

**IN THE COURT OF ANURAG SAIN, DISTRICT JUDGE
(COMMERCIAL COURT-01), PATIALA HOUSE COURTS,
NEW DELHI**

OMP (COMM) 83/2019

Piyush Jain
R/o 22nd Floor/17224,
ATS Advantage, Indirapuram,
Ghaziabad, U.P.-201014

Also at:-

Piyush Jain
C/o Jain Prints and Packaging
A-2/26, Site-4,
GD Steel Compound,
Sahibabad, Ghaziabad,
U.P.-201014

.....Petitioner

Versus

1. M/s BMW India Financial Services Pvt. Ltd.
Registered office at :
The Oberoi Corporate Tower,
Building No.11, 1st Floor,
DLF Cyber City,
Phase-II, Gurugram,
Haryana-122002

Branch Office at :-

H-5/B-1, Mohan Coop Industrial Area,
Mathura Road, New Delhi-110044

2. Sh. Sanjay Aggarwal
Sole Arbitrator
Off : Chamber No. 480,
New Chamber Block,
Patiala House Court,
New Delhi

.....Respondents

Date of institution : 03.05.2019
Date of reserving judgment : 19.05.2023
Date of pronouncement : 05.06.2023

JUDGMENT

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been filed by the petitioner for setting aside the Award in arbitration file No. M/S BMW/RB:5123/LOT-87/11 dated 09.04.2019 passed by respondent no.2 Sole Arbitrator Sh. Sanjay Aggarwal.
2. It has been averred by the petitioner in the present petition that it was the case of respondent no.1 before Ld. Sole Arbitrator that on 18.04.2018 a loan-cum-hypothecation agreement no.CN00150596 and other relevant documents were executed between respondent no.1 against the vehicle make BMW X Series X6 Drive 351 M Sport bearing registration no. UP14-DQ-0900 and as per the said agreement, a total agreement value was Rs. 94,15,000/- including interest which was to be payable by the petitioner in 60 monthly installments. The petitioner

executed security documents in favour of respondent no.1. Upon further perusal of the impugned award, it was revealed that Ld. Sole Arbitrator entered reference in the arbitration proceedings and issued notice dated 05.03.2019 to the petitioner for intimating that respondent no.1 had invoked the arbitration clause of the loan-cum-hypothecation agreement and appointed him as a Sole Arbitrator and the Arbitrator had fixed a preliminary meeting of the parties on 22.03.2019 at the last known address of the petitioner. That Ld. Sole Arbitrator thereafter, passed the impugned award dated 09.04.2019 holding *inter-alia* that respondent no.1 is entitled to a sum of Rs. 89,68,666/- along with interest @ 24% p.a. from 11.02.2019 till the payment and/or realization thereof along with all costs, charges and expenses. The petitioner has assailed the impugned award *inter-alia* on the grounds that the Ld. Arbitrator has misconstrued himself and commenced and carried out the arbitration proceedings without jurisdiction with a view to extend favours to respondent no.1 which smells of bias in favour of respondent no.1 and against the petitioner for the obvious reason that the Sole Arbitrator was appointed by respondent no.1; The arbitration proceedings are vitiated due to non-compliance of mandatory provisions of law; The Sole Arbitrator has not entered upon reference in the matter in

accordance with law and as no notice was issued by the Ld. Sole Arbitrator for entering upon reference in the matter and notifying the parties about the date of hearing in the arbitration and such deliberate omission of mandatory requirement of law on the part of the Ld. Sole Arbitrator goes to the root of the arbitration proceedings, rendering it void and *non-est* in law; The impugned award has been passed by the Ld. Sole Arbitrator in violation of the principles of natural justice enshrined in the maxim *audi alteram partem* which mandates that none shall be condemned unheard; The alleged notice dated 05.03.2019 sent by the Ld. Sole Arbitrator has not been received by the petitioner and thus, the impugned award is liable to be set aside on this ground alone; The conclusion of the Ld. Sole Arbitrator is erroneous and against the settled principles of law inasmuch as the claimant who approached the courts/tribunal/quasi-judicial authorities has to stand on its own footing and mere failure of the opposite party to contradict the case of the claimant does not entitle him to the reliefs prayed for; In the present case, the Ld. Sole Arbitrator has accepted the case of respondent no.1 to be gospel truth without weighing the legality of the averments, documents and evidence relied upon by respondent no.1; It has nowhere been stated in the impugned award as to how and in what manner the Ld. Sole Arbitrator has

dealt with the statement of accounts submitted by respondent no.1 to substantiate its claim; The impugned award is without any base and based on no evidence and a fervent example of total non-application of mind coupled with a biased and lopsided approach which generally happens when one sits with a prejudged and premeditated mind; Ld. Arbitrator has not bothered to serve the principal borrower as per law; The petitioner received the copy of the impugned award on 20.04.2019 and only thereafter, the petitioner came to know about the proceedings initiated by the Ld. Arbitrator. On these premise, the instant petition has been filed on behalf of the petitioner for setting aside of arbitral award dated 09.04.2019 passed by Ld. Sole Arbitrator/respondent no.2 in the present case.

3. Reply to the present petition has been filed by respondent no.1 wherein respondent no.1 has averred that the petitioner has taken loan of Rs. 94,15,000/- from the respondent but failed to maintain financial discipline and failed to repay the same. Legal demand notice dated 21.01.2019 was sent to the petitioner but despite the service of the same, the petitioner failed to clear the legally payable debt/liability under the agreement to the respondent and thus, as per the terms of the agreement, the respondent approached Ld. Sole Arbitrator/respondent no.2 for

adjudication of the disputes between the parties who vide letter dated 04.02.2019 entered upon the reference and asked/informed the parties to appear before him on 05.03.2019 but the petitioner failed to appear before the Ld. Arbitrator on the said date. Again notice was issued to the petitioner along with claim petition and the copies of the supporting documents for 22.03.2019 but despite service of notice/summons by way of registered AD post, the petitioner failed to appear before the Ld. Arbitrator and thus, the petitioner was proceeded ex parte. The Ld. Arbitrator, on perusal of all the documents and after getting satisfied with them, was pleased to pass the award against the petitioner. It has been further averred that the petitioner did not make the payment of the installment to the respondent as per the agreement and thereafter, the respondent took the possession of the vehicle from the petitioner as per order passed by the court of Ld. ADJ, Patiala House Court, New Delhi. The petitioner did not contact the respondent for releasing the same. Thereafter, the respondent send the letter to the petitioner regarding sale of the vehicle but the petitioner did not contact the respondent regarding the sale of the same. The respondent has sold the said vehicle as per rule for a sum of Rs. 69,00,000/- and adjusted the sale amount towards the loan amount and after adjustment of the same, a sum of Rs. 2,28,086.28 is still due

against the petitioner towards the loan amount. It has been submitted that the Arbitrator has been appointed as per the Loan-cum-hypothecation agreement and arbitration reference notice has been served on the petitioner on 04.02.2019 vide speed post. Further notice has been duly served on the petitioner vide speed post dated 11.02.2019 and notice was again issued to the petitioner on 05.03.2019 by speed post but despite the same, the petitioner failed to appear before the Ld. Arbitrator. It has been submitted that Ld. Arbitrator has passed a reasoned award and no fault can be found with the same. On these premises, respondent no.1 has prayed for the dismissal of the instant petition.

4. I have heard Sh. K.K. Sharma and Sh. Saurabh Sachan, Ld. Counsels for the petitioner and Sh. Diwakar Maheshwari and Sh. Shreyas Edupuganti, Ld. Counsels for respondent no.1.
5. I have examined the Award dated 09.04.2019 in question, arbitration proceedings and also given due consideration to the facts and pleadings of the case, written submissions along with citations filed by the parties as well submissions put forth by the respective Ld. Counsel for the parties and the relevant legal position.
6. Ld. Counsel for the petitioner has argued that the impugned award suffers of various irregularities, violation of principles of

natural justice against the public policy and further argued that the impugned award is not sustainable in the eyes of law in view of the unilateral appointment of Sole Arbitrator who passed the impugned award.

7. On the other hand, Ld. Counsel for respondent no.1 has argued that the impugned award is a reasoned award and does not suffer from any irregularity. It has been further argued by Ld. Counsel for respondent no.1 that the ground of unilateral appointment of Sole Arbitrator by respondent no.1 has not been raised by the petitioner in the present petition and thus, the same cannot be looked into by the court. In support of his contention, Ld. Counsel for respondent no.1 relied upon the judgment passed by the Hon'ble Supreme Court of India in a case titled as State of Maharashtra Vs. Hindustan Construction Company Ltd. (2010) 4 SCC 518 and prayed that the ground of unilateral appointment of the Ld. Arbitrator has been raised by the petitioner at belated stage which is an afterthought and the same ought to be eschewed and discarded by the court.
8. Before deciding the validity of the impugned Award, it is relevant to observe that the scope of inquiry in Section 34 of the Arbitration and Conciliation Act, 1996 proceedings is restricted to consideration whether any one of the grounds mentioned in Section 34 (2) of the Arbitration and Conciliation Act, 1996

exists for setting aside the Award. The scope of the interference by the court under Section 34 (2) of the Arbitration and Conciliation Act, 1996 has been time and again restricted in catena of judgments by the Hon'ble Superior Courts and it has been held that in proceedings under Section 34 of the Arbitration and Conciliation Act, 1996, the re-appreciation of the facts, evidence or interpretation of the terms of contract is not permissible. What is permissible is, if there is a patent illegality, apparent error on the face of the record, perversity in the Award or misconduct by the Ld. Arbitrator.

9. Section 34(2) of the Arbitration and Conciliation Act, 1996 reads as under:-

"34.Application for setting aside arbitral award-(1)Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2)An arbitral award may be set aside by the court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1 - For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-- (i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.-- For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2A) An arbitral award arising out of arbitrations other than

international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

10. Normally, the general principles are that Arbitrator is a Judge of the choice of the parties and his decision, unless there is an error apparent on the face of the award which makes it unsustainable, is not to be set aside even if the court as a court of law would come to a different conclusion on the same facts. The court cannot reappraise the evidence and it is not open to the court to sit in appeal over the conclusion of the arbitrator. It is not open to the court to set aside a finding of fact arrived at by the arbitrator and only grounds on which the award can be cancelled are those mentioned in the Arbitration Act. Where the arbitrator assigns cogent grounds and sufficient reasons and no

error of law or misconduct is cited, the award will not call for interference by the court in exercise of the power vested in it. Where the arbitrator is a qualified technical person and expert, who is competent to make assessment by taking into consideration the technical aspects of the matter, the court would generally not interfere with the award passed by the arbitrator.

11. **The Hon'ble Supreme Court of India in a case titled as Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49** has held that the interference with an arbitral award is permissible only when the findings of the arbitrator are arbitrary, capricious or perverse or when conscience of the Court is shocked or when illegality is not trivial but goes to the root of the matter. It is held that once it is found that the arbitrator's approach is neither arbitrary nor capricious, no interference is called for on facts. The arbitrator is ultimately a master of the quantity and quality of evidence while drawing the arbitral award. Patent illegality must go to the root of the matter and cannot be of trivial nature.

12. **The Hon'ble Supreme Court of India in a case titled as Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India, 2019 SCC OnLine SC 677** has held that under Section 34 (2A) of The Act, a

decision which is perverse while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. A finding based on the documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties and therefore would also have to be characterized as perverse. It is held that a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

13. Perusal of the grounds so raised by the petitioner in the petition challenging the award shows that the award is challenged as being perverse against settled provisions of Law and public policy and in the opinion the court, though, the the ground of unilateral appointment of Ld. Sole Arbitrator by respondent no.1 has not been taken by the petitioner in specific and appears to be general in nature but it would cover the issue of appointment of Ld. Sole Arbitrator unilaterally by respondent no.1 because, the same is pure question of law which goes to the root of the matter and therefore, the court is inclined to consider the same.

14. In the present case, the arbitral proceedings were initiated in

terms of Loan-cum-hypothecation agreement dated 18.04.2018 whereby respondent no.2 was appointed as a Sole Arbitrator in the present matter by respondent no.1.

15. **Clause 24** of the agreement is reproduced as under:-

“Any dispute, controversy or claim arising out of or relating to this agreement or any related agreement or other documents or the validity, interpretation, breach of termination thereof (“Dispute”), including claim seeking redress or asserting rights under applicable laws, shall be resolved and finally settled in accordance with the provisions of the Arbitration and Conciliation Act, 1996 as may be amended from time to time or its re-enactment (the Arbitration Act”). The parties consent to a single, consolidated arbitration for all Disputes that may at this time. The arbitral tribunal shall be constituted of sole arbitrator to be appointed by the BMW Financial Services. In case the sole arbitrator is unable to act as such for any reasons whatsoever the BMW Financial Services shall appoint another person to act as the arbitrator who shall be entitled to proceed from the stage left by his/her/their predecessor. The arbitration proceedings shall be conducted in the English language and any documents not in English submitted by any party shall be accompanied by an English translation. The arbitration shall be conducted in Delhi/New Delhi. The arbitral tribunal shall determine the Dispute in accordance the law of India, without giving effect to any conflict of law rules or other rules that might render such law inapplicable or unavailable, and shall apply this Agreement according to its terms. The parties agree to be bound by any award or other resulting from any

arbitration conducted hereunder. The arbitral tribunal shall award the prevailing party, as determined by such arbitral tribunal, all its costs and fees. For the purpose of this Agreement, the expression 'costs and fees' shall mean and include all reasonable pre-award expenses of the arbitration including the arbitrator's fees, administrative fees, travel expenses, out of pocket expenses such as copying and telephone, court costs and lawyer's fees. The parties hereto agree to be bound by any award or order including the arbitral tribunal in the manner laid out thereinabove".

16. In the present case, as per Clause 24 of the Agreement, it has been mentioned that in case of any dispute arose between the parties, the same shall be referred to the Sole Arbitrator to be nominated by the Lender, respondent no.1. The bare perusal of the clause of the agreement shows that any dispute in relation to the agreement if unsolved then the dispute shall be referred to the arbitration. The Arbitrator shall be appointed by respondent no.1, however, post 2015 amendment in the Act, this clause is ex-facie bad and is in contravention of the provision of the Arbitration and Conciliation Act which goes to the root of the matter and arbitrator become *de jure* ineligible to act as an arbitrator by operation of law.

17. Even otherwise, this issue is no more *res-integra* as the **Hon'ble Supreme Court of India in a case titled as Perkins Eastman Architects DPC & Anrs. Vs. HSCC 2019 SCC**

Online SC 1517 has categorically held that a person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator and thus, unilateral appointment of Sole Arbitrator has been held as illegal.

18. **The Supreme court in the case of Perkins Eastman Architects DPC and Anr. Vs. HSCC (India) Limited (Supra)** considered the effect of Section 12(5) of the said Act, read with the Seventh Schedule has held in para 20 and 21 as under:-

“20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited 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 Limited, 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.

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 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 recognized by the decision of this Court in TRF Limited.”

19. The judgment passed by the **Hon’ble Apex Court in Perkins (Supra)** was further relied upon by the **Hon’ble High Court of Delhi in a case titled as Poddatur Cable TV Digi Services Vs. SITI Cable Network Limited (2020 SCC OnLine Del 350)** wherein it has been observed that:-

“The Managing Director was ineligible from appointing an Arbitrator on the simple logic that a Managing Director of a Company would always have an interest in the outcome of the arbitration proceedings. The interest in this context takes the shape of bias and partiality. As a natural corollary, if the Managing Director suffers this disability, even if he was to appoint another person as an Arbitrator, the thread of biasness, partiality and interest in the outcome of the dispute would continue to run. Seen in this light, it can hardly be argued that the judgment in Perkins (Supra) will not apply only because the designated Authority empowered to appoint an Arbitrator in other than a Managing Director. Moreover, as brought out by the respondent itself, Company here is run by the Board of Directors.”

20. In the present case, it is apparent from the the arbitration clause that it was respondent no.1 only who has the power and authority to unilaterally appoint the Sole Arbitrator in the

present matter without any prior consent or reference to the petitioner and such rights of appointing of Arbitrator are not questionable by the petitioner. Admittedly, respondent no.1 has appointed the Sole Arbitrator unilaterally in the present case which was clearly in the teeth of the position of law clarified by the Hon'ble Supreme Court of India.

21. **The Hon'ble High Court of Bombay also in a case titled as Lite Bite Foods Pvt. Ltd. Vs. Airports Authority of India 2019 SCC OnLine Bom 5163**, further clarified the ratio laid down by the Hon'ble Apex Court in the matter of Perkins (Supra). The court held that appointment of an arbitral tribunal can either be with consent of the parties or by an order of the court, there can be no third way.
22. The arguments of Ld. Counsel for respondent no.1 that since the petitioner has not taken the plea of unilateral appointment of the Ld. Sole Arbitrator in the petition in specific and therefore, the judgments of Perkins (Supra) and Poddatur Cable TV Digi Services (Supra) are without any basis as the same is pure question of law which goes to the root of the present matter. Hence, the judgment titled as State of Maharashtra Vs. Hindustan Construction Company Ltd. (Supra) so relied upon by respondent no.1 is not applicable to the facts of the present case.

23. In **Naresh Kanayalal Rajwani and Ors Vs. Kotak Mahindra Bank Ltd & Anrs, Comm. Arbitration Petition (L) No. 1444 of 2019, the Hon'ble High Court of Judicature at Bombay Ordinary Original Civil Jurisdiction** has held in para 22 that :-

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

24. The **Hon'ble High Court of Delhi in a case titled as Abraham Memorial Education Trust Vs. Prodigy Development Institution in OMP (COMM) 391/2020 decided on 23.03.2021** has also held the same.

25. In the light of the ratio of judgments discussed above, in the present case admittedly, the Sole Arbitrator has been appointed by respondent no.1 unilaterally without the consent of the petitioner and thus, the entire arbitration proceedings stands vitiated and also nothing further survives and all the proceedings held thereafter and thereunder are *void ab initio*.

26. In view of my aforesaid discussion, the present petition is allowed and the impugned arbitral award dated 07.09.2019 is set aside being patently illegal and in contravention of principles of natural justice and settled principles of laws as

provided under Section 34 of the Arbitration and Conciliation Act, 1996. No order as to cost.

27. File be consigned to record room.

(Announced in the Open Court
today on 05.06.2023)

(Anurag Sain)
District Judge (Commercial Court)-01,
Patiala House Courts Complex, New Delhi



LEGALERA
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE