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C.R.P.No.5197 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. 5197 of 2024

M/s.Sundaram Finance Limited,
21, Patullos Road, Chennai 600002.
Rep by its Senior Manager (Legal)

..... Petitioner

-Versus-

1.S.M. Thangaraj
2.T.Selvamani
3.M.Rajendran

..... Respondents

Petition filed under Section 115 of the Code of Civil Procedure, 1908, praying to set aside the order dated 14.11.2024 made in E.P.No.640 of 2018 in Arbitration Case No.CP No.RJ/SF/302/2017 by the learned II Additional Subordinate Judge, Coimbatore.



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For Petitioner : Mr.Mr.Aravind P. Datar,
Senior Counsel for
Mr.M.Arunachalam

For Respondent : No appearance for R2

Revision against RR1 and 3
given up

ORDER

Challenging the order of the Executing Court / II Additional Subordinate Judge, Coimbatore, dated 14.11.2024, *suo motu*, dismissing the Execution Petition in E.P.No.640 of 2018 in Arbitration case No. CP No.RJ/SF/302/2017, the decree holder has come up with the present revision petition.

2. The revision petitioner is the claimant and the respondents are the respondents in the arbitration case in CP No.RJ/SF/302/2017 arose out of a dispute over a loan transaction. The revision petitioner, a financial institution, referred the matter to the sole arbitrator to adjudicate the dispute that arose between the respondents and themselves. The sole arbitrator passed an award on 13.02.2018 whereby the respondents were directed to pay to the revision petitioner a sum of Rs.1,68,047.26 together with interest from 31.07.2017 till date of realization of the said amount in full and also to pay a sum of Rs.1700/-



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towards arbitrator's fee and a sum of Rs.800/- towards expenses incurred by the arbitrator. On the basis of the award, the revision petitioner initiated an execution proceedings to get executed the award which was taken on file by the learned II Additional Subordinate Judge, Coimbatore, in E.P.No.640 of 2018.

3. The learned Judge, however, *suo motu*, dismissed the execution petition by order dated 14.11.2024 holding that the arbitrator was appointed unilaterally and that the award made by the sole arbitrator is invalid due to a lack of inherent jurisdiction; as a result, the award made by the sole arbitrator in the arbitration case in CP No. RJ/SF/302/2017 was not enforceable and could not be regarded as a valid award.

4. This court, by order dated 17.12.2024, admitted the revision petition and directed the notice to be served on the respondents both through court as well as privately. However, on 20.01.2025, when the matter came up for hearing, the learned counsel for the revision petitioner had given up the claim against the respondents 1 and 3. Despite service of notice, the 2nd respondent did not enter appearance either in person or through counsel, and hence, the matter was ordered to be listed today, printing the name of the 2nd respondent on the cause list. Accordingly, it is listed today, and despite the name having



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been printed on the cause, the 2nd respondent has not entered appearance either in person or through counsel. Therefore, this court has no other option except to proceed with the matter further and pass orders on the merits.

5. Heard Mr.Arvind P.Datar, learned senior counsel for Mr.M.Arunachalam, learned counsel on record for the revision petitioner.

6. Mr.Arvind P.Datar, learned senior counsel, 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 and Conciliation Act, 1996.

7. Mr.Arvind P.Datar 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 nullity and hence, according to him, though the unilateral appointment of arbitrator creates an ineligibility, the same would not amount to inherent lack



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of jurisdiction rendering the entire arbitral proceedings and the consequential award nullity altogether.

8. In a nutshell, according to Mr.Arvind P.Datar, 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.

9. In support of his above submissions, Mr.Arvind P.Datar, 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].

10. 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



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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.

11. 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.

12. 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, 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.

.....

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



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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.”

13. 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 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.



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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 and Conciliation Act, 1899, an objection in the course of the 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.”

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14. 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.

15. 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 absence of any challenge to the decree, no objection can be raised in execution.

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



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17. A constitution bench of the Hon'ble Supreme Court in the case of

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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. This only will apply prospectively to arbitrator appointments to be made after the date of this 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, this Court can exercise its discretionary jurisdiction under Article 142 to give prospective effect to its decisions.”



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18. 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.

19. 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.

20. 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 follows:

“Recourse to a Court against an arbitral award
may be made only by an application for setting aside



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executing court *suo motu* dismissing the execution petition filed by the revision petitioner to get executed the arbitral award cannot be sustained in the eye of law. This revision petition succeeds accordingly.

In the result, the revision petition is allowed; the order dated 14.11.2024 passed by learned II Additional Subordinate Judge, Coimbatore, *suo motu*, dismissing the Execution Petition in E.P.No.640 of 2018 in Arbitration Case No.CP No.RJ/SF/302/2017 is set aside. This court directs that the Executing Courts should not *suo motu* dismiss the Execution Petition(s) solely on the ground of unilateral appointment of an arbitrator. No costs.

Index : yes / no
Neutral Citation : yes / no

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To

1.The II Additional Subordinate Judge, Coimbatore.



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N.SATHISH KUMAR.J.,

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