



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**COMMERCIAL ARBITRATION APPEAL NO.5 OF 2025
IN
COMMERCIAL ARBITRATION PETITION NO.210 OF
2024**

M/s. NM Construction

...Appellant

V/s.

Suryadeep Engineering Pvt. Ltd.

...Respondent

Ms. Gayatri Mohite with Mr. Drupad Vaghani & Mr. Ashwath Reddy for the Appellant.

Mr. Akash Menon (through VC) for Respondent.

**CORAM : ALOK ARADHE, CJ. &
SANDEEP V. MARNE, J.**

DATED : 12 AUGUST 2025.

Order: (PER : SANDEEP V. MARNE, J.)

1) This Appeal is filed under the provisions of Section 37 of the Arbitration and Conciliation Act, 1996 (**the Act**) challenging the judgment and order dated 10 January 2025 passed by the learned Single Judge of this Court in Commercial Arbitration Petition No.210 of 2024. By the impugned order, the learned Judge has set aside the Award passed by the Arbitral Tribunal.

2) Brief facts of the case are that a company by name Pratibha Industries Ltd. (**Pratibha**) was awarded two work orders by Public Health Engineering Department, Government

of Rajasthan. Pratibha awarded some part of the work to the Respondent. The Appellant claims to have facilitated such work allotted to the Respondent by Pratibha and claims facilitation consideration from the Respondent.

3) The Appellant claims that Memorandum of Understanding dated 15 January 2019 (**the MoU**) was executed between the parties, under which it was agreed to pay facilitation consideration as percentage of margin of the work awarded by Pratibha to the Respondent. Respondent denied having executed such MoU. Appellant raised several demands on the Respondent for payment of facilitation consideration. On 2 July 2021, the Appellant invoked arbitration clause recommending one Mr. A. Jagannathan as the sole Arbitrator to resolve the disputes between the parties in accordance with clause 7 of the MoU. On 10 August 2021, the Respondent addressed letter to the Arbitrator informing him about his appointment as sole Arbitrator. On 7 September 2021, the Respondent addressed a letter to the Arbitrator objecting to his appointment. Appellant disputes the genuineness of the said letter. On 27 September 2021, Respondent wrote to the Appellant with a copy to the sole Arbitrator and once again refused to accept appointment of Mr. A. Jagannathan as sole Arbitrator. On 20 October 2021 the Respondent filed a civil suit in Jaipur seeking declaration that the MoU was null and void. Appellant has filed statement of claim before the Arbitrator. On 29 January 2022. The Respondent reiterated objection before the

Arbitrator. On 16 March 2022 the Arbitrator ruled that he intended to continue with the arbitration proceedings holding that the Respondent had not challenged his appointment within the time limit specified in Section 13(2) of the Act. On 14 October 2022, the Arbitrator made an Award awarding the amount of Rs.11,20,90,862/- alongwith interest @12% per annum in favour of the Appellant.

4) Respondent filed Commercial Arbitration Petition No.210 of 2024 challenging the Award under Section 34 of the Act. The learned Single Judge, by the impugned judgment and order dated 10 January 2025, has set aside the Award holding that the appointment of the learned Arbitrator was unilateral, illegal and void. Aggrieved by the order of the learned Single Judge setting aside the Award, the Appellant has filed the present Appeal under the provisions of Section 37 of the Act.

5) We have heard Ms. Mohite, the learned counsel appearing for the Appellant, who would submit that the learned Single Judge has grossly erred in setting aside the arbitral Award. That the learned Single Judge has ignored the position that the Respondent never challenged the jurisdiction of the Arbitrator by filing application under Section 16 of the Act. That having failed to challenge jurisdiction of the arbitral tribunal under Section 16 of the Act, it was impermissible for the Respondent to challenge the Award on the ground of erroneous appointment of the Arbitrator under Section 34 of the Act. In support, she would rely upon judgment of the Hon'ble Apex

Court in ***Gas Authority of India Ltd. and Anr. Vs/. Ket Construction (I) Ltd. and Others***¹. She would also rely upon judgment of Delhi High Court in ***Arjun Mall Retail Holdings Private Limited and Others V/s. Gunocen Inc.***² That the learned Judge has travelled beyond the scope of Section 34 of the Act while setting aside the Award.

6) The Appeal is opposed by Mr. Menon, the learned counsel appearing for the Respondent. He would submit that the learned Arbitrator was unilaterally appointed by the Appellant without consent of the Respondent. That the genuineness of the MoU itself is under dispute and that therefore there was no agreement between the parties for resolution of dispute through arbitration. That Respondent had specifically objected conduct of arbitral proceedings by the learned Arbitrator. That therefore the learned Single Judge has rightly set aside the arbitral award after noticing that the appointment of the Arbitrator was unilaterally made by the Appellant. He would accordingly pray for dismissal of the Appeal.

7) Rival contentions of the parties now fall for our consideration.

8) The learned Single Judge has set aside the Arbitral Award on the ground that appointment of Mr. A. Jagannathan as Arbitrator was *ab initio void*. The learned Single Judge has held that the appointment of the learned Arbitrator was unilaterally

¹ (2007) 5 SCC 38

² 2024 SCC OnLine Del 428

made by the Appellant without securing consent of the Respondent. There is no dispute to the position that the Appellant, while invoking the arbitration clause, unilaterally suggested the name of Mr. A. Jagannathan as Arbitrator. Under Clause 7 of the MoU, it was not agreed between the parties that the Appellant can appoint arbitrator unilaterally. Clause 7 of the MoU merely provides for resolution of dispute through arbitration. After the Appellant proposed the name of Mr. A. Jagannathan while invoking arbitration, consent of the Respondent was not secured. Therefore, it was necessary for the Appellant to seek appointment of Arbitrator by filing Petition under Section 11 of the Act. However, Appellant directly proceeded to write to the Arbitrator informing him of his appointment.

9) Thus, there is no dispute to the position that the appointment of learned Arbitrator is done unilaterally by the Appellant. It is strenuously sought to be contended by the Appellant that if the Respondent had objection about appointment of Arbitrator, it ought to have been taken either within the time limit specified under Section 13 or by filing application under Section 16 of the Act. The learned Single Judge has held that the Respondent had addressed two letters dated 7 September 2021 and 27 September 2021 objecting to the appointment of the Arbitrator. Though receipt of the first letter is disputed, there is no dispute about receipt of letter dated 27 September 2021. Therefore the learned Arbitrator ought to have decided the issue of his appointment rather than proceeding

ahead with the arbitration by observing that challenge to the procedure could only be made under Section 13 of the Act within the stipulated time. We are therefore unable to accept the contention sought to be raised by the Appellant that objection as to jurisdiction of the Arbitrator was not raised by the Respondent. Such an objection was specifically raised vide letter dated 27 September 2021. Therefore, reliance by the Appellant on the judgments in *Gas Authority of India Ltd.* and *Arjun Mall* (supra) is misplaced in the light of raising of objection to the appointment of the Arbitrator by the Respondent.

10) The Appellant unilaterally went for arbitration to the Arbitrator of his choice rather than securing the appointment through Section 11 proceedings. Since the very appointment of the Arbitrator was ab initio void, the award deserved to be set aside under Section 34 of the Act. The learned Single Judge has acted within the bounds of jurisdiction under Section 34 of the Act.

11) We see no reason to interfere in the order passed by the learned Single Judge. The Appeal is accordingly **dismissed**.

[SANDEEP V. MARNE, J.]

[CHIEF JUSTICE]