IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 15599 of 2020
With
CIVIL APPLICATION (FOR DIRECTION) NO. 2 of 2021
In R/SPECIAL CIVIL APPLICATION NO. 15599 of 2020
With
CIVIL APPLICATION (FOR ORDERS) NO. 1 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 15599 of 2020
With
CIVIL APPLICATION (FOR ORDERS) NO. 2 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 15599 of 2020

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BIREN VAISHNAV

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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INDIAN BANK (ERSTWHILE ALLAHABAD BANK)
Versus
MORRIS SAMUEL CHRISTIAN

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Appearance:
MR NEERAJ J VASU(3159) for the Petitioner(s) No. 1
MR GIRISH M DAS(2323) for the Respondent(s) No. 1
MR SHAILESH V RAVAL(2953) for the Respondent(s) No. 2

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CORAM:**HONOURABLE MR. JUSTICE BIREN VAISHNAV**

Date : 14/02/2023

COMMON ORAL JUDGMENT

1. The petitioner-Indian Bank initially approached this Court by challenging an ‘interim measure award passed by the respondent no.1-Morris Samuel Christian in Arbitration Case No.23 of 2020. Subsequently, pending the petition, it appears that the respondent no.1- Sole Arbitrator passed the final award dated 24.11.2020. By the aforesaid award, the suit of the respondent no.2 was allowed and the term loan which is the subject matter of the award, was interfered with.

2. Facts in brief indicate as under:

2.1 The petitioner bank pursuant to a request for a credit facility by way of a term loan of Rs.20 lakhs issued a term loan sanction letter dated 02.05.2016 in favour of M/s.Ekta Enterprise – the respondent no.2 for the purposes of procurement of machines and raw-material relating to bakery

items. It is the case of the petitioner that the respondent no.2 defaulted in payment of this loan and therefore being declared as a non-performing asset on 01.10.2019, on 15.10.2019, a notice under Section 13(2) of the Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 ('SARFAESI Act' for short) for recovery of Rs.19,60,214/- was issued. Having failed to pay the amount, a notice under Section 13(4) of the SARFAESI Act was issued on 18.01.2020, by which, it was proposed to conduct a symbolic possession of the immovable properties of the respondent no.2 which were mortgaged to the bank.

2.2 Aggrieved by these notices, the respondent no.2 approached the respondent no.1 Shri Morris Samuel Christian 'Sole Arbitrator' who by an

interim award dated 11.11.2020 granted a stay of the notices under the SARFAESI Act. This led the petitioner to file the present petition. Pending the petition, since the final award was passed by way of an amendment, the award passed on 24.11.2020 is also challenged.

3. Mr.Neeraj Vasu learned counsel for the petitioner would make the following submissions:

3.1 It is the case of the petitioner that without invoking the remedy available to the respondent no.2 of approaching the Debt Recovery Tribunal under Section 17 of the SARFAESI Act, the respondent no.2 invoked the jurisdiction of the Sole Arbitrator.

3.2 Mr.Vasu would submit that it is well recognized that an arbitrator can be appointed only when the parties to the contract mutually

agree to such appointment, that too, if there is a stipulation for arbitration in a contract entered into between the parties. He would submit that neither is there a contract between the parties and more so, the contract never provided for an arbitration clause so as to subject the dispute referred to at the hands of the respondent no.2 to arbitration.

3.3 Alternatively assuming for the sake of the argument that there was a contract which did stipulate an arbitration clause, no appointment can be made without resorting to the provisions of Section 11 of the Arbitration Act.

3.4 Mr.Vasu would take the Court through the sanction letter, the terms thereto, the mortgaged deed entered into between the parties and the relevant notices issued by invoking the

provisions of the SARFAESI Act to take over the symbolic possession of the properties of the respondent no.2. He would submit that this was a pure case of a bank being the creditor and the respondent no.2 who had availed of such loan and based on the outstanding amounts that the respondent no.2 owed to the bank, provisions of the SARFAESI Act were invoked and the Arbitration and Conciliation Act, 1996, had no role to play in the mechanism to resolve the dispute.

4. Mr.Shailesh Raval learned counsel appearing for the borrower / respondent no.2 would make the following submissions:

4.1 He would take the Court through Civil Application No.2 of 2021 filed by the respondent no.2 with a prayer to vacate the stay on the

execution filed by the respondent which is pending before the City Civil Court, Bhadra.

4.2 He would submit that the respondent no.2/applicant of Civil Application No.2 of 2021 was admittedly a small enterprise the sanctioned letter of the loan indicated that it was being extended the benefit of the loan because of it being an MSME. As per the scheme of the Central Government, it was entitled to a facility of loans upto Rs.2 crores.

4.3 Falling back upon the provisions of the Micro, Small and Medium Enterprises Development Act 2006, Mr.Raval would submit that being an MSME, mechanism under the Act could be invoked to resolve a dispute with regard to the amount due. He would resort to sections 15, 16 and 17 of the Act. The invocation of the

arbitration proceedings and appointment of respondent no.1 as an arbitrator, was just and proper.

4.4 Mr.Raval would further submit that this Court had initially granted an ex-parte interim order staying the proceedings and even before such an order could be passed, the arbitration proceedings concluded and were a subject matter of an execution before the Civil Court and there was no reason for this Court to suspend further hearing in the proceedings and see that the award is complied with.

4.5 Mr.Raval would further submit that this Court had initially granted an ex-parte ad-interim order staying the proceedings and even before such an order could be passed, the arbitration proceedings concluded and were a subject

matter of an execution before the Civil Court and there was no reason for this Court to suspend further hearings in the proceedings and see that the award is complied with.

4.6 He would rely on the hypothecation and the term loan agreement annexed to the Civil Application and would refer to condition 6 of the term loan agreement and submit that there was an inbuilt mechanism of referring the dispute to arbitration and the contention of the learned counsel for the petitioner that there was no contract or a clause under the contract for referring the dispute to arbitration was misconceived.

4.7 Lastly Mr.Raval submitted that even Section 35 of the SARFAESI Act also provides that with regard to MSME, there cannot be any mortgage

upto Rs.2 crores.

5. Mr.Girish Das learned advocate appearing for the respondent no.1- Sole Arbitrator too would support the submissions of Shri Raval. In addition thereto, Mr.Das learned counsel appearing for the respondent no.1-Sole Arbitrator would draw the Court's attention to the provisions of the Arbitration Act, especially Section 16 of the Act and submit that rather than approaching this Court by filing the present petition, the petitioner ought to submit to the jurisdiction of the arbitrator. He would draw the Court's attention to the application filed by the learned counsel for the petitioner on behalf of the petitioner on 24.11.2020 objecting to the jurisdiction of the Tribunal and having approached this Court on the very next day without waiting for outcome of the application.

5.1 Being an MSME, proper records to the proceedings under the arbitration mechanism of the MSME Act ought to be resorted to.

6. In rejoinder, Mr.Vasu would rely on the decision of this Court in case of ***Varshaben Naranbhai Dantani v. Radheshyam Tarachand Agarwal*** rendered in ***Letters Patent Appeal No.1011 of 2021 and allied matters*** to support his submission that this Court under Article 226 of the Constitution of India can interfere in awards passed by the Arbitral Tribunals when such awards are without jurisdiction.

7. Before proceeding with passing of the order, the Court is conscious of the fact that it has come across multiple cases which are pending, wherein, awards have been passed by the respondent no.1 as 'Sole Arbitrator'. That is an

independent issue that will be dealt with in those petitions.

7.1 Coming to the facts of the case, the transaction in question is a transaction between the bank and the borrower-respondent no.2. A term loan facility was extended to the respondent no.2 by the bank in course of its business. On default, the respondent no.2 was declared to be a Non-Performing Asset and seeking resort to the provisions of Section 13 of the SARFAESI Act, notices were issued to the respondent no.2 for taking over symbolic possession of the properties that were mortgaged as collateral securities by the respondent no.2 to the bank. Essentially therefore it was a remedy availed of by the bank under a special law enacted for recovery of a defaulting loan and as the title of Section 13 would indicate for enforcement of security

interest. The terms 'security interest', and 'secured creditor' are defined under the Act in Sections 2(zd) and 2(zf) respectively. Said sections read as under:

> 2(zd) "secured creditor" means
>
> (i) any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible assets or intangible asset as specified in clause (l);
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> (ii) debenture trustee appointed by any bank or financial institution; or
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> (iii) an asset reconstruction company whether acting as such or managing a trust set up by such asset reconstruction company for the securitisation or reconstruction, as the case may be; or
>
> (iv) debenture trustee registered with (the board and appointed) for secured debt, securities; or
>
> (v) any other trustee holding securities on behalf of a bank or financial institution,
>
> in whose favour security interest is created for due repayment by any borrower of any financial assistance;

> 2(zf) "security interest" means right, title or interest of any kind whatsoever, other than those specified in section 31, upon property created in favour of any secured creditor and includes
>
> (i) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tengible asset, retained by the secured creditor as an owner of the property, given on higher or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or
>
> (ii) such right, title or interest in any intangible asset or assignment or license of such intangible asset which secures the obligation to pay any unpaid portion or the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or license of intangible asset;]

8. Under the mechanism of the SARFAESI Act, on a notice issued under Section 13, remedy is provided to any person who is aggrieved by the measures so taken for seeking resort to Section 17 of the Act.

9. Having failed to invoke such provisions as required under Section 17 of the Act, on this first count alone, it was not open for the respondent no.2 to invoke the jurisdiction of 'the Sole Arbitrator' as was so done.

10. The second question is, whether even otherwise, could the respondent no.2 have invoked the arbitration clause, if any, in a contract between the parties, if any. At the cost of reiteration, what was at large before the two parties which is the matter of dispute was a loan transferred between the bank and the borrower had failed to honor the terms of the loan agreement and repay the amount. The contention of the other side - the borrower is that the loan agreement itself had an inbuilt clause providing for resorting to arbitration. The term loan agreement is annexed by the respondent no.2 in its Civil Application.

The respondent no.2 would contend that being MSME as per the term loan agreement, particularly clause 6 thereof clearly indicated that any dispute that arises in connection with the policies or the claims made thereunder could be referred to arbitration. This gives the Arbitrator the jurisdiction to decide the dispute. Reading the term loan agreement, it indicates that there are several clauses to the agreement and the interpretation of Clause-6 thereof to indicate existence of an arbitration agreement, cannot be accepted. Clause 6 of the loan agreement reads as under:

> *"6. The Hypothecated assets shall at all times during the currency of this security and so long as any money shall remain due and owing in the said loan account be maintained in good and saleable condition and kept insured by and at the expenses of the Borrower, against fire, lightning, riot, strike, malicious damage and such other risk as may be required by the Bank or as may be required by law to the full extent of the value thereof with an insurance*

company approved by the Bank in the joint name of the Bank and the Borrower and the policy/ies or copy/ies thereof shall be handed over to the Bank. The Borrower shall duly and punctually pay the premia due on the policy/ies at least one week before the same shall have become due or payable and hand over the receipt to the Bank and the Borrower agrees not to raise any disputes as to the amount of the insurable interest of the Bank. If the Borrower makes default in effecting such insurance as aforesaid or renewing any policy or in payment of such premia or in keeping the hypothecated assets so insured or in delivering to the Bank receipts for the premia it shall be lawful (but not obligatory) for the Bank to effect such insurance or to renew or to pay such premia and to keep the hypothecated assets insured and to debit the expenses incurred by the Bank for the purposes to current account of the Borrower and the same shall be treated as loan secured by this Agreement. The Borrower agrees to pay the same with interest as provided in clause 5 hereof. All sums received under any such insurance as aforesaid shall after deduction of all expenses be applied in or towards the liquidation of the balance due to the Bank for the time being and in the event of there being a surplus the same shall be applied towards any other dues owned tot he Bank by the Borrower. The Borrower agrees that if any moneys under any such insurance are received by the Borrower the same will be forthwith paid to the bank. The Borrower

further agrees that the Bank would be entitled to adjust, settle, compromise or refer to arbitration any dispute between the insurance company and the insured arising under or in connection with such policy/ies and the certificate or any claim made hereunder and to give a valid receipt thereof and the Borrower shall not raise and question that a larger sum might or ought to have been received."

11. Reading the aforesaid clause indicates that the hypothecated assets as long as they are secured and the money outstanding to the loan accounts remains due shall be maintained in good and saleable condition and kept insured by and at the expenses of the borrower against certain contingencies like fire, lightning, riot etc. Such insurance to such risks may be as per the requirements of the bank and the insurance policy shall be in the joint name of the bank and the borrower. It is in this context that the arbitration clause has to be read. It is only when a dispute arises with regard to adjustment,

settlement or a compromise in connection with the dispute between an insurance company and the insured that the arbitration clause would come into play. Therefore, existence of a clause cannot be said to be an inbuilt mechanism provided in the term loan agreement in context of the borrowings and therefore invocation of the arbitration and the proceedings thereunder which were held continued and resulted in passing of the award are totally without jurisdiction.

12. That brings me to decide the other contention raised by the respective parties is the fact of it being an MSME and therefore *ipso-facto* being a dispute falling for consideration with the arbitrator. The MSME Act 2006 was an act provided for facilitating the permission and development and enhancing the competitiveness

of micro, small and medium enterprises and for matters connected therewith. Sections 15, 16 and 17 of the MSME Act when read indicate that when there is a transaction or a contract between a supplier or a buyer of goods and services, payments had to be made in accordance with the schedule, failing which, such payments shall accrue interest. In the event a dispute arises between the parties i.e. the supplier and the buyer of goods or services, the dispute may be referred to a facilitation council which would adjudicate upon the dispute in accordance with the provisions of the Arbitration Act. Essentially this is a mechanism to resolve disputes between the suppliers and buyers of goods and services *inter-se* between the two enterprises and not in the nature of the dispute of a loan transaction which is a subject matter of a special Act that is the SARFAESI Act,

2002. Merely because the borrower happens to be an MSME would not be governed by the provisions of the Act in question. The contention of the counsel for the respondents therefore of seeking resort to such a provision is purely misconceived.

13. The real question therefore would be whether the Sole Arbitrator could have resorted to passing of the awards by adopting the mechanism of arbitration. In order to promote resolution of disputes through speedy measures between the various bodies, the Arbitration and Conciliation Act, 1996 was framed to use meditation, conciliation or other procedures to encourage settlement of disputes. Arbitration agreement in accordance with Section 7 of the Act would mean an agreement between the parties to submit to arbitration all or certain

disputes which had arisen or which may arise between them in respect of defined legal relations whether contractual or not. The agreement could be in the form of an arbitration clause or a separate agreement. The mechanism of appointing arbitrator is provided under Section 11 of the Act which indicates that the parties are free to appoint an arbitrator on a failure to agree to appoint such arbitrator, the parties have to file application under Section 11 of the Act for the Court to appoint one in the event parties do not agree to a common name. Essentially therefore primarily there has to be an agreement between the parties to appoint an arbitrator failing which either of the parties to the agreement have to resort to a mechanism under Section 11 of the Arbitration Act.

14. For the reasons which have been discussed

herein above, evident it is that the Sole Arbitrator harbored a completely misconceived notion of the existence of an arbitration agreement and a contract of arbitration and so did the respondent no.2 and therefore apart from that fact, there is nothing on record that the parties had agreed to appoint the respondent no.1 as the Sole Arbitrator or was a mechanism under Section 11 resorted by the respondent no.2 herein to appoint the respondent no.1 is an Arbitrator.

15. To borrow the terms of the Division Bench in the case of ***Varshaben Naranbhai Dantani*** (supra) when it comes to adjudication of such awards passed by this masquerading Arbitrator – respondent no.1, this Court under Article 226 of the Constitution of India has to step in and set aside such award passed by an arbitrator 'Sole

Arbitrator' who is in fact not 'Sole' but 'Self Appointed Arbitrator'.

16. Paras 14 to 21 of the decision of the Division Bench are kept in mind in considering the award passed by the respondent no.1. The said paragraphs read as under:

> *"14.In the instant case, the 11th respondent claims to be an arbitrator and had acted under the Act to conduct arbitration proceedings. As to his authority and the source of his appointment is not forthcoming from the pleadings. They are silent. Obviously, appellants herein had set up 11th respondent to act as an arbitrator and on the said right given to him, he had assumed jurisdiction under the Act, which he did not possess. Thus, commencement of the arbitration proceedings is not only illegal but also void-ab-initio and nullity from its inception. It would be apt to deal with the first contention raised in these appeals by appellants viz., whether learned Single Judge could have exercised extra-ordinary jurisdiction to set aside the awards/proceedings initiated by 11th respondent and he ought to have directed the appellants/respondent Nos.1 and 2 herein to avail the alternate remedy of filing*

an application under Section 34 of the Act.

15. *The High Court would not act as a court of appeal against the decision of a Court or a Tribunal to correct errors of fact and does not assume the jurisdiction under Article 226 of the Constitution when an alternate remedy is provided by the Statute for obtaining the relief is available, where it is open to the aggrieved person to avail such alternate remedy for redressal of the grievance. This Court will not permit entertaining a petition under Article 226 of the Constitution of India and thereby the machinery provided under the Statute is by-passed.*

16. *The Hon'ble Apex Court in the case of Nivedita Sharma Vs. Cellular Operators Association of India reported in (2011)14 SCC page 337 has held as under:*

"11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation—L. Chandra Kumar v. Union of India [(1997) 3 SCC 261 : 1997 SCC (L&S) 577] . However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a

writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

17. *In the matter of M/s Deep Industries Ltd. Vs. Oil and Natural Gas Corporation reported in 2020 (15) SCC 706, their Lordships of the Hon'ble Apex Court have held that extraordinary jurisdiction can be exercised for entertaining of writ petition filed for enforcement of fundamental rights or where there has been violation of principles of natural justice or where order under challenge is wholly without jurisdiction or the vires of the Statute is under challenge. It has been further held thus:*

> *"16. It can, thus, be said that this Court has recognized some exceptions to the rule of alternative remedy. However, the proposition laid down in Thansingh Nathmal v. Supt. of Taxes [Thansingh Nathmal v. Supt. of Taxes, AIR 1964 SC 1419] and other similar judgments that*

the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. In SBP & Co. (supra), this Court while considering interference with an order passed by an Arbitral Tribunal under Articles 226/227 of the Constitution laid down as follows :

> *"45. It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating its grievances against the award including any in between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the*

Act. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible.

46. The object of minimising judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution against every order made by the Arbitral Tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37

of the Act even at an earlier stage."

18. In this background, when the facts on hand are examined, following facts would clearly emerge from the pleadings :

(1) Admittedly there is no agreement between the parties namely, the appellants and respondent Nos.1 to 4 herein of any sort whatsoever agreeing for disputes between them would be resolved through arbitration;

(2) The 11th respondent herein has assumed the role of an arbitrator based on the unilateral consent given by the appellants.

(3) Neither the respondent Nos.1 to 4 herein nor the appellants have agreed upon any dispute much less the dispute relating to the property in question being resolved through arbitration.

19. In other words, the parties never at ad-idem for resolving their dispute by taking recourse to the alternate dispute redressal mechanism namely, arbitration. The provisions of the Act would be applicable only in the circumstances where the parties are at ad-idem and have agreed for resolution of their disputes through arbitration process. The Hon'ble Apex Court in Dharma Prathishthanam Vs. Madhok Construction Pvt. Ltd. reported in 2005 (9) SCC 686 has held as under:

"12. On a plain reading of the several provisions referred to hereinabove, we are clearly of the opinion that the procedure followed and the methodology adopted by the respondent is wholly unknown to law and the appointment of the sole arbitrator Shri Swami Dayal, the reference of disputes to such arbitrator and the ex parte proceedings and award given by the arbitrator are all void ab initio and hence nullity, liable to be ignored. In case of arbitration without the intervention of the court, the parties must rigorously stick to the agreement entered into between the two. If the arbitration clause names an arbitrator as the one already agreed upon, the appointment of an arbitrator poses no difficulty. If the arbitration clause does not name an arbitrator but provides for the manner in which the arbitrator is to be chosen and appointed, then the parties are bound to act accordingly. If the parties do not agree then arises the complication which has to be resolved by reference to the provisions of the Act. One party cannot usurp the jurisdiction of the court and proceed to act unilaterally. A unilateral appointment and a unilateral reference — both will be illegal. It may make a difference if in respect of a unilateral appointment and reference the other party submits to the jurisdiction of the arbitrator and waives its rights which it has under the agreement, then the arbitrator may proceed with the reference and the party submitting to his jurisdiction and participating in the proceedings before him may later on be

precluded and estopped from raising any objection in that regard. According to Russell (Arbitration, 20th Edn., p. 104). "An arbitrator is neither more nor less than a private judge of a private court (called an Arbitral Tribunal) who gives a private judgment (called an award). He is a judge in that a dispute is submitted to him; ... He is private insofar as (1) he is chosen and paid by the disputants, (2) he does not sit in public, (3) he acts in accordance with privately chosen procedure so far as that is not repugnant to public policy, (4) so far as the law allows he is set up to the exclusion of the State courts, (5) his authority and powers are only whatsoever he is given by the disputants' agreement, (6) the effectiveness of his powers derives wholly from the private law of contract and accordingly the nature and exercise of these powers must not be contrary to the proper law of the contract or the public policy of England, bearing in mind that the paramount public policy is that freedom of contract is not lightly to be interfered with."

xxxx xxxx xxxx

20. Thus, there is ample judicial opinion available for the proposition that the reference to a sole arbitrator as contemplated by para 1 of the First Schedule has to be a consensual reference and not a unilateral reference by one party alone to which the other party does not consent.

xxxx xxxx xxxx

29. In the event of the appointment of an arbitrator and reference of disputes to him being void ab initio as totally incompetent or invalid the award shall be void and liable to be set aside dehors the provisions of Section 30 of the Act, in any appropriate proceedings when sought to be enforced or acted upon. This conclusion flows not only from the decided cases referred to hereinabove but also from several other cases which we proceed to notice.

xxxx xxxx xxxx

36. In the present case, we find that far from submitting to the jurisdiction of the arbitrator and conceding to the appointment of and reference to the arbitrator Shri Swami Dayal, the appellant did raise an objection to the invalidity of the entire proceedings beginning from the appointment till the giving of the award though the objection was belated. In ordinary course, we would have after setting aside the impugned judgments of the High Court remanded the matter back for hearing and decision afresh by the learned Single Judge of the High Court so as to record a finding if the award is a nullity and if so then set aside the same without regard to the fact that the objection petition under Section 30 of the Act filed by the appellant was beyond the period of limitation prescribed by Article 119(b) of the Limitation Act, 1963. However, in the facts and circumstances of the case, we consider such a course to follow as a futile exercise

resulting in needless waste of public time. On the admitted and undisputed facts, we are satisfied, as already indicated hereinabove, that the impugned award is a nullity and hence liable to be set aside and that is what we declare and also do hereby, obviating the need for remand."

20. The agreement of arbitration is the very foundation on which the jurisdiction of arbitrators to act rests and where it is not in existence, the proceedings must be held to be wholly without jurisdiction. Appearance of the parties submitting to the jurisdiction would not confer the jurisdiction on the arbitrator or the Arbitral Tribunal. However, the parties can enter into an agreement even at that point of time. In the instant case, as noticed hereinabove and at the cost of repetition, there is no such agreement entered into between the parties much less the arbitration agreement which gave rise for the 11th respondent herein to assume the jurisdiction and donned the role of an arbitrator to conduct the arbitration proceedings. It is in this factual scenario the 11th respondent appeared before the learned Single Judge and conceded for his orders being set aside. In fact, he filed an affidavit to the said effect which has already been noticed by us hereinabove. In that view of the matter, we are of the considered view that order passed by the learned Single Judge in setting aside the orders passed in the arbitration proceedings commenced by the 11th respondent does not suffer from any infirmity either in law or on facts as it

was without jurisdiction and a nullity. Said order does not call for our interference.

RE: POINT NO.(3)

21. *The learned Single Judge obviously did not mulct the appellants herein with costs who are the private respondents, for the reason, they had conceded for the arbitral proceedings being set at naught as it was wholly without jurisdiction. Despite such order by consent having been passed and without any fear of law or respect to the rule of law, they have filed the present appeals raising hyper technical plea, which cannot be countenanced. At this juncture, it would be apt and appropriate to note the judgment of the Hon'ble Apex Court in the case of Dalip Singh Vs. State of Uttar Pradesh and Others reported in 2010 (2) SCC 114 wherein their Lordships have expressed that two basic values of life "satya" (truth) and "ahimsa" (non-violence), which was guided by the Father of the Nation has been over shadowed by greed. It was observed by the Hon'ble Apex Court as under:*

"1. For many centuries Indian society cherished two basic values of life i.e. "satya" (truth) and "ahimsa" (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to

feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

2. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.

xxxx xxxx xxxx

4. In Welcom Hotel v. State of A.P. [(1983) 4 SCC 575 : 1983 SCC (Cri) 872 : AIR 1983 SC 1015] the Court held that a party which has misled the Court in passing an order in its favour is not entitled to be heard on the merits of the case.

xxxx xxxx xxxx

7. In Prestige Lights Ltd. v. SBI [(2007) 8

SCC 449] it was held that in exercising power under Article 226 of the Constitution of India the High Court is not just a court of law, but is also a court of equity and a person who invokes the High Court's jurisdiction under Article 226 of the Constitution is duty-bound to place all the facts before the Court without any reservation. If there is suppression of material facts or twisted facts have been placed before the High Court then it will be fully justified in refusing to entertain a petition filed under Article 226 of the Constitution. This Court referred to the judgment of Scrutton, L.J. in R. v. Kensington Income Tax Commissioners [(1917) 1 KB Page 25 of 29 486 (CA)] , and observed: (Prestige Lights Ltd. case [(2007) 8 SCC 449] , SCC p. 462, para 35) In exercising jurisdiction under Article 226 of the Constitution, the High Court will always keep in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the court, then the Court may dismiss the action without adjudicating the matter on merits. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible. xxxx xxxx xxxx 24. From

what we have mentioned above, it is clear that in this case efforts to mislead the authorities and the courts have transmitted through three generations and the conduct of the appellant and his son to mislead the High Court and this Court cannot, but be treated as reprehensible. They belong to the category of persons who not only attempt, but succeed in polluting the course of justice. Therefore, we do not find any justification to interfere with the order under challenge or entertain the appellant's prayer for setting aside the orders passed by the prescribed authority and the appellate authority."

17. For the aforesaid reasons, the petition is allowed. The award dated 24.11.2020 passed in Arbitration Case No.23 of 2020 is quashed and set aside.

18. In light of the order passed in the main petition, all three connected Civil Applications are dismissed.

(BIREN VAISHNAV, J)

ANKIT SHAH