

HDB Financial Service Vs Balram etc

Present: Sh. Suraj Kanwar, Counsel for decree-holder.

Case was fixed today for consideration on the aspect of maintainability of present execution for enforcement of the arbitral award dated **22.10.2022**, copy of which is already on record.

2. A perusal of the arbitral award shows that the same has been passed by the sole arbitrator appointed by the claimant/company/degree-holder in terms of the loan-cum-hypothecation agreement dated **30.03.2019**. In view of the law laid down by Hon'ble Apex Court in the cases of TRF Ltd. Vs Energo Engineering Projects Ltd. (2017) 8 SCC 377, Bharat Broadband Network Ltd. Vs United Telecoms Ltd. (2019) 5 SCC 755 and Perkins Eastman Architects DPC and another Vs HSCC (India) Ltd. (2020) 20 SCC 760, learned counsel for the decree-holder was asked to make submissions with respect to the maintainability of present execution application.

3. Learned counsel for the decree-holder has made broad submissions. He submits that an arbitral award is not open to challenge except by way of filing objections under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") by an aggrieved party. He submits that no such objections having been filed by the respondents/JDs, the issue with respect to maintainability and legality of arbitral award could not be raised by this Court in execution, and that too *suo moto* without any objection in this regard from the other side.

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4. It is pertinent to mention here that independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. In a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity or bias, which strikes at the very root of the principle of neutrality of arbitrator, thereby demolishing the very foundation of adjudicatory process of arbitration. Even prior to the enactment of Act, the Hon'ble Supreme Court while dealing with a case involving unilateral appointment of sole arbitrator under the Arbitration Act, 1940 in the case of Dharma Prathishthanam Vs Madhok Construction Pvt. Ltd. (2005) 9 SCC 686 held that a unilateral appointment as well as unilateral reference are both illegal, the only exception being a case where the other party had submitted to the jurisdiction of arbitrator so appointed thereby waiving off its rights.

5. However, after the enforcement of the Act as amended by the Arbitration and Conciliation (Amendment) Act, 2015 and with the introduction of Section 12(5) read with Seventh Schedule, the underlying principle of rule against bias which was already implicit in the adjudicatory process of arbitration, has been made explicit and more strict, whereby the appointment of sole arbitrator by/ at the instance of claimant is rendered ex-facie illegal notwithstanding any prior agreement to the contrary, the only exception being by way of proviso to Section

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12(5) of the Act which provides that the parties can waive the applicability of the sub-section only subsequent to the dispute having arisen between them and such waiver must be by an express agreement in writing. Reliance in this regard may be placed upon judgments of Hon'ble Apex Court in the cases of TRF Ltd. Vs Energo Engineering Projects Ltd., Bharat Broadband Network Ltd. Vs United Telecoms Ltd., Perkins Eastman Architects DPC and another Vs HSCC (India) Ltd., *supra*. While emphasizing that the principles of independence and impartiality lay at the foundation of any adjudicatory process, Hon'ble Apex Court has authoritatively laid down that any party/ person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator, and any such appointment falls foul of the express provisions laid down in Section 12(5) read with Seventh Schedule of the Act and is ex-facie illegal and void, the mandate of such *de jure* ineligible arbitrator terminating automatically by operation of law. While referring to the proceedings/award given by such an illegally appointed arbitrator, the Hon'ble Apex Court has held that once the infrastructure collapses, the superstructure is bound to collapse. The conclusion is, thus, inescapable that any proceedings undertaken and award given by such *de jure* ineligible arbitrator are a nullity, and the nullity thereof may be set up at any stage in any proceeding where it is sought to be enforced or even in collateral proceedings.

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6. In a recent Judgment of the Hon'ble Supreme Court of India in case titled as 'Kotak Mahindra Bank Limited Vs. Narender Kumar Prajapat', decided on 12.12.2023 in SLP (Civil) Diary No.(s). 47322/2023, it has been held that the award passed by Sole Arbitrator unilaterally appointed is not executable.

7. In the present case, it is clear from a perusal of the arbitral award that the same has been passed by the sole arbitrator appointed unilaterally by the claimant/ decree-holder in terms of the arbitral agreement incorporated in the Loan Agreement dated **30.03.2019**. No express agreement in writing between the parties, subsequent to the dispute having arisen between them, waiving the applicability of Section 12(5) of the Act has either been alleged or placed on record. In view of the law enunciated by Hon'ble Apex Court as already adverted to hereinabove, such appointment of the sole arbitrator by the claimant/ decree-holder is *ex facie* illegal and void, while the proceedings undertaken and award given by such *de jure* ineligible arbitrator are clearly a nullity and the nullity thereof may be set up at any stage in any proceeding where it is sought to be enforced or even in collateral proceedings. Thus, there could be no lawful impediment to the Court *suo moto* examining the arbitral award, which is sought to be enforced as deemed decree, in order to find out whether the same is a nullity and therefore unenforceable and filing of objections by the other party/

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respondent cannot be held to be a pre-requisite in this regard. The contentions urged on behalf of the DH/ claimant are, therefore, untenable.

8. Resultantly, upon finding that the arbitral award is a nullity and unenforceable, the present execution application is hereby dismissed.

File be consigned to the record room after due compliance.

Date: 15.07.2024

(Neha Nohria)
Additional District Judge, Jind.
UID No. HR-0230

Rakesh, Stenographer II