IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 241 OF 2022

Hanuman Motors Pvt. Ltd. & Anr. .... Petitioners
Vs.
M/s. Tata Motors Finance Ltd. ...Respondent

Ms. Nishtha Garg i/b. Kartik S. Garg, for the Petitioners.
Mr. Rahul Sarda a/w. Ms. Netra Jagtap i/b. Jay and Co., for the Respondent.

CORAM : MANISH PITALE, J.
RESERVED ON : 13TH FEBRUARY 2023
PRONOUNCED ON : 01st MARCH 2023

JUDGEMENT

. Heard finally with the consent of the learned counsel for the rival parties. The question that arises for consideration in this petition is, as to whether the petitioners are justified in claiming that the impugned award passed by the learned arbitrator deserves to be set aside, only on the ground that the respondent unilaterally appointed the learned arbitrator. The other issues that arise for consideration are, as to whether such a ground can be raised in this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, without expressly having raised the same before the learned arbitrator and as to whether in the facts

and circumstances of the present case, it can be held that the appointment of the learned arbitrator was hit by Section 12(5) read with the Seventh Schedule of the said Act.

2. The facts, in brief, leading to filing of the present petition are that the petitioners received a notice dated 17/3/2021, for recall of loan from the Advocate of the respondent. By the said notice, the loan agreement was also terminated and a sole arbitrator was appointed. The petitioners claimed that the agreement in question was itself non-existent and, in that backdrop, they sent a communication to the respondent dated 22/3/2021, asking for a copy of the loan agreement. The respondent proceeded on the basis that the arbitration clause in the agreement was invoked and the sole arbitrator stood nominated. The respondent further proceeded to file an application under Section 17 of the said Act before the learned arbitrator.

3. On 3/4/2021, the learned arbitrator accepted his nomination and fixed the schedule for the arbitral proceedings. He also gave a disclosure statement, as required under Section 12 of the said Act. On 9/4/2021, the Advocate representing the petitioners sent a letter, requesting for a copy of the agreement and called upon the respondent not to proceed further as the learned arbitrator was appointed without the consent of the

petitioners. On 27/4/2021, the respondent supplied a copy of the agreement to the petitioners. It contained an arbitration clause, which reads as follows:

> *"Arbitration Clause – 21.1 – All disputes, differences and/or claims arising out of this agreement or as to the construction, meaning or effect hereof or as to the rights and liabilities of the parties hereunder shall be settled by arbitration to be held in Mumbai in accordance with Arbitration and Conciliation Act, 1996, or any statutory amendments thereof and shall be referred to a sole arbitrator to be appointed by the Lender. In the event of death, refusal, neglect, inability or incapability of the person so appointed to act as an arbitrator, the Lender may appoint a new arbitrator. The proceedings will be conducted in English. The award of the arbitrator shall be final and binding on all the parties concerned."*

4. The petitioners sent a letter dated 6/5/2021, claiming that the agreement was a forged and fabricated document and that the petitioners had never executed the same. In the meanwhile, the learned arbitrator fixed a date for virtual hearing. The petitioners also sent a letter dated 6/9/2021, to the learned arbitrator, challenging the execution of the said agreement and further took a stand that they had not consented to the arbitration

proceedings. On 13/9/2021, the respondent filed an affidavit, responding to the objections raised by the petitioners in their letter dated 6/9/2021. On 21/9/2021, the respondent filed its affidavit in evidence. On 21/10/2021, the petitioners sent a letter to the respondent reiterating their stand that the agreement was forged and also that they had not consented to the arbitration proceedings.

5. On 8/11/2021, the learned arbitrator passed the impugned award, allowing the claim of the respondent, thereby directing the petitioners to pay a sum of Rs.5,78,437.83, to the respondent with interest @ 18% per annum, giving further direction that the respondent shall be entitled to repossess the vehicle in question, in respect of which the loan was advanced.

6. Aggrieved by the said award, the petitioners filed the present petition before this Court, wherein the respondent appeared through counsel.

7. Ms. Nishtha Garg, learned counsel appearing for the petitioners, submitted that the impugned award deserves to be set aside, only on the ground that the arbitration clause in the present case providing for unilateral appointment of the arbitrator by the respondent, was hit by Section 12(5) read with the Seventh Schedule of the said Act. It was submitted that after

amendment of the said Act, in the year 2015, unilateral appointment of the arbitrator is no longer permissible, because sub-Section (5) of Section 12 of the said Act starts with a *non-obstante* clause. It specifically provides that notwithstanding any prior agreement to the contrary between the parties, any such arbitrator appointed unilaterally is ineligible to proceed with the arbitration proceedings.

8. It was submitted that in the present case the arbitration clause, quoted above, clearly provided for unilateral appointment of a sole arbitrator by the respondent and therefore, it was hit by Section 12(5) read with the Seventh Schedule of the Act. By placing reliance on judgment of the Supreme Court in the case of *Perkins Eastman Architects DPC and Anr. Vs. HSCC (India) Limited* [1] and judgments of this Court in the case of *Lite Bite Foods Pvt. Ltd. Vs. Airports Authority of India* [2] *and Naresh Kanayalal Rajwani and Ors. Vs. Kotak Mahindra Bank Ltd. & Anr.* [3]*,* the learned counsel for the petitioners submitted that the appointment of the learned arbitrator in the present case was covered under Item 1 of the Seventh Schedule, read with Section 12(5) of the said Act.

9. The learned counsel for the petitioners further submitted that the objection regarding ineligibility of the arbitrator under

1 *2019 SCC Online SC 1517*

2 *2019 SCC Online Bom 5163*

3 *2022 SCC Online Bom 6204*

Section 12(5) of the said Act could be waived only by express agreement between the parties and not by their conduct. In this regard, the learned counsel for the petitioners relied upon judgment of the Supreme Court in the case of *Bharat Broadband Network Limited Vs. United Telecoms Limited* [4] *and judgments of Delhi High Court in Govind Singh Vs. Satya Group Pvt. Ltd. and Anr.* [5]*, MS Bridge Building Construction Co. Pvt. Ltd. Vs. Bharat Heavy Electricals Ltd.* [6] *and judgment of Madras High Court in the case of Vighnaharta Travels and Resorts Pvt. Ltd. Vs. Daimler Financial Services India Pvt. Ltd. and Anr.*[7]. The learned counsel emphasized on the fact that in the present case, admittedly, there was no written agreement between the parties to waive such an objection.

10. The learned counsel for the petitioner further contended that the arbitration agreement in the present case was a forged and fabricated document, which the learned arbitrator failed to appreciate. It was also submitted that the claim of the respondent was accepted in the absence of any evidence. On this basis, it was submitted that the impugned award deserved to be set aside.

11. On the other hand, Mr. Rahul Sarda, learned counsel appearing for the respondent submitted that in the present case,

4 *(2019) 5 SCC 755*

5 *2023 SCC Online Del 37*

6 *2023 SCC Online Del 242*

7 *2022 SCC Online Mad 5291*

the objection under Section 12(5) read with the Seventh Schedule of the said Act could not be raised on behalf of the petitioners, because the learned arbitrator appointed by the respondent did not fall within any of the items specified in the Seventh Schedule of the said Act. It was submitted that the judgments on which the petitioners had placed reliance pertained to a factual scenario wherein either a Managing Director or a person appointed as an arbitrator by such Managing Director was found to be ineligible for appointment as an arbitrator. It was submitted that the amendment brought about in the year 2015 did not ban unilateral appointment by one of the parties, as long as the parties had agreed for such a clause of arbitration. In this regard, the learned counsel for the respondent placed emphasis on party autonomy in such cases.

12. It was further submitted that reliance placed on judgment of the Supreme Court in the case of *Perkins Eastman Architects DPC and Anr. Vs. HSCC (India) Limited (supra)* was misplaced, for the reason that the said judgment / order was passed under Section 11 of the said Act, which as per the judgment of the Supreme Court in the case of *Avitel Post Studioz Limited and Ors. Vs. HSBC PI Holdings (Mauritius) Limited* [8] cannot have binding effect. It was further submitted that the petitioners ought to have specifically raised the objection regarding unilateral appointment of the arbitrator, before the learned arbitrator

8 *(2021) 4 SCC 713*

himself and only then they could be permitted to raise such a ground in the present petition filed under Section 34 of the said Act. It was submitted that in the absence of any such objection being raised before the learned arbitrator, the same could not be directly raised for the first time under Section 34 of the said Act in the present proceedings. The learned counsel for the respondent further submitted that the petitioners failed to raise any such objection before the learned arbitrator and merely denied the very execution of the said agreement.

13. It was further submitted that the learned arbitrator in the present case conducted the proceedings in an appropriate manner, granting sufficient opportunity to both parties to support their respective stands and that therefore, there was no ground made out under Section 34 of the said Act for interference with the arbitral award. It was emphasized that after the amendment of the said Act in the year 2015 and in the light of judgment of the Supreme Court in the case of *SSangyong Engineering and Construction Co. Ltd. Vs. National Highways Authority of India (NHAI)* [9], laying down the scope of jurisdiction available under Section 34 of the said Act, the present petition deserves to be dismissed. In order to support the contentions raised on behalf of the respondent, the learned counsel for the respondent relied upon judgments of the Supreme Court in the case of *Voestalpine*

9 *(2019) 15 SCC 131*

Schienen GMBH Vs. Delhi Metro Rail Corporation Limited [10], *Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Ors.* [11], *Gas Authority of India Ltd. and Anr. Vs. Keti Construction (I) Ltd. and Ors.* [12] *and Avitel Post Studioz Limited and Ors. Vs. HSBC PI Holdings (Mauritius) Limited (supra).*

14. The learned counsel for the respondent also contended that the ratio of a judgment ought to be appreciated in the facts in which the judgment was rendered, thereby indicating the petitioners cannot rely upon the judgments of the Supreme Court referred to by their learned counsel. For this proposition, the learned counsel for the respondent relied upon judgments of the Supreme Court in the case of *State of Orissa and Ors. Vs. Md. Illiyas (2006) 1 SCC 275 and Ambica Quarry Works Vs. State of Gujarat and Ors.* [13] *and Commissioner of Income Tax Vs. Sun Engineering Works (P) Ltd.* [14]

15. Heard learned counsel for the parties and perused the material on record. Before considering the facts of the present case and the question as to whether the petitioner is justified in invoking Section 12(5) read with the Seventh Schedule of the said Act, it would be appropriate to refer to the contentions raised on behalf of the respondent, indicating that such an objection

10 *(2017) 4 SCC 665*
11 *(2002) 3 SCC 572*
12 *(2007) 5 SCC 38*
13 *(1987) 1 SCC 213*
14 *(1992) 4 SCC 363.*

cannot be considered by this Court under Section 34 of the said Act and that the petitioners having participated in the arbitration proceedings, cannot be heard to say that the appointment of the arbitrator was vitiated and the impugned award deserves inference, only on that ground.

16. The basis on which the learned counsel for the respondent proceeded was that judgments of the Supreme Court on the aspect of unilateral appointment of arbitrator, were rendered while exercising power under Section 11 of the said Act and that as per the law laid down by the Supreme Court in the case of *Avitel Post Studioz Limited and Ors. Vs. HSBC PI Holdings (Mauritius) Limited (supra)*, the said judgments of the Supreme Court under Section 11 of the said Act, are not of binding nature. A perusal of the relevant paragraph of the judgment of the Supreme Court in the case of *Avitel Post Studioz Limited (supra)* would be appropriate at this stage. In paragraph 17 of the said judgment, the Supreme Court held as follows:

> *"17. We now come to a learned Single Judge's judgment in Swiss Timing. There is no doubt that this judgment delivered by a learned Single Judge under Section 11 jurisdiction cannot be said to be a binding precedent (see Associated Contractors at para 17). However, the learned Judge's reasoning has strong persuasive value which we are inclined to*

adopt."

17. The Supreme Court has observed that while such judgments rendered under Section 11 of the aforesaid Act, cannot be binding precedents but the reasoning does have persuasive value, which in the facts of the said case the Supreme Court adopted. In the present case, the learned counsel for the petitioners relied upon judgments of the Supreme Court in the case of *Perkins Eastman Architects DPC and Anr. Vs. HSCC (India) Limited* (*supra)* and *TRF Ltd. Vs. Energo Engineering Projects Limited* [15] which were judgments rendered under Section 11 of the said Act. The said judgments are certainly of persuasive value, particularly in the context of the amendment brought about in the year 2015, in the said Act with reference to Section 12(5) read with the Seventh Schedule thereof.

18. In the case of *Bharat Broadband Network Limited Vs. United Telecoms Limited (supra),* the Supreme Court had an occasion to specifically deal with and decide a case concerning Section 12(5) read with the Seventh Schedule of the said Act, in appeals that arose out of orders passed by the High Court. In the said judgment, the Supreme Court considered the judgment in the case of *TRF Ltd. Vs. Energo Engineering Projects Limited (supra).* The view adopted therein was approved, while considering various aspects of the question pertaining to the

15 *(2017) 8 SCC 377*

unilateral appointment of an arbitrator and the manner in which it vitiated the entire arbitration proceedings. Therefore, the contention raised on behalf of the respondent cannot be accepted that this Court may not rely upon judgments rendered by the Supreme Court in the case of *Perkins Eastman Architects DPC and Anr. Vs. HSCC (India) Limited (supra) and TRF Ltd. Vs. Energo Engineering Projects Limited (supra).*

19. A perusal of judgment of the Supreme Court in the case of *Perkins Eastman Architects DPC and Anr. Vs. HSCC (India) Limited (supra),* shows that after taking into consideration the earlier judgment in the case of *TRF Ltd. Vs. Energo Engineering Projects Limited (supra)*, the Supreme Court considered two distinct categories of cases in which Section 12(5) read with the Seventh Schedule of the said Act could apply, which would vitiate the appointment of the arbitrator and consequently the arbitration proceedings. This Court relied upon the said judgements in the case of *Lite Bite Foods Pvt. Ltd. Vs. Airports Authority of India (supra).* The relevant portion of the said judgement reads as follows:

> *"26. In summary, the legal principles are these:*
>
> *(a) An officer or employee of one party cannot be the arbitrator or, upon eligibility, the person empowered to appoint an arbitrator. This is the TRF Ltd. category or rule.*

(b) Where the arbitration clause provides for nomination by each side, and for the appointment of an umpire by the two nominee arbitrators, of a person from a Panel (i) that panel cannot be hand-picked by one side; and (ii) it must be broad-based and inclusive, not narrowly tailored to persons from a particular category. The opponent and the two nominee arbitrators must have the plenitude of choice. This is the rule in Voestalpine Schienen. Conceivably, a broad-based panel commonly agreed in the contract by both sides would serve the purpose.

(c) A clause that confers on one party's employee the sole right to appoint an arbitrator, though that employee is himself not to the arbitrator, is also not valid, and this is a logical and inescapable extension of the TRF Ltd. doctrine. It makes no difference whether this power is to be exercised by choosing from a panel or otherwise. This is the rule in Eastman Perkins.

27. The guiding principle is neutrality, independence, fairness and transparency even in the arbitral-forum selection process."

20. In the case of *Bharat Broadband Network Limited Vs. United Telecoms Limited (supra)* the Supreme Court had an

occasion to consider the said aspect of unilateral appointment of an arbitrator and the position of law was reiterated to indicate that whenever either party had exclusive power to appoint a sole arbitrator, a situation was created where serious doubts would arise about eligibility of said arbitrator, simply for the reason that the party appointing the sole arbitrator would have exclusive power in determining the course of dispute resolution, which vitiated the entire proceedings.

21. In a recent judgment, rendered in the case of *Naresh Kanayalal Rajwani and Ors. Vs. Kotak Mahindra Bank Ltd. & Anr (supra),* this Court deliberated upon and considered a situation where it was claimed that mere participation on the part of petitioners in the arbitral proceedings, resulted in waiving their right to raise such an objection to unilateral appointment of arbitrator. This Court found that a proper application of Section 12(5) of the said Act is a complete answer to the contentions raised on behalf of the respondent therein. Unless the party waives such an objection in writing, mere participation in the arbitral proceedings would not disentitle the party from specifically raising the issue. In the said case also, the petitioners had challenged an award passed by a sole arbitrator, by invoking section 12(5) of the said Act before this Court and it was found that the entire proceedings stood vitiated because of unilateral appointment of the arbitrator. In the present case also, the sole

arbitrator was unilaterally appointed by the respondent. There was no agreement in writing between the parties to waive objection pertaining to unilateral appointment of the arbitrator and therefore, the proviso to Section 12(5) of the said Act cannot operate. In such a situation, mere participation in the arbitral proceedings cannot disentitle the petitioners from raising the said issue in the present petition filed before this Court.

22. It is specifically contended on behalf of the respondent that the petitioners should have first raised such objection before the learned arbitrator and having failed to do so, the petitioners cannot raise the said ground before this Court. In this regard, specific reliance was placed on judgement of learned Single Judge judgment of Delhi High Court in the case of *Kanodia Infratech Limited Vs. Dalmia Cement (Bharat) Limited* [16]. In this regard, the learned counsel appearing for the respondent is justified in relying upon Division Bench judgment of the Delhi High Court in the case of *Govind Singh Vs. Satya Group Pvt. Ltd. and Anr (supra),* holding that it was not necessary to raise such an objection before the learned arbitrator, to be able to raise the same in a petition filed under Section 34 of the said Act, while challenging an arbitral award.

23. This Court is in agreement with the said view, for the reason that the nature of the objection is such that it goes to the

16 *2021 SCC Online Del 4883*

very root of the matter and if it is found that the learned arbitrator could not have entered upon the reference itself, there was no question of holding that such an objection could never be raised before the Court under Section 34 of the said Act, merely because it was not raised before the learned arbitrator.

24. Even otherwise, in the present case, the petitioners sent communications to the learned arbitrator and they also filed an application before the learned arbitrator, challenging his jurisdiction, sufficiently demonstrating that the petitioners indeed objected to the learned arbitrator entering upon the reference.

25. The learned counsel appearing for the respondent specifically relied upon judgments of the Supreme Court in the case of *Ambica Quarry Works Vs. State of Gujarat (supra)* and *Commissioner of Income Tax Vs. Sun Engineering Works (P) Ltd. (supra)* to contend that the *ratio decidendi* in a judgment ought to be properly appreciated and much emphasis was placed on the requirement of ascertaining the questions that arose for consideration and the determination thereof, before treating a particular portion of the judgement as its *ratio decidendi* . There can be no quarrel with the aforesaid proposition, but this Court is not in agreement with the learned counsel for the respondent that the judgments upon which the petitioner has placed reliance did

not decide the questions that arise in the present petition or that the *ratio decidendi* of the said judgments is not applicable to the facts of the present case.

26. A perusal of the judgments passed by the Supreme Court in that regard would show that the real question that arose for consideration was, as to whether the appointment of the sole arbitrator was hit by Section 12(5) read with the Seventh Schedule of the said Act. This is the precise question that is raised on behalf of the petitioners in the present petition. The learned counsel for the respondent sought to distinguish the facts of the cases in which the Supreme Court decided the applicability of Section 12(5) read with the Seventh Schedule of the said Act, by emphasizing that the Court therein was considering, as to whether a Managing Director of one of the parties could act as an arbitrator or such a Managing Director could unilaterally appoint a sole arbitrator. It was submitted that the clause in the present case was distinguishable. But, a perusal of the arbitration clause, quoted hereinabove, would show that the respondent was empowered to unilaterally appoint the sole arbitrator. Merely because in the present case it was not stipulated that the Managing Director of the respondent would appoint the arbitrator, it would not lead to the conclusion that the *ratio decidendi* of the said judgements of the Supreme Court is inapplicable.

27. The real crux of the matter is that when one of the parties to the dispute has an overwhelming and unilateral power to appoint a sole arbitrator, the same completely vitiates such an appointment as being hit by Section 12(5) read with the Seventh Schedule of the said Act. The learned counsel for the petitioners is justified in contending that Item 1 of the Seventh Schedule of the said Act read with Section 12(5) thereof, would apply to the facts of the present case to show the precedential value of the judgments upon which reliance was placed on behalf of the petitioners. This Court is of the opinion that the judgments rendered by the Supreme Court in the context of Section 12(5) read with the Seventh Schedule of the said Act clearly apply to the facts of the present case.

28. This Court has considered the material on record and it is found that in the absence of specific waiver of the said objection, considering the *non-obstante clause* with which Section 12(5) of the said Act opens, the unilateral appointment of arbitrator by the respondent vitiated the entire proceedings from the very beginning and this aspect goes to the very root of the matter. Hence, the petitioners are certainly entitled to raise the said issue while challenging the impugned award under Section 34 of the said Act. The respondent was unable to demonstrate as to whether there was indeed any waiver on the part of the petitioners in writing and as observed hereinabove, mere

participation on the part of the petitioners would not disentitle them from raising such an objection in the present petition filed under Section 34 of the said Act. There is enough material on record to show that from the very beginning when the respondent unilaterally appointed the arbitrator, the petitioners sent communications, not only disputing the execution of the very agreement, but they raised objection to the arbitral proceedings. Hence, this Court is convinced that the impugned award deserves to be set aside, only on this ground.

29. Reliance placed on behalf of the respondent upon judgments of the Supreme Court in the case of *Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation Limited (supra), Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Ors. (supra)and Gas Authority of India Ltd. and Anr. Vs. Keti Construction (I) Ltd. and Ors. (supra),* can also not take its case any further. In the case of *Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation Limited (supra),* the Supreme Court held that leaving option for one of the parties to choose its nominee on the arbitral tribunal only from a panel of five forwarded by the other party, vitiated the process and it was found to have been cured only when the entire panel of 31 names was made available, from amongst whom the first party could choose its nominee. The aspect of neutrality of arbitrators was discussed in that light and a proper appreciation of the same

shows that the said judgement, in fact, assists the petitioners in the principal ground raised on their behalf concerning unilateral appointment of arbitrator by the respondent herein.

30. The judgements in the cases of *Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Ors. (supra)and Gas Authority of India Ltd. and Anr. Vs. Keti Construction (I) Ltd. and Ors. (supra)*, also do not help the case of the respondent, inter-alia, for the reason that they were rendered prior to the amendment of the Act in the year 2015. The amendment brought about significant changes in the Act, including in Section 12 thereof, sub-section (5) of which opens with a *non-obstante* clause. The unilateral appointment of the sole arbitrator in the present case completely vitiated the impugned award, rendering it vulnerable to interference on this ground alone.

31. In view of the above, the petition is allowed. The impugned award is quashed and set aside. There shall be no order as to costs.

MANISH PITALE, J.