

IN THE COURT OF 4th ADDITIONAL SENIOR CIVIL JUDGE, AHMEDABAD (R)
@ NAVARANGPURA

Regular Execution Petition No. 1436 - 2022
Exhibit-

Applicant/ Claimant:M/S. SBI CARDS AND PAYMENT SERVICES PVT. LTD.

v.

Opponents/ Respondents:BINOY MISTRY

1. The present execution petition is filed by the claimant/ Finance Company for the recovery of the amount from the respondents (borrower & guarantor) on the basis of an ex-parte award passed by the Sole Arbitrator. On perusing the copy of the award, it reveals that the claimant has appointed the sole Arbitrator by virtue of the powers contained in the agreement. Therefore, this is an undisputed fact that the Sole named Arbitrator has not been appointed at the time of execution of the agreement between the parties but later on unilaterally by the claimant, when the dispute arose.

2. Provisions for appointment of Arbitrator are enumerated in Section 11 of the Arbitration and Conciliation Act 1996 (hereinafter referred to as “The Act” for brevity and convenience) as under:

11. Appointment of arbitrators:—

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and— (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the

other party; or (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court;

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

3. According to sub-section 1 of section 11 of the Act, a person of any nationality can be appointed as an Arbitrator and sub section 2 of section 11 enables the parties to the agreement to form any procedure for appointment of Arbitrator or Arbitrators. But it is subject to sub-section 6 of Section 11 of the Act. According to sub-section 3 of section 11 of the Act, in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator. According to sub-section 6 of Section 11 of the Act, if a party fails to act as required under that procedure or the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure or a

person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court. Therefore, it is clear that the procedure adopted by the parties must be unvarying and always subject to sub-section 6 of section 11 of the Act.

4. Perusing the copy of the impugned award, it is not the case that each party has appointed one Arbitrator and the two appointed Arbitrators failed to appoint the third Arbitrator. It is also not the case that at the time of entering into the agreement, parties had given consent to any person or institution for the appointment of a third Arbitrator. In sub section 6(c) of Section 11 of the Act, the word used is person or institution and not the party to the agreement or party to the dispute. Therefore, any of the parties to the agreement is not entitled to take the consent of another party regarding appointment of Arbitrator on his own. According to law, parties to the agreement are entitled to appoint any named third person as an Arbitrator at the time of execution of agreement with regard to any dispute, differences or claim, if it arises between the parties in future. But any of the parties is not entitled to enter into the procedure for taking the consent of another party for appointing the Arbitrator in future.

5. In **Bharat Broadband Network Limited v. United Telecoms Limited**, (2019) 5 SCC 755, Hon'ble Supreme Court had authoritatively held that waiver of a right to object to ineligibility of an arbitrator under Section 12(5) of the Arbitration & Conciliation Act cannot be inferred by conduct of a party. Such waiver can only be by an express agreement in writing. The Court had also clarified that

“the expression ‘express agreement in writing’ refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct”.

In **TRF Ltd. v. Energo Engineering Projects Ltd.**: (2017) 8 SCC 377, the Supreme Court held that once the Arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator.

Similarly Hon'ble Supreme Court in **Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.**: (2020) 20 SCC 760 following the earlier decision in TRF Ltd. (supra) and held that the Chairman-cum-Managing Director of a party was ineligible to appoint an arbitrator.

Hon'ble High Court of Delhi in **Govind Singh v. M/S Satya Group Pvt Ltd & Anr.**: 2023/DHC/000081 has held as under:

“In view of the above, the remaining question to be addressed is whether an arbitral award rendered by a person who is ineligible to act as an arbitrator is valid or binding on the parties. Clearly, the answer must be in the negative. The arbitral award rendered by a person who is ineligible to act as an arbitrator cannot be considered as an arbitral award. The ineligibility of the arbitrator goes to the root of his jurisdiction. Plainly an arbitral award rendered by the arbitral tribunal which lacks the inherent jurisdiction cannot be considered as valid. In the aforesaid view, the impugned award is liable to be set aside as being wholly without jurisdiction.”

6. In this present case on hand the other party to the agreement i.e. the borrower had neither waived his right to object in writing with regard to the ineligibility of an arbitrator under Section 12(5) of the Act nor had given his consent regarding the appointment of the sole named Arbitrator after his appointment by the claimant. It reveals from the facts stated in the award that the parties to the agreement had not appointed the named Sole Arbitrator but later on by the claimant himself unilaterally. At the time of entering into the agreement if any third party or institution is empowered to appoint the Arbitrator later on, then there is no illegality. But in the present case, no third party or institution was designated for appointment of Arbitrator and the power of appointing the Sole Arbitrator was taken by the claimant himself unilaterally. As the sole named Arbitrator was not appointed at the time of execution of agreement between the parties and the sole arbitrator was appointed without following the provisions of section 11 and 12 of the Act. Therefore, the unilaterally

appointed Arbitrator is ineligible in the eyes of law and he has no jurisdiction to adjudicate the dispute between the parties.

The Hon'ble Supreme Court in *Urban Improvement Trust, Jodhpur v. Gokul Narain*, AIR 1996 SC 1819, has held in para 15 as under:-

15.....a decree passed by a court without jurisdiction over the subject-matter or on any other ground which goes to the root of its exercise of jurisdiction or inherent jurisdiction, is a nullity. A decree passed by such a court is a nullity and is non est. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the authority of the court to pass a decree which cannot be cured by consent or waiver of the party. If the court has jurisdiction but there is any defect in its exercise of jurisdiction it does not go to the root of its authority. Such a defect like territorial jurisdiction could be waived by the party which could be corrected only by way of an appeal or revision. In that case it was held that since the decree was a nullity the validity was upheld in execution. Similarly, the Hon'ble Supreme Court in *Sunder Dass v. Ram Prakash*, AIR 1977 SC 1201 has held that the executing court cannot go beyond the decree nor can it question its legality or correctness. But there is one exception to this general rule and, that is, that where the decree sought to be executed is a nullity for lack of inherent jurisdiction in the Court passing it, its invalidity can be set up even in an execution proceedings.

8. It is the settled legal position that the executing court can go behind a decree only if there was lack of inherent jurisdiction and not on the ground that there was erroneous exercise of jurisdiction. In this case on hand the unilaterally appointed Arbitrator has inherent lack of jurisdiction to adjudicate the dispute between the parties. Therefore, the impugned award is nullity and is non est. In view of this the award passed by unilaterally appointed Arbitrator is void from its nativity and this Executing Court is not bound to execute an award which is not enforceable under law.

Accordingly, the present execution petition is rejected with no order as to cost. As this execution petition is rejected, therefore other proceedings , if any carried on, related to this matter shall stand disposed of.

Order passed in the open Court today on the 06 th March 2024.

(Takhatsinh Jujarsinh Devada)
4th Additional Senior Civil Judge
Ahmedabad (R) Navarangpura.
Judge Code No.GJ00944