

IN THE XXVI ASSISTANT CITY CIVIL COURT, CHENNAI**Present : Thiru. G.ARUNKUMAR, B.Sc., B.L.,****XXVI Assistant Judge****Saturday, this the 19th day of October, 2024****E.P.No.3607/2023****in****A.R.B. No. 79/2021****CNR NO. TNCH01- 028981 -2023**

M/s. Shriram Finance Limited,
 Formerly known as M/s. Shriram Transport Finance Company Limited,
 3rd Floor, Mookambika Complex,
 No.4, Lady Desika Road, Mylapore,
 Chennai – 600 004.
 Represented by its Authorized Signatory,
 M. Sakthivel.

...Decree Holder/Claimant

-Vs-

1. Vijayakumar N, (J.D.1)
 No.8/19, Kallakara Street, Near Mundaga
 Kanniamman Koil, Mylapore,
 Chennai – 600 004.

2. Ramu G S, (J.D.2)
 Old No. 39, New.8, Alagiri Nagar,
 4th Cross Street, Vadapalani Murugan Temple
 Back Side, Chennai – 600 026.

....Judgment Debtors/ Respondents

This Execution Petition is came up on 3.10.2024 for final hearing before me, in the presence of M/s. S.Balaji Raja, M.Kanniga and S.Dilly Bai, Counsels for the Decree Holder and the attachment order of movables against J.D1 & 2 were already ordered on 18.03.2024 and upon perusing the entire records and having stood over for consideration till this day, this court delivered the following:

ORDER

This Petition has been filed under Order XXI Rule 43, 64 & 66 of C.P.C by the petitioner/Decree Holder seeking for execution of award to attach and sale of the

movable Properties of Judgment Debtors 1 & 2 mentioned in the schedule for recovery of E.P claim amount of Rs.5,59,478/- (Rupees Five Lakhs Fifty Nine Thousand Four Hundred and Seventy Eight only) in pursuance of Arbitration Award passed in A.R.B. No. 79/2021, dated 27.8.2021.

2. Point for consideration:-

Whether this petition can be allowed or not?

3. Decree holder counsel present and heard. Perused the records. It is revealed from the records, the arbitration proceedings were commenced in the year 2021. The sole arbitrator had passed the award against the Judg.debtor/s on 27.8.2021 for a sum of Rs.3,87,098/- with applicable interest. Since the judg.debtors failed to comply with the terms of award, the present execution petition has been filed.

4. On careful perusal it could be seen that the award was passed by an arbitrator who was appointed unilaterally by the claimant. ie. the decree holder herein. Pending enquiry this court has raised the question before the decree holder in regard to the validity of the award and to decide its executability in view of *Perkins Eastman Architects DPC and Anr Vs HSCC India Ltd 2020 20 SCC 760* and whether Proviso Clause to Section 12 (5) of the Arbitration and Conciliation Act has been complied or not.

5. The learned decree holder counsel would submit that the award passed by the arbitrator is an executable one and the judg debtor/s has not raised any objections neither in the arbitral proceedings nor in the stage of execution and as such the award can very well be executed. No document filed on the side of the decree holder to substantiate his case. Hence this court is constrained to proceed further to decide the admissibility, executability of the the award now pending for execution before this court.

6. As per Sec.36 of the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) (hereinafter referred as Act), an arbitral award shall be enforced in

accordance with the provisions of Civil procedure Code in the same manner as if it were a decree of the Court. A plain reading makes it clear the award passed by an arbitrator can very well be executed before a civil court. The Act was amended in 2015 and Sub section 5 has been inserted in Sec.12 of the Act which came into effect from 23.10.2015. The relevant provision has been reproduced hereunder for better appreciation.

(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”.

7. It is imperative to note Sec.21 of the Act provides the commencement of the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. In view of the amended Act, the provisions will not apply to the arbitral proceedings commenced in accordance with the provisions of sec.21 of the principal Act. Thus we can see all the arbitral proceedings shall be commenced after the amendment Act of 3/2016. In the present case on hand the arbitral proceedings have commenced after the amended Act.

8. One of the reason of inclusion of Section 12 (5) read with Schedule 7 in the Act was to instill transparency and fairness in appointment of Arbitrators and bringing an end to the era of unilateral appointment of chosen Sole Arbitrators. The Hon’ble Supreme court and the Hon’ble High courts of different states have settled the position in various cases so far in regard to the question of unilateral appointment of sole Arbitrator is concerned and the question whether the party can by its conduct, waive its right under Sec.12(5) of the Act is no longer *res integra*. The scope of Sec.12(5) was widely explained by the Honble Supreme Court in *Voestalpine*

Schienen Gmbh vs Delhi metro rail corporation Ltd (2017 4 SCC 665) and in Bharat Broadband Network Limited vs United Telecoms Limited (2019 5 SCC 755).

9. The Hon'ble Supreme Court in the case of TRF Limited Vs Energo Engineering Projects Ltd (2017 8 SCC 377) while interpreting Sec.12(5) of the Act read with seventh schedule has categorically held that a person who himself is ineligible under the provisions of the Amendment Act to be appointed as an arbitrator, cannot himself/herself nominate a sole arbitrator.

10. At this juncture it is appropriate to cite the decision in *Perkins Eastman Architects DPC and another Vs HSCC India Ltd* (2020 20 SCC 760). The Hon'ble Apex court has annulled the appointment of Arbitrator and held that 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. The appointment of arbitrator cannot be made unilaterally by one party even if the clause vests that power in the said party. The relevant point mentioned hereunder:

16. But, in our view that has to be the logical deduction from TRF Limited, Paragraph 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator". The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is

clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited.”

The above judgment aimed to prevent parties from unilaterally appointing a sole arbitrator which could lead to bias and unfairness in the arbitration process.

11. The same principle has been embodied in the subsequent decision in *P. Sivaramankrishnan Vs. Kotak Mahindra Prime Limited* (2023 SSC Online MAD 2608) wherein it was held that the borrower cannot be compelled to participate in the arbitration proceedings and even the borrower can very well raise the plea of validity of unilateral appointment, when an unqualified person commences the arbitration and the validity of the decision amounts to nullity, non est in law and it can be raised at any stage of plea arbitral enquiry including at the stage of execution of award.

12. Such principle has been elaborately discussed in the case of *Cholamandalam Investment Vs. Amarapalli* (2023 SCC Online Calcutta High Court 605). Few excerpts of the Judgment is as follows:

“.....In order to overcome this issue, the legislative amendments of 2015 and the judicial pronouncements on such amendments by the Apex Court have brought in a level playing field so that no party could have a higher bargaining power in the decision making process for appointment of an arbitrator. Such interpretation, as discussed above, has ensured complete impartiality in such appointments and

served the intended purpose of saving the 'small guy' while counter-balancing party autonomy. In conclusion, one may say that the apparent impartiality that existed providing power to one of the parties to choose the arbitrator unilaterally has been taken away as the same was fraught with inequalities at the very threshold of the initiation of the arbitration proceedings. However, the proviso to Section 12(5) of the Act allows for waiver but clarifies that the same has to be explicit and in writing.

“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 aside 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....”

13. The Division Bench of Hon’ble High Court of Delhi in *Kotak Mahindra Bank Limited Vs. Narendra Kumar Prajapat* (2023 DHC 3705) has categorically held that the person who is ineligible to act as an arbitrator lacks the inherent Jurisdiction to render an arbitral award under the Act. It is trite law that a decision, by any authority, which lacks inherent jurisdiction to make such a decision cannot be considered as valid and as such the impugned award cannot be enforced.

14. The ratio of Perkins case was succinctly explained in *Lite Bite Foods (P) Ltd Vs. Airports Authority of India* (2019 SSC Online BOM 5163), held that there are only two modes of appointment of an arbitrator, the arbitrator must be appointed by consent of the parties or alternately there must be an order of the court appointing an arbitrator.

15. In the present case, the decree holder did not adduce any documentary evidence to show the proviso clause of Section 12 (5) of the Act has been duly complied with. In the absence of anything contra, the failure on the part of judgment debtor to oppose the unilateral appointment of arbitrator cannot be construed as waiver

of his right in view of Sec 12 (5) of the Act.

16. The proviso to Sec 12 (5) of the Act provides a party can waive its right to appear the validity of an arbitrator subject to condition that the waiver is required to be done by an express agreement in writing and another one is such agreement is entered into after the dispute have arisen between the parties. Unless the above conditions are satisfied there can be no waiver of eligibility of an arbitrator.

17. As far as the present execution of award is concerned, it is seen that the arbitrator was unilaterally appointed by the decree holder and the sole arbitrator has passed the award. The proceedings carried out by such unilaterally appointed arbitrator ex-parte and the award sought to be executed is found to have been passed with inherent lack of jurisdiction. The contention of the decree holder that the award passed by the arbitrator cannot be questioned in the stage of execution cannot be sustained.

18. The Judgment debtor remained exparte in the execution proceedings and the absence of J.D does not confer any beneficial right to the decree holder. Sec.47 of the Code governs the principle that all questions relating to execution of decree shall be determined by the executing court and not by way of separate suit. Such provision laid down the scope of judicial intervention even by an executing court.

19. As discussed *supra* it is the duty of this Court to go into the validity and executability of the award at any stage, when the award is passed by an arbitrator, which is *non est* in law, it cannot bind the parties and such invalid award cannot be enforced by this Court. It is settled principle a court of execution cannot go behind the decree but there are some exceptions. *jus ex injuria non oritur* – A right does not arise out of a wrong.

20. *In extenso*, keeping in mind of the above judicial precedents laid down by the Hon'ble Apex Court and Hon'ble High Courts, this Court being a court of execution is of considered view, the decree holder cannot be permitted to proceed

further with the execution. However it is pertinent to mention here, the parties are at liberty to re-agitate their disputes before the properly constituted forum in accordance with law to work out their remedy, without any influence of this court's order made in this execution petition. With the above observations, the E.P is liable to be dismissed. Accordingly this point is decided.

In the result, this execution petition is dismissed. No costs. The parties are at liberty to re-agitate their disputes before the properly constituted forum in accordance with law since this petition is dismissed on the ground of non – compliance to Sec 12 (5) r/w Schedule 7 of the Arbitration and Conciliation Act, 2015.

Dictated to Steno typist, directly computerized by her, corrected and pronounced by me in the open court, this the 19th day of October 2024.

Sd/-. **G.ARUNKUMAR**,
XXVI Assistant Judge,
City Civil Court, Chennai.

Both side Witnesses & Exhibits : Nil

Sd/-. **G.ARUNKUMAR**,
XXVI Assistant Judge,
City Civil Court, Chennai.

Draft/Fair Order

E.P.No.3607/2023

in

A.R.B. No. 79/2021

19.10.2024

XXVI Assistant Court,
Chennai.