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

\# **CNR No. DLHC010370982026**

\+ FAO (COMM) 233/2026

M/S SM FINLEASE LTD. .....Appellant

Through: Mr. Mishal Johari and Ms. Divyanshi Khemka, Advs.

versus

SH. SHAILENDRA DATT
RATURI & ANR. .....Respondent

Through: Mr. S.K. Singh, Mr. Manish, Mr. Ankush Sadh and Ms. Trapta Kushwaha, Advs.

\# **CNR No. DLHC010370992026**

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CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR
HON'BLE MS. JUSTICE NIVEDITA ANIL SHARMA

JUDGMENT (ORAL)

% 27.10.2026

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C. HARI SHANKAR, J.

1. By two loan agreements dated 31 October 2020, the appellant advanced financial loans to the respondents. The agreements envisaged resolution of disputes, in the event of their arising, by arbitration. Clause 4.5 of both the agreements, which was identical, read thus:

> "4.5 Any dispute between the parties in relation to this agreement or in relation to any of the transaction under this agreement shall be amenable to Arbitration by a Tribunal of Sole Arbitrator Mr. Abhay Sahai, Advocate, whose decision shall be final and binding. The place of arbitration shall be Delhi, and the language shall be English, that without prejudice to arbitration, court in Delhi shall have exclusive jurisdiction".

2. The appellant raised a dispute, alleging that the respondents had defaulted in repaying the loans advanced by it. Arbitral proceedings were initiated by the appellant. The arbitration was conducted by Mr. Abhay Sahai, Advocate, who was the Arbitrator named in Clause 4.5 of the loan agreements. The arbitration culminated in two awards, both rendered on 31 July 2024, in favour of the appellant and against the respondents.

3. The respondents assailed the arbitral awards before the learned District Judge (Commercial Court)-01, Patiala House Court[1] by way of OMP (Comm) 223/2024 and OMP (Comm) 224/2024.

4. Both the OMPs have been allowed by the learned Commercial Court by separate judgments rendered on 5 June 2026, on the sole

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ground that the appointment of the learned Arbitrator was in the teeth of Section 12(5)[2] of the Arbitration and Conciliation Act, 1996[3].

5. The judgments are identical in terms. We deem it appropriate to reproduce paras 17 to 20 of the judgment rendered by the learned Commercial Court thus:

> "17. In the present case on perusal of arbitral record, I could find relevant loan agreement containing the arbitration clause. Clause 4.5 of the loan agreement provides for arbitration and for appointment of arbitrator. This agreement is dated 31.10.2020 and the relevant part is reproduced as under:-
>
> > "Clause 4.5 Any dispute between the parties in relation to this agreement or in relation to any of the transaction under this agreement shall be amenable to Arbitration by a Tribunal of Sole Arbitrator Mr. Abhay Sahai, Advocate, whose decision shall be final and binding. The place of arbitration shall be Delhi, and the language shall be English, that without prejudice to arbitration, court in Delhi shall have exclusive jurisdiction".
>
> 18. The aforesaid clause of the agreement is clearly in the teeth of law explained by Hon'ble Supreme Court in the case of ***CORE v. ECI SPIC SMO MCML***[4]. In that case, Hon'ble Supreme Court not only declared the practice of unilateral appointment of arbitrator as illegal and against the norms of equity, the court also declared that all such kind of agreements providing any unilateral appointment of sole arbitrator shall be considered as null and void.
>
> 19. Therefore, I have no hesitation to say that aforesaid agreement itself was a void agreement and hence, on the basis of the same no appointment could have been made unilaterally by the respondent. The arbitrator was appointed unilaterally, is well reflected from the award itself. The award and first order passed by ld. Arbitrator refer to appointment of ld. Arbitrator, but there is no

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[1] "learned Commercial Court" hereinafter

[2] (5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

[3] "the 1996 Act" hereinafter

[4] **2024 SCC OnLine SC 3219,** hereinafter referred to as "**CORE**"

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mention of any written consent/waiver if given by petitioners, for appointment of ld. Arbitrator by respondent. The argument that in the loan agreement itself, petitioners had given consent for appointment of ld. Arbitrator, does not stand the test of legal mandate. As per settled law after amendment in the Act w.e.f. 23.10.2015, it is mandatory to have written consent/waiver from the opposite party after dispute coming into existence. The case law relied upon by respondent pertains to pre amendment period, which cannot be applicable to this case. In ***Bharat Broadband Network Limited v. United Telecoms Limited***[5]**,** Supreme Court rejected the contention that the waiver of a right to object the ineligibility of an arbitrator, under Section 12(5) of the A&C Act, could be inferred by conduct. That means that even if petitioners appeared before ld. Arbitrator or participated in the proceedings, such conduct cannot be used as an excuse for non-compliance of mandate u/s 12 (5) of the Act.

DECISION

20. In view of my foregoing observations, discussions and findings, I do find that appointment of Sole Arbitrator by respondent, was without compliance of mandate of S. 12 (5) of the Act, thereby making the appointment illegal and arbitration proceedings void ab initio. Hence, petition is allowed and award is set aside."

6. Aggrieved by the aforesaid judgments passed by the learned Commercial Court, the appellant has preferred the present appeals under Section 37 of the 1996 Act.

7. We have heard Mr. Mishal Johari, learned Counsel for the appellant and Mr. S.K. Singh, learned Counsel for the respondents, at length.

8. As we were *prima facie* convinced that the impugned judgments are not in accordance with law, we called upon Mr. Singh to justify the decision of the learned Commercial Court.

[5] **(2019) 5 SCC 755**

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9. Mr. Singh candidly acknowledges that the signatures of the parties, as they figure on the body of the loan agreement dated 31 October 2020, are not in dispute. He, however, submits that his clients had been provide with a blank sheet of paper on which they had appended their signatures and that, therefore, they could not be treated as subscribing to the arbitration of the dispute by Mr. Abhay Sahai. He is, however, unable to substantiate his contention that the signatures of his clients were taken on a blank sheet of paper.

10. In any case, having consented to, and participated in, the arbitral proceedings till rendering of the award, it is obviously too late in the day for the respondent to seek to urge that their signatures had been obtained on a blank piece of paper, and that they, therefore, cannot be taken to have consented to Clause 4.5 of the loan agreements. The plea is an obvious afterthought, and is rejected outright.

11. Mr. Singh has also placed reliance on the well known decision of the Supreme Court in ***Bharat Broadband Network***, from which he has specifically drawn our attention to para 18, which read as under:

> "18. On the facts of the present case, it is clear that the Managing Director of the appellant could not have acted as an arbitrator himself, being rendered ineligible to act as arbitrator under Item 5 of the Seventh Schedule, which reads as under:
>
> "Arbitrator's relationship with the parties or counsel
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> *****
>
> 5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an

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> affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration."
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> Whether such ineligible person could himself appoint another arbitrator was only made clear by this Court's judgment in ***TRF Ltd.* v. *Energo Engg. Projects Ltd***[6]., on 3-7-2017, this Court holding that an appointment made by an ineligible person is itself void ab initio. Thus, it was only on 3-7-2017, that it became clear beyond doubt that the appointment of Shri Khan would be void ab initio. Since such appointment goes to "eligibility" i.e. to the root of the matter, it is obvious that Shri Khan's appointment would be void. There is no doubt in this case that disputes arose only after the introduction of Section 12(5) into the statute book, and Shri Khan was appointed long after 23-10-2015. The judgment in ***TRF Ltd.***, nowhere states that it will apply only prospectively i.e. the appointments that have been made of persons such as Shri Khan would be valid if made before the date of the judgment. Section 26 of the Amendment Act, 2015 makes it clear that the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after 23-10-2015. Indeed, the judgment itself set aside the order appointing the arbitrator, which was an order dated 27-1-2016, by which the Managing Director of the respondent nominated a former Judge of this Court as sole arbitrator in terms of Clause 33(*d*) of the purchase order dated 10-5-2014. It will be noticed that the facts in the present case are somewhat similar. The APO itself is of the year 2014, whereas the appointment by the Managing Director is after the Amendment Act, 2015, just as in ***TRF Ltd.*** Considering that the appointment in ***TRF Ltd.***, of a retired Judge of this Court was set aside as being non est in law, the appointment of Shri Khan in the present case must follow suit."

12. Mr. Singh submits that the Supreme Court has expanded the scope of Section 12(5) of the 1996 Act, which, facially only bars a person who falls within one of the prohibited categories enumerated in the VII Schedule to the 1996 Act from acting as an arbitrator. He submits, quite correctly, that, starting from the judgment in ***TRF,*** through later decisions in ***Bharat Broadband Network*** and ***Perkins Eastman Architects DPC v. HSCC (India) Ltd.***[7] and other decisions

[6] **(2017) 8 SCC 377**
[7] **(2020) 20 SCC 760**

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which followed it, the Supreme Court has held that a person who was ineligible to act as an arbitrator is also equally ineligible to appoint an arbitrator. He submits that, therefore, as the appointment of Mr. Abhay Sahai as Arbitrator was by the Managing Director of the appellant, the appointment was *ex facie* invalid and the arbitral award rendered consequent on arbitration was equally vitiated.

13. We are unable, quite frankly, to appreciate the submission advanced by Mr. Singh.

14. The appointment of the learned Arbitrator in the present case is, quite clearly, not unilateral, or by the Managing Director of the appellant as Mr. Singh would seek to urge, but bilateral, as specifically provided in Clause 4.5 of the Loan Agreement, which is signed by both parties. Mr. Singh does not dispute the signatures of his clients as they figure on the body of the loan agreement.

15. Further, as has been pointed out correctly to us by Mr. Johari, the execution of the loan agreement stands candidly acknowledged by the respondents in paras 1 to 3 of the Section 34 petition filed by the respondents before the learned Commercial Court, in which the impugned order has come to be passed. We may reproduce, for ready reference, the said paragraphs, as under:

> "1. That the applicants approached the respondent company in the year 2020, and sought loan/advance of Rs.30,00,000/- (Rupees thirty lakh only) for meeting their financial requirements. Based on Applicants' positive representations and multiple promises, respondent agreed to advance Rs.30,00,000/- as loan upon the terms set forth in the loan agreement dated 31/10/2020 and in other loan/security documents.

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2. That in consideration of the aforesaid agreement respondent agreed to grant the loan under the loan agreement dated 31/10/2020.

3. That the applicants breached the terms and conditions of the said agreement by making defaults in tendering their EMIs as per schedule 1 of the aforesaid agreement, the respondent sent notice of loan recall dated 07/02/2023."

16. The submission of Mr. Singh, which is also reflected in the impugned order of the learned Commercial Court that, the appointment was unilateral is, therefore, not sustainable in law. They proceed on a basic misunderstanding of the concept of unilateral appointment of an arbitrator.

17. Once the execution of the loan agreement bilaterally by both parties stand acknowledged, the learned Commercial Court is clearly in error in holding that the appointment of the Arbitrator was unilateral. There is no bar on the parties bilaterally naming, in the arbitration agreement, the arbitrator who would arbitrate on the dispute between them. In such an event, the named arbitrator cannot be said to have been appointed unilaterally.

18. The learned Commercial Court has held, quite strangely, that Clause 4.5 is violative of the judgment rendered by the Supreme Court in ***CORE*** which prohibits unilateral appointment of Arbitrators. Inasmuch as the appointment of the learned arbitrator in the present case was not unilateral but bilateral, the finding of the learned Commercial Court is obviously incorrect on facts as well as in law.

19. We may also note that it is not the case of the respondents that

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Mr. Abhay Sahai personally fell within any of the clauses of the VII Schedule to the arbitration agreement so as to render him ineligible to act as an arbitrator. Indeed, that is not even the ground on which the impugned judgment has come to be passed by the learned Commercial Court.

20. We are, therefore, of the considered opinion that that the learned Commercial Court is seriously in error in holding that Clause 4.5 of the loan agreement was illegal and hit by the judgment of the Supreme Court in ***CORE***. The appointment of a named arbitrator, bilaterally by the parties in the agreement, is clearly permissible in law, so long as the arbitrator himself does not fall within any prohibited degree as envisaged by Section 12(5) of the 1996 Act read with the VII Schedule thereto.

21. We, therefore, are unable to sustain the impugned judgments of the learned Commercial Court which are, therefore, quashed and set aside.

22. The present appeals stand allowed accordingly with no order as to costs.

C. HARI SHANKAR, J.

NIVEDITA ANIL SHARMA, J.

OCTOBER 27, 2026*/aky*

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