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C.R.P.No.4959 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27-01-2025

CORAM

THE HONOURABLE MR JUSTICE N. SATHISH KUMAR

C.R.P.No.4959 of 2024

and

C.M.P.No. 27917 of 2024

D. Aruldoss

..... Petitioner

-Versus-

1.The Authorised Signatory

M/s. Shriram City Union Finance Ltd.

Rep by its Power of Attorney Mr.P.Sivakumar,

Deputy Manager,

No.12, Ramasamy Street,

T.Nagar, Chennai 600 017.

2.K.Dhanusu

3.R.Moorthi

..... Respondent(s)

Petition filed under Article 227 of the Constitution of India, praying to strike off the Execution Petition in E.P.No.86 of 2022 in C.P.No.YKR/SCUF/179/2020 on the file of the learned I Additional District Judge, Tindivanam, Villupuram District.

For Petitioner : Mr.G.Mohammed Aseef

For Respondent(s) : Mr.J.Vikraman for R1

No Appearance for RR2 and 3



C.R.P.No.4959 of 2024

WEB COPY

ORDER

This civil revision petition is at the instance of one of the judgement-debtors seeking to strike off the Execution Petition in E.P.No.86 of 2022, which was filed by the 1st respondent and is pending on the file of the learned I Additional District Judge, Tindivanam, to get executed the Award dated 17.03.2021 passed by the learned arbitrator in C.P.No.YKR/SCUF/179/2020.

2. The revision petitioner is the 1st respondent and the respondents 2 and 3 are the respondents 2 and 3 in the arbitral award and the 1st respondent is the claimant in the arbitral proceedings, which arose , out of a dispute that arose over a loan transaction. The 1st respondent, a financial institution, referred the matter to the sole arbitrator to adjudicate the dispute arose between the revision petitioner and the respondents 2 and 3 and themselves. The sole arbitrator passed an award on 17.03.2021 whereby the respondents in the arbitral proceedings were directed to pay to the claimant a sum of Rs.21,70,626/- together with interest at the rate of 18% p.a. from 07.12.2020 till date of realisation of the amount in full and also to pay a sum of Rs.5,000/- towards the cost of arbitration proceedings. On the basis of the award, the 1st respondent initiated an execution proceedings on the file of the learned I



C.R.P.No.4959 of 2024

Additional District Judge, Tindivanam, for attachment and sale of immovable properties belonging to the revision petitioner/1st judgement-debtor. That application was taken on file as E.P.No.86 of 2022 and the same has been pending for execution of the decree.

3. On notice in the Execution Petition, the revision petitioner/1st judgement debtor entered appearance in the execution proceedings through counsel. It is however seen from the typed set of papers that on 15.03.2023, as the judgement-debtors did not file their counter despite conditional order, and they were not present, the executing court set the judgement debtors ex parte and proceeded further to order for attachment of the property and adjourned the matter to 25.04.2023. At that stage, the 1st judgement-debtor has come forward with the present revision petition seeking to strike off the execution petition.

4. It is seen from the typed set of papers that subsequently, the 1st judgement-debtor has filed his counter opposing the execution petition and *inter alia* contending that he had altogether paid a sum of Rs.3,00,000/-, but the claimant had not taken that amount into credit. Despite repeated demands, the claimant has not given the particulars of instalments paid thus far. The property sought to be attached is not his absolute property and his two sisters



C.R.P.No.4959 of 2024

have equal shares in the same.

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5. In this revision petition, on notice, the 1st respondent/decreed-holder claimant entered appearance through counsel. The respondents 2 and 3, the other judgement debtors have not entered appearance either in person or through counsel, despite their name having been printed on the cause list. Thus, this court had no other option except to proceed with further in the revision petition and pass orders on merits.

6. Heard Mr.G.Mohammed Aseef, learned counsel for the revision petitioner/1st judgement-debtor and Mr.J.Vikraman, learned counsel for the 1st respondent/decreed-holder.

7. Mr.G.Mohammed Aseef, learned counsel for the revision petitioner/judgement debtor would submit that the order of attachment was based on an ex parte award passed by the sole arbitrator appointed unilaterally without even giving an opportunity to the revision petitioner. The revision petitioner was also not served with any notice in the arbitral proceedings. According to the learned counsel, the unilateral appointment of an arbitrator would itself create an ineligibility.



C.R.P.No.4959 of 2024

8. Mr.G.Mohammed Aseef would further submit that it is the settled law that even if an award is not set aside under the procedure established in Section 34 of the Arbitration and Conciliation Act, 1996, the executing court can step in and hold that an award passed by the unilaterally appointed arbitrator as non est in law and declare such award as a nullity and direct the parties to re-agitate the issues before a new arbitral tribunal constituted in accordance with law.

9. Per contra, J.Vikraman learned counsel appearing for the 1st respondent/decreed-holder, would submit that the executing court cannot *suo motu* annul the award when a party to the agreement did not challenge the award on the ground of ineligibility of the arbitrator under Section 12(5) of the Arbitration and Conciliation Act, 1996. According to the learned senior counsel, when the party to the arbitral proceedings did not choose to challenge the appointment of the arbitrator, the same would, in the eye of law, amount to a waiver of applicability of provision to Section 12(5) of the Arbitration Act, 1996.

10. Mr.J.Vikraman would further submit that the bar of ineligibility partakes of a character of not being an absolute bar which would hit at the root of the very assumption of jurisdiction at the inception, rendering the award a



C.R.P.No.4959 of 2024

nullity and hence, according to him, though the unilateral appointment of arbitrator creates an ineligibility, the same **would not amount** to inherent lack of jurisdiction rendering the entire arbitral proceedings and the consequential award nullity altogether.

11. In a nutshell, according to Mr.J.Vikraman, any award passed by the arbitrator can be set aside only on an application under Section 34 of the Arbitration and Conciliation Act, 1996. If the award passed by the arbitrator has not been challenged by the aggrieved party, such award shall be final and binding on the parties to the contract. Therefore, the executing court cannot *suo motu* annul the arbitral award.

12. In support of his above submissions, Mr.J.Vikraman would place reliance upon the judgements in the cases of (i) **Bhawarlal Bhandari vs. Universal Heavy Mechanical Lifting Enterprises**, 1999 (1) SCC 558; (ii) **Satish Karthikeyan vs. Axis Bank Limited** [C.R.P.(NPD) No.3808 of 2023 dated 13.11.2024]; and (iii) **Kotak Mahindra Bank Limited vs. Shalibhadra Cottrade Private Limited and others** [Execution Case No.193 of 2019 dated 02.07.2024].



C.R.P.No.4959 of 2024

13. The award in question was passed in the arbitration Case in C.P.No.RJ SF/302/2017 on 13.02.2018. When the execution petition was filed, the executing court placing reliance upon the provision in Section 12(5) of the Arbitration and Conciliation Act, 1996 and the judgement of the Hon'ble Supreme Court in **TRF Limited v. Energo Engineering Projects Limited** [(2017) 8 SCC 377 and **Perkins Eastman Architects DPC and others v. HSCC (India) Limited** [AIR 2020 SC 39], *suo motu* dismissed the Execution Petition holding that the award is non est in the eye of law due to lack of inherent jurisdiction on the ground of ineligibility of the arbitrator.

14. No doubt, the Hon'ble Supreme Court in the case of **TRF Limited and Perkins Eastman Architects'** cases [cited supra] has held that unilateral appointment of an arbitrator by one of the parties itself would come under the purview of disqualification by ineligibility.

15. It is, however, relevant to note here that proviso to sub-section (5) of Section 12 of the Arbitration and Conciliation Act, 1996, provides an option to the parties to waive the applicability of provision to sub-section (5) by express agreement in writing. Thus, an objection as to the applicability can be raised under sub-section (5) of Section 12 of the Arbitration and Conciliation Act,



C.R.P.No.4959 of 2024

1996. As long as there is no objection raised, it cannot be said that a mere unilateral appointment of arbitrator would vitiate the entire arbitral proceedings which culminated in an award. The very proviso of sub-section (5) of Section 12 of the Arbitration and Conciliation Act, 1996 would indicate that a mere ineligibility does not make the entire arbitral proceedings *void ab initio*. In this regard, it is relevant to refer to the judgement of the High Court of Calcutta in the case of **Kotak Mahindra Bank Limited v. Shalibhadra Cottrade Private Limited** (cited supra) wherein at paras 29, 30, 32 and 53 it has been held as under:

“29. Thus, the very fact that the proviso contemplates subsequent waiver of the objection as to ineligibility also unerringly indicates that the ineligibility does not render the entire proceeding void ab initio or a nullity at the inception. If it were to be so, it would be non est and could not exist in the eye of law. Such a fundamental defect cannot be cured subsequently even by express waiver in writing.

30. Hence, in view of the provision of waivability under the proviso to Section 12(5), the bar of ineligibility partakes of a character of not being an absolute bar which would hit at the root of the very assumption of jurisdiction at the inception, rendering the award a nullity.



C.R.P.No.4959 of 2024

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32. Hence, although unilateral appointment creates an ineligibility, the same is not of such a high stature as to tantamount to an implicit and inherent lack of jurisdiction rendering the entire proceedings and the consequential award a nullity altogether.

.....

.....

53. Thus, on a comprehensive consideration of the above judgments, it is crystal-clear that the ineligibility of the Arbitrator cannot be set up as a ground of inexecutability of an award in a proceeding under Section 36 of the 1996 Act for the first time.”

16. In the case of **Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman**, (1970) 1 SCC 670, the Hon'ble Supreme Court has held that the executing court cannot go behind the decree unless it is shown that it was passed by a court inherently lacking jurisdiction and thus was a nullity. The relevant portions of the judgement read as under:

“6. A court executing a decree cannot go behind the decree: between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in



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C.R.P.No.4959 of 2024

law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.

7. When a decree which is a nullity, for instance, where it is passed without bringing the legal representative on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a court which has no inherent jurisdiction to make objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. In *Jnanendra Mohan Bhaduri v. Rabindra Nath Chakravarti* [LR 60 IA 71] the Judicial Committee held that where a decree was passed upon an award made under the provisions of the Indian Arbitration Act, 1899, an objection in the course of the



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C.R.P.No.4959 of 2024

execution proceeding that the decree was made without jurisdiction, since under the Indian Arbitration Act, 1899, there is no provision for making a decree upon an award, was competent. That was a case in which the decree was on the face of the record without jurisdiction.”

17. The above mentioned judgement in Vasudev Dhanjibhai v. Rajabhai Abdul Rehman [(1970) 1 SCC 670] was followed by the Hon'ble Supreme Court in the case of Bhawarlal Bhandari v. Universal Heavy Mechanical Lifting Enterprises (cited supra). In Bhawarlal Bhandari's case the Hon'ble Supreme Court has held that even if the decree was passed beyond the period of limitation, it would be an error of law or at the highest, a wrong decision, which can be corrected in appellate proceedings and not by the executing court which was bound by such decree.

18. In the case of **ONGC Limited v. M/s. Modern Constructions and Company** reported in (2014) 1 SCC 648, the Hon'ble Supreme Court has held that executing court cannot go behind the decree and in the absence of any challenge to the decree, no objection can be raised in execution.

19. In the case of **Shivshankar Gurjar v. Dilip** [(2014) 2 SCC 465], the



C.R.P.No.4959 of 2024

Hon'ble Supreme Court has observed that the executing court cannot go behind the decree; it has no jurisdiction to modify a decree; and it must execute the decree as it is.

20. A constitution bench of the Hon'ble Supreme Court in the case of **Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV), a Joint Venture Company** [2024 (6) CTC 495] in a majority view has held that “unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution and the principle of express waiver contained under the proviso to Section 12(5) also applies to situations where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties. After the disputes have arisen, the parties can determine whether there is a necessity to waive the nemo judex rule.” The Hon'ble Supreme Court has, however, held that the law laid down in the said judgement will apply prospectively to arbitrator appointments to be made after the date of the judgement. The doctrine of prospective overruling was specifically made by the Hon'ble Supreme Court taking note of the fact that change in law may have the effect of distorting established rights and commercial bargains between parties. To avoid large-scale social and economic disruption, the Hon'ble Supreme Court exercised its discretionary



C.R.P.No.4959 of 2024

jurisdiction under Article 142 to give prospective effect to its decisions.

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21. Further, the Hon'ble Supreme Court has applied the doctrine of prospective overruling to bring about a smooth transition of the operation of law without unduly affecting the rights of people who acted upon the overruled law.

22. Even in a minority view one of the Hon'ble Judges has held that the occasion for the court to examine the constitution of the independent and impartial tribunal under the arbitration clause will arise when one of the parties makes an application under Sections 11, 14 or 34. It is not permissible for the court to give an advance declaration that all such agreements which enable one of the parties to unilaterally constitute the arbitral tribunal would be void per se. No two agreements are the same and it is necessary for the court to examine the text and context of the agreement.

23. It is also further to be noted that to set aside an arbitral award, an application under Section 34 of the Arbitration and Conciliation Act, 1996 is must. The very wording employed in Section 34 of the Arbitration and Conciliation Act, 1996 reads as under:-



C.R.P.No.4959 of 2024

WEB COPY

“Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)”

Therefore, the words employed in Section 34 “**recourse to a court against an arbitral award may be made only by an application for setting aside the award**” make it clear that an award has to be set aside only in the manner known to law as provided under Section 34 of the Arbitration and Conciliation Act, 1996. As long as an aggrieved party to the award did not challenge the award passed against him in the manner known to law, the arbitral award shall be final and binding on the parties and the persons claiming under them respectively. When a party to the award had not chosen to challenge the award within the time prescribed, such award shall be enforced in accordance with the provisions of the Code of Civil Procedure in the same manner as if it was a decree passed by the Civil Court. Therefore, as no objection was raised and the revision petitioner has waived the objection and also did not choose to file any application under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the award, such award is certainly executable. The issue of



C.R.P.No.4959 of 2024

unilateral appointment of arbitrator cannot be raised during the pendency of the execution proceedings. Thus, this court is of the view that execution petition cannot be struck off and the petitioner is not entitled for any relief in this revision. The revision petition must fail.

In the result, the revision petition is dismissed. No costs. Consequently, CMP is closed.

Index : yes / no
Neutral Citation : yes / no
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27-01-2025

To

1.The I Additional District Judge, Tindivanam, Villupuram District.



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C.R.P.No.4959 of 2024

N.SATHISH KUMAR.J.,

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C.R.P.No.4959 of 2024

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