

Suo moto reopened. On perusal of records. Award passed by Sole Arbitrator. Hence, invoked proviso to Sec.12(5) of Amendment Act 3/2016 (Arb., Act). Hence, Order pronounced. **i)** The counsel for the petitioner in has submitted that the award passed in Arbitral proceedings attained finality and that the respondents failed to pay award amount and that the respondents did not file any appeal as against the award and that the respondent did not at all challenge appointment of Arbitrator made by the petitioner even after the receipt of the notice from arbitrator and that this Executing court can't beyond the Award and is bound to execute as it is and prays for allow this Execution petition.

ii) Heard petitioner side perused the records. To decide the matter in issue it is most relevant to mention here that Arbitration and Conciliation Act was amended in the year 2015 and Section 12(5) was inserted with effect from **23.10.2015** as per **Amended Act 3 of 2016**.

Section 12(5) of the Act reads as follows ;

“Not withstanding any prayer 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 7th Schedule shall be ineligible to be appointed as on Arbitrator”.

“Provided that parties may, subsequent to the dispute having arisen between them waive the applicability of this sub section by an express agreement in writing ”.

iii) **Section 21 of the Act** deals with Arbitral proceedings in respect of the particular dispute commences on the date on which a request for that dispute to be referred to Arbitration is received by the respondent. But as per **Section 26 of the Act** the

provision contain in the Amended Act will not apply to the Arbitral Proceedings commenced in accordance with the provisions of the Section 21 of the Parent Act. Hence, it is clear that after the amendment Act 3/2016, all Arbitral proceedings shall be commenced only in accordance with the amended Act. **The present case also the Arbitral proceedings namely Arbitration Proceeding No.282/2020, Dated 01.09.2021 commenced after the amendment Act.**

iv) As per the dictum laid down by the Hon'ble Supreme Court in **TRF Limited -vs- Energo Engineering Projects Ltd., 2017 (8) SCC 377, Perkins Eastman Architects DPC and others -vs- HSCC (India Ltd), AIR 2020 SC 39, P. Sivaramakrishnan -vs- Kodak Mahendra Prime Ltd., Represented by its Authorised Signatory P. Balaji 2023 SCC online Madras 2608 and Cholamandalam investments -vs- Amarapalli, 2023 SCC online Calcutta 605** it is clear that “ A person who is specified in Schedule 7 of the Act become **ineligible** to be appointed as on Arbitrator and **such specified person can't also nominate any other person as arbitrator**. The sole reason for incorporation of Section 12(5) of Amended Act 3/2016 is to **ensure neutrality in the Arbitral Proceedings**. As per 7th Schedule of Act the Arbitrator should not have relationship with the parties to the dispute. **Thus the Manager, Director are the person having a part in the Management or ineligible to be appointed as on Arbitrator. Similarly, those person can't at also nominate others to act as an Arbitrator.**

v) It is needless to mention here that the present case the sole Arbitrator was appointed by the claimant/ Decree Holder

after the amended Act 3/2016 came into force as a sole Arbitrator to adjudicate the dispute arose between himself and the respondents herein. But in fact the Claimant / Decree Holder did not have any authority or right to appoint another to Act as on sole Arbitrator. It is needless to mentioned here that the claimant/Decree Holder did not at all produce any documentary evidence that to show that either of the respondents **had waived the applicability of Section 12 (5) Amendment Act 3/2016 by an agreement writing subsequent to the dispute arose between the parties.** Thus **very appointment** of sole arbitrator by the claimant / decree holder **is not in accordance** with law and the said person is totally in eligible to be appointed as Arbitrator and thus the award was passed by the sole arbitrator is non-est in law. Thus such a award passed by the sole arbitrator cant be executed by this Executing court.

vi) It is true that executing court can't be beyond the decree or award. But in the present case when the award passed by the sole arbitrator who being in eligible to be appointed as Arbitrator and the award passed by him is also null and void. The executing court can very well decide the competency of sole Arbitrator to pass such an award and its enforceability before the Civil Court.

vii) Thus the ultimate contention of the learned counsel for the petitioner/decreed holder that in absence of the respondent **who failed to appear** before this court and contest or challenge the validity of the award passed as against them this court has no jurisdiction to go in to the question of validity of the award suomotu has merit at all in as much as stated earlier this executing court can very well decide the very competency of the sole Arbitrator to pass such an award and its enforceability. Hence

the contention of the petitioner counsel in this regard is totally merit-less and liable to be rejected.

viii) In the present case, it is beyond the doubt that the claimant / decree holder who appointed the sole Arbitrator in the Arbitral proceedings in clear violation to the amended act, 3/2016 as well as the legal pronouncement of the Hon'ble Supreme Court can't be permitted to get any unlawful benefit or enrichment out of his own wrong by blaming the respondents for their non appearance. As per the ratio laid down by the Hon'ble High Court, Calcutta in the the Choramandalam case as stated supra that the **executing court can't close its eyes without seeing the grave irregularity and it should interfere whenever the same will occur.** Thus the award passed by the sole Arbitrator is also locking for want of inherent jurisdiction. Considering all this court is of the view that the award passed by the sole arbitrator in ACP 21/2018 is totally non-est in the eye of law and can't be considered as the valid award and thus the same can't be at all executing by the executing court. Hence, this court inclined to dismiss the execution petition. But however the parties are liberty to reagitate the dispute before a new Arbitral Tribunal if the same is constituted in accordance with the law stated supra.

In the result, this Execution petition is dismissed. No cost.

Sd/- S. Dhanalakshmi

**II ASJ.,
CBE.,**

