



2025:DHC:6636-DB



\$~76

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO (COMM) 129/2025**

M/S INTEC CAPITAL LTD.Appellant

Through: Mr. Hari Kishan, Ms. Pooja
Chaudhary and Mr. Manish Kumar Sharma,
Advocates

versus

FRONTLINE RETAIL INDIA PVT. LTD. & ORS.

.....Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

HON'BLE MR. JUSTICE OM PRAKASH SHUKLA

JUDGMENT (ORAL)

% **07.08.2025**

C. HARI SHANKAR. J.

1. The appellant and the respondent entered into a Business Loan Agreement¹ dated 31 August 2015, whereunder a business loan was extended by the appellant to the respondent. The BLA contained the following Arbitration Clause:

“18. ARBITRATION

18.1 The Parties agree that, in the event of any dispute or differences or disagreement or claim arising out of this Agreement including any dispute as to validity, interpretation, breach of any provision of the Agreement, any Transaction Document or with

¹ “BLA”, hereinafter



respect to any appointed amount outstanding ("Dispute"), shall be referred to a sole arbitrator, from amongst those listed in Schedule i hereto, as per his/her availability, in the order of preference in which they have been set-out. The Parties consent to such appointment of arbitrator and agree that, upon reference of any Dispute to the arbitrator and acceptance by the sole arbitrator, no separate consent of the Parties will be required for the appointment. Such arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and/or any amendment or re-enactment thereof.

18.2 The seat of the sole arbitrator shall be New Delhi and the arbitration shall be conducted in English language.

18.3 The arbitrator so appointed herein above, shall also be entitled to pass an award on any other securities furnished by or on behalf of the Borrower/ Co-Borrower. The award of the arbitrator shall be binding on the parties and shall be enforceable in any competent court of law in India.

18.4 The Costs of the arbitration proceedings shall be determined by the arbitrator and to be borne by the Parties in equal proportion.

18.5 The Arbitrator shall have summary powers to adjudicate the matters. No oral evidence shall be adduced in the arbitration proceedings. The Arbitrator shall decide on the basis of documentary evidence.”

2. Alleging that an amount of ₹1,68,79,445/- was due from the respondent, the appellant issued, to the respondent, a notice of demand dated 22 July 2024, followed by a demand notice dated 2 September 2016, and further followed by a notice under Section 21² of the 1996 Act dated 6 October 2016.

3. The Section 21 notice appointed one Rajesh Rai, Advocate, as the Arbitrator to arbitrate on the disputes between the parties. The

² **21. Commencement of arbitral proceedings.**—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be



2025:DHC:6636-DB



Arbitrator entered into the reference and passed an arbitral award dated 9 June 2017.

4. The appellant moved Ex (Comm) 211/22 before the learned Commercial Court, for execution of the said arbitral award dated 9 June 2017.

5. However, as the invocation of arbitration was unilateral, the appellant itself, on 17 May 2024, sought leave to withdraw the Execution Petition with liberty to proceed as per law. Liberty, as sought, was granted by the learned Commercial Court, by the following order:

“17.05.2024

Present: Sh. Pranav Goyal counsel for DH. (through VC)
Ms. Pooja Chaudhary counsel for DH.

Ld. Counsel for the DH submits that he may be permitted to withdraw the present petition.

Let the statement of Ld. counsel for the DH be recorded.

Statement of Ms. Pooja Chaudhary counsel for DH. Mob. 9871169411, Enroll No. D-1990/2007

AT Bar

I am the counsel for DH and have instructions to make statement on behalf of the DH Bank. DH Bank may be permitted to withdraw the present petition with liberty to proceed as per law.

RO & AC



In view of statement of Ld. Counsel for the DH, petition is dismissed as withdrawn. Liberty as prayed is granted. No order as to costs. File be consigned to record room.

(Anuradha Shukla Bhardwaj)
District Judge
(Commercial Court-02)
South Distt., Saket, New Delhi/17.05.2024”

6. Following the aforesaid, the appellant issued a fresh demand notice to the respondent on 22 July 2024, followed by a Section 21 notice dated 3 September 2024. The Section 21 notice proposed reference of the dispute to arbitration in the following terms:

“8. In view of the aforesaid circumstances, my client is constrained to initiate arbitration proceedings in terms of the loan agreement dated 31.08.2015. As such my client requests you, the notices, for proposing the appointment of a Sole Arbitrator from the panel of the Arbitrators of the Delhi International Centre (DIAC), within 15 days of issuance of the present notice to adjudicate upon the disputes arising out of the agreement dated 31.08.2015 in respect of the dues amounting to INR. 1,68,79,445/- (Indian Rupees One Crore Sixty Eight Lacs Seventy Nine Thousand Four Hundred Forty Five Only) in terms of the Loan agreement dated 31.08.2015 alongwith interest as on 30.06.2024.

9. The claim of such dispute shall be submitted to the Arbitrator upon initiation of proceedings.

Now, therefore under instructions for and on behalf of my client, I call upon you the above-mentioned noticees to inform you that my client is initiating arbitration proceedings and is proposing appointment of a Sole Arbitrator for adjudication of disputes arising out of the agreement dated 31.08.2015.

This is without prejudice to all other rights, claims and demands which my client may have against you.

A copy of the present notice is retained in the office of the undersigned for future action and reference.”



7. The respondent did not reply to the aforesaid notice.
8. The appellant, thereafter, moved an application before the learned Commercial Court under Section 9(1)³ of the 1996 Act, seeking pre-arbitral interim directions to the respondent to deposit an amount of ₹ 1,68,79,445/- in order to secure the claim of the appellant.
9. It is this application which has been dismissed by the learned Commercial Court by the following order dated 3 April 2025, against which the appellant has approached this Court:

“03.04.2025

Present: Ms. Pooja Chaudhary, Ld. Counsel for Petitioner.

This is a petition u/s 9 of the Arbitration and Conciliation Act filed by the Petitioner praying for ad-interim relief

³ 9. **Interim measures, etc. by Court. –**

(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court:—

- (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
- (ii) for an interim measure of protection in respect of any of the following matters, namely:—

- (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
- (b) securing the amount in dispute in the arbitration;
- (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
- (d) interim injunction or the appointment of a receiver;
- (e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.



in the form of directions to the Respondent to deposit a security of Rs. 1,68,79,445/-and also directing the Respondent to file its affidavit of assets both movable and immovable.

The parties herein had entered into an agreement dated 31.08.2015 carrying an arbitration clause providing appointment of a sole arbitrator amongst those listed in schedule by the Petitioner. It is further the case of the Petitioner that Petitioner had already invoked the said arbitration clause and had also obtained an arbitration award in its favour. However, due to subsequent amendments in the Arbitration Act as well as the pronouncement of Hon'ble Apex Court that the unilateral appointment of an Arbitrator by a party was declared invalid, void-ab-initio, the said award had subsequently become a nullity and thus unexecutable.

Hence, now after issuing a fresh notice u/s 21 of the Arbitration and Conciliation Act, 1996, the petitioner has moved before this Court seeking ad-interim relief as provided u/s 9 of the said Act.

Be that as it may, the arbitration clause as existing in the original agreement has already been declared illegal and void-ab-initio not only by the amendments carried out in the Arbitration and Conciliation Act but also by the pronouncement of Hon'ble Supreme Court in case titled as "*Kotak Mahindra Bank Limited Vs. Narendra kumar prajapat, Special Leave Petition (Civil) Diary No(S). 47322/2023*" wherein the Hon'ble Supreme Court was pleased to hold that unilateral appointment of an arbitrator by any of the parties is per se illegal.

Hence, I am of the considered opinion that once the clause itself is void-ab-initio, then it could not be acted upon in the manner it has been sought to be acted upon now by the Petitioner.

Therefore, I do not find any merits in the present petition warranting awarding an ad-interim relief to the Petitioner. The petition as moved is accordingly dismissed.

File be consigned to record room after completion of all necessary formalities in this regard."

10. Notice in this appeal was issued to the respondent. Despite notice having been served on the respondent at the address provided



by the respondent before the executing court, no one has appeared for the respondent though the matter was adjourned twice.

11. In these circumstances, the service of notice has to be deemed to have been effected.

12. The issue in controversy is short. We have heard Mr. Hari Kishan, learned Counsel for the appellant.

13. In our considered opinion, the learned Commercial Court was clearly in error in holding that the arbitration clause in the agreement between the parties had been declared illegal and *void ab initio, inter alia* by the judgment of the Supreme Court in **Kotak Mahindra Bank Limited v Narendra Kumar Prajapat**⁴. The decision in **Kotak Mahindra Bank** merely holds that unilateral appointment of an Arbitrator is illegal. It was because the initial appointment of the Arbitrator was unilateral that the appellant itself did not proceed with the execution of the award which had been passed by the Arbitrator on 9 June 2017. The appellant, thereafter, issued a notice to the respondent under Section 21 of the 1996 Act. That notice did not unilaterally appoint any Arbitrator but merely suggested that an Arbitrator could be appointed from the panel of the Delhi International Arbitration Centre.

14. This clearly amounts to a valid initiation of arbitration as

⁴ Order dated 12 December 2023 in SPL (C) 47322/2023



envisaged by Section 21.

15. As the respondent did not respond to the said Section 21 notice, the appellant moved a Section 9 petition before the learned Commercial Court.

16. We are of the opinion that the learned Commercial Court was in clear error in holding that the arbitration clause itself had been rendered *void ab initio*. Even in cases in which the arbitration clause in the agreement between the parties envisages unilateral appointment of the arbitrator by one of the contracting parties, the Supreme Court has, in *Bharat Broadband Network Ltd v United Telecoms Ltd*⁵, *Perkins Eastman Architects DPC v HSCC (India) Ltd*⁶ and *Haryana Space Application Centre v Pan India Consultants Pvt Ltd*⁷, proceeded to appoint the arbitration. The arbitration clause, therefore, is not rendered void *ab initio*. The intent of the parties to have their disputes resolved by arbitration remains intact, and, in the interests of the arbitration ecosystem, and party autonomy, that intent has to be respected. The only consequence of an arbitration clause envisaging unilateral appointment of the arbitrator is that the clause becomes unworkable. The dispute does not thereby become non-arbitrable.

17. Inasmuch as the Section 21 notice dated 3 September 2024 did not unilaterally appoint an arbitrator, but called upon the respondent to do so, the learned Commercial Court was in error in refusing to

⁵ (2019) 5 SCC 755

⁶ (2020) 20 SCC 760



2025:DHC:6636-DB



adjudicate the appellant's Section 9 petition on merits.

18. Accordingly, the impugned order passed by the learned Commercial Court on 3 April 2025 is quashed and set aside.

19. OMP (I) (Comm) 521/2025 stands remitted to the learned Commercial Court for decision afresh.

20. In order to expedite matters, the appellant is directed to appear before the learned Commercial Court on 27 August 2025.

21. The appeal is allowed to the aforesaid extent.

C. HARI SHANKAR, J.

OM PRAKASH SHUKLA, J.

AUGUST 7, 2025

AR