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

Date of decision: 23.02.2024

+ **O.M.P. (COMM) 399/2022**

M/S UPPER INDIA TRADING CO. PVT. LTD

..... Petitioner

Through: Mr. Jaswinder Singh, Adv.

versus

M/S HERO FINCORP LTD

..... Respondent

Through: Mr. Aditya Prasad, Mr. Amit Kr.
Sinha, Adv.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 seeking setting aside of the *ex parte* award dated 17.05.2022 passed by the Sole Arbitrator awarding a sum of Rs. 6,05,46,413.80/- in favour of the respondent and against the petitioner.
2. It is stated by Mr. Singh, learned counsel appearing for the petitioner that in the present case, the appointment of the Arbitrator is itself faulty.
3. The brief facts are as under:
 - a. The petitioner company namely M/s Upper India Trading Co. Pvt. Ltd., sought working capital limit from the respondent.
 - b. Pursuant to sanction of the Facility Agreement *vide* letter dated



26.04.2018, a formal agreement dated 11.05.2018 was executed between the parties.

- c. The agreement dated 11.05.2018 contained the arbitration agreement which reads as under:-

“DISPUTE RESOLUTION

All claims, disputes, differences or question of any nature arising between the parties, whether during or after the termination of this Agreement, in relation to the construction, meaning or interpretation of any term used or clause of this Agreement or as to the rights, duties, liabilities of the parties arising out of this Agreement or in relation to this Agreement, shall be referred to the sole arbitrator appointed by the HFCL.

The arbitration proceedings shall be conducted in accordance with the Arbitration and Conciliation Act, 1996 and the proceedings shall be held at New Delhi. Pending the giving of the award including interim award, the Borrower shall be liable to perform its obligation under this Agreement in keeping with the provisions of this Agreement. The arbitral award shall be final and binding on the parties.”

- d. Since M/s Upper India Trading Co. Pvt. Ltd. defaulted in payments of its obligations, the respondent *vide* notice dated 15.06.2021 recalled the loan advanced to M/s Upper India Trading Co. Pvt. Ltd. and sought recovery of Rs. 6,05,46,413.80/-.
- e. On 29.06.2021, the respondent *vide* legal notice dated 29.06.2021 invoked proceedings under Section 21 of the Arbitration and Conciliation Act, 1996.
- f. On 24.12.2021, the respondent *vide* a letter dated 24.12.2021



unilaterally appointed Ms. Divya Raj, Adv. as an Arbitrator for adjudication of the disputes regarding the loan account of M/s Upper India Trading Co. Pvt. Ltd. The letter is reproduced as under:-

Ref No: HFCL/REF/DEC-21/01

Date: - 24/12/2021

To,

MS. DIVYA RAJ (ADVOCATE)
Chamber. No. 720, 7th Floor,
Saket Court, New Delhi-110017

Exh CW-1/E
D
Sole Arb. Delhi
29/04/22

SUB: - REFERENCE FOR APPOINTMENT/ NOMINATION OF ARBITRATOR & INITIATION OF ARBITRATION PROCEEDINGS AGAINST - UPPER INDIA PVT. LTD. AND OTHERS IN RESPECT TO LOAN RECALL OF INVENTORY FUNDING AGREEMENT DATED 26.11.2018 AND OFFER LETTER BEARING REFERENCE NO. 00001096 DATED 25.04.2018, 00001311 DATED 27.09.2018 AND AGREEMENT TO HYPOTHECATE DATED 26.04.2016.

Dear Sir,

1. We, Hero Fincorp Ltd (Hereinafter referred to as "HFCL"), is a Company incorporated under the Companies Act, 2013 and registered with Reserve Bank of India (RBI) and having its Registered office at 34, Basant Lok, Vasant Vihar, New Delhi 110057, India. We are engaged in the business of rendering financial/credit facilities, in the form of loans to the intending borrowers.
2. That Upper India Pvt. Ltd., Mr. Sunil Sethi and Ms. Simmi Sethi (Herein after referred to as "Borrowers") in capacity as Borrowers approached our client seeking Loan. That after considering loan application of Upper India Pvt. Ltd. and relying upon the guarantee and information provided by Borrowers, HFCL granted following financial facility:-
3. That the above said loan against inventory funding facility was availed vide loan Agreement dated 11.05.2018 for sum of Rs. 3,50,00,000/- (Rupees Three Crore Fifty Lakh(s) Only) (hereinafter referred to as "the Agreements") whereby a total financial assistance / loans of Rs. 3,50,00,000/- was availed by Upper India Pvt. Ltd. for the purpose, and on the terms & subject to the conditions, more specifically described in the Agreements respectively. In consideration of the aforementioned loan availed from HFCL by Upper India Pvt. Ltd., the Guarantors i.e. Mr. Sunil Sethi and Ms. Simmi Sethi executed Deed of Guarantee in favour of HFCL. The Borrowers irrevocably and unconditionally, jointly and/or severally guaranteed the repayment of said loan amount. The agreement, inter alia, provides for settlement of any dispute arising under the contract by Arbitration of a sole arbitrator.

Copy of the Inventory Funding loan Agreements dated 11.05.2018 and Deeds of Guarantee is enclosed for your reference as **Appendix A (Colly)**.



4. That vide Loan Recall Notice dated **15.06.2021**, HFCL had called upon Upper India Pvt. Ltd., Mr. Sunil Sethi and Ms. Simmi Sethi to pay a sum of **Rs. 6,05,46,415.88/- (Rupees Six Crore Five Lakh(s) Forty Six Thousand Four Hundred Fifteen and Paise Eighty Eight Only)** within **Seven days** of receipt of notice. That since the Upper India Pvt. Ltd., Mr. Sunil Sethi and Ms. Simmi Sethi have failed to pay the said outstanding amount, therefore a dispute has arisen between the parties to be adjudicated by the Sole Arbitrator as per the Arbitration Clause mentioned above. Copy of the Loan Recall notice dated **15.06.2021** is enclosed as **Appendix B**.
4. That as per Article 22 of the Inventory Funding Agreement dated 26.11.2018 and have invoked the arbitration clause and is interested in initiating the Arbitration proceedings against Upper India Pvt. Ltd., Mr. Sunil Sethi and Ms. Simmi Sethi at Delhi.
5. We would like to appoint / nominate you as the sole arbitrator for adjudication of the dispute in the captioned Loan account, and we further request you in terms of Article 22 of the Inventory Funding Agreement dated 26.11.2018. The contract provides for the settlement of disputes in accordance with the Arbitration and Conciliation Act, 1996 and also provides that the Decision / Award of the Arbitrator shall be final and conclusive and binding on both the parties.

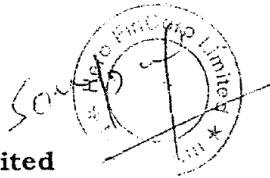
That we have appointed **KMPS Partners, Advocates & Legal Consultants**, E-43, Ground Floor, Office No. 2, Sharma Palace, Kirokari, New Delhi-110014, as our lawyers for and on behalf of HFCL, to conduct the Arbitration proceedings before your good self and any notice to us if served to our counsel at above given address shall be deemed to have been served upon us.

You are requested to convey your concurrence to act as Sole Arbitrator in aforesaid matter in writing to our lawyers, guarantor and to HFCL and thereafter, you may initiate Arbitration proceedings in respect of the above claim/ dispute by issuing necessary notice to the parties.

Thanking You.

Yours faithfully

For **Hero Fincorp Limited**



Copy To:

1. **UPPER INDIA PVT. LTD.**
1/1662 LOTHIAN ROAD KASHMERE GATE
DELHI - 110006
EMAIL.ID: upperindiadelhi@yahoo.co.in



4. It is stated by the learned counsel for the respondent that thereafter the learned Sole Arbitrator so appointed by the respondent issued notices to the petitioner, but the petitioner did not appear.
5. At this stage, Mr. Singh, learned counsel for the petitioner company has drawn my attention to a letter dated 12.04.2022, wherein the Director of the petitioner company visited the office of the Sole Arbitrator, but the same was locked and thereafter no further notice for proceedings was given to the petitioner.
6. Mr. Singh, learned counsel has primarily rested his submissions on the fact that the unilateral appointment of the Arbitrator by the respondent is hit by the judgments of the Hon'ble Supreme Court in "*Perkins Eastman Architects DPC vs. HSCC (India) Ltd.*" [(2020) 20 SCC 760] and "*TRF Limited & Anr. vs. Damodar Valley Corporation & Anr.*" [AIR 2017 SC 3889] and judgment passed by this court in ARB.P. 133/2019 in "*Geeta Poddar vs. Satya Developers Private Limited*".
7. Per contra, Mr. Prasad, learned counsel for the respondent states that the petitioner has not participated in the arbitration proceedings despite repeated notices. The objection raised by the petitioner today could have very well been raised at an early stage and the objection to the jurisdiction of the Arbitrator at this belated stage cannot be entertained.
8. In this regard, he relies upon the judgment passed by the Hon'ble Division Bench of this court in FAO (COMM) 31/2021 dated 23.01.2024 titled "*Arjun Mall Retail Holdings Pvt. Ltd. & Ors. vs. Gunocen Inc.*" The operative portion reads as under:-

"35. The aforesaid dictum in Airport Metro Express (Supra) makes it clear that under Section 34 of the Act, scope of



interference by the courts is very limited and only if there is any patent illegality in the Arbitral Award, then only it is required to be touched upon. In the present case, even if it is accepted that the appellants had raised objection to the appointment of learned Arbitrator by sending a letter to him but the fact remains that the appointment was never challenged under the provisions of Section 11(6) of the Act, 1996 nor did the appellants participate in arbitral proceedings, despite having knowledge of the same. Instead of contesting the respondent's claim before the learned Arbitrator, the appellants remained mute spectator and only after losing the battle in arbitral proceedings, the appellants preferred appeal under Section 34 of the Act, challenging the appointment of Arbitrator as well as the Arbitral Award.

36. Therefore, the challenge against the appointment of the learned Sole Arbitrator is not tenable in the present case.”

9. I have heard learned counsels for the parties.
10. In the present case, the Arbitrator has been appointed by the respondent in pursuance to the agreement arrived at between the parties. The Arbitration Clause in the agreement gives the power to the respondent to appoint the Sole Arbitrator.
11. The Hon'ble Supreme Court in **“TRF” (supra)** held as under:-

“49. Regard being had to the same, we have to compare and analyse the arbitration clause in the present case. Clause (c), which we have reproduced earlier, states that all



disputes which cannot be settled by mutual negotiation shall be referred to and determined by arbitration as per the Act, as amended. Clause (c) is independent of Clause (d). Clause (d) provides that unless otherwise provided, any dispute or difference between the parties in connection with the agreement shall be referred to the sole arbitration of the Managing Director or his nominee.

50. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming



ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the “named sole arbitrator” and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. In this regard, our attention has been drawn to a two-Judge Bench decision in State of Orissa v. Commr. of Land Records & Settlement. In the said case, the question arose, can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held :

“25. We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This



position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in Roop Chand v. State of Punjab [Roop Chand v. State of Punjab, AIR 1963 SC 1503]. In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, delegated its appellate powers vested in it under Section 21(4) to an “officer”, an order passed by such an officer was an order passed by the State Government itself and “not an order passed by any officer under this Act” within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer in his own right and not as a delegate of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate.”

(emphasis in original)

12. The Hon’ble Supreme Court in “**Perkins**” (*supra*) held as under:-

“21. But, in our view that has to be the logical deduction



from TRF Ltd. Para 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 (3 of 2016) and recognised by the



decision of this Court in TRF Ltd. .”

13. Following the judgment of *Perkins (supra)* and *TRF (supra)*, this court in *Geeta Poddar (supra)* has further held as under:-

“7. In view of the foregoing settled position of law, there exists no doubt in the mind of the Court that unilateral appointment of the second sole arbitrator by the Managing Director of the Respondent was non-est in law, being in conflict with Section 12(5) read with Seventh Schedule of the Act, and thus void ab initio.”

14. The facts in the present case are similar. The Sole Arbitrator has been appointed by the respondent unilaterally. The same is clearly hit by the judgments of “*Perkins Eastman Architects DPC*” (supra) and “*TRF Limited*” (supra) As the appointment is barred u/s 12(5) read with the Seventh Schedule of the Arbitration and Conciliation Act, 1996 , the whole arbitration proceedings are *non-est* in law.
15. For the said reasons, the petition is allowed and the Award dated 17.05.2022 is hereby set aside.
16. Pending applications, if any, are disposed of.

JASMEET SINGH, J

FEBRUARY 23, 2024 / (MS)

Click here to check corrigendum, if any