

Ex.(Comm.) No.408/2023

M/s Aar Kay Fin Lease Pvt. Limited V/s Mohd. Akram Ansari @ Chhedi Ansari & Ors.

CNR No.DLNW01-008716-2023

28.02.2025

Present: Shri Nikhil Dahiya, Ld. Counsel for the Decree Holder.

Shri Manish, Ld. Counsel for the Judgment Debtor(s).

1. This is an execution petition filed by DH, *inter alia* seeking execution of Arbitral Award dated 16.05.2023, passed by sole Arbitrator namely Ms.Rashmi Jain at New Delhi (hereinafter referred to as the “**impugned Award**”).

2. Objections in the execution petition have been filed by the JD(s), *inter alia* stating therein that the learned Arbitrator namely Ms.Rashmi Jain, Advocate was appointed by the DH **unilaterally**.

3. A perusal of the impugned Award reveals the Arbitration Clause as under:

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(3)

(i) All disputes, differences, and or claims, arising out of this Loan Agreement shall be settled by arbitration, in accordance with the provisions of the Indian Arbitration Act, 1996, or any other statutory amendments thereof and **shall be referred to the Sole Arbitration of Ms.Rashmi Jain, Advocate or in case of his/her death, refusal, neglect, incapability to act as an arbitrator to the Sole arbitration of Ms.Nidhi Jain, Advocate.** The

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reference to the arbitrator shall be within the CLAUSES, TERMS AND CONDITIONS of this Agreement. The award given by the Arbitrator shall be final and binding on all the parties concerned.

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4. On an oral enquiry made from the learned counsel for the DH, it has been revealed at Bar that for the last ten years Ms.Rashmi Jain, Advocate as well as Ms.Nidhi Jain, Advocate have been appointed as Arbitrators in more than 500 cases of Decree Holder. It is, therefore, apparent that Ms.Rashmi Jain, Advocate is being named as an “**Arbitrator**” on regular and frequent basis in the loan agreement(s) executed by the Decree Holder. It can, therefore, be *prima facie* inferred that Ms.Rashmi Jain, Advocate has been repeatedly appointed as “**Arbitrator**” by the Decree Holder, she has financial interest attached to her appointment as an Arbitrator in the cases of Decree Holder. It is also general knowledge that Decree Holder has been appointing/naming selected few persons as Arbitrators in their loan agreements. Thus, there is no reason which would justify that the financial interest of the named Arbitrator is not involved and it can also be safely inferred that persons so appointed as an Arbitrator will always have apprehension in mind that if he or she give any finding against the Decree Holder/claimant/non-banking financial institution, then his or her appointment as an Arbitrator will be at risk in future cases.

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As such, there is every possibility that the learned Arbitrator has not decided the claim in an unbiased manner and she might have been guided by her financial interest. Since, she has been appointed as an Arbitrator in such voluminous number of cases, it can further safely be inferred that that she is a “**stock arbitrator**” of the Decree Holder and, therefore, the participation/consent of the Judgment Debtor in agreeing to her name as an Arbitrator was not present.

5. It is also pertinent to mention here that since the Judgment Debtor did not have equal bargaining power being the borrower and the fact that Decree Holder only suggested names of two persons as Arbitrator, the Judgment Debtor did not have the option to exercise an effective option of suggesting name of Arbitrator of his choice. Also, as far as the submission of learned counsel for the Decree Holder in respect of consent of Judgment Debtor is concerned, from the information furnished at Bar by Decree Holder, it can be said that no effective consent of Judgment Debtor can be said to have been obtained by the Decree Holder. It is, thus, apparent that the name of the learned Arbitrator was unilaterally mentioned by the Decree Holder in the loan agreement.

6. In case reported as, “**Arb.Pet.No.560/2019**”, titled as, “**Sawarmal Gadodia V/s Tata Capital Financial Services Ltd.**”, Hon’ble

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Bombay High Court has been pleased to hold that if the arbitrator has not disclosed to the petitioner the total number of cases in which he/she has been appointed as an arbitrator by the respondent company, then the arbitral award can be set aside. The relevant paras in this regard are reproduced hereunder:

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"7. Section 12 of the Act mandates a proposed Arbitrator to disclose in writing in the form specified in the Sixth Schedule, any circumstance which is likely to give rise to justifiable doubts as to the independence or impartiality of an arbitrator and which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months. It is also specified/explained in the said Section that the grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist, which give rise to justifiable doubts as to the independence or impartiality of an Arbitrator. One of the grounds set out in the Fifth Schedule, which would give rise to justifiable doubts as to the independence or impartiality of the arbitrator is Ground No.22 and the same is reproduced here under:

"The Arbitrator has within the past three years been appointed as Arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties."

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It is therefore clear beyond any doubt, that if an arbitrator has been appointed within the past three years as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties, he is bound to disclose this fact in his Disclosure, because the same constitutes a ground giving rise to justifiable doubts as to the independence or impartiality of the Arbitrator.

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18. In the circumstances, I pass the following Order :

i. All the four impugned Awards, dated 25th February, 2019 passed by the Arbitrator - Advocate Shri P.C. Phalgunan in the above four Petitions, are set aside without going into the merits of the matters and by consent of the parties, the disputes which forms the subject matter of four Awards, which are set aside, are referred to the sole arbitration of Mr.Rohan Kelkar....”

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7. It is noted that the learned Arbitrator at the time of furnishing Certificate under Section 12 of the Arbitration & Conciliation Act, 1996 did not mention the fact that she had been appointed as an Arbitrator in more than 500 cases of Decree Holder.

8. (i) The Hon’ble Supreme Court of India in case reported as, “(2020) 20 SCC 760”, titled as, “**Perkins Eastman Architects DPC V/s HSCC India Limited**” has been pleased to lay down that unilateral

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appointment of Arbitrator without consent of the other party is non-est in law.

(ii) Even the Hon'ble High Court of Delhi in cases reported as, **"2023 Latest Case Law 709 Del"**, titled as, **"Kotak Mahindra Bank Limited V/s Narendra Kumar Prajapat"**, (DOD: 17.05.2023) and **"FAO (Comm.) No.150/2023"**, titled as, **"GTB Hospital Through Its Medical Superintendent V/s M/s Richpal Singh & Anr."** (DOD: 21.07.2023) has been pleased to authoritatively lay down that the Award rendered by an Arbitrator, who is ineligible to act as an Arbitrator by virtue of Section 12(5) of the "Act" is a nullity and, therefore, cannot be enforced.

(iii) It is pertinent to mention herein that aggrieved by the order dated 17.05.2023, passed by Hon'ble High Court of Delhi in the case of **Narendra Kumar Prajapat** (supra), Kotak Mahindra Bank Limited preferred an SLP (Civil) against the same before the Hon'ble Supreme Court of India. Even the Hon'ble Supreme Court vide its order dated 12.12.2023, passed in **SLP (Civil) Diary No(s).47322/2023**, titled as, **"Kotak Mahindra Bank Limited V/s Narendra Kumar Prajapat"** has been pleased to dismiss the said SLP, thereby upholding the order dated 17.05.2023, passed by the Hon'ble High Court of Delhi.

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9. Even recently, the Division Bench of Hon'ble High Court of Delhi in case reported as, "**EFA (Comm.) No.5/2023**", titled as, "**Mercedes Benz Financial Services India Pvt. Ltd. V/s M/s Khokher Enterprises**" (DOO: 16.01.2024), while making reference to order dated 17.05.2023 in case of **Narendra Kumar Prajapat** (supra) as also order dated 12.12.2023 of the Hon'ble Supreme Court, passed in SLP (Civil) No.47322/2023 has been pleased to lay down that **even if no objection is filed by JD, the Court shall not execute an Award passed by unilaterally appointed Arbitrator.**

10. As guided by the law laid down in the aforesaid judgments, the Arbitral Award in question cannot be executed, being nullity/not sustainable in the eyes of law.

11. The execution petition is accordingly dismissed.

12. File be consigned to Record Room after completion of necessary formalities.

13. Dasti.

(Vinod Yadav)
District Judge (Commercial Court)-02
North-West/Rohini Courts/28.02.2025