

**IN THE COURT OF 4TH ADDITIONAL DISTRICT JUDGE
GANDHIDHAM-KACHCHH**

ORDER BELOW EX. 1 in Com.Ex. No.275/2022

1. Read the execution petition. Perused the award along with the execution. Upon perusal of the award, this Court has found that the Ld. Arbitrator was unilateral appointed by the Decree Holder in violation of the provisions of sub-section 5 of section 12 read with Seventh Schedule of the Act. Hence, on this issue, looking to the provisions of sub-section 5 of section 12 read with Seventh Schedule of the Act and in view of the judgments of the Hon'ble Apex Court, which are as follows :

Hon'ble Supreme Court in Perkins Eastman v. HSCC, (2019) 17 SCR 275 and HRD Corporation v. GAIL, (2018) 12 SCC 471, held that arbitrator unilaterally appointed would be lacking jurisdiction to decide the dispute between the parties, therefore, the consequent award would also be a nullity.

In Cholamandalam Investment v. Amrapali Enterprises, (2023) SCC Online Cal 605 wherein Hon'ble Calcutta High Court had ruled on the similar lines. It held that an award passed by an arbitrator who is unilaterally appointed by one of the parties is not valid in the eyes of law and there is nothing to execute in an application seeking enforcement of an arbitral award which was passed by a unilaterally appointed arbitrator.

Same ration was laid down in Case of SREI Equipment Finance v. Sadhan Mandal, EC 137 of 2023 reported in Citation: 2023 LiveLaw (Cal) 100 and 2023 SCC OnLine Cal 831 decided on Date: 11.03.2023

Hon'ble High Court of Delhi in Kotak Mahindra Bank Limited vs. Narendra Kumar Prajapat 2023 SCC Online Del 3148 relying on decisions of Bharat Broadband Network Limited vs. United Telecoms

Limited (2019) 5 SCC 755 and Perkins Eastman Architects DPC and Anr. vs. HSCC (India) Ltd. (2020) 20 SCC 760 and Proddatur Cable TV Digi Services vs. Siti Cable Network Limited (2020) 267 DLT 51, held that it was not permissible for a party to unilaterally appoint an arbitrator without the consent of the other party and that a person who was ineligible to act as an arbitrator himself, could not appoint an arbitrator. The Court also, inter alia, relied upon the judgment of the Hon'ble Supreme Court of India ("Supreme Court") in HRD Corporation vs. GAIL (India) Limited (2018) 12 SCC 471. The court has affirmed the suo motu dismissal of execution petition done by the Commercial Court of District

2. Now the question before this court that court may reject the execution of the unilateral arbitral award? The decision of Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat, 2023 SCC OnLine Del 3148 (Decided on 17 May 2023) is important on the issue. The Issue No.1 raised in the proceedings was "Whether the ex parte arbitral award, rendered by an arbitrator unilaterally appointed by D.H. Finance Company, is enforceable?" The Appellant argued that the Respondent's failure to object to the appointment of the Arbitrator constituted a waiver of their right to challenge the award. On the other hand, the Respondent contended that the arbitral award was null and void due to the arbitrator's ineligibility. The Delhi High Court, relying on previous judgments, including TRF Ltd. v. Energo Engineering Projects Ltd. and Perkins Eastman Architects DPC v. HSCC (India) Ltd., emphasized that an arbitrator who becomes ineligible by operation of law cannot nominate another arbitrator. It was further held that the appointment of an arbitrator by a party without the consent of the other party is impermissible. The Court highlighted that the waiver of objection to the ineligibility of an arbitrator can only be made through an express agreement in writing, entered into after the disputes have arisen. Conduct alone cannot be construed as a waiver. Referring to Bharat Broadband Network Limited v. United Telecoms Limited, the Court reiterated that waiver of the right to

object to the ineligibility of an arbitrator must be by an express agreement in writing, not by inferred conduct. Therefore, the Court concluded that the Arbitrator's ineligibility and the unilateral appointment without the consent of the Respondent rendered the *exparte* arbitral award a nullity. The court further explained that the ineligibility of an arbitrator goes to the root of their jurisdiction, and an award rendered by an arbitrator lacking inherent jurisdiction is invalid. As per *HRD Corporation v. GAIL (India) Ltd. and Govind Singh v. Satya Group Pvt. Ltd.*, an award rendered by an ineligible arbitrator lacks jurisdiction and cannot be considered valid. Consequently, the Delhi High Court upheld the decision of the Commercial Court, stating that the award rendered by the ineligible arbitrator cannot be enforced. In case of *Jaipur Jila Dudh Utpadak Sehkari Sangh Ltd. V/s. Ajay Sales & Supplier*, 2021 SCC Online SC 370, the Hon'ble Supreme Court Bench Headed by Hon'ble Mr. Justice M. R. Shah Saheb dealt with the case where arbitration clause dtd. 31/03/2015 provided for appointment of Sangh's Chairman as Sole Arbitrator. When the dispute arose and arbitration was invoked on 19/10/2019, the respondent approached High Court of Rajasthan which u/s 11 of the Act, where a fresh arbitrator was appointed. When the High Court's order challenged before the Hon'ble Supreme Court with a plea that the arbitration clause pre-existed 2015 Amendment of the Act and inclusion of Section 12(5) and Schedule 7 the Hon'ble Supreme Court while dismissing the petition challenged the High Court's order ruled that, "so far as the submissions of the petitioner with the agreement was prior to the insertion of sub-section 5 of section 12 with 7th Schedule to the Act and therefore disqualification of sub-section 5 of section 12 read with Seventh Schedule to the Act shall not be applicable and that once an arbitrator - Chairman started the arbitration proceedings thereafter the High Court is not justified in appointing arbitrator are concerned the aforesaid has not substance and can to be accepted in view of the decision of this Court in *Tft Ltd.* (supra), *Bharat Broadband Network Ltd.* (supra), *Voestalpine Schiennen* (supra), in the aforesaid decisions this Court had an

occasion to consider in detail the object and purpose of insertion of sub-section 5 of section 12 read with Seventh Schedule to the Act. In case of Voestalpine Schiennen (*supra*), it is observed and held by this Court that the main purpose for amending the provision was to provide for 'neutrality of arbitrators'. It is further observed that in order to achieve this, sub-section 5 of section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subjectmatter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. It is further observed that in such an eventuality i.e. when the arbitration clause finds foul with the amended provisions (Subsection (5) of Section 12 read with Seventh Schedule) the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator as may be permissible. It is further observed that, that would be the effect of non obstante clause contained in subsection(5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of the arbitration agreement. It is further observed and held by this Court in the aforesaid decision that independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which apply to all judicial and quasijudicial proceedings.

In the case of EKTA MEDICAL SYSTEMS PVT. LTD. AND ANR versus INSTITUTE OF LIVER AND BILIARY SCIENCES, 2021 SCC Online Delhi 3979, when the petitioner arose the issue unilateral appointment and carrying on all arbitral proceedings in violation of section 5 read with seventh schedule of the Act while deciding Perkins Eastman Architects DPC council for respondent, simply conceded, legal position and paved the way for appointment of natural arbitrator by the High Court. The Hon'ble Delhi High Court ruled that "the petitioners of this petition seek termination of the mandate mandate of the arbitrator, presently in seisin of the disputes between the

parties in view of Section 12(5) of the Arbitration and Conciliation Act, 1996 read with the judgments of the Supreme Court in Bharat Broadband Network Ltd. v. United Telecoms Ltd 1, Perkins Eastman Architects DPC v. HSCC (India) Ltd and Haryana Space Application Centre v. Pan India Consultants Pvt. Ltd.

3. Thus, looking to the discussion made above and the ratio laid down by the Hon'ble Apex Court and the Hon'ble High Courts, as in the case on hand the same situation is prevailed, this court is also on the view that the arbitral award passed by the unilateral arbitrator is nullity as per the decisions cited above, the court can not execute it and liable to dismiss the proceedings. Resultant, following final order is required to pass.

:: FINAL ORDER ::

The application for the execution of arbitration award is dismissed.

No order as to costs.

Pronounced and signed in the open court today on this **16th** day of **December, 2023**.

Date: 16/12/2023
Place : Gandhidham

(A.M.Memon)
Code No. GJ00674
4th Additional District Judge,
Gandhidham