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

COMM. ARBITRATION PETITION (L) NO. 1444 OF 2019
WITH
INTERIM APPLICATION (L) NO. 30023 OF 2021

Naresh Kanayalal Rajwani and Ors. ...Petitioners
Vs.
Kotak Mahindra Bank Limited & Anr. ...Respondents

Dr. Abhinav Chandrachud a/w. Mr. Mehul Rathod a/w. Mr. Laxminarayan Shukla i/b. M/s. Legal Vision, for the Petitioners.

Ms. Chinmayee Ghag a/w. Mr. Nishant Ranan i/b. Zastriya, for the Respondent No.1.

CORAM : MANISH PITALE, J.
DATE : 23rd NOVEMBER 2022

Order:

. Heard the learned counsel for the parties. Admit. Heard finally with the consent of learned counsel for the rival parties.

2. By the present petition, the petitioners have challenged Award dated 3/8/2019, passed by a sole Arbitrator, whereby the petitioners were directed to pay specific amount alongwith interest to the respondent – Bank.

3. The brief facts leading to filing of the present petition are

that a home loan agreement was executed between the respondent – Bank and the petitioners, whereby certain amounts were advanced to the petitioners. The said agreement contained an arbitration clause, which reads as follows:

> *"(h) In the event of any dispute or differences arising under this Agreement including any dispute as to any amount outstanding, the real meaning or purport hereof ("Dispute"), such Dispute shall be finally resolved by arbitration. Such arbitration shall be conducted in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 or any amendment or reenactment thereof by a single arbitrator to be appointed by the Lender. The venue of arbitration shall be at New Delhi and the arbitration shall be conducted in English language."*

4. It appears that certain disputes arose between the parties in the context of the aforesaid agreement, as a consequence of which, the respondent – Bank invoked the arbitration clause, leading to initiation of arbitration proceedings, culminating in the Award dated 30/1/2013. The said Award was made subject matter of challenge at the behest of the petitioners, by filing Arbitration Petition No.427/2013, under Section 34 of the Arbitration and Conciliation Act, 1996. On 17/8/2015, the aforesaid petition was allowed by a learned Single Judge of this

Court, accepting the contentions raised on behalf of the petitioners as regards violation of principles of natural justice on the part of the learned Arbitrator while passing Award dated 30/1/2013.

5. Thereafter, on 9/2/2018, the respondent – Bank again invoked the arbitration clause and unilaterally appointed an Arbitrator, in respect of disputes and differences that arose between the parties. On 9/3/2018, the learned sole Arbitrator gave his declaration as per Section 12(1)(b) of the aforesaid Act, specifically stating that he had held arbitrations for more than 500 financial institutions. In the said arbitration proceedings initiated on behalf of the respondent – Bank, the petitioners applied for grant of certified copies of documents, which according to the petitioners were not supplied. Thereafter, the petitioners raised a preliminary objection as regards the maintainability of the arbitration proceedings. The said objection was rejected by order dated 5/10/2018, subsequent to which, on 31/12/2018, the petitioners submitted their statement of defence. It is a matter of record that on 8/2/2019 and 4/6/2019, the learned Arbitrator unilaterally extended his mandate in order to complete the arbitration proceedings and to pronounce the Award. Eventually, on 3/8/2019, the learned Arbitrator pronounced the impugned award.

6. The present petition was filed challenging the said Award, wherein the respondent – Bank raised preliminary objection regarding maintainability, on the ground that this Court did not have territorial jurisdiction to entertain the present petition. By a detailed order dated 9/3/2021, this Court rejected the aforesaid objection and it was held that this Court does have territorial jurisdiction to entertain and decide the present petition. The petition is taken up for final hearing today.

7. Dr. Abhinav Chandrachud, learned counsel appearing for the petitioners submitted that there were number of grounds raised in the petition to challenge the impugned Award, including flagrant violations of principles of natural justice, as also certain procedural infirmities as to the manner in which the learned Arbitrator conducted the proceedings and pronounced the impugned Award. But, it was emphasized that one important aspect of the matter was that the entire arbitral proceedings, from the very inception, stood vitiated for the reason that the learned Arbitrator was unilaterally appointed by the respondent – Bank. It was submitted that even if the appointment of the learned Arbitrator was in terms of the arbitration clause, it was hit by Section 12(5) of the aforesaid Act read with Seventh Schedule thereof. It was submitted that the appointment itself was vitiated in terms of the said provision and the law clarified by the Supreme Court in the case of *Perkins Eastman Architects DPC*

and Anr. Vs. HSCC (India) Limited (2020) 20 SCC 620. Hence, the impugned Award deserved to be set aside, only on the said ground.

8. It was further submitted that the petitioners had sufficiently demonstrated in the petition as to the manner in which the learned Arbitrator proceeded in the matter, indicating that proper opportunity was not granted to the petitioners to lead evidence, particularly in the backdrop of the admitted position that issues were not framed during the arbitral proceedings. It was only in the Award that the learned Arbitrator referred to issues that were framed for consideration. It was submitted that the entire proceedings stood vitiated, thereby indicating that within the limited scope available under Section 34 of the aforesaid Act, this Court ought to interfere with the Award, in the facts and circumstances of the present case. On this basis, it was submitted that the impugned Award deserved to be set aside.

9. On the other hand, Ms. Chinmayee Ghag, learned counsel appearing for the respondent – Bank submitted that the ground pertaining to Section 12(5) of the aforesaid Act, was not specifically raised in the petition. It was submitted that in the absence of the ground being specifically raised on behalf of the petitioners, the same ought not to be considered by this Court. It was further submitted that the aforesaid ground of challenge was

not available to the petitioners, firstly, because they never raised such an objection before the learned Arbitrator, indicating that they waived their right to raise such an objection. In support of the said contention, learned counsel for the respondent – Bank relied upon Section 4 of the aforesaid Act and submitted that once the petitioners failed to raise the said objection before the learned Arbitrator, it ought to be deemed that they had waived their right to do so. Secondly, it was submitted that since the agreement in the present case was admittedly executed in the year 2006, the amendment brought in Section 12(5) with effect from 23/10/2015, would not operate and that therefore, there was no substance in the said ground raised on behalf of the petitioners.

10. As regards, the aspect of violation of the principles of natural justice, it was submitted that the minutes of the meeting recorded by the learned Arbitrator on 27/7/2019, specifically stated that sufficient opportunities were granted to the petitioners to lead evidence, but they had failed to do so. It was when the petitioners failed to avail of such opportunities that the learned Arbitrator was constrained to close the proceedings and then he proceeded to pronounce the award.

11. On this basis, it was submitted that the grounds raised in the petition as regards the violation of the principles of natural justice were not supported by the record of proceedings before

the learned Arbitrator and that therefore, the petition deserved to be dismissed.

12. Having heard the learned counsel for the rival parties, this Court is of the opinion that the ground raised on behalf of the petitioners as regards the arbitration proceedings being vitiated from the very inception, by referring to Section 12(5) of the said Act, goes to the very root of the matter. If the said ground raised on behalf of the petitioners is accepted, all other grounds of challenge pale into insignificance.

13. It was specifically contended on behalf of the respondent – Bank that the aforesaid ground was not raised in the petition and that therefore, this Court may not consider ruling on the said ground. A perusal of the grounds of challenge raised in the petition shows that the Award is challenged as being perverse, against settled provisions of law and public policy. Although, the said ground appears to be general in nature, it would cover the aforesaid specific ground raised on behalf of the petitioners, in the context of Section 12(5) of the aforesaid Act. This is because, the same is a pure question of law, which goes to the very root of the matter and therefore, this Court in inclined to consider the same on merits.

14. In order to appreciate the said ground, it would be

necessary to peruse the arbitration clause, which has been quoted above. As per aforesaid arbitration clause, it is only the respondent – Bank, which has authority to appoint a sole Arbitrator for resolving the disputes that may arise between the parties.

15. Section 12(5) of the aforesaid Act reads as follows:

> *"Section 12(5) – Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator;*
>
> *Provided that, parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."*

16. It is significant to note that the aforesaid provision was inserted by way of amendment with effect from 23/10/2015. The said provision starts with the words 'Notwithstanding any prior agreement to the contrary'. This indicates that even if any agreement prior to introduction of the aforesaid amendment provides for appointment of an Arbitrator that falls foul of Section 12(5) of the said Act read with the Seventh Schedule, the said provision would apply in full force. It is also significant to

note that the proviso to Section 12(5) of the said Act specifies the manner in which the parties may waive the applicability of the said provision, by an express agreement in writing. It is also significant that in the present case, the respondent-Bank invoked arbitration in the year 2018, much after the aforesaid amendment had come into force.

17. A proper application of the above provision i.e. Section 12(5) of the Act is a complete answer to the contentions raised on behalf of the respondent – Bank. It is clear that there is no substance in the contention raised on behalf of the respondent – Bank that Section 12(5) read with Seventh Schedule as amended with effect from 23/10/2015, would not apply merely because the agreement between the parties was executed prior in point of time i.e. in the year 2006. The non-obstante clause, with which Section 12(5) of the aforesaid Act begins, destroys the very basis of the aforesaid submission made on behalf of the respondent – Bank.

18. It was also submitted on behalf of the respondent – Bank that Section 4 of the Act would apply, indicating that the petitioners having participated in the arbitration proceedings without raising an objection, it ought to be deemed that they had waived their right to raise such an objection. Section 4 of the Act reads as follows:

> *"4 – Waiver of right to object – A party who knows that-*
> *(a) any provision of this Part from which the parties may derogate or*
> *(b) any requirement under the arbitration agreement,*
> *has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."*

19. A proper application of Section 4(a) of the said Act, to the facts of the present case, would show that even if applicability of Section 12(5) of the said Act was to be waived, the same was required to be done only in terms of the proviso to Section 12(5) of the said Act, quoted hereinabove. The specific manner of waiving the applicability of Section 12(5) of the said Act is mandated in the proviso thereof, but such procedure was admittedly not followed in the present case and therefore, it cannot be said that merely because the petitioners participated in the arbitration proceedings, they were dis-entitled from raising the ground about the arbitration proceedings having been vitiated, due to unilateral appointment of the Arbitrator by the respondent – Bank.

20. 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. After referring to its earlier judgment in the case of *TRF Ltd. Vs. Energo Engineering Projects Limited (2017) 8 SCC 377,* the Supreme Court in paragraph Nos.20 and 21 held thus-

> *"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 recognised by the decision of this Court in TRF Limited."

21. The Supreme Court has clearly laid down that a person having an interest in the dispute or in the outcome thereof, is ineligible not only to act as an Arbitrator, but, is also rendered ineligible to appoint anyone else as an Arbitrator. In the present case, as noted above, the arbitration clause gave power and authority to the respondent – Bank to unilaterally appoint the Arbitrator. As a matter of fact, in the present case, the learned Arbitrator was appointed unilaterally by the respondent – Bank,

which was clearly in the teeth of the position of law clarified by the Supreme Court in the context of Section 12(5) of the said Act, read with Seventh Schedule thereof.

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

23. Nonetheless, this Court has perused the material placed on record. There is substance in the contentions raised on behalf of the petitioners that the procedure adopted by the learned Arbitrator in the present case did not adhere to the principles of natural justice. There is no dispute about the fact that the learned Arbitrator failed to frame issues in order to afford an opportunity to the parties to lead evidence. The minutes of the meeting dated 27/7/2019, upon which the respondent – Bank has placed reliance can be of no assistance to the respondent – Bank, for the reason that in the absence of framing of issues and consideration of the stand taken on behalf of the petitioners, granting of opportunity to lead evidence, could be of no significance. It is also apparent that the learned Arbitrator extended his own mandate twice. Therefore, it is found that the impugned award passed by the learned Arbitrator suffers from serious procedural

infirmities and violation of the principles of natural justice.

24. In any case, the very appointment of the learned Arbitrator, being unilateral, stood vitiated under Section 12(5) of the said Act read with Seventh Schedule thereof, thereby demonstrated that the impugned award is rendered unsustainable and deserves to be set aside. In view of the above, the petition is allowed and the impugned award is set aside. Pending application(s) stand disposed of. There shall be no order as to costs.

MANISH PITALE, J.