IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE
COMMERCIAL DIVISION

Present:

The Hon'ble Justice Shekhar B. Saraf

EC 122 of 2022

CHOLAMANDALAM INVESTMENT AND FINANCE COMPANY LTD.

VERSUS

AMRAPALI ENTERPRISES AND ANR

For the Petitioner	:	Mr. Pratip Mukherjee, Adv. Mr. Ranjit Singh, Adv.
For the Respondents	:	Sk. Sariful Haque, Adv.

Last Heard On: February 22nd, 2023

Judgement On: March 14th, 2023

Shekhar B. Saraf, J.:

1. The present application has been filed under Section 36 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') by Cholamandalam Investment and Finance Company Ltd (hereinafter referred to as the 'award holder') seeking execution of an arbitral award dated November 22, 2021 (hereinafter referred

to as the 'impugned award') passed by Mr. Soma Kar Ghosh, Sole Arbitrator. The award debtors herein are Amrapali Enterprises represented by proprietor Mohammad Jahangir (hereinafter referred to as the 'borrower') and Saif Khan (hereinafter referred to as the 'guarantor').

2. The impugned award arises out of a Loan cum Hypothecation Agreement dated February 24, 2020 entered between the parties wherein financial assistance was extended to the borrower for purchase of one vehicle. It is to be noted here that the said hypothecated vehicle is presently in possession of the award holder as the same was surrendered by the borrower.

3. It has also been submitted that the impugned award has been challenged under Section 34 of the Act before the City Civil Court. However, I understand that the same may be time barred.

4. From the submissions made by the parties and perusal of the arbitral award, it is apparent that Mr. Soma Kar Ghosh, Sole Arbitrator was unilaterally appointed by the award holder vide its letter dated June 24, 2021. Further, the arbitral proceedings were conducted without participation of the award debtors and consequently, the arbitral award was passed ex-parte.

5. The position of law on unilateral appointment of an arbitrator is no more *res integra* and has been settled by the Supreme Court through various judicial pronouncements.

6. Firstly, in the case of ***HRD Corporation -vs- GAIL*** reported in ***(2018) 12 SCC 471*** *[Coram: R.F.Nariman and S.K. Kaul, **JJ.**]*, the Apex Court ruled that when a person directly falls under Schedule VII, ineligibility goes to the root of the appointment as per prohibition under Section 12(5) read with Schedule VII. Such person lacks inherent jurisdiction. Thereafter, in ***TRF Limited –vs- Energo Engineering Projects Limited*** reported in ***[2017] 7 S.C.R. 409*** *[Coram: Dipak Misra and A.M. Khanwilkar, **JJ.**]*, the Apex Court expanded the approach in ***HRD Corporation (supra)*** and held that an individual who himself is ineligible under the provisions of the Act to be appointed as an arbitrator, cannot nominate a sole arbitrator. The ineligibility goes to the root of the matter and arises out of lack of inherent jurisdiction. The relevant paragraph penned down by J. Nariman in ***HRD Corporation (supra)*** is enumerated below for reference :–

> *"57. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to*

say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."

7. Subsequently, in ***Perkins Eastman Architects DPC & Anr. –vs- HSCC (India) Ltd.*** reported in ***[2019] 17 S.C.R. 275*** *[U.U. Lalit and Indu Malhotra, JJ.]* the Supreme Court extended the approach taken in ***TRF Limited (supra)*** and held that a party who has an interest in the outcome of a dispute also cannot nominate a sole arbitrator. The relevant portion of eloquent exposition penned by U.U. Lalit, **J.** is extracted below :–

"15. ……. We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd. where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Ltd., all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator."

16. 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 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."***

Emphasis Added

Therefore, the proscription under Section 12(5) read with Schedule VII of the Act was extended to persons unilaterally appointed to act as an arbitrator. Such persons who are unilaterally appointed lack inherent jurisdiction unless an express written approval is given by the parties subsequent to disputes having arisen.

8. Finally, the Supreme Court in ***Bharat Broadband Network Limited –vs- United Telecoms Limited*** reported in ***[2019] 6 S.C.R. 97*** *[Coram: R. F. Nariman and Vineet Saran, JJ.]* held that a unilaterally appointed arbitrator is *de jure* ineligible to perform his functions and that his mandate is automatically terminated under Section 14(1)(a) of the Act. Further, any prior agreement to do away with this ineligibility would be wiped out by the *non-obstante* clause contained

in Section 12(5), and the same can be cured only through an express waiver. I have delineated the relevant paragraphs herein below :-

> *"15. Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the nonobstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule."*
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> *17. The scheme of Sections 12, 13 and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case i.e., a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e., de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated……"*

9. In ***Yashovardhan Sinha and Ors. –vs- Satyatej Vyapaar Pvt. Ltd.*** reported in ***2022(3) CHN (CAL) 305***, while analyzing the judicial pronouncements in ***TRF Limited (supra)*** and ***Perkins (supra***), I had outlined the following ratio –

> *"8…….Therefore, the dicta laid down in these judgments makes it crystal clear that there cannot be unilateral appointment of a sole arbitrator by the respondent as per Clause 19 of the loan agreement as the same is illegal and defeats the very purpose of unbiased and impartial adjudication of the dispute between the parties. The guiding principle is transparency, fairness, neutrality and independence in the selection process and hence, appointment of a sole arbitrator can either be with mutual consent of parties or by an order of the competent court. There can be no third way."*

10. Similarly in ***B.K. Consortium Engineers Private Limited –vs- Indian Institute of Management, Calcutta*** reported in ***(2023 SCC OnLine Cal 124)***, I had the occasion to examine the importance of independence and neutrality of the arbitral tribunal wherein I had expressed the following observations –

> *"8. In the light of the apex court's pronouncements in Perkins Eastman Architects DPC & Another v. HSCC (India) Ltd. reported in [2019] 17 S.C.R. 275 and TRF Ltd. v. Energo Engineering Projects Ltd. reported in [2017] 7 S.C.R. 409, it is crystal clear that unilateral appointment of an arbitrator by a party who has some sort of interest in the final outcome or decision is not permissible. The cardinal importance of the independence and neutrality of the arbitral tribunal has been reiterated by the Supreme Court on multiple occasions. For arbitration to be seen as a viable dispute resolution mechanism and as an alternate recourse to litigation, the independence of arbitration process outside the purview of undue influence and favor needs to be ensured in both letter and spirit. and in case of non-adherence to such principles, the courts must step in. If one takes a careful look, the very basic essence of the principle laid down in the above-mentioned case laws is the natural justice principle of nemo judex in causa sua that is 'no one should be made a judge in his own case'. For arbitration decisions to be respected*

> *and accepted as decrees of the court, a similar level of integrity in the appointment of arbitrators must be ensured."*

11. In light of the aforementioned judicial precedents, it can be said with unambiguous certainty that the unilateral appointment of Mr. Soma Kar Ghosh by the award holder is illegal and void. However, what still remains to be determined is the impact of the aforesaid illegality on the arbitral award and the present execution petition.

12. In ***Ram Kumar and Ors. -vs- Shriram Transport Finance Co. Limited*** reported in ***MANU/DE/4941/2022*** *[Coram: Vibhu Bakhruand Amit Mahajan, JJ.]* a division bench of the Delhi High Court, while adjudicating a Section 34 challenge to an arbitral award passed by a unilaterally appointed arbitrator, held that an arbitral award passed by a person ineligible to act as an arbitrator cannot be considered as an arbitral award under the provisions of the Act. The relevant portion has been reproduced below –

> *"8. Clearly, an award rendered by a person who is ineligible to act as an arbitrator would be of little value; it cannot be considered as an arbitral award under the A&C Act. While it is permissible for the parties to agree to waive the ineligibility of an arbitrator, the proviso to Section 12(5) of the A&C Act makes it clear that such an agreement requires to be in writing. In Proddatur Cable TV Digi Services v. Siti Cable Network Limited (2020) 267 DLT 51, the learned Single Judge of this Court, following the decision in TRF Ltd. v. Energo Engineering Projects Ltd. (supra) and Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd. (supra), held that unilateral appointment of an arbitrator by a party is impermissible."*

13. In a similar fashion, in ***JV Engineering Associate, Civil Engineering Contractors –vs- General Manager, CORE*** reported in ***2020 SCC OnLine Mad 4829***, the Madras High Court dealt

with the validity of an arbitral award passed by an *ineligible* arbitrator. *P.T. Asha*, J., concluded as follows :-

> *"31. In the above circumstances the Award in question having been passed by an Arbitrator who is ineligible to be an Arbitrator deserves to be set aside more particularly since there is no express waiver in writing as contemplated under the proviso to Section 12(5)."*

14. Likewise, the Bombay High Court in ***Naresh Kanyalal Rajwani - vs- Kotak Mahindra Bank*** reported in ***2022 SCC OnLine Bom 6204***, was dealing with effect of unilateral appointments on an arbitral award. *Manish Pitale, J.,* remarked the following :-

> *"23. Therefore, it becomes evident that in the present case, from the very inception, i.e. from the stage of appointment of the Arbitrator, the proceedings were vitiated and the arbitral award was therefore, rendered unsustainable. This Court is inclined to allow the petition only on the aforesaid ground."*

15. I find myself in complete concurrence with the aforesaid judgments, and in my view, the impugned award is *unsustainable* and *non-est* in the eyes of law. It is a settled principle of law that compliance with Section 12(5) read with Schedule VII is *sine qua non* for any arbitral reference to gain recognition and validity before the Courts. In the present facts in hand, an arbitral reference which itself began with an illegal act has vitiated the entire arbitral proceedings from its inception and the same cannot be validated at any later stage. Thus, it would be a logical inference to consider the aforesaid arbitral proceedings as *void ab initio.*

16. In my view, the impugned award, which was passed by a *dejure* ineligible arbitrator, suffers from a permanent and indelible mark of bias and prejudice which cannot be washed away at any stage including the execution proceedings. Infact, as the arbitrator was *dejure* ineligible to perform his functions and therefore lacked inherent jurisdiction or competence to adjudicate the disputes in hand, the impugned award cannot be accorded the privileged status of an *award*.

17. In light of the above findings, it is palpably clear that an arbitral award passed by a unilaterally appointed arbitrator will not survive the Section 34 challenge. However, the arbitration application before me is not under Section 34 but rather an execution petition under Section 36. There is no denying the fact that the Act is a complete code in itself and at the same time, it is equally true that Section 36 provides no scope of adverse interference with an arbitral award except executing it as a decree of the court. While Section 47 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') governs the challenge to a court decree at the execution stage, there is no such similar provision provided in the Act. However, at this juncture it would be relevant to examine the jurisprudence with respect to decrees passed by bodies lacking inherent jurisdiction.

18. The Apex Court in ***Sunder Dass –vs- Ram Prakash*** reported in ***1977 AIR 1201*** had stated that decrees passed by bodies lacking inherent jurisdiction are unenforceable and it would be as if no decree existed at all. *P.N. Bhagwati, J.*, in his inimitable style had examined and penned down the following:

> *"3. Now, the law is well settled that an executing court cannot go behind the decree nor can it question its legality or correctness. But there is one exception to this general rule and that is that where the decree sought to be executed is a nullity for lack of inherent jurisdiction in the court passing it, its invalidity can be set up in an execution proceeding. Where there is lack of inherent jurisdiction, it goes to the root of the competence of the court to try the case and a decree which is a nullity is void and can be declared to be void by any court in which it is presented. Its nullity can be set up whenever and wherever it is sought to be enforced or relied upon and even at the stage of execution or even in collateral proceedings. The executing court can, therefore, entertain an objection that the decree is a nullity and can refuse to execute the decree. By doing so, the executing court would not incur the reproach that it is going behind the decree, because the decree being null and void, there would really be no decree at all. Vide Kiran Singh v. Chaman Paswan [AIR 1954 SC 340 : (1955) 1 SCR 117] and Seth Hiralal Patni v. Sri Kali Nath [AIR 1962 SC 199 : (1962) 2 SCR 747] . It is, therefore, obvious that in the present case, it was competent to the executing court to examine whether the decree for eviction was a nullity on the ground that the civil court had no inherent jurisdiction to entertain the suit in which the decree for eviction was passed. If the decree for eviction was a nullity, the executing court could declare it to be such and decline to execute it against the respondent."*

Similar pronouncements were made in ***Hiralal Moolchand Doshi –vs- Barot Raman Lal Ranchhoddas*** reported in **(1993) 2 SCC 458** *[Coram: Yogeshwar Dayal, J.]* and ***Sushil Kumar Mehta –vs- Gobind Ram Bohra***, reported in **(1990) 1 SCC 193** *[Coram: K Ramaswamy, J].*

19. While Section 47 of the CPC is not directly applicable, the jurisprudence referred to above cannot be ignored. Similar principles have to be applied in cases of awards passed by arbitral tribunals lacking inherent jurisdiction. This court cannot shut its eyes to the grave irregularity that will occur if it does not interfere. As outlined in various afore-stated judicial pronouncements, an arbitral award passed by a unilaterally appointed arbitrator cannot be considered as an award under the provisions of the Act and consequently, they have to be regarded as *non est* in the eyes of law. We have a peculiar situation. The jurisprudence and statute (Section 12[5] read with Schedule VII) ascertains selected arbitrators to inherently lack jurisdiction. But, such jurisdiction can be sanctified/legalised, if express waiver is made by a written agreement, as statutorily carved out owing to considerations of party autonomy. Possibility of waiver was granted as a concession to party autonomy in arbitration law. **But that does not mean that the jurisdiction is not inherently lacking before such express waiver is made. As a flip side to this, such waivers should be very strictly construed in terms of its explicitness.**

20. In view of the above, the present execution petition has no legs to stand on for the reasons that the award sought to be enforced is not a legal decree. The decree does not exist. Therefore, not merely is it non-executable, the parties would be free to re-agitate the

matter before a new arbitral tribunal. However, the parties have given consent in the present matter.

21. I make it clear that observations in this judgement remain applicable and limited to awards wherein arbitral proceedings commenced post the 2015 amendment to the Act. I have not examined or dealt with the conundrum of the proceeding having been initiated pre the 2015 amendment and concluding post the 2015 amendment.

22. From the analysis undertaken above, the principles that emanated are extracted below:

a) As held in ***HRD Corp (supra)***, arbitrators falling under Schedule VII of the Act are ineligible as they lack inherent jurisdiction. Such ineligibility was extended to persons appointed by persons falling under Schedule VII of the Act in ***TRF Limited (supra)***. This ineligibility was ultimately extended to persons who are unilaterally appointed by one of the parties to the arbitration in ***Perkins (supra)***.

b) The Apex court has judicially expanded the Schedule VII of the Act to include persons unilaterally appointed by one of the parties vide its judgement in ***Perkins (supra)*** and/or persons appointed by persons falling under Schedule VII of the Act vide its judgement in ***TRF Limited (supra)***.

c) It is a settled principle of law that compliance with Section 12(5) read with Schedule VII is *sine qua non* for any arbitral reference to gain recognition and validity before the Courts. An arbitral reference which begins with an illegal act vitiates the entire arbitral proceedings from its inception and the same cannot be validated at any later stage. Thus, it would be a logical inference to consider such arbitral proceedings as *void ab initio.*

d) Awards passed by a unilaterally appointed arbitrator are non-est in the eyes of law. While Section 47 of the CPC is not directly applicable, guidance has to be sought from the jurisprudence of the Apex Court vis-à-vis decrees passed while lacking inherent jurisdiction. Such decrees do not exist in the eyes of law and similarly awards passed while lacking inherent jurisdiction can be said to have never existed. Therefore, the parties would be free to re-agitate the matter.

e) This judgement is applicable to awards wherein the arbitral proceeding commenced post the 2015 amendment to the Act. It does not deal with proceedings having been initiated pre the 2015 amendment and concluding post the 2015 amendemnt.

Epilogue:

23. The law of arbitration is an alternative dispute resolution mechanism that was brought into the statute books in order to

facilitate a quick and efficient method of dispute resolution. The raison d'être of arbitration is to provide liberty to parties wherein they can decide upon various facets of dispute resolution. Ergo, party autonomy is sine qua non of the law of arbitration. However, a virus had emerged wherein finance companies and banks were facilitating appointment of a small cabal of arbitrators in hundreds of cases for themselves. The awards passed were soiled and tainted with bias. It was clear that the borrower was the underdog as he had no choice in the matter of appointment of arbitrator and the very concept of impartiality was given a go bye. In order to overcome this issue, the legislative amendments of 2015 and the judicial pronouncements on such amendments by the Apex Court have brought in a level playing field so that no party could have a higher bargaining power in the decision making process for appointment of an arbitrator. Such interpretation, as discussed above, has ensured complete impartiality in such appointments and served the intended purpose of saving the 'small guy' while counter-balancing party autonomy. In conclusion, one may say that the apparent impartiality that existed providing power to one of the parties to choose the arbitrator unilaterally has been taken away as the same was fraught with inequalities at the very threshold of the initiation of the arbitration proceedings. However, the proviso to Section 12(5) of the Act allows for waiver but clarifies that the same has to be explicit and in writing.

24. Impartiality as discussed is the paramount principle of arbitral proceedings and something which the Courts have to safeguard at every stage of such proceedings. Even at the stage of execution, the lady of justice cannot turn a blind eye and let one party run over the other. The people vest faith in the Court to safeguard their rights and uphold the principles of natural justice, irrespective of procedural hurdles. Whatever the case may be, including an execution case where Courts are expected to simply enforce the award without further probing, impartiality as a principle cannot be railroaded. Shackles of procedural limitation in such cases will not prevent parties from seeking the immunity of the Court. Parties making such unilateral appointments couch behind procedural technicalities to shield their unlawful act and reap the fruit of their own mischief. Accordingly, even if an award is not set side under the procedure established in section 34 of the Act, the courts, at the stage of execution can step in and declare a 'unilateral appointment award' as non-est in law, declare the same as a nullity and direct parties to re-agitate their issues before a new arbitral tribunal constituted in accordance with law.

25. Accordingly, for the reasons as discussed above, EC 122/2022 is dismissed. There shall be no order as to the costs.

26. The award-debtor is also directed to withdraw the Section 34 application before the City Civil Court as the same has now become infructuous.

27. The parties have consented before me to go for fresh arbitration and accordingly, I appoint Mr. Ayon Dutta, (Mobile No.9874487022) as the sole Arbitrator by the consent of the parties.

28. The appointment is subject to submission of declaration by the Arbitrator in terms of Section 12(1) in the form prescribed in the Sixth Schedule of the Act before the Registrar, Original Side of this Court within four weeks from date. Let this order be conveyed to the Arbitrator by the Registrar, Original Side forthwith.

29. The award-holder is directed to maintain the status quo with regard to the vehicle that is in their possession. However, parties shall be at liberty to file appropriate applications before the Arbitrator seeking appropriate orders in accordance with law.

30. Urgent photostat-certified copy of this order, if applied for, should be readily made available to the parties on complies with the requisite formalities.

(Shekhar B. Saraf, J.)