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Arb.O.P (Com.Div.) No.132 of 2025

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.07.2025

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THE HON'BLE Mr. JUSTICE ABDUL QUDDHOSE

Arb.O.P (Com.Div.) No.132 of 2025 and A.No.1307 of 2025

1.M/s.JRS Infrastructure,
through its Sole Proprietor Jaswant Rai Garg

2.Vaibhav Garg

... Petitioners

Versus

M/s.Sundaram Finance Ltd.

... Respondent

Prayer: Arbitration Original Petition (Commercial Division) filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitral Award dated 25.07.2024 passed by the Sole Arbitrator, Dr.S.S.P.Darwesh (Former District and Sessions Judge) in the arbitration proceedings between the petitioners and the respondent.

For Petitioners : Mr.Advaidh Neelakandan R.
Assisted by
Mr.Pranav R.Menon
Krishnasree.S
for M/s.ARK Law Associates

For Respondent : Mr.M.Arunachalam

ORDER

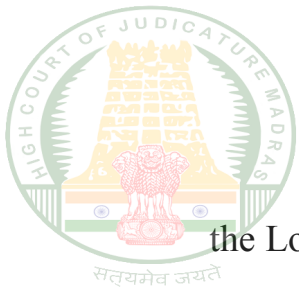


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This petition has been filed under Section 34 of the Arbitration and Conciliation Act, challenging the impugned Arbitral Award dated 25.07.2024 passed in favour of the respondent against the petitioners.

2.The petitioners have primarily challenged the impugned arbitral award on the ground that the Arbitrator, who has passed the impugned arbitral award, was appointed unilaterally by the respondent, without obtaining the consent of the petitioners.

3.Learned counsel for the petitioners drew the attention of this Court to the impugned arbitral award and would submit that as seen from the same, the Arbitrator was appointed unilaterally by the respondent. He would submit that as per Section 12(5) of the Arbitration and Conciliation Act, there must be an express waiver with regard to the arbitration clause, relied upon by the respondent, which provides for the appointment of an Arbitrator by the Managing Director of the respondent. He would submit that there is no express waiver given by the petitioners for the Managing Director of the respondent to appoint an Arbitrator as per the arbitration clause, provided in



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the Loan Agreement. Learned counsel for the petitioners also relies upon the judgment of the Hon'ble Supreme Court in the case of **Perkins Eastman Architects DPC and another vs. HSCC (India) Limited reported in (2020) 20 SCC 760** and in particular, he relies upon paragraph 21 of the said judgment and would submit that the Managing Director of the respondent company as per the said judgment is ineligible to appoint an Arbitrator and since in the instant case, the Managing Director of the respondent company had appointed the Arbitrator, without the consent of the petitioner, the arbitral award passed by such an Arbitrator is bad in law.

4.On the other hand, learned counsel for the respondent places reliance on the following:

- a)The loan contract provides for an arbitration clause;
- b)Notice dated 25.01.2022 sent by the respondent to the petitioners intimating the petitioners that they are defaulters in the repayment of the loan and calling upon them to pay the outstanding dues of the respondent;
- c)Letter dated 12.12.2022 sent by the petitioners to the respondent.

5.According to the respondent, the petitioners, having undertaken to



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regularise all the arrears of installments and other charges pending as on date and having agreed to pay the future installments on the respective due dates, without committing any delay and having requested the respondent to withdraw the arbitration by giving liberty to the respondent to initiate fresh arbitration at the respondent's discretion, the petitioner cannot raise the contention that the Arbitrator was appointed unilaterally by the respondent. The respondent has also stated that in the very same letter dated 12.12.2022, the petitioner has confirmed that there exists an arbitration clause in the contract, which provides for the appointment of a Sole Arbitrator by the Managing Director of the respondent company and the venue of the Arbitration has also been fixed as Chennai. Therefore, having accepted the arbitration clause as provided under the loan agreement, without any demur, the petitioner cannot raise a contention in this Section 34 petition that the Arbitrator was appointed unilaterally by the respondent.

6.Learned counsel for the respondent would submit that the petitioners have waived their right to object to the appointment of the Arbitrator by the Managing Director of the respondent company since they have acquiesced to the arbitration clause contained in the loan contract and since they have



participated in the arbitration, having filed the vakalat on their behalf.

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7.As rightly contended by the learned counsel for the petitioners, the Hon'ble Supreme Court in the decision relied upon by him in the case of **Perkins Eastman Architects DPC and another vs. HSCC (India) Limited reported in (2020) 20 SCC 760** has held that the Managing Director of the party to a dispute is ineligible to appoint an Arbitrator even if the arbitration clause in the contract, which is the subject matter of the dispute between the parties, enables him to appoint an Arbitrator. Paragraph No.21 of the judgment of the Hon'ble Supreme Court, referred to supra, is reproduced hereunder:

'21.But, in our view that has to be the logical deduction from TRF Limited. Paragraph 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not



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have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited .'

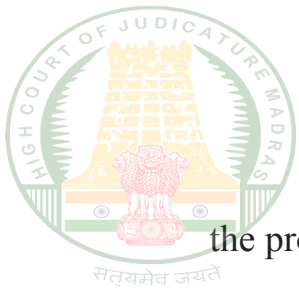
8.As seen from the aforementioned paragraph in Perkins judgment, a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an Arbitrator, but must also not be eligible to appoint anyone else as an Arbitrator and such a person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an Arbitrator. The Managing



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Director of the respondent company is certainly having an interest in the dispute and certainly, he will support the case of the respondent company in the arbitration. Naturally, the person, who has an interest in the outcome or decision of the dispute, cannot have the power to appoint a Sole Arbitrator.

9. Though the learned counsel for the respondent would contend that the petitioners participated in the arbitration, but as seen from the arbitral award, it is an *ex parte* award. As rightly contended by the petitioners, they did not participate in the arbitration. The notice sent to the petitioners by the Arbitrator was also not served and was returned with the endorsement 'unclaimed'. The petitioners were set *ex parte* in the arbitral proceedings. Documents have also been filed by the petitioners along with this petition in the form of the procedural order passed by the Arbitrator in the arbitral proceedings dated 05.06.2024, wherein it has been recorded by the Arbitrator himself that the petitioners have objected to the arbitral proceedings. Therefore, it cannot be contended that the petitioners had participated in the arbitral proceedings as claimed by the respondent. No documentary evidence has been placed on record to show that the Arbitrator, who has passed the Arbitral award, has filed his disclosure statement as per

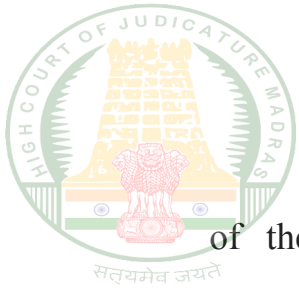


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the provisions of Section 12(5) of the Arbitration and Conciliation Act, 1996 as to whether he will fall under any of the categories under Fifth Schedule of the Arbitration and Conciliation Act, 1996 or not.

10. Under the Fifth Schedule of the Arbitration and Conciliation Act, 1996, clause 22 makes it clear that the Arbitrator has to disclose as to whether within the past three years, he was appointed as an Arbitrator on two or more occasions by one of the parties to the dispute or an affiliate to one of the parties to the dispute. The disclosure statement is also not placed on record before this Court. The arbitral award also does not disclose specifically with regard to clause 22 of the Fifth Schedule to the Arbitration and Conciliation Act and as to whether the Arbitrator has filed his disclosure statement as per Section 12(5) of the Arbitration and Conciliation Act.

11. Learned counsel for the petitioner also brought to the notice of this Court an order dated 12.02.2025 passed by this Court in Arb.O.P. (Com.Div.) No.77 of 2024 and A.No.784 of 2024 and would submit that the very same Arbitrator, who has passed the impugned arbitral award, had also passed the award in favour of the respondent, which was the subject matter



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of the Arb.O.P. (Com.Div.) No.77 of 2024 and A.No.784 of 2024.

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Therefore, he would submit that the very same Arbitrator is acting as an Arbitrator in various disputes raised by the respondent against various other parties as well.

12. There is no evidence placed on record to prove that there was express waiver by the petitioner for accepting the nomination of the Arbitrator by the Managing Director of the respondent company to attract Section 4 of the Arbitration and Conciliation Act.



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13.For the foregoing reasons, this Court is of the considered view that the impugned arbitral award has been passed by an Arbitrator unilaterally appointed by the respondent, without obtaining the consent of the petitioners. Therefore, the impugned arbitral award is bad in law and the decision of the Hon'ble Supreme Court in Perkins judgment, referred to supra, is squarely applicable to the facts of the instant case.

14.In the result, the impugned arbitral award dated 25.07.2024 is hereby set aside and this petition is allowed. The period spent by both the parties before the Arbitrator as well as this Court shall stand excluded for the purpose of saving limitation under Section 14 of the Limitation Act. Liberty is granted to the respondent to initiate fresh arbitration in accordance with law. No costs. Consequently, connected application is closed.

16.07.2025

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