IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.03.2023

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

Arb.O.P (Com.Div.) No.286 of 2022

P.Cheran,
Proprietor,
M/s.Dream Theatres,
No.9A, Sivasailam Street,
Habibullah Road,
Chennai 600 017.

...Petitioner

versus

M/s.Gemini Industries & Imaging Limited,
(In Liquidation)
Rep by its
Official Liquidator,
High Court, Madras,
Having Office at Corporate Bhavan, 2nd Floor,
Rajaji Salai, Chennai 1

... Respondent

Arbitration Original Petition filed under Section 34(2)(a)(iv) and (v) and (b)(2)of the Arbitration and Conciliation Act, 1996, to set aside the award dated 29.04.2015 passed by the Arbitrator, which had arisen out of the dispute between the petitioner and the respondent and direct the

respondent to pay the costs of the petition.

For petitioner : M/s.S.Elambharathi
For Respondent : Mr.B.Dhanraj

ORDER

This Arbitration Original Petition has been filed by the petitioner seeking to set aside the arbitral award dated 29.04.2015 passed by the Arbitrator.

2.The case of the petitioner is that the petitioner had entered into an Agreement dated 12.08.2012 with the respondent and availed financial assistance from the respondent to the tune of Rs.2,00,00,000/- for the production of Bilingual feature film “JK ENUM NANBANIN VAZHKAI” and the respondent had released the financial assistance in seven installments. The petitioner has admitted the fact about the disbursement of the said loan and on various dates, the petitioner had repaid Rs.1,15,00,000/- out of the total due of Rs.2,00,00,000/-. The petitioner had not released the film in any theatre or in the electronic media including satellite, etc. Thereafter, the petitioner requested the respondent to allow

them to release the said film in DVD format. However, the respondent obtained an order of interim injunction dated 12.01.2015 in O.A.No.43 of 2015, restraining the petitioner from releasing the film in any format without settling the due amounts to the respondent. At this juncture, without realising the gravity of the situation, one of the distributors at Dharmapuri, had realeased the film in DVD format on 07.03.2015. Hence the petitioner without any other option, released the film in DVD format in other districts also.

3. Further, it was submitted by the petitioner that due to the above act of the petitioner, the respondent had filed contempt petition No.581 of 2015 in O.A.No.43 of 2015 and also initiated the arbitration proceedings against the petitioner. The Arbitrator was appointed by the respondent without the knowledge and consent of the petitioner and obtained the ex-parte award on 29.04.2015. However, the petitioner had not received the copy of the award. During the hearing of aforesaid contempt petition, the respondent informed that since the petitioner had not paid the arbitration fee, the award was not sent by the arbitrator. Thereafter, by virtue of an application under Section

39(2) of the Arbitration and Conciliation Act, 1996 (hereinafter called as "the Act"), the petitioner approached this Court and obtained an order directing the respondent to send a copy of the award dated 29.04.2015 to the petitioner's counsel. The petitioner got the copy of the award only on 02.11.2020. Aggrieved over the said award, the petitioner came before this Court, seeking to set aside the award dated 29.04.2015. The Learned Arbitrator without giving sufficient opportunity to the petitioner to contest and counter the matter in the arbitration, he passed an *ex-parte* award dated 29.04.2015 against the petitioner, which is liable to be set aside.

4.The main grounds of challenge made by the petitioner are that the respondent appointed the learned Arbitrator unilaterally and the *ex parte* award also came to be passed on 29.04.2015 without giving sufficient opportunity to the petitioner. Therefore, the said award is in conflict with the most basic notion of morality or justice. The learned Arbitrator, in spite of appearance of his counsel and though the respondent has not served any claim statement to the petitioner to counter it, he passed an ex-parte award without giving sufficient opportunity to contest the matter. Also the

petitioner never received any notice from the respondent with regard to the unilateral appointment of the Arbitrator, which is unlawful. Therefore, according to the petitioner, the award dated 29.04.2015 passed by the learned Arbitrator cannot be sustained and the same is liable to be set aside.

5. The learned counsel for the petitioner would submit that as per the law laid down by the Hon'ble Apex Court in the case of "***Perkins Eastman Architects DPC Vs. HSCC (India) Ltd.***" reported in ***2019 SCC OnLine SC 1517,*** in the event of any unilateral appointment of Arbitrator without the consent of the other party, the same would be non-est in law. Therefore, he contended that the appointment of Arbitrator in the present case is non-est in law. In terms of the proviso of Section 12(5) of the Arbitration and Conciliation Act (hereinafter referred as 'the Act'), in the event of unilateral appointment, the appointed Arbitrator can proceed with, when the other party waives the applicability of this Section by way of an express agreement in writing. In the present case, no such express agreement has been made between the parties. Therefore, he would contend that in the absence of any such express agreement, the unilateral appointment of the Arbitrator is null

and void and consequently any award passed by the said Arbitrator, is liable to be set aside.

6. The learned counsel for the petitioner would also contend that since the unilateral appointment is contrary to proviso to sub-section (5) of Section 12 of the Act, the same would fall under Explanation (2) of Section 34(2)(b) of the Act, and it is in contravention with the fundamental policy of Indian law as held by the Hon'ble Apex Court. Further, he would contend that the award is also liable to be set aside, since the learned Arbitrator has not given any opportunity to the petitioner to file a counter and contest the matter. Hence, he prayed to set aside the award.

6. On the other hand, the learned counsel for the respondent strongly refuted the contentions of the petitioner, stating that if there is any unilateral appointment, the remedy available to the petitioner is to immediately challenge the same under Section 13 of the Act before the same Arbitral Tribunal. However, in the present case, the petitioner had not resorted to this

remedy. Hence, the petitioner is not entitled to challenge the award at this stage.

7. Further, the learned counsel for the respondent would contend that a notice has been sent to the petitioner with regard to the appointment of Arbitrator by the Learned Arbitrator. Therefore, the petitioner was well aware of the fact about the appointment of the Arbitrator. They failed to appear before the Learned Arbitrator. Hence, now they cannot come before this Court and raise the issue of unilateral appointment. He would further contend that there is no merits in this original petition and same is liable to be dismissed.

8.I have given due consideration to the submissions made by the learned counsel appearing for the petitioner as well as respondent and perused the entire materials placed on record.

9. Upon hearing the learned counsel on both sides and perusing the documents, it appears that in the present case in the terms of the provision of

Loan-Agreement, the respondent has an option for appointment of sole Arbitrator at their discretion. In terms of the said agreement, the respondent had nominated the sole Arbitrator.

10. In terms of Schedule VII of the Act, if the Arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party or if the Arbitrator is a Manager, Director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration, shall be ineligible to be appointed as Arbitrator.

11. When a person is ineligible to be appointed as Arbitrator, in the same way, he is also ineligible to nominate any Arbitrator also. This is what the Hon'ble Apex Court has held in the ***Perkins'*** case (cited supra).

12. Any person can be appointed as the Arbitrator, subject to that he shall not be either the employee, consultant, advisor or have any other past or present business relationship or as Manager, Director or part of the

management of the respondent. If any of the above mentioned person is appointed as Arbitrator, he is ineligible to act as an arbitrator in terms of Section 12(5) of the Act. In the same way, the above persons are also not eligible to nominate any person as Arbitrator to act on behalf of them or the concern.

13. In the present case, the respondent appointed the arbitrator unilaterally without the consent of the petitioner. Section 12(5) of the Act states as follows:

> ***"12. Ground for challenge.-***
>
> *(1).....*
>
> *(2).....*
>
> *(3).....*
>
> *(4).....*
>
> *(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."*

A mere perusal of the above makes it clear that the persons mentioned in Schedule VII of the Act would be ineligible to be appointed as Arbitrator.

Further, the persons mentioned in Schedule VII are also ineligible to nominate any person as arbitrator. Further there is no express agreement between the parties for providing consent in writing for the unilateral appointment of the arbitrator. Hence, the unilateral appointment of the arbitrator made by the respondent is in violation of provisions of Section 12(5) of the Act.

14. At this juncture, it would be appropriate to extract the relevant portion of the judgment rendered by the Hon'ble Supreme Court in the ***Perkins*** case. at paragraph Nos.16, 17, 18 and 21, which read as follows:

> *"**16**. However, the point that has been urged, relying upon the decision of this Court in Walter Bau AG and TRF Limited, requires consideration. In the present case Clause 24 empowers the Chairman and Managing Director of the respondent to make the appointment of a sole arbitrator and said Clause also stipulates that no person other than a person appointed by such Chairman and Managing Director of the respondent would act as an arbitrator. In TRF Limited, a Bench of three Judges of this Court, was called upon to consider whether the appointment of an arbitrator made by the Managing Director of the respondent therein was a valid*

one and whether at that stage an application moved under Section 11(6) of the Act could be entertained by the Court. The relevant Clause, namely, Clause 33 which provided for resolution of disputes in that case was under:

> *"33. Resolution of dispute/arbitration*
>
> *(a) In case any disagreement or dispute arises between the buyer and the seller under or in connection with the PO, both shall make every effort to resolve it amicably by direct informal negotiation.*
>
> *(b) If, even after 30 days from the commencement of such informal negotiation, seller and the buyer have not been able to resolve the dispute amicably, either party may require that the dispute be referred for resolution to the formal mechanism of arbitration.*
>
> *(c) All disputes which cannot be settled by mutual negotiation shall be referred to and determined by arbitration as per the Arbitration and Conciliation Act, 1996 as amended.*
>
> *(d) Unless otherwise provided, any dispute or difference between the parties in connection with this agreement shall be referred to sole arbitration of the Managing Director of buyer or his nominee. Venue of arbitration shall be Delhi, and the arbitration shall be conducted in English language.*
>
> *(e) The award of the Tribunal shall be final and binding on both, buyer and seller."*

***17**. In TRF Limited, the Agreement was entered into before the provisions of the Amending Act (Act No.3 of 2016)*

came into force. It was submitted by the appellant that by virtue of the provisions of the Amending Act and insertion of the Fifth and Seventh Schedules in the Act, the Managing Director of the respondent would be a person having direct interest in the dispute and as such could not act as an arbitrator. The extension of the submission was that a person who himself was disqualified and disentitled could also not nominate any other person to act Arbitration Application No.32 of 2019 Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd. as an arbitrator. The submission countered by the respondent therein was as under: -

> *"7.1. The submission to the effect that since the Managing Director of the respondent has become ineligible to act as an arbitrator subsequent to the amendment in the Act, he could also not have nominated any other person as arbitrator is absolutely unsustainable, for the Fifth and the Seventh Schedules fundamentally guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence and impartiality of the arbitrator. To elaborate, if any person whose relationship with the parties or the counsel or the subject-matter of dispute falls under any of the categories specified in the Seventh Schedule, he is ineligible to be appointed as an arbitrator but not otherwise.*

18. *The issue was discussed and decided by this Court as under:-*

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: (SCC p. 173, para 25)

> *"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. 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)*

51. Be it noted in the said case, reference was made to Behari Kunj Sahkari Awas Samiti v. State of U.P., which followed the decision in Roop Chand v. State of Punjab. It is seemly to note here that the said principle has been followed in Indore Vikas Pradhikaran.

52. Mr Sundaram has strongly relied on Pratapchand Nopaji. In the said case, the three-Judge Bench applied the maxim "qui facit per alium facit per se". We may profitably reproduce the passage: (SCC p. 214, para 9)

> *"9. ... The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim: "qui facit per alium facit per se" (what one does through another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the "pucca adatia", or, as the High*

Court had held, he is clothed with the powers of an ordinary commission agent only."

53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to the learned counsel for the appellant, ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.

54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to

nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."

19.....

20. *We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd4. 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 Ltd. 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 Arbitration Application No.32 of 2019 Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd. 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."

Therefore, the above judgment of the Hon'ble Apex Court makes it clear that the appointment of sole arbitrator unilaterally by one of the parties would be ineligible by operation of law.

15. Now the question that arises for consideration is whether the petitioner having participated in the arbitral proceedings or after having the knowledge of the appointment of the sole Arbitrator, failed to challenge the said appointment in terms of Section 13 of the Act, and whether the same would deprive the rights of the petitioner to challenge the said appointment of the Arbitrator in terms of the provisions of Section 34 of the Act for the violation of provisions of Section 12(5) of the Act?

16. In my considered view, the answer is no. The petitioner is certainly entitled to challenge the appointment of the Arbitrator under Section 34 of the Act, if there is any violation of the provisions of the Act. Even though, the petitioner had not challenged the unilateral appointment of the sole Arbitrator under Section 13 of the Act, it would not certainly take away the rights of the petitioner to challenge the same under Section 34 of the Act. Even if there is any participation by the petitioner in the arbitral proceedings, they would still have the right to challenge the violation of the provisions of Section 12(5) of the Act under Section 34 of the Act.

17. Further, proviso to Section 12(5) envisages that the parties may subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing. The definition of 'express and implied authority' is explicitly defined under Section 187 of the Contract Act, which reads as under:

> *"187.* ***Definitions of express and implied authority.*** *An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is*

to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

18. A perusal of the above makes it clear that an authority is to be implied when it is inferred from the circumstances of the case and is said to be expressed when it is given by words spoken or written. In the present case, from the circumstances even if it is inferred that the authority is implied by the act of the petitioner having not raised any objection towards the appointment of the Arbitrator made by the respondent unilaterally, the same cannot be taken as implied authority inasmuch as the *proviso* to Section 12(5) of the Act insists that the 'express agreement between the parties for providing consent for unilateral appointment, must be in writing. Therefore, if the consent is not in writing, no other inference can be drawn contrary to what is provided under the *proviso to* Section 12(5) of the Act.

19. The endeavour of this Court is always to rectify the errors apparent on the decisions/orders/judgments of the authorities/Tribunals/lower Courts etc., at any stage of the matter in order to

avoid miscarriage of justice. Once this Court finds irregularity or illegality in the orders/judgments of the lower authorities, while exercising inherent jurisdiction, this Court can very well set right the same. In the present case, the award itself was challenged under Section 34 of the Act primarily on the ground that the appointment of Arbitrator is unilateral and cannot be sustained. Therefore, now the question raises as to whether such a challenge to the appointment of the Arbitrator is sustainable in the proceedings filed under Section 34 of the Act for setting aside the award?

20. The answer is 'yes'. When an authority exercises jurisdiction it does not possess, its decision amounts to a nullity in law. Thus, a decision by an authority having no jurisdiction is non est in law and its invalidity can be set up whenever it is sought to be acted upon. In the present case, by virtue of Section 12(5) of the Act, the learned Arbitrator, who was appointed unilaterally, is ineligible to be an Arbitrator and the award passed by him, deserves to be set aside, more particularly, as already observed, there is no express waiver in writing as contemplated under the proviso to Section 12(5). Therefore, this Court is of the considered view that irrespective of the stage whether it is at the initial stage of the arbitral proceedings or at stage of

the execution of the award, the appointment of the Arbitrator can be questioned, not particularly under Section 13 but also under Section 34 of the Act and the same can be rectified by this Court.

21. In this regard, it is worthwhile to refer a judgment of the Hon'ble Supreme Court reported in ***"Hindustan Zinc Ltd. v. Ajmer Vidyut Vitran Nigam Ltd.***, (2019) 17 SCC 82, wherein, it has been held under as under in para 16 and 17:

> ***"16.*** *Shri Vaidyanathan, learned Senior Counsel for the appellant, has argued that the challenge to the award was only on merits before the learned Commercial Court, and no challenge was raised stating that the arbitrator's appointment itself would be without jurisdiction, both the parties having agreed to the order dated 12-2-2007 to refer the matter to arbitration. However, the said issue was argued and taken up before the High Court in first appeal under Section 37 of the Arbitration Act.*
>
> ***17.*** *We are of the view that* ***it is settled law that if there is an inherent lack of jurisdiction, the plea can be taken up at any stage and also in collateral proceedings****. This was held by this Court in "Kiran Singh v. Chaman Paswan [Kiran Singh v.Chaman Paswan, (1955) 1 SCR 117 : AIR 1954 SC 340] as follows : (SCR p. 121 : AIR p. 342, para 6)*

> *"6. ... It is a fundamental principle well-established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was coram non judice, and that its judgment and decree would be nullities."*

22. In ***"Sanjay Pukraj Bafna v. Volkswagon Finance (P) Ltd***. Reported in 2020 SCC OnLine Bombay 6362, it was held that an improper and impermissible appointment imperils any arbitral award, for it goes to the root of the matter.

23. Therefore, arbitration proceedings are liable to be vitiated from the stage of the appointment of the Arbitrator when the very appointment of the Arbitrator unilaterally, is improper and impermissible by virtue of Section 12(5) of the Act.

24. Further, any violation of provisions of the Act is against the public policy of India. The Hon'ble Supreme Court has also held at paragraph No.27 in the case of "***Associate Builders vs. Delhi Development Authorities"*** reported in ***2015 3 SCC 49***, which reads as follows:

> **"*Fundamental Policy of Indian Law***
>
> *27. Coming to each of the heads contained in the Saw Pipes judgement, we will first deal with the head "fundamental policy of Indian Law". It has already been seen from the Renusagar judgement that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgement of a superior court being disregarded would be equally violative of the fundamental policy of Indian law."*

A perusal of the above judgment makes it clear that if any award passed in violation of the provisions of the Act, the same would be against the public policy of India.

25. In the present case, without any intimation, the respondents proceeded with the arbitration and appointed the Sole Arbitrator unilaterally. Though the petitioner received the notices of hearing and appeared on 21.06.2017, the learned Arbitrator did not record their appearance. When the petitioner appeared for the subsequent hearing, they were informed that further notice will be sent for next hearings. But no notices were never received. The learned Arbitrator while recording non-appearance, he ought to have issued a fresh notice to the petitioner and afforded them an opportunity to contest the matter. Therefore, the petitioner did not have any opportunity to file the counter and contest the matter. Even if the petitioner had filed the counter and contested the matter, the present award is still liable to be set aside for violation of the provision under Section 12(5) of the Act. But the learned Arbitrator has proceeded with the matter and passed the award *ex parte* and never sent a copy of the award despite sending several

notices by the petitioner. Further, admittedly, in writing, the petitioner had not expressly waived the applicability of Section 12(5) of the Act. Taking all the above points into consideration, this Court is of the considered view that the present award is liable to be set aside for the violation of the provision under Section 12(5) of the Act. Further in the present case, it appears that the award has been passed without giving any opportunity to the petitioner and therefore, the award is suffered with the violation of principles of natural justice also.

26. For all the reasons assigned above, this Court is of the view that the present award is not sustainable under law and the same is liable to be set aside as it is against the public policy of India and violates the principles of natural justice.

27. In the result, this Arbitration Original Petition is allowed and the Award dated 29.04.2015 passed by the learned Arbitrator is set aside. No costs. **Consequently, the connected applications are closed.**

28.03.2023

KRISHNAN RAMASAMY.J.,
suk

Arb.O.P (Com.Div.) No.286 of 2022

28.03.2023