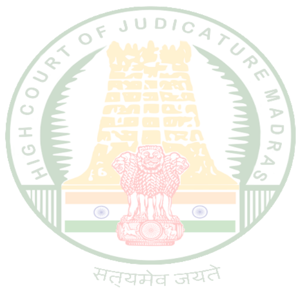

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 20.04.2023

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

Arb.O.P (Com.Div.) No.257 of 2021
and Arb.O.P(Com.Div).No.209 of 2022
A.Nos.3867 of 2021, 721 and 1908 of 2022 &
EP SR No.97542 of 2021

1.M/s.Prime Store,
Represented by its Partner, Mr.S.Kaarthi,
No.77, New Market Street,
Tiruppur – 641 604.

2.S.Kaarthi

3.Padma Sivalingam

4.Shruthi Kaarthi ... Petitioners
in Arb.O.P(Com.Div).No.257 of 2021

1.M/s.SCM Silks Private Limited,
Rep. by its Director, Mr.K.Sivalingam,
No.77, New Marker Street,
Tiruppur – 641 604.

2.K.Sivalingam ... Petitioners
in Arb.O.P(Com.Div).No.209 of 2022

versus

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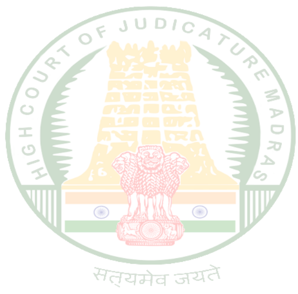
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1.Sugam Vanijya Holdings Private Limited,
Plot No.11B, Sy No.40/9,
Devasandra Industrial Area,
2nd Stage, K.R.Puram,
Hobli, Bangalore – 560 048.

2.K.Sivalingam

3.M/s.SCM Silks Private Limited,
No.77, New Marker Street,
Tiruppur – 641 604. ... Respondent
in Arb.O.P(Com.Div).No.257 of 2021

1.Sugam Vanijya Holdings Private Limited,
Plot No.11B, Sy No.40/9,
Devasandra Industrial Area,
2nd Stage, K.R.Puram,
Hobli, Bangalore – 560 048.

2.M/s.Prime Store,
Represented by its Partner, Mr.S.Kaarthi,
No.77, New Market Street,
Tiruppur – 641 604.

3.S.Kaarthi

4.Padma Sivalingam

5.Shruthi Kaarthi. ... Respondent
in Arb.O.P(Com.Div).No.257 of 2021

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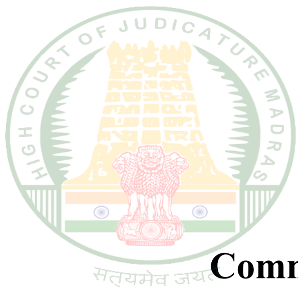
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Common Prayer: Arbitration Original Petition filed under Section 34(2)(b)(ii) and 2-A of the Arbitration and Conciliation Act, 1996, to set aside the arbitral award dated 22.03.2021.

For Petitioners
in both Arb.O.Ps : Mr.Anirudh Krishnan

For Respondents
in both Arb.O.Ps : Mr.P.S.Raman, Senior Counsel
for Mr.P.J.Rishikesh for R1
RR2to 4 – No appearance in
Arb OP No.257 of 2021

COMMON ORDER

These Arbitration Original Petitions have been filed by the petitioners, seeking to set aside the arbitral award dated 22.03.2021 passed in common, by the learned sole Arbitrator.

2. The facts in brief, necessary for disposal of the present petitions, can be stated as under:

2.1. The 1st petitioner is a partnership concern, engaged in the business of operating and running retail textile outlets in Tamil Nadu,

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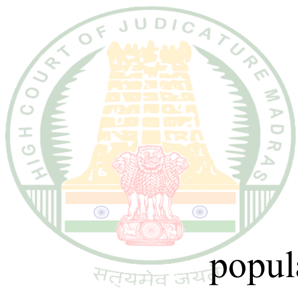
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popularly known as 'The Chennai Silks'. The petitioners 2 to 4 are the partners of the 1st petitioner's concern. The 1st respondent is a company engaged in the business of developing and operating commercial projects and shopping malls. The respondents 2 and 3 retired from the 1st petitioner's firm by executing a Partnership Release Deeds dated 11.09.2019 and 30.09.2020 respectively.

2.2. According to the petitioners, the 1st respondent during its course of business decided to develop a Mall viz., 'VR – Chennai' at Anna Nagar, Chennai. The 1st petitioner also intended to run the e-commerce store and therefore, approached the 1st respondent to take on lease the space with a carpet area of 34,434 sq.ft, in the mall 'VR Chennai'. The construction of the Mall was completed on 20.04.2018. Thereafter, the parties herein entered into a deed of lease dated 12.09.2018 registered as Doc.No.3779 of 2018, in the Sub-Registrar Office, Anna Nagar. Subsequently, an Addendum to the Lease Deed was executed between the parties on 25.09.2018, wherein certain changes were brought into the terms and conditions of the deed of lease dated 12.09.2018.

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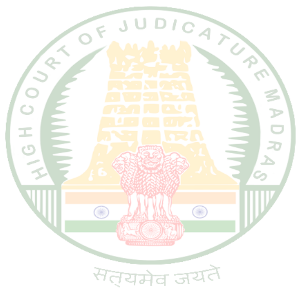
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2.3. The demised premises were handed over on 05.09.2018, vide possession notice and the lease was to subsist for a period of nine years with a lock-in period of 36 months i.e from 30.11.2018 to 30.11.2021. However, the petitioners terminated the lease deed due to unforeseen circumstances and claimed for refund of interest free refundable security deposit of Rs.75,75,480/- from the 1st respondent. In reply to the said termination, the 1st respondent claimed a sum of Rs.11,88,16,397/- towards the rent for the lock-in period and fit out expenses refuting the claim of the petitioners, which led to the invocation of Clause 17.7 (b) of the lease deed that provides for resolution of disputes through Arbitration. The 1st respondent on 23.01.2019 without obtaining consent of the petitioners, unilaterally appointed the Sole Arbitrator to adjudicate the disputes *inter se* the parties. Consequently, the Sole arbitrator, vide its letter dated 07.02.2019, sent a communication to the parties fixing a date for preliminary hearing. The 1st respondent filed a statement of claim and raised total of 5 claims and the petitioners filed their counter statement raising a counter claim. The Sole

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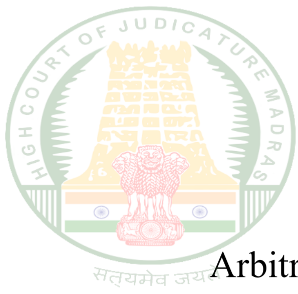
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Arbitrator passed the impugned award dated 22.03.2021 by partly allowing the claims in favour of the 1st respondent and rejected the counter claim of the petitioners. Aggrieved by the same, the petitioners have come forward with the present petition.

3. The case of the respondents are as follows:

3.1. The 1st respondent/claimant-VR Mall gave a space for lease for a period of 9 years within the mall to the petitioners-Chennai silks to an extent of 34,434 sq.ft. through a lease deed dated 12.09.2018, registered as Doc.No.2779/2018 and an addendum was also added to the lease deed on 25.09.2018. But the actual possession was handed over on 02.08.2018. The commencement date is 120 days from the date of signing of the lease deed, the lock in period was 36 months, the rent to be paid per month was Rs.25,25,160/-. During the said period of 120 days, the petitioners-Chennai silks have to do their fit-outs and their interiors, where this 120 days was a rent-free period. Unfortunately, neither did petitioners-Chennai silks take the possession nor did they use the 120 days rent-free period to complete their interiors. But after the completion of 120 days, through an e-mail dated 12.12.2018, the petitioners-Chennai silks informed the respondents-VR

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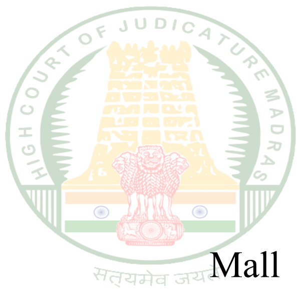
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Mall that they would like to commence their fit-outs from 14.12.2018. Subsequently, the petitioners-Chennai silks without issuing prior notice unilaterally terminated the lease deed vide e-mail dated 14.12.2018 stating the only reason that due to unforeseen and unavoidable circumstances. Then the respondents-VR Mall sent a response e-mail dated 15.12.2018 and sought for 100% rent for the lock-in period and 50% of CAM charges as per Clause 4.3 of the lease deed. However, petitioners- Chennai silks failed to honor the clauses of the contract and hence dispute arose and a retired judge of this Hon'ble Court was appointed as a Sole Arbitrator to adjudicate the disputes between the parties and claimed the same by a letter dated 23.01.2019. The Learned Sole Arbitrator sent a letter dated 07.02.2019 fixing preliminary date of hearing of the Arbitration proceedings. The respondents-VR Mall raised two claims before the Arbitrator one is wrongful termination of lease deed and other is compensation to be paid as per the terms of the contract. The Statement of Claim were filed by the Respondents on 09.04.2019. The petitioners-Chennai silks participated in the Arbitration proceedings and did not whisper and object the appointment made. They filed their counter on 15.07.2019 and also filed a joint memo

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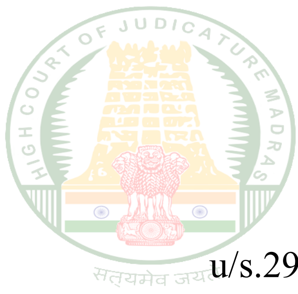
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u/s.29A, but at no point in time, raised any objections. During the Arbitration proceedings the respondents-VR Mall also filed application under Section 17 to cancel the registered lease deed and the same was allowed and cancelled the lease deed on 12.11.2019. The petitioners-Chennai silks also attempted to improve their case before the learned Arbitrator by stating the termination was due to frustration of contract as respondents-VR Mall did not have a water connection and necessary approvals. But the respondent proved that the petitioners-Chennai silks terminated the contract for their convenience and also did not adhere to the Clauses in the Lease Deed. The learned Arbitrator, after considering all the evidences and decided that the termination made by the petitioners-Chennai silks was invalid, ultimately, awarded the compensation to respondents-VR Mall for a sum of Rs.11,88,16,397/- with interest @24% p.a. with cost through an award dated 22.03.2021. Therefore, according to the respondents, the learned Arbitrator has dealt with the claim of the respondents and counter claim made by the petitioners in proper perspective and passed the award, which requires no interference.

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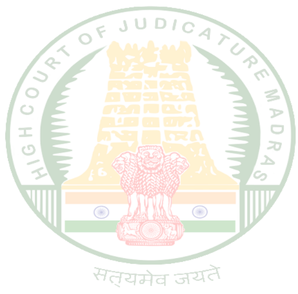
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4. Learned counsel appearing for the petitioner would submit that the appointment of the Sole Arbitrator is arbitrary and unlawful and the Sole Arbitrator ought to have recused from proceedings in the arbitration since he is *de jure* ineligible to act as an Arbitrator. Section 34 of the Act contemplates that an award is liable to be set aside if it is against the public policy of India and violates basic notions of justice and the present award is passed in violation of basic notions of justice since the learned Sole Arbitrator ignored the settled principles of law in relation to unilateral appointment. He pointed out that it is settled law that the damages cannot be granted in contemplation of future loss, while so, the Sole Arbitrator had granted rent and 50% of CAM charges for 36 months without analyzing the fact that the 36 months' period ends only on 30.11.2021, which would establish that the 1st respondent did not incur any loss till the month of November 2021. Further, there is no evidence produced before the Sole Arbitrator to show that the 1st respondent had taken mitigation measures to reduce the alleged losses. He would also contend that instant case falls foul of Section 12(5) of the Act since the arbitral Tribunal was constituted in violation of Section 12(5) r/w Schedule VII of the Act and further, there was

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no waiver of right in writing by the petitioners and it is evident in preliminary hearing dated 27.02.2019, wherein, no express waiver was recorded by the learned Arbitrator. He would also contend that challenge to unilateral appointment can be challenged even at the stage of Section 34 proceedings since unilateral appointment goes to the root of the jurisdiction and the sole Arbitrator in the present case virtually lacks of jurisdiction in terms of Section 12(5) r/w Schedule VII of the Act.

5. The learned counsel for the petitioners would also contend that the 1st respondent has not produced any evidence to prove the losses, but the sole Arbitrator, has erroneously put the burden on the petitioners to prove that no loss was sustained by the 1st respondent and passed the award merely based on the claim statement submitted by the 1st respondent even though no evidence was adduced in regard to the losses incurred by them and no steps were taken to mitigate the losses. It is also submitted that the learned Arbitrator, without proper appreciation of evidence available on record, has awarded the claim of the 1st respondent with exorbitant rate of interest at 24% p.a. while rejecting the counter claim of the petitioner for refund of

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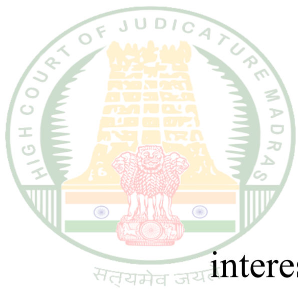
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interest free security deposit. Therefore, with these contentions, the learned counsel sought for setting aside the award passed by the learned Arbitrator.

6. Apart from raising various grounds to challenge the award, the learned counsel for the petitioners would attack the impugned award primarily on the ground of unilateral appointment of the Arbitrator. He would vehemently contend that though the Arbitration Clause 17.7(b) of the Deed of Lease enables the respondents to appoint a sole Arbitrator, the respondents ought to have made the appointment of the Arbitrator strictly in terms of Section 12(5) of the Act which would not draw adverse and arbitrariness in the arbitral proceedings. He would also contend that a unilaterally appointed Arbitrator is *de jure* ineligible to act as an Arbitrator in terms of Section 12 r/w Schedule VII of the Act. In this regard, he relied upon the decisions of the Hon'ble Supreme Court reported in 2019 SCC Online SC 1516 (***Perkins Eastman Architects DPC & Another versus HSCC (India) Ltd.***) and (2019) 5 SCC 755 (***Bharat Broadband Network Limited versus United Telecoms Limited).***

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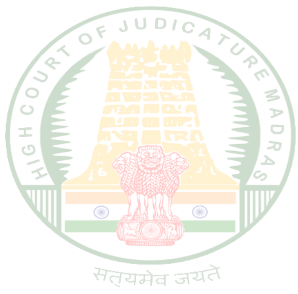
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7. The learned counsel also would contend that though the petitioners participated in the proceedings and filed a joint memo under Section 29A seeking to extend the time-line, would not by itself construe that the petitioners have waived off their right to object the unilateral appointment. He pointed out that mere filing a memo under Section 29A may perhaps amount to waiver under Section 4, but certainly not 'express waiver' under Section 12(5) Act. In this regard, the learned counsel relied upon a decision reported in ***"JMC Projects (India) Ltd., versus Indure Private Limited"*** reported in 2020 SCC Online Delhi 1950. Further, the learned counsel would contend that even participation in the arbitral proceedings, shall not bar the petitioners to challenge the unilateral appointment under Section 34 r/w 12(5) of the Act. In this regard, he relied upon a decision reported in "***Hina Suneet Sharma & another Versus M/s.Nissan Renault Financial Services India Pvt.Ltd."*** vide order dated 15.02.2023 in Arb.O.P.(Com.Div.) No.159 of 2022 passed by this Court.

8. The learned counsel would further contend that challenge to unilateral appointment can be raised at any stage and even at the stage of

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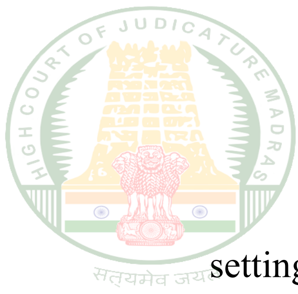
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setting aside of the award also since the unilateral appointment goes to the root of the jurisdiction. If the appointment of an Arbitrator is made in violation of Section 12(5) r/w VII Schedule of the Act, he/she becomes *de jure* ineligible to act as an Arbitrator and lacks inherent jurisdiction. Therefore, he would contend that the challenge to inherent lack of jurisdiction can be raised at any stage including at the stage of setting aside of the award. According to the learned counsel for the petitioners, since the respondent made the appointment of the Arbitrator unilaterally in violation of Section 12(5) r/w VII Schedule of the Act, the petitioners have rightly challenged the same while challenging the award in the present proceedings. Therefore, the learned for the petitioners prayed this Court to set aside the arbitral award as prayed for.

9. On the other hand, the learned Senior counsel Mr.P.S.Raman appearing for the respondents would submit that the petitioner-Chennai silks mainly contends that VR Mall hasn't incurred any losses and produced any evidence to show such losses but they claimed Rs.11,26,16,397/-and Rs.62,00,000/- in the award which was granted by the Learned Arbitrator

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are huge, but it is pertinent to note that the clause 14.3(b) of the lease deed provides that if the petitioner terminates the lease deed before the expiry of the lock-in period, it requires prior notice of 6 months and 100% of the rent for remaining term to be paid and clause 4 of the addendum also provides for 50% of the CAM charges rent for the remaining term to be paid as well. Therefore, in the award it is very clear that it is not the loss incurred by the respondents but it is the recovery of admitted liability for Claim worth Rs.11,26,16,397/-for full space/showroom made ready exclusively for Chennai silks. Concerning the claim worth of Rs.62,00,000/- awarded, VR Mall has incurred expenditure for dismantling the existing RCC structure and other works done for the purpose of suiting the needs of the petitioner- Chennai silks which required restoration of the structure to original design for the future tenants, the records regarding were filed as Ex.C-15-C18 to show the expense incurred. Therefore the loss incurred has been justified with appropriate evidences.

10. Further the learned Senior counsel for the respondent justifies the claim and grant of interest @ 24% for the claim is appropriate. The Learned

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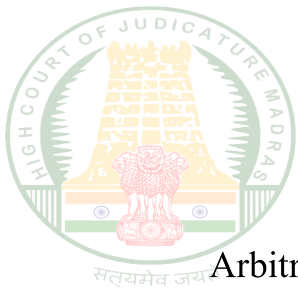
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Arbitrator awarded only after considering that transaction between the petitioners and respondents is of commercial nature. Where the deed also provides a clause 5.4(a) for "Late Charges- that in event of payment of any sum of money due under the lease deed, including but not limited to rent, taxes and other charges becomes overdue beyond the date on which the said payments are due and payable in terms of deed, the Lessee shall be under obligation to pay interest on the amount due and payable at 24%". The learned counsel for the respondents also contends that it is false to state that the award passed by the Learned Arbitrator ignores vital evidence. As to Security deposit, clause 14.5b says that in the event of illegal/ wrongful termination by petitioner-Chennai silks the respondent-VR Mall is entitled to forfeit the security deposit.

11. The learned Senior counsel for the respondents would also contend that at no point of time, the petitioners never raised any objection as regards the unilateral appointment of the learned Arbitrator, but they completely participated in the arbitral proceedings and further, they filed a joint memo, agreeing for extension of the mandate of the learned Arbitrator,

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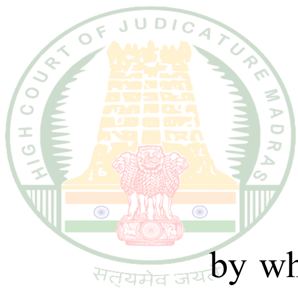
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by which, the petitioners have virtually waived off their right to object the appointment of the Arbitrator. He would also point out that if at all the petitioners were aggrieved by the appointment of the Arbitrator, they ought to have raised objections prior to the first arbitration hearing, but all along till the award passed by the learned Arbitrator, the petitioners have not raised any objections. He would also point out that in this matter, a retired Hon'ble Judge of this Court was appointed and hence, the plea of bias can never be attributed.

12. The learned Senior counsel for the respondents would submit that the unilateral appointment in the present case is not at all wrong and the learned Arbitrator does not lack jurisdiction, as the learned Arbitrator appointed was a retired High Court Judge of this Hon'ble Court, so none of the Clauses under VII schedule of the Act are attracted and hence there is no applicability of Section 12(5) of the Act. He would also contend that 'express waiver' is not required in the present case inasmuch as the petitioners have completely participated in the proceedings and did not raise a whisper about the appointment and has acquiesced with such appointment

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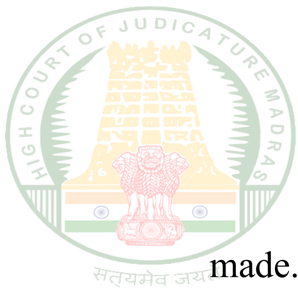
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made. He pointed out that when the said learned Arbitrator accepted the appointment through a letter, to which the petitioners never raised any objections at that time, which demonstrates that the petitioners expressly waived off their right to object. In this regard, he referred the judgment of the Calcutta High Court in "***McLeod Russel India Ltd. v. Aditya Birla Finance Ltd.***, in Arb.Petn.No.106 of 2020, dated 14.02.2023, wherein the Court observed that the pleadings filed by the petitioners before the Arbitrator would constitute an express agreement as required under the proviso to S.12(5) of the Act and the exchange of statement of claim and statement of defence/affidavit by the parties, fulfills the requirement of S.7(2)(e) of the Act which provided that the existence of an arbitration agreement in case it is alleged by one party and not denied by the other by way of exchange of statements of claim and defence.

13. The learned counsel would submit that as regards the express waiver, the judgment which was relied upon by the petitioners in the case of "***Hina Suneet Sharma & Anr. v. M/s. Nissan Renault Financial Services India Pvt.Ltd.***, in Arb.O.P.No.159 of 2022, dated 15.02.2023 is concerned,

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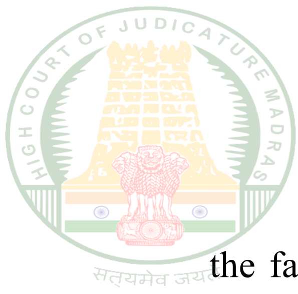
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the facts and circumstances are different and will not apply to the present facts and circumstances of the case. He also contends that this judgment hasn't considered the decision of the Hon'ble Division Bench of Madras High Court in "***General Manager, CORE, Allahabad v. JV Engineering Associates***" in OSA. No. 119 of 2021 dated 11.08.2021, which held that waiver u/S.12(5) of the Act can also be inferred from the correspondences. In the present case, relying on the Hon'ble Division Bench in *General Manager, CORE, Allahabad v. JV Engineering Associates*, the joint memo dated December, 2020 filed by both the petitioners and the respondents for the extension of time till May, 2021 is sufficient to constitute "the express waiver in writing".

14. The learned counsel also contends that Sec.12 of the Act is specific to the mandate of the Arbitrator while section 4 of the Act is omnibus in nature. Hence, the waiver in this case would be covered under section 4 of the Act which says waiver need not to be 'express'. Where mere participation and failure to object itself would constitute a waiver. In this regard, he referred the following case laws, viz.,

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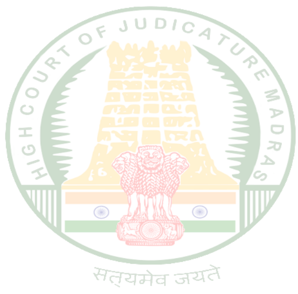

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i. **Quippo Constructions v. Janardan Nirman Pvt. Ltd., 2020 SCC OnLine SC 419:: 2020 (3) Arb LR 75** - The Supreme Court after considering Section 4 of the Act, held as follows:

> *"31. ... Considering the facts that the respondent failed to participate in the proceedings before the Arbitrator and did not raise any submission that the Arbitrator did not have jurisdiction or that he was exceeding the scope of his authority, the respondent must be deemed to have waived all such objections".*

ii. "**State Bank of India v. Ram Das", (2003) 12 SCC 474**, wherein, it has been held as under:

> *"It is an established view of law that where a party despite knowledge of the defect in the jurisdiction or bias or malice of an arbitrator participated in the proceedings without any kind of objection, by his conduct it dis entitles itself from raising such a question in the subsequent proceedings".*

iii. "**BSNL v. Motorola India (P) Ltd**" reported in **(2009) 2 SCC 337,** wherein, after considering S 4 of the Act, at Para 39, it has been held by the Hon'ble Supreme Court as follows:

> *"39.Pursuant to Section 4 of the Arbitration and Conciliation Act, 1996, a party which knows that a*

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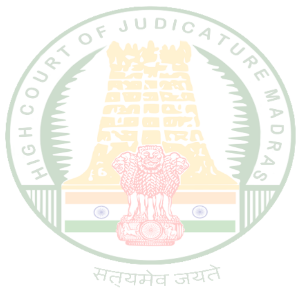

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requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object. The High Court had appointed an arbitrator in response to the petition filed by the appellants (sic respondent). At this point, the matter was closed unless further objections were to be raised. If further objections were to be made after this order, they should have been made prior to the first arbitration hearing. But the appellants had not raised any such objections. The appellants therefore had clearly failed to meet the stated requirement to object to arbitration without delay. As such their right to object is deemed to be waived."

iv. **Union of India v. Pam Development (P) Ltd.,** reported in **(2014) 11 SCC 366,** the Honble Supreme Court, after considering Section 4 of the Act, has held in para 16 as follows:

"16. As noticed above, the appellant not only filed the statement of defence but also raised a counterclaim against the respondent. Since the appellant has not raised the objection with regard to the competence/jurisdiction of the Arbitral Tribunal before the learned arbitrator, the same is deemed to have been waived in view of the provisions contained in Section 4 read with Section 16 of the Arbitration Act, 1996".

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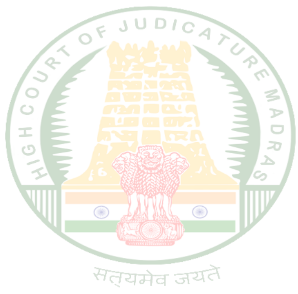

WEB COPY v. "**ASM Shipping Ltd of India v TTMI Ltd of England, Queen Bench Division**" reported in [2005] EWHC 2238, wherein, after considering the scope of Waiver, at Para (49], it has been held as under:

> *"In my judgment, by taking up the award, at the very least, the owners had lost any right they may have had to object to X QC's continued involvement in that part of the arbitral process. It is unacceptable to write making further objections after the hearing was concluded. X QC's had made his decision not to recuse himself, rightly or wrongly, at the beginning of the third day. Owners were faced with a straight choice: come to the court and complain and seek his removal as a decision-maker or let the matter drop. They could not get themselves into a position whereby if the award was in their favour they would drop their objection but make it in the event that the award went against them. A 'heads we win and tails you lose' position is not permissible in law as s 73 makes clear. The threat of objection cannot be held over the head of the Tribunal until they make their decision and could be seen as an attempt to put unfair and undue pressure upon them. ".*

15. Finally, he also contends that the judgment in Perkins case will not apply to the present case as it deals with unilateral appointment at the

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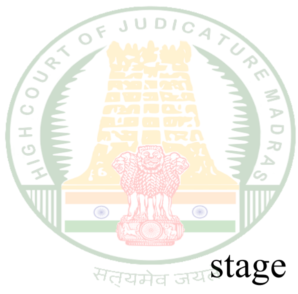
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stage of invocation/appointment and not under Section 34 of the Act to set aside the award. In the present case, the arbitration was invoked on 23.01.2019 and the Arbitral Tribunal was constituted on 07.02.2019. The judgment in the Perkins' case was delivered on 26.11.2019. Assuming that the law laid down by the Perkins was to apply only from the date of the said judgment, the petitioner in the present case never raised any objection and in fact a joint memo was filed agreeing for the extension of the mandate in December, 2020. Consequently, such an act would constitute waiver. He further contends that in the present case both are private parties and the learned Sole Arbitrator was a Retired High Court Judge and the question of bias will never rise at all.

16. Therefore, the learned counsel for the respondents conclude that the learned Arbitrator vide his award dated 22.03.2021 has rightly awarded a sum of Rs.11,88,16,397/- with interest 24% and costs of Rs.5,00,000/- which requires no interference.

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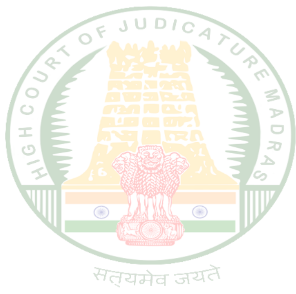

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17. Keeping in mind the provisions of law and the relevant case laws relied on by the parties and the arguments advanced by the learned counsel for the parties, this Court is inclined to deal with the issue as regards the validity of the unilateral appointment of the learned Sole Arbitrator without providing express agreement in writing by the petitioners in terms of *proviso* of Section 12(5) of the Act.

18. Arbitration is a method of alternate dispute resolution wherein a third party is appointed for adjudication of disputes between the concerned parties. Therefore, the Arbitrator(s) are also commonly known as creatures of a contract. As arbitration requires adjudication on rights of the parties involved, principles of natural justice play a critical role in avoiding any potential risk of miscarriage of justice.

19. The first principle of natural justice is *'nemo judex in causa sua'*, which means 'no man can be a judge in his own cause'. This principle intends to avoid any 'reasonable apprehension of bias' that may arise during any judicial process. Section 12 of the Arbitration and Conciliation Act,

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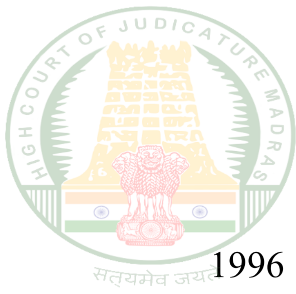
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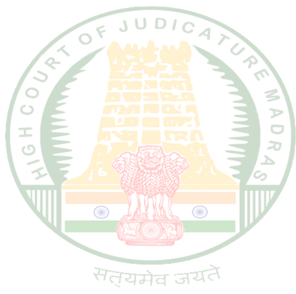
1996 lays down provisions for the appointment of an Arbitrator and conditions where the appointment may be valid or invalid.

20. Prior to the Arbitration and Conciliation (Amendment) Act, 2015, unilateral appointments were allowed in India without any restrictions. However, time and again, unilateral appointment is becoming controversial because it does not take into account the wishes of the other party as to the sole arbitrator or arbitral tribunal, which leads to an apprehension of bias and in order to avoid justifiable doubts and to promote the neutrality of arbitrators to maintain the independence and impartiality of the arbitral process, the Arbitration and Conciliation (Amendment) Act, 2015 ["**2015 Amendment Act**"] came to be enacted, which widened the grounds of challenging the composition of the arbitral Tribunal under Section 12, providing that the appointment of person as an arbitrator may be challenged if they fail to make necessary disclosures when approached in connection to their appointment as an arbitrator and stating one's relation with any of the parties in relation to the subject matter must be disclosed, irrespective of the nature of such relationship.



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21. Section 12(5) of the Arbitration and Conciliation Act, 1996 was amended to incorporate two separate schedules into the Act. The newly incorporated Fifth Schedule provides for factors as to whether there are circumstances which give rise to justifiable suspicions 'as to an arbitrator's independence or impartiality,' and Seventh Schedule sets out the 'categories of individuals ineligible to be nominated as arbitrators.

22. The grounds enumerated under the Fifth and Seventh Schedules to the Act enlist the circumstances that could raise a justifiable doubt about the independence and impartiality of an arbitrator and/or de jure disqualify him from being appointed as an arbitrator.

23. Coming to the case on hand, before dealing with the above issue, it is relevant to extract the arbitration Clause contained in the Lease Deed entered into by the parties, which reads as under:

"17.7 (b) of the Deed of Lease:

If any question of difference or claim or dispute shall arise between the parties herein touching these presents or the

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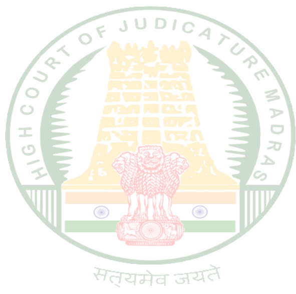
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construction thereof to rights, duties or obligations of the parties hereto or as to any matter arising out of or connected with the subject matter of these presents, the same shall be referred to the arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and amendments. The seat of arbitration shall be Chennai. **The reference shall be to a Sole Arbitrator to be appointed by the Lessor.** The arbitrator shall render the award in English language and in writing. The Parties agree to abide by the decision of the arbitrator, which shall be final and binding."

24. It appears that the respondents, invoking the above Clause, by letter dated 23.01.2019, nominated Shri Justice A.Ramamoorthy (Retd.) Judge of this Court as a Sole Arbitrator to adjudicate the dispute between the parties. Therefore, it is not in dispute that the appointment of the Arbitrator is unilateral at the instance of the respondents.

25. It is pertinent to note here that as on this date, the respondents invoking the arbitral clause and appointing the Sole Arbitrator, the law as

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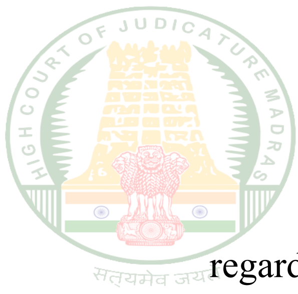
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regards unilateral appointment of Arbitrator has been well settled. In order to provide for "neutrality of arbitrators" and rule against bias, sub-section (5) of Section 12 (as inserted by 2015 Amendment) provided that notwithstanding any prior agreement 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, he shall be ineligible to be appointed as an arbitrator. Further, in the case of ***"TRF Ltd. v. Energo Engineering Projects Ltd.,*** reported in (2017) 8 SCC 377, the Supreme Court dealt with the question of as to whether an individual who has become ineligible by law under Section 12(5) of the Act to be the arbitrator be able to appoint another individual in his place. The Court held that once a person becomes ineligible by law to be the arbitrator he/she cannot nominate another person to be the arbitrator and observed in para 57 as under:

> *"57. 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*

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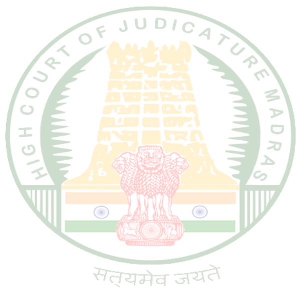
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to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable 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." (Emphasis added)*

26. In the above said judgment, the Hon'ble Supreme Court relied on its decision in the case of ***"Walter Bau AG v Municipal Corporation of Greater Mumbai"*** reported in (2015) 3 SCC 800, wherein the Hon'ble Court observed that "*Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law".*

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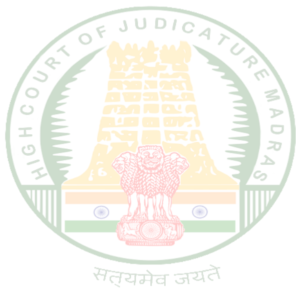
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27. In its landmark judgment in ***"Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd***" reported in *2019 SCC Online SC 1517*, the Hon'ble Supreme Court has settled the position of unilateral appointment of Sole arbitrators by holding that Unilateral appointment of the arbitrator shall be vitiated by Section 12(5) of the Arbitration and Conciliation Act, 1996. It has been observed in paragraph Nos.16,17,18,20 and 21 as under:

> *"**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*

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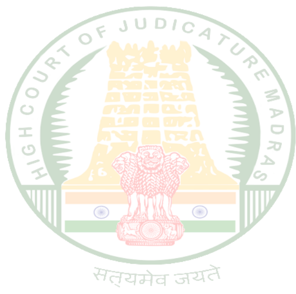

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(a) In case any disagreement or dispute arises between the buyer and the seller under or in connection with the PO, both shall make every effort to resolve it amicably by direct informal negotiation.

(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*

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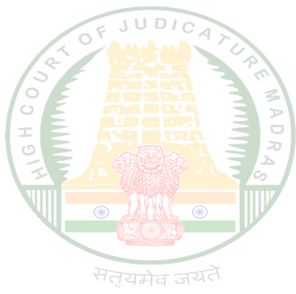
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arbitrator. The extension of the submission was that a person who himself was disqualified and disentitled could also not nominate any other person to act Arbitration Application No.32 of 2019 Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd. 18 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*

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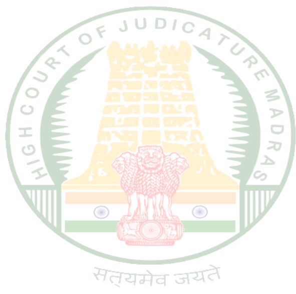
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that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from 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*

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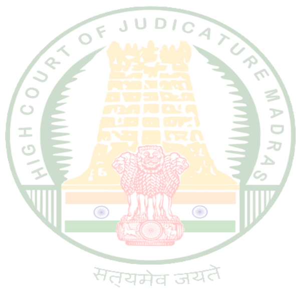
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Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in Roop Chand v. State of 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)

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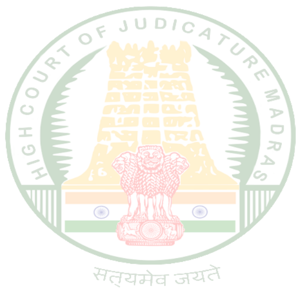
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> *"9. ... The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim: "qui facit per alium facit per se" (what one does through another is done by oneself). To put it in another form, that 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

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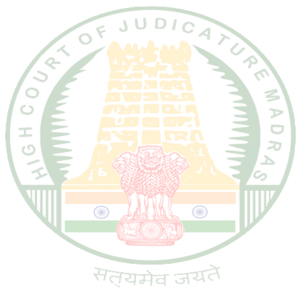
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concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator 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..........................

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*

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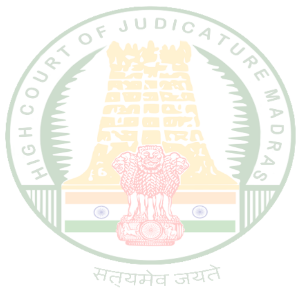
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outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute 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. 24 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."

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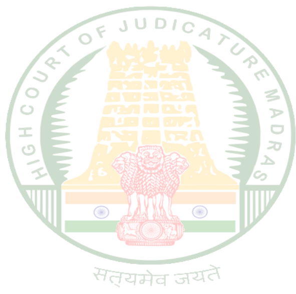
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28. A perusal of the above judgment, it is clear that the Hon'ble Apex Court has extended the applicability of the TRF Limited case principle and held that interested persons to a dispute, such as a Managing Director or Chief Executive Officer (CEO) would not only be ineligible to act as an arbitrator but also be proscribed from appointing an arbitrator to adjudicate the dispute.

29. Though the learned counsel for the respondents would point out that in the present case, the arbitration clause was invoked on 23.01.2019 and the Arbitral Tribunal was constituted on 07.02.2019, i.e. much prior to the pronouncement of above judgment in the Perkins' case as delivered on 26.11.2019, the ratio laid down will not apply to the present case, it is significant to note that the ratio laid down in Perkin's case has been moulded based upon the judgment in TRF case, which was delivered by the Supreme Court on 03.07.2017. Therefore, the concept and proposition of law laid down by the Hon'ble Apex Court in Perkin's case will squarely apply to the facts of the present case.

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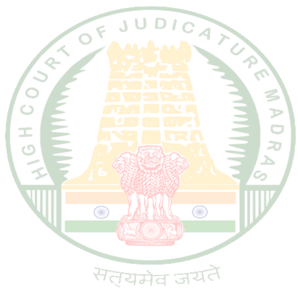
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30. That apart, the law laid down by the Hon'ble Apex Court in both TRF and Perkins cases is based on the amendment made to Section 12(5) in the year 2015. Therefore, even though the judgment Perkins's case delivered in the year 2019, the proposition laid down in regard to the amended provision which came into effect from the year 2015 and hence, it is applicable to the present case. What the law laid down by the Hon'ble Supreme Court is by interpreting the amended provision of Section 12(5) and though the Hon'ble Supreme Court provided the interpretation on 3.7.2017 in TRF case, the said interpretation would apply from the date of commencement of Section 12(5) of the Act. The Hon'ble Supreme Court has not made any observation or law which are not available under Section 12(5) of the Act, but the law laid down by the Supreme Court is within the scope of Section 12(5).

31. Therefore, by virtue of amended provision vis-a-vis the above mentioned judgment of the Hon'ble Supreme Court, the law is very clear to the effect that no person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories

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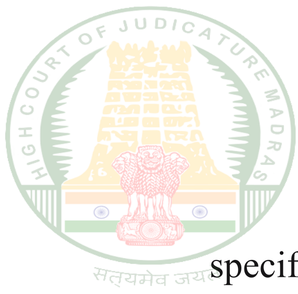
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specified in the Seventh Schedule, shall be ineligible to be appointed as an arbitrator and that once such person becomes ineligible by law to be the arbitrator he/she cannot nominate another person to be the arbitrator.

32. The respondents having empowered by the arbitration Clause 17.7(b) of the agreement, appointed the Sole Arbitrator, they should aware of the provision of law and its amendment and the relevant case laws rendered by the Hon'ble Supreme Court in the matter of unilateral appointment and after having nominated the Arbitrator unilaterally, they ought to have waited for 30 days from the date of receipt of Section 21 notice by the petitioners for obtaining the consent in writing in terms of *proviso* of Section 12(5). In the event of the petitioners failing to waive their right to object the unilateral appointment of the Arbitrator by way of express agreement in writing within 30 days from the date of receipt of Section 21 notice, then the respondents should have approached this Court seeking for appointment of the Arbitrator in terms of Section 11(5) & (6) of the Act. In the present case, no such procedure has been followed. On the other hand, the respondents proceeded with the appointment of the

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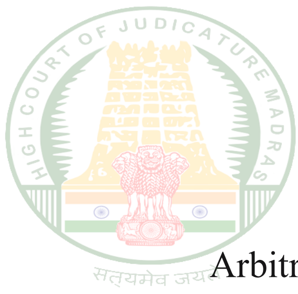
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Arbitrator unilaterally against the provision of Section 12(5) of the Act and the learned Arbitrator commenced the proceedings with his disabilities wherein, the petitioners have also participated.

33. Now the issue that arises for consideration is as follows:

"***Whether the Arbitrator nominated by the respondents, is disqualified under Section 12(5) r/w Seventh Schedule of the Act*?**

34. Admittedly, in the present case, the appointment of the Arbitrator has been made unilaterally by the respondents and no express agreement as contemplated under the *proviso* to Section 12(5) of the Act was given by the petitioners waiving their right to object the same. It is contended on behalf of the respondents that since they nominated a retired Judge of this Court as Arbitrator, he is free from any disqualification and no bias can be attributed. However, it is significant to note that Section 12(5) r/w Seventh Schedule of the Act which deals with ineligibility of a person to be appointed as an Arbitrator, is a mandatory and non-derogable provision of

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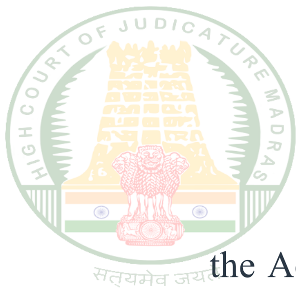
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the Act and it would clearly described the persons who are ineligible to be appointed as Arbitrator, i.e. as a result of them being disqualified under the Seventh Schedule. Therefore, the disqualification under the Seventh Schedule would be applicable to any person including the retired Judge and this is what the law laid down by the Hon'ble Supreme Court in TRF case. If a retired Judge acted as an Advisor or giving opinion in the matter, will certainly comes under the category of disqualified persons category and the Act has not provided any special privileges for a retired Judge. That being the law enacted, the contention of the learned Senior counsel that the learned Arbitrator who is a retired Judge is free from bias, is not acceptable.

35. A person who is disqualified from being appointed as an Arbitrator, cannot commence the arbitral proceedings and if he commences any such proceedings where even though both parties have participated and ultimately any award is passed, such award is non est in law and liable to be set aside. Conducting the arbitral proceedings and passing an award by a disqualified person is as good as conducting the proceedings and delivering the judgment by a Kangaroo Court where even both the parties had

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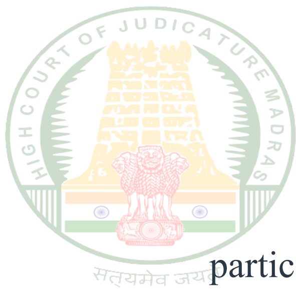
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participated. Law will not recognize any judgment or order passed by Kangaroo Court where the law and justice are disregarded or perverted and the similar logic would apply to a disqualified person who is appointed as an Arbitrator.

36. Absolutely there is no bar for appointing the Arbitrator unilaterally *ipso facto* prior to the amended provision 12(5) of the Act. What the Section 12(5) insists upon that in the event of unilateral appointment, the consent of the other party should be obtained in writing. Now the issue is at what stage such consent in writing should be obtained from the other party? The stage, in the opinion of this Court is immediately upon receipt of the notice by the other party who is intimated about the appointment of Arbitrator unilaterally. Section 11(5) states that in the event if no agreement for appointment of the Arbitrator is arrived within 30 days from the date of request made by the party who appointed the Arbitrator, the other party can approach the Court, seeking for appointment of Arbitrator. Therefore, in the event of unilateral appointment, this Court is of the considered view that the express agreement in writing in terms of

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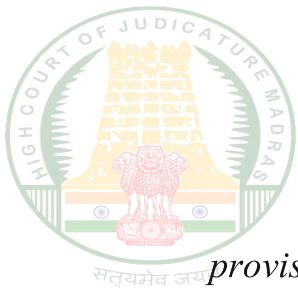
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proviso to Section 12(5) should be obtained within 30 days from the date of receipt of notice of appointment of Arbitrator unilaterally. In case no such consent in writing is provided by the other party for the unilateral appointment of the Arbitrator, the recourse available for the party is to approach this Court, seeking for appointment of the Arbitrator. Therefore, if no such consent in writing is provided for the unilateral appointment of the Arbitrator within 30 days, the disqualification as contemplated under Section 12(5) r/w Seventh Schedule comes into effect on expiry of 30 days and when once the disqualification gets attached to the Arbitrator, he cannot perform his duties and commence the arbirtral proceedings. Despite the same, if the proceedings are commenced, it would be non est in law. Even if both parties participated in those proceedings since the proceedings commenced by a disqualified person, the same are rendered in non est in law and if any award is passed by the disqualified Arbitrator, it cannot be sustained and liable to be set aside. In other words, when arbitral proceedings are commenced by a disqualified person, the question of mere participation in the arbitral proceedings by the parties cannot be considered as a waiver. As far as the unilateral appointment of the Arbitrator is

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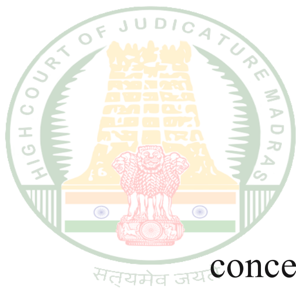
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concerned, to waive the disqualification attached, is only by way of express agreement in writing by the other party in terms of Section 12(5), which should be obtained in 30 days, otherwise, it would be considered that there is no agreement between the parties for the appointment of Arbitrator unilaterally.

37. Section 12(5) read with the Seventh Schedule of the Act makes it abundantly clear that if the arbitrator incurs any disqualification under the items listed in the Seventh Schedule, he *de jure* becomes ineligible to act as an arbitrator. As far as the contention raised on behalf of the respondents that since a retired Hon'ble Judge of this Court was appointed as learned Sole Arbitrator, the plea of bias can never be attributed and more over, none of the clauses mentioned under Schedule VII of the Act are attracted to such appointment and hence, applicability of Section 12(5) does not arise is concerned, this Court is of the view that the said contention does not merit consideration in view of the amendment brought in by the 2015 Amendment and recognized by the Hon'ble Apex Court in its decisions in TRF Ltd. and Perkin's Cases, which emphasized and settled the legal

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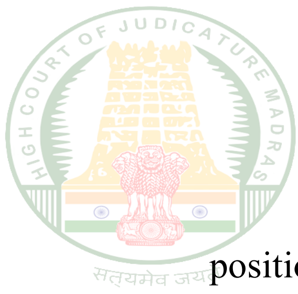
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position that ***a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator***. In the present case, no doubt, the respondents are having interest in the dispute *vis-a-vis* the outcome and in the decision thereof, in the opinion of this Court, would certainly be ineligible to act as Arbitrator, but also not eligible to appoint any one including a retired Judge of this Court.

38. Further, a bare perusal of Section 12(5) discloses that 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 and in Seventh Schedule, particularly, Clause (8) states that the arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom. Therefore, a reasonable and justifiable doubt may arise in the minds of the petitioners that in the present case since the respondents had particularly chosen and appointed the learned Arbitrator unilaterally, he

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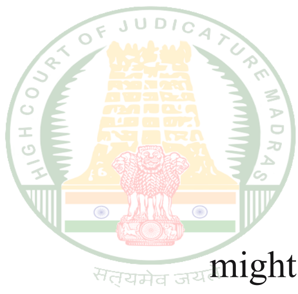
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might have been regularly advising the respondents even though he derived no significant financial income. The very purpose to introduce Section 12(5) read with Seventh Schedule is to ensure the independence and impartiality of arbitrators, which is the hallmark of any arbitration. If an arbitrator falls within any of the categories under Schedule Seven, it will strike at the very jurisdiction of the arbitrator to continue with the proceedings.

39. In the light of the above discussion, this Court is of the considered view that the learned Arbitrator who passed the Award, has become *de jure* to perform his functions by reason of the statutory bar under Section 12(5) r/w Schedule VII of the Act since appointed by the respondent/Lessor, who is ineligible to nominate the learned Arbitrator.

40. It is very unfortunate that the respondents, having made illegality in appointing the Arbitrator unilaterally in contravention of the amended provision of law and the settled legal position, now, by placing untenable

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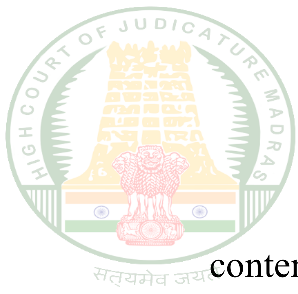
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contentions, urged this Court to countenance and approve their unlawful action, which this Court refrains to do so.

41. Since a contention raised on behalf of the respondents that the petitioners have waived off their right to object the unilateral appointment of the Arbitrator, this Court feels it appropriate to deal with the following issue:

> **“Whether the petitioners have waived of their right to object the appointment of the learned Arbitrator in terms of *proviso* of Section 12(5) of the Act?”**

42. It is vehemently contended on behalf of the respondents that when admittedly, the petitioners have participated in the arbitral proceedings through out and at no point of time, they raised any objection with regard to the unilateral appointment of the learned Arbitrator and further, the petitioners have filed a joint memo dated December, 2020 seeking for extension of the mandate of the Arbitrator, which demonstrates that the petitioners expressly waived off their right to object. In this regard, a

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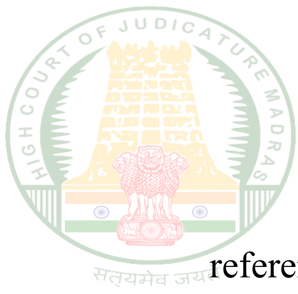
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reference is made to the judgment of the Calcutta High Court in "***McLeod Russel India Ltd. v. Aditya Birla Finance Ltd.**,* in Arb.Petn.No.106 of 2020, dated 14.02.2023, wherein the Court observed that the pleadings filed by the petitioners before the Arbitrator would constitute an express agreement as required under the proviso to S.12(5) of the Act.

43. However, according to the petitioners, they have not given any express agreement in writing as required under *proviso* to Section 12(5) agreeing to the unilateral appointment of the Arbitrator and thereby waived off their right to object the same. It is further contended that even participation in the arbitral proceedings, shall not bar the petitioners to challenge the unilateral appointment under Section 34 r/w 12(5) of the Act.

Section 12(5) of the Act reads as under:

> 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"*

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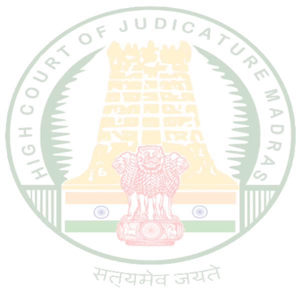
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Proviso to Sub Section 5 to Section 12 of the Act reads as under:

> *"Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub section by an express agreement in writing."*

44. Therefore, it is clear that where under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. However, this ineligibility can be removed by the parties after disputes have arisen between them, by waiving the applicability of this Sub-section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.

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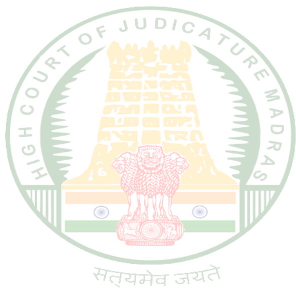
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45. In the present case, it is not in dispute that there is no agreement in writing as contemplated under *proviso* to Section 12(5) of the Act whereby the petitioners had expressly agreed in writing to waive their right regarding the applicability of Section 12(5) of the Act.

46. Further, the learned Arbitrator who is well aware than the parties to the agreement about the settled legal position in the matter of unilateral appointment, particularly, the disqualification contemplated under the amended Section 12(5) r/w Schedule VII of the Act, after entering into reference by way of unilateral appointment, at the first hearing itself, before commencing the arbitral proceedings, shall fair enough ensure from the parties whether they are willing to conduct the arbitral proceedings and also insist upon waiver in writing in respect of applicability of Section 12(5) of the Act and in the event any party does not appear despite receipt of notice, he/shall not proceed further and immediately recuse or withdraw from the arbitration. This is a fair practice which every Arbitrator who is appointed unilaterally has to necessarily adopt before commencing the arbitral proceedings and to insist upon express agreement in writing from them and

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record the minutes accordingly even despite both parties are co-operating to participate in the proceedings, which would certainly save the time and avoid the multiplicity of proceedings, otherwise, the entire proceedings including the award would be rendered as bad in law and become liable to be set aside.

47. In ***Hina Suneet's*** case (cited supra), this Court has categorically held that the unilateral appointment of the Arbitrator in the absence of consent in writing is in violation of Section 12(5) and that when a person is ineligible to be appointed as Arbitrator, he is also ineligible to nominate any Arbitrator. Relevant portion of the decision as found in paragraphs 11, 12 and 13 is extracted as under:

> *11. When a person is ineligible to be appointed as Arbitrator, in the same way, he is also ineligible to nominate any Arbitrator. This is what the Hon'ble Apex Court has held in the Perkins case.*
>
> *12. In the present case, the person appointed as the Arbitrator is neither the employee, consultant,*

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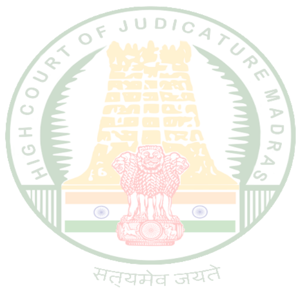

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advisor or have any other past or present business relationship or manager, director or part of the management of the respondent. If any of the above persons appointed as Arbitrator, those persons are ineligible to act as an arbitrator in terms of 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 consent of the petitioners. 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

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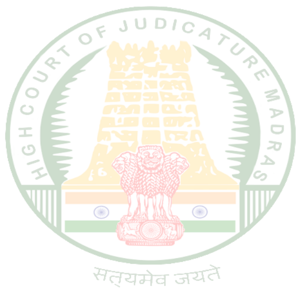
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be ineligible to be appointed as Arbitrator and the persons mentioned in Schedule VII are also ineligible to nominate any persons as arbitrator. Further there is no express agreement, between the parties for providing consent in writing for unilateral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

48. Further, this Court, in its recent decision in "***G.Antony Kanselin and another versus M/s.Naresh & Co.,*** in Arb.O.P.(Com.Div.) No.600 of 2022 dated 05.04.2022, while dealing with the issue of unilateral appointment, as regards the *proviso* to Section 12(5) of the Act, it has been held as under:

"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*

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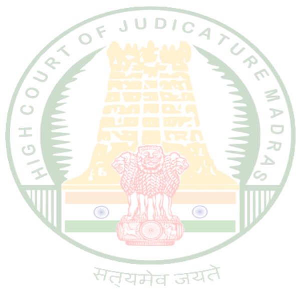
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> *to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.*

> 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 petitioners 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.

49. Therefore, since the statutory provision mandates that the 'express agreement between the parties for providing consent for unilateral appointment, 'must be in writing' and if such consent is not in writing, no

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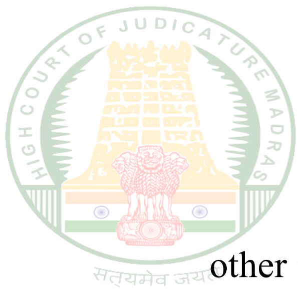
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other inference can be drawn contrary to what is provided under the *proviso* to Section 12(5) of the Act. In such view of the matter, this Court is unable to fortify the reliance placed in this regard on behalf of the respondents to the effect that no objection was raised by the party and fully participated in the arbitral proceedings and mere filing the pleadings by the parties before the Arbitrator would constitute an express agreement and thereby, it can be construed that the parties have waived off their right to object the unilateral appointment. The object behind getting the 'express agreement in writing' from the parties who are willing to waive their right to object the unilateral appointment is, only to know the confidence and faith reposed by the party on the learned Arbitrator and to enable the Arbitrator to commence the arbitral proceedings and complete the same.

50. However, a contention was raised by the learned counsel for the respondents that in the case of ***Hina Suneet***, this Court has not considered the judgment of a Division Bench judgment of this Court, in "***General Manager, CORE, Allahabad versus JV Engineering Associates***" in OSA. No.119 of 2021. It is to be noted that in the said judgment, the Division

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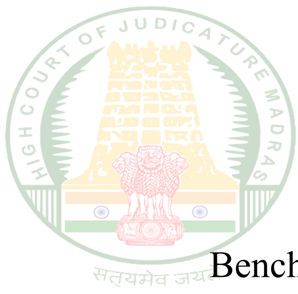
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Bench of this Court observed that to constitute an express agreement in writing', three conditions have to be met, viz.,

> *"a) that there would have to be an express agreement in writing;*
> *b) that such express agreement in writing would unequivocally waive the applicability of the relevant sub-section;*
> *c)such express agreement in writing must have been executed at a time subsequent to the disputes having arisen."*

and further, the Bench also observed that to apply S.12(5), one party must be made aware of the amendments made to the statute. It is held as under:

> *"Express waiver on the other hand would arise when the right is specifically brought to the notice of the person, he responds thereto and such response reveals his awareness of his right; and, finally, the conscious relinquishment of the known right."*

51. In the above mentioned JV Engineering case, the respondent, vide letter dated 13.09.2017 brought to the notice of the appellants therein about the 2015 Amendment and requested for a proposed modification to the arbitration agreement in light of the amendment to be accepted by the Appellants. The Appellants, after the amendment were brought to their attention, responded specifically stating that they opted to be governed by

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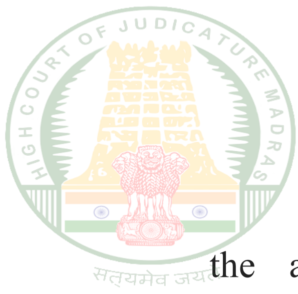
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the already existing agreement. This exchange of correspondence specifically brought to the knowledge of the Appellant about the effect of the amendment. The Appellants' refusal to get the modified agreement in terms of amended provision and still opting for their remedy in law by virtue of their express letter dated 13.09.2017 was held to amount an express wavier in writing under Section 12(5) of the Act. The facts involved in ***JV Engineering*** case are quite different in ***Hina Suneet*** case, wherein, there was no such correspondence between the parties and the respondent therein unilaterally appointed the Arbitrator, who in turn failed to send any notice about hearing to the petitioners and in such circumstances, the award came to be set aside. Hence, the ratio laid down in ***JV Engineering*** case is not applicable to the case on hand.

52. In view of the above discussion, it can be safely concluded that the petitioners have not waived off their right to object the appointment of the learned Arbitrator in terms of *proviso* of Section 12(5) of the Act.

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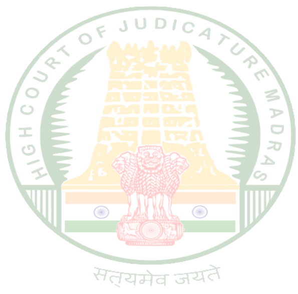
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53. Now the this Court has to venture upon the issue as regards whether the petitioners, without raising any objections or challenging the inherent jurisdiction of the learned Arbitrator during pendency of the arbitral proceedings, can challenge the unilateral appointment of the Arbitrator while seeking to set aside the arbitral award under Section 34 of the Act?

54. It is settled law that when an authority exercises jurisdiction which 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 amended Section 12(5) r/w Seventh Schedule of the Act *vis-a-vis* landmark judgments of the Hon'ble Apex Court in TRF Ltd. and Perkin cases, the learned Arbitrator, who was appointed unilaterally and incurs disqualification, has become 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) of the Act.

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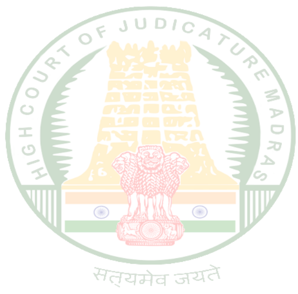
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55. The endeavour of this Court is always to rectify the errors apparent on the decisions/orders/judgments of the authorities/ Tribunals/lower Courts etc., at any stage of the matter in order to avoid miscarriage of justice. Once this Court finds irregularity 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.

56. 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*

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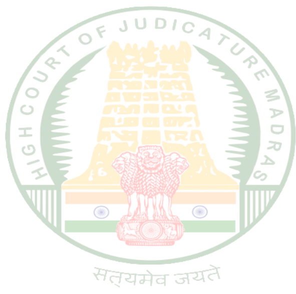
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itself would be without jurisdiction, both the parties having agreed to the order dated 12-2-2007 to refer the matter to arbitration. However, the said issue was argued and taken up before the High Court in first appeal under Section 37 of the Arbitration 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*

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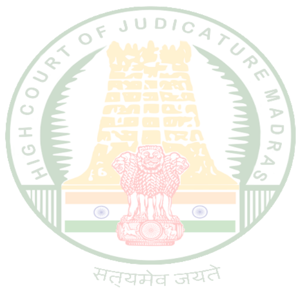
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of Monghyr was coram non judice, and that its judgment and decree would be nullities."

57. 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. Merely the petitioners failed to make a challenge under Section 13, it would not disqualify the petitioners from raising the issue of ineligibility under Section 34 proceedings. Even assuming if an application is filed under Section 13 and the same is rejected, no appeal can be filed against the said dismissal in terms of provisions of Section 13(4) of the Act and the arbitral Tribunal shall continue the arbitral proceedings and make the arbitral award. Therefore, the said award can be challenged under Section 34 as provided under Section 13(5) of the Act. Therefore, Section 13 itself provides the way for challenging the appointment of the Arbitrator under Section 34 of the Act. Hence, the failure on the part of the petitioners from challenging

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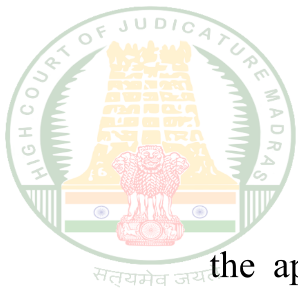
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the appointment of the Arbitrator under Section 13 would not disqualify them to challenge the same under Section 34 of the Act.

58. In similar circumstances, the Calcutta High Court in "***Cholamandalam Investment and Finance Company Ltd. versus Amrapali Enterprises and another***" (EC 122 of 2022) has held that an arbitration award passed by an unilaterally appointed arbitrator is non-est in law and its enforcement would be refused even under Section 36 of the Act even if the award was not set aside under Section 34 proceedings of the Act. Though it was put to challenge under Section 34 of the Act, however, the Court opined that the challenge may be time barred. It went on to hold that executing Court also has the power to declare an 'unilateral appointment award' is non-est in law and declare it to be null and direct the parties to re-agitate their dispute before an independent and impartial arbitral tribunal. The relevant portion as found in paragraphs 16 and 24 are extracted as under:

> "*16. In my view, the impugned award, which was passed by a de jure ineligible arbitrator, suffers from a permanent and indelible mark of bias and prejudice which*

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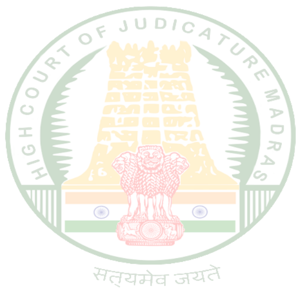
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cannot be washed away at any stage including the execution proceedings. In fact, as the arbitrator was de jure ineligible to perform his functions and therefore lacked inherent jurisdiction or competence to adjudicate the disputes in hand, the impugned award cannot be accorded the privileged status of an award.

"17. to 23. ... .

24. Impartiality as discussed is the paramount principle of arbitral proceedings and something which the Courts have to safeguard at every stage of such proceedings. Even at the stage of execution, the lady of justice cannot turn a blind eye and let one party run over the other. The people vest faith in the Court to safeguard their rights and uphold the principles of natural justice, irrespective of procedural hurdles. Whatever the case may be, including an execution case where Courts are expected to simply enforce the award without further probing, impartiality as a principle cannot be railroaded. Shackles of procedural limitation in such cases will not prevent parties from seeking the immunity of the Court. Parties making such unilateral appointments couch behind procedural technicalities to shield their unlawful act and reap the fruit of their own mischief. Accordingly, even if an award is not set side under the procedure established in section 34 of the Act, the courts, at the stage of execution can step in and declare a 'unilateral appointment award' as non-est in law, declare the same as a nullity and direct parties to re-agitate their issues before a new arbitral tribunal constituted in accordance with law.

59. Since the present Arbitrator was appointed against the amended Section 12(5) of the Act and it is in contravention of Arbitration Act. An contravention of the Arbitration Act itself would be regarded as patent illegality as held by the Hon'ble Apex Court in in the case of "***Associate***

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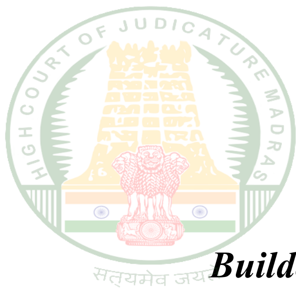
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Builders vs. Delhi Development Authorities" reported in ***2015 3 SCC 49***, in para 42 as under:

> "42.2. (*b*). A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

60. In the present case as stated above, the appointment itself is not in accordance with the amended Section 12(5) of the Act and it is in contravention of the Arbitration Act and it would amount to patent illegality and hence, the present award passed by a disqualified Arbitrator, is liable to be set aside on the ground well.

61. In the above said judgment, it is also held that any violation of provisions of the Act is against the public policy of India. The relevant portion as found in para 27, 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*

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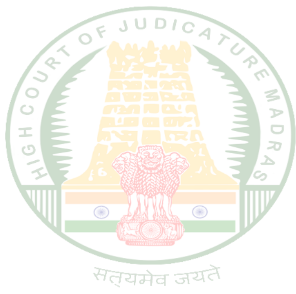
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policy of Indian Law". It has already been seen from the Renusagar judgement that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. 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."

62. In the present case, the respondents took the plea as if the petitioners have waived off their right to object the unilateral appointment of the Arbitrator. However, it is incumbent upon the respondent while venturing to the appointment of the Arbitrator unilaterally, to aware of the relevant amended provision of law, i.e. Section 12(5) of the Act and the law laid down by the Hon'ble Apex Court and he should have obtained the express agreement in writing from the other party for the unilateral appointment of the Arbitrator. Admittedly, the respondents have not provided in Section 21 notice issued to the petitioners, any time limit for obtaining the consent in writing from them. In view of Section 12(5) *vis-a-vis* Section 11(5) of the Act, the respondent should have waited for 30 days for getting consent in writing from the other party after issuance of Section

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21 notice. In the event any consent in writing is provided by the petitioners within the stipulated period of 30 days, then, the appointment made by the respondents unilaterally, is well within the provisions of the Act. However, in the present case, it is not in dispute that no consent was provided by the petitioners and therefore, in the absence of consent in writing from the petitioners, the appointment of the Arbitrator itself is considered as non-est in law and the Arbitrator is disqualified to commence the arbitral proceedings.

63. For all the foregoing reasons, this Court is of the considered view that the award passed by the learned Arbitrator is liable to be set aside. Since this Court arrived at the conclusion that the appointment of the Arbitrator itself is non est in law and the award is liable to be set aside on this ground, this Court would not traverse all other contentions raised by the learned counsel on the merits of the award.

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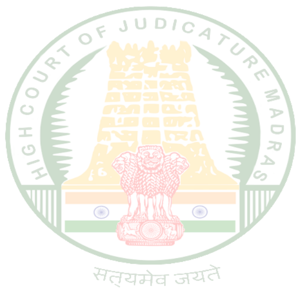
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64. In the result, these Arb.Original Petitions are allowed and the common award, dated 22.03.2021 by the learned sole Arbitrator is hereby set aside. Consequently, all connected Applications are closed.

65. In view of setting aside the common arbitral award in these petitions by this Court, execution of the award does not arise. Hence, the E.P. is dismissed as SR stage itself.

66. Since this Court set aside the award as it was passed by the learned Arbitrator who is appointed unilaterally and being disqualified as per Section 12(5) r/w Seventh Schedule of the Act, this Court feels it appropriate to appoint an Arbitrator which will save time and avoid multiplicity of proceedings. Accordingly, I am persuaded to exercise the powers under sub-section 6 of Section 11 of the Act and pass the following order :

i) Hon'ble Mr.Justice N.Kirubakaran (Rtd.,), residing at No.36, 2nd Cross Street, Rayala Nagar, Ramapuram, Chennai 600 089, Contact No.9445025454, is appointed as Arbitrator

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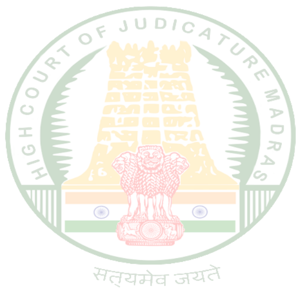
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to enter upon reference and adjudicate the disputes *inter se* the parties.

ii) The learned Arbitrator appointed herein, shall after issuing notice to the parties and upon hearing them, pass an award separately in each of the matter as expeditiously as possible, preferably within a period of six months from the date of receipt of the Order.

iii) The learned Sole Arbitrator appointed herein shall be paid fees and other incidental charges, fixed by him and the same shall be borne by the parties equally. In the event of non-appearance of the respondent, the petitioner shall bear the entire remuneration and other expenses and thereafter, recover the same directly from the respondent, vice versa.

20.04.2023

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Speaking/Non-speaking order
Index : Yes / No
Neutral Citation : Yes / No

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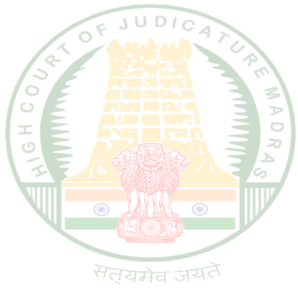

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KRISHNAN RAMASAMY.J.,

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Arb.O.P (Com.Div.) No.257 of 2021 &
Arb.O.P(Com.Div).No.209 of 2022 etc.

20.04.2023

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