



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parties.

7. The petitioners filed two applications before the learned Arbitrator, under Section 12(1) and Section 16 of the 1996 Act.

8. By virtue of letter dated 25 March 2015, the learned sole arbitrator fixed the next date for arbitration on 14 April 2015 and on the said date, the matter was reserved for delivering the award.

9. After hearing learned Counsel for both sides, I am of the opinion that the impugned award is vitiated on each of the three grounds urged by Mr. Manik Dogra, learned Counsel for the petitioners, viz., that (i) the learned arbitrator had not submitted the requisite disclosure as per Section 12(1)⁵ of the 1996 Act, (ii) the learned arbitrator had failed to decide the applications filed by the petitioners under Sections 12 and 16 of the 1996 Act and (iii) the appointment of the learned arbitrator was unilateral and was, therefore, *ex facie* illegal *ab initio*.

Re: Section 12 of the 1996 Act

⁵ 12. **Grounds for challenge. –**

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the

Sixth Schedule.

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10. Mr. Aggarwal, learned Counsel for the respondents, had sought to submit that the objection with respect to Section 12(1) would not apply in the present case, as the arbitral proceedings had commenced prior to the amendment of Section 12(1) by Section 8(i)⁶ of the Arbitration and Conciliation (Amendment) Act, 2015⁷.

11. In this context, I am in agreement with Mr. Dogra that the fact that the arbitration may have commenced prior to the amendment of Section 12(1) of the 1996 Act may not make any substantial difference as Section 12(1), even as it stood prior to amendment⁸, required the arbitrator to mandatorily disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

12. There is no dispute about the fact that the arbitrator had been appointed as an arbitrator in 215 cases involving the Respondent 1. Besides, the petitioners had, in their application under Section 12(1), raised serious concerns about the impartiality of the learned Arbitrator, predicated on allegations that the learned Arbitrator was

⁶ 8. **Amendment of Section 12.** – In Section 12 of the principal Act, –

(i) for sub-section (1), the following sub-section shall be substituted, namely –

“(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances, –

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1. – The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2. – The disclosure shall be made by such person in the form specified in the Sixth Schedule.”;

⁷ “the 2015 Amendment Act” hereinafter

⁸ (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.



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not found at the venue fixed for arbitration at the appointed time on more than one occasion, and that all orders, except one, were passed in the absence of the petitioners.

13. At the very least, therefore, the learned Arbitrator was required to have dealt with the petitioners' application under Section 12 before concluding the matter. Also, he ought to have disclosed the fact that he had arbitrated in 215 cases involving the Respondent 1, before entering on reference. That disclosure never took place. The reliance, by Mr. Dogra, on the judgment of the Division Bench of this Court in ***Ram Kumar v Shriram Transport Finance Co Ltd***⁹ is well taken. The Division Bench has, in para 31 of the said decision, specifically held, apropos a challenge to the impartiality of the arbitrator under Section 12 of the 1996 Act, thus:

“31. This Court is of the view that the approach of the learned Commercial Court is flawed. *Unilateral appointment of the Arbitrator by the respondent is impermissible. The fact that the learned Sole Arbitrator had been engaged in a number of matters by the respondent is, concededly, a material fact that would raise justifiable grounds as to his independence and impartiality. Thus, in addition to being ineligible as an arbitrator under Section 12(5) of the A&C Act, the grounds giving rise to justifiable doubts as to the independence and impartiality exist in the present case. The learned Sole Arbitrator was required to disclose in writing such circumstances which are likely to give rise to justifiable doubts as to his independence and impartiality, but he had failed to make any such disclosure. In our view, since the grounds giving rise to justifiable doubts as to impartiality exist, failure to make such disclosure vitiates the arbitral proceedings and the impugned award.*”

(Emphasis supplied)

14. ***Ram Kumar*** entirely covers the case. The failure, on the part



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of the learned Arbitrator, to submit the requisite disclosure under Section 12(1) of the 1996 Act and the fact that he had arbitrated in 215 cases involving the Respondent 1, despite the petitioners specifically moving an application to that effect, clearly vitiates the award. That decision would apply even prior to the amendment of Section 12(1) by the 2015 Amendment Act.

Re. application under Section 16 of the 1996 Act

15. The second ground on which the impugned award is vitiated is that the learned arbitrator did not take any decision on the application filed by the petitioners under Section 16 of the 1996 Act on the ground that the appointment of the arbitrator, being unilateral, was illegal.

16. Mr. Aggarwal sought to submit that, having filed the application, the petitioners never prosecuted the application by appearing to press or argue it. He has drawn attention, in this context, to the recital, in the impugned award, of the fact that, having filed the application, the petitioners never appeared to argue the application on 14 April 2015.

17. I am of the opinion that, once an application had been filed, and the learned arbitrator was conscious of the fact that the application was pending, the learned arbitrator could not have refrained from passing any orders on the application merely because the applicant did not personally appear to argue the application.



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18. The objection taken in the application pertained to the jurisdiction of the learned arbitrator to arbitrate on the dispute and, therefore, went to the very root of the exercise of arbitral jurisdiction by him. It was incumbent on him, therefore, to decide the application.

19. The failure on the part of the learned arbitrator to decide the application is an additional factor which vitiates the impugned award.

Re. unilateral appointment of the learned Arbitrator

20. Perhaps the most damaging defect in the entire process is the fact that the appointment of the learned arbitrator was unilateral. A unilateral appointment, in an arbitral proceeding, is completely impermissible in law.

21. This is the position that has existed even prior to the amendment of the 1996 Act. The Supreme Court has, even in its decisions prior to the said amendment, clearly held that the very essence of arbitral proceedings is consensus *ad idem* and that, therefore, there can be no question of an arbitration by an arbitrator appointed by one of the parties without the consent of the other. One may refer, in this context, to the following passage from *Dharma Prathishthanam v. Madhok Construction (P) Ltd*¹⁰:

“14. In *Thawardas Pherumal v. Union of India*¹¹ a question arose in the context that no specific question of law was referred to, either by agreement or by compulsion, for decision of the arbitrator and yet the same was decided howsoever assuming it to be within

¹⁰ (2005) 9 SCC 686

¹¹ (1955) 2 SCR 48 : AIR 1955 SC 468



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his jurisdiction and essentially for him to decide the same incidentally. It was held that : (SCR p. 58)

“A reference requires the assent of *both* sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them that it should be referred, then recourse must be had to the court under Section 20 of the Act and the recalcitrant party can then be compelled to submit the matter under sub-section (4). In the absence of either, agreement by *both* sides about the terms of reference, or an order of the court under Section 20(4) compelling a reference, the arbitrator is not vested with the necessary exclusive jurisdiction.”

(emphasis in original)

15. A Constitution Bench held in *Waverly Jute Mills Co. Ltd. v. Raymon and Co. (India) (P) Ltd*¹² that :

“[A]n agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the *time* when they enter on their duties, the proceedings must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the parties in those proceedings, even if that is without protest, because it is well settled that consent cannot confer jurisdiction.”

16. Again a three-Judge Bench held in *Union of India v. A.L. Rallia Ram*¹³ that it is from the terms of the arbitration agreement that the arbitrator derives his authority to arbitrate and in absence thereof the proceedings of the arbitrator would be unauthorised.”

(Italics in original; underscoring supplied)

22. Admittedly, the appointment of the arbitrator in the present case was unilateral. That single factor, even without reference to any other infirmity, is sufficient to vitiate the award.

23. For all the aforesaid reasons, without entering into merits, the impugned award is set aside.

¹² (1963) 3 SCR 209 : AIR 1963 SC 90

¹³ (1964) 3 SCR 164 : AIR 1963 SC 1685]



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24. The petition stands allowed in the aforesaid terms.

C. HARI SHANKAR, J.

AUGUST 23, 2024

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Click here to check corrigendum, if any

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