

Mahindra And Mahindra Financial Services Ltd.)
 Having its registered office at)
 Gateway Building, Apollo Bunder,)
 Mumbai MH 400 001 In) ...Applicant

1.	Hans India Solution	)
	Through its Proprietor Mr. Indu Gupta,	)
	Registered Address :II No.383/5, Gali No.5,	)
	Near Ahuja Sweet, Govind Puri,	)
	Kalkaji, South Delhi – 110 019.	)
	Also at	
	Factory Address: TA 328, First Floor,	)
	Okhla Estate Marg, Tughlakabad	)
	Extension, New Delhi – 110 019.	)
2.	Suraj Gupta	)
	Permanent Address: Gali No.5,	)
	near Ahuja Sweet, Govind Puri, Kalkaji,	)
	South Delhi – 110 019.	)
	Also At:	
	H No.383/5, Gali No.5, near Ahuja Sweet,	)
	Govind Puri, Kalkaji, South Delhi – 110 019.	) ...Respondents

Ms. Pranjali Khemnar a/w Vikrant Pandey i/b. Hedgehog And Fox LLP for the Applicant.

CORAM: ADVAIT M. SETHNA, J.
DATE : 25 FEBRUARY 2025

1. This is an application filed under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of Sole Arbitrator. The disputes and

differences in the present case have arisen under the agreement dated 10 June 2022 named and styled as “Master Facility Agreement” (“Master Agreement” for short). It is executed between the parties who are also parties to the present application. Such fact of execution is not controverted/ disputed. The agreement contains an arbitration clause which reads thus:-

“24.11. Arbitration

All disputes, differences and/or claims arising out of these presents or in any way concerning the same or as to construction, meaning or effect hereof or as to the right and liabilities of the Parties hereunder shall be settled by arbitration to be held in accordance with the provision of the Arbitration and Conciliation Act, 1996 or any statutory amendments/replacements thereof and shall be referred to the sole arbitrator to be nominated by the Lender. In the event of death, refusal, neglect, inability or incapability of a person so appointed to act as an arbitrator, the Lender may appoint a new arbitrator. The arbitrator shall not be required to give any reasons for the award and the award of the arbitrator shall be final and binding on all parties concerned. The arbitration proceedings shall be held in Mumbai.”

2. Before delving into the merits, it is pertinent to note that the Court is constrained to hear and pass appropriate orders in the said application in the given facts and circumstances:-

(a) By an order dated 14 December 2024 this Court issued notice to the respondents returnable on 13 January 2025. The Advocate for the applicant placed on record an affidavit of service dated 9 August 2024. In addition to Court service, liberty was also granted to the applicant to serve the respondents by private service.

(b) The application under Section 11 has been filed on 25 April

2024.

(c) Pursuant to the order of this Court dated 14 December 2024 the service report of the Registry of the Court indicates that respondent nos.1 and 2 were served on 7 January 2025 on the address mentioned in the cause title.

(d) Pursuant to the above, this application was listed on 28 January 2025 when the following order was passed:-

- “1. The learned Advocate for the applicant refers to an order passed by this Court on 14 December 2024. Pursuant thereto, the respondents have been served through the registry of this Court dated 1 January 2025. The service report dated 7 January 2025 would show that the service is complete on both the respondents. The learned Advocate for the applicant has also effected private service to the respondents pursuant to such order. An affidavit of service in this regard dated 9 August 2024 was filed by the learned Advocate for the applicant. She would today submit that on behalf of the applicant she has also undertaken paper publication to serve the respondents, considering the fact that they have not at all been appearing before this Court in the said proceedings. She has filed an additional affidavit of service dated 28 January 2025, placing on record such paper publication effected by the applicant, a copy of which is taken on record.
2. It appears from the record that service to the respondents is now complete. In order to enable the respondents to represent before the Court in the present application the proceedings are adjourned, as a matter of last chance for a period of two weeks. It is made clear that despite service, if the respondents choose not to appear on the adjourned date of hearing it would be presumed that the respondent is not interested to contest this application and appropriate orders would be passed on such date.
3. Stand over to **11 February 2025.**”

3. In the above backdrop, the respondents despite being duly served, have deliberately chosen not to appear and sought to avoid service. In fact, even today, the matter was kept back for the afternoon session after being called out in the

morning session giving an opportunity to the respondents to appear. Accordingly, the learned counsel for the applicant addressed an email to the respondents, which despite being delivered to the respondents, as stated by the learned counsel for the applicant, the respondents have once again failed to appear.

4. In view thereof, it is in the interest of justice, that this application under Section 11 be proceeded with as the respondents are clearly not inclined/interested to represent themselves and/or contest these proceedings. In the above facts and circumstances, I am constrained to hear the learned counsel for the applicant and upon careful perusal of the record proceed to adjudicate this application.

5. The parties to this application had executed a Master Facility Agreement dated 30 June 2022. This was in the nature of a loan which was granted by the applicant to the respondent against hypothecation of the machinery in favour of the applicant by the respondent. Certain disputes and differences arose to such Master Facility Agreement whereby, according to the applicant, certain amounts were due and payable under such agreement by the respondent to the applicant. The said agreement contain an arbitration clause which is reproduced above.

6. As disputes and differences arose between the parties, the applicant was constrained to issue a loan recall notice dated 4 March 2024 to the respondents terminating the loan facility advanced to the respondents and recalling the amount of Rs.31,57,313.84/- due and payable as stated by the applicant, as on 18 January 2024, along with interest and other applicable charges. The learned counsel for the applicant would submit that there is no response to the above

recall notice.

7. The applicant then proceeded to issue notice invoking arbitration dated 20 March 2024 to the respondents under section 21 of the Arbitration and Conciliation Act, 1996 (“**ACA**” for short) *inter alia* calling upon the respondent to pay an outstanding of Rs.31,57,313.84/- as on 18 January 2024 along with applicable interest failing which steps would be taken by the applicant to appoint the Sole Arbitrator under the arbitration clause as stipulated under Master Agreement. The learned counsel for the applicant would further submit that despite notices invoking arbitration there is no response to the same from the respondents, much less any denial thereto. According to the learned counsel for the applicant, the quantum of disputed claim in the present matter is Rs.31,57,313.84/- as on 18 January 2024, which the applicants are legally entitled to recover from the respondents. Needless it is to record that such claim is not admitted and would be disputed by the respondents.

8. In the above backdrop, it is clear that the Master Agreement is the primary agreement between the parties to the present dispute which contains an arbitration clause as noted (supra). It appears that existence of such arbitration clause is not controverted and/or denied by the respondent who has failed to record to the loan recall notice dated 4 March 2024 issued by the applicant as also to the notice invoking arbitration dated 20 March 2024. It is settled legal position that such arbitration clause partakes the nature and character of arbitration agreement under Section 7 of the ACA.

9. The arbitration clause incorporated in the Master Agreement confers the sole right on the applicant to appoint arbitrator. However, this is no longer valid or enforceable in the light of the settled law by the Supreme Court, as the unilaterally appointed arbitrator by one of the interested parties is ineligible to act as held by the Supreme Court in *Perkins Eastman Architects DPC and Anr. vs. HSCC (India) Limited*¹ and *TRF Limited v. Energo Engg. Projects Ltd.*² and other decisions in this regard, of the Supreme Court. The said decisions have been followed and recently referred to by the Five Judges Constitutional Bench of the Supreme Court in the case of *Central Organisation for Railway Electrification vs. ECI SPIC SMO MCML (JV) A Joint Venture Company*³, where the Supreme Court has reiterated its rulings against the appointment of Arbitrator being unilaterally appointed by one of the interested parties to arbitration proceedings. As a sequitur in the given facts and circumstances, this Court under Section 11(6) of the ACA is empowered to appoint an independent arbitrator.

10. In the above facts and circumstances, I proceed to appoint Shri Manish Kelkar, learned Advocate of this Court as the Sole Arbitrator to adjudicate and arbitrate upon the disputes and differences arising under the Master Facility Loan Agreement dated 30 June 2022, with reference to the arbitration clause provided for therein as noted (supra).

1 (2020) 20 SCC 760

2 (2017) 8 SCC 373

3 2024 SCC OnLine SC 3219

11. Considering the above, I deem it fit and proper to pass the following order:-

Appointment of Arbitrator:-

Advocate Mr. Manish Kelkar, Bombay High Court is hereby appointed as learned sole arbitrator.

- i. A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Applicant within ten (10) days from the date this order is uploaded.
- ii. The Advocates for the Applicant will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses:

Arbitrator/s : Mr. Manish Kelkar, Advocate.
 Address : 212A-213A, Commerce House,
 Opposite Kala Ghoda Cafe,
 140, Nagindas Master Road,
 Fort-400001.
 Mobile : 9545036036
 Email : adv.manishkelkar@gmail.com

- iii. **Disclosure:** The learned Sole Arbitrator is requested to forward, in hard copy, soft copy, the necessary statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996 to Advocates for the parties as soon as possible. The Advocates for the applicant will arrange to file the original statement in the Registry with the Prothonotary & Senior Master (Original Side) within three (03) days of it being made

available by the learned sole arbitrator.

- iv. **Appearance before the Arbitrator:** Parties will appear before the learned Sole Arbitrator on such date and at such place as the learned Sole Arbitrator decides to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.
- v. **Interim Application/s:** Interim Application, if any, filed under Section 17 of the Arbitration and Conciliation Act, 1996 shall be decided by the arbitrator, if and so when referred.
- vi. **Fees:** The arbitral tribunal's fees shall be governed by the Fourth Schedule to the Arbitration and Conciliation Act, 1996.
- vii. **Sharing of costs and fees:** Parties agree that all arbitral costs and the fees of the arbitrator will be borne by the two sides in equal proportion.
- viii. **Venue of Arbitration :** The venue of arbitration as stated in the Arbitration clause shall be Mumbai.

12. The Arbitration Application No.199 of 2024, is allowed as per prayer clause (a) and in the above terms. No order as to costs.

13. Needless to mention that all contentions of parties on all issues are expressly kept open to be urged before the learned Sole Arbitrator.

[ADVAIT M. SETHNA, J.]