



O.S.A. (CAD) Nos.62 and 63 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.11.2024

DELIVERED ON : 26.11.2024

CORAM :

THE HON'BLE MR.K.R.SHRIRAM, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

O.S.A. (CAD) Nos.62 and 63 of 2023
and C.M.P.Nos.14361 and 14368 of 2023

O.S.A (CAD) No.62 of 2023:

VR Dakshin Private Limited
(formerly known as Sugam Vanijya
Holdings Private Limited)
rep. by its Authority Signatory, Ramu Rangaraju,
Plot No.11B, Sy. No.40/9,
Devasandra Industrial Area,
2nd Stage, K.R. Puram,
Hobli, Bengaluru-560 048.

.. Appellant

[Cause-title accepted vide order of the
Court dated 26.6.2023 made in
C.M.P.No.12196 and 12197 of 2023]

Versus



O.S.A. (CAD) Nos.62 and 63 of 2023

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1.SCM Silks Private Limited,
rep. by its Director, K.Sivalingam,
No.77, New Market Street,
Tiruppur-641 604.

2.K.Sivalingam

3.Prime Store,
No.77, New Market Street,
Tiruppur-641 604.

4.S.Kaarthi

5.Padma Sivalingam

6.Shruthi Kaarthi

.. Respondents

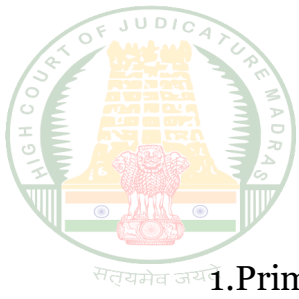
O.S.A (CAD) No.63 of 2023:

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.. Appellant

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C.M.P.No.12196 and 12197 of 2023]

Versus



O.S.A. (CAD) Nos.62 and 63 of 2023

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1.Prime Store,
No.77, New Market Street,
Tiruppur-641 604.

2.S.Kaarthi
3.Padma Sivalingam
4.Shruthi Kaarthi
5.K.Sivalingam

6.SCM Silks Private Limited,
No.77, New Market Street,
Tiruppur-641 604.

.. Respondents

Prayer : Appeals under Section 37 of the Arbitration and Conciliation Act, 1996 read with Clause 15 of the Letters Patent read with Order 36 Rule 1 of the Original Side Rules and Section 13(1) of the Commercial Courts Act, 2015 to set aside the common order dated 20.4.2023 made in Arb. O.P. (Com. Div) No.257 of 2021 and 209 of 2022.

For Appellant
in both appeals

: Mr.P.S.Raman
Senior Advocate
for Mr.P.J.Rishikesh

For Respondents
in both appeals

: Mr.Anirudh Krishnan
Mr.Adarsh Subrmanian
Mr.Mohit Kumar
Mr.Sasank Iyer
Mr.Anuraag Rajagopalan
Ms.Nivethithaa.S



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COMMON JUDGMENT

THE CHIEF JUSTICE

Appellant, unhappy with the order dated 20.4.2023 passed by the learned Single Judge under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act), has preferred these appeals under Section 37 of the Act. The learned Single Judge, by the impugned order, set aside an award dated 22.3.2021 made by the Sole Arbitrator, Hon'ble Mr. Justice A.Ramamoorthy, a Former Judge of the Madras High Court, *inter alia*, on grounds of appointment of the Sole Arbitrator purportedly being foul of the Seventh Schedule read with Section 12 of the Act.

2. Appellant is engaged in the business of developing and operating commercial projects and malls. First respondent, which is engaged in the business of operating and running retail textile outlets in the State of Tamil Nadu, popularly known as “The Chennai Silks”, was inclined to open a store in the mall owned and operated by appellant in Chennai. The mall was called VR Chennai Mall (hereinafter referred to as “*the Mall*”).



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3. Appellant and first respondent executed necessary documents, by which first respondent took on lease a space with a carpet area of 34,434 sq.ft. in mall that was owned and operated by appellant. A lease deed dated 12.9.2018 was executed and the same was also registered in the Sub Registrar Office, Anna Nagar. An addendum to the lease deed was executed between the parties on 25.9.2018. Appellant handed over possession of the premises to first respondent on 5.9.2018 and issued a possession notice in this regard. The lease deed was for a term of nine years, with a lock-in period of 36 months commencing from 30.11.2018.

4. First respondent, subsequently, vide email dated 14.12.2018, terminated the lease deed stating “*due to unforeseen and unavoidable circumstances the Management of The Chennai Silks have decided not to proceed with the proposed store Nachaas at VR Mall, Chennai.*” First respondent also sought refund of the security deposit of Rs.75,75,480/-.

5. Appellant, by a reply dated 23.1.2019, informed respondents that



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the lease deed provided a lock-in period of 36 months and that respondents had no unilateral right to terminate the lease deed before the expiry of the lock-in period. Respondents were also called upon to pay compensation of Rs.11,88,16,397/-. By the said letter dated 23.1.2019, appellant invoked the arbitration clause, i.e., Clause 17.7(b) of the lease deed read with Clause 20 of the Addendum. Clause 17.7 (b) reads as under:

"17.7(b) of the Deed of lease:

*If any question of difference or claim or dispute shall arise between the parties herein touching these presents or the construction thereof to rights, duties or obligations of the parties hereto or as to any matter arising out of or connected with the subject matter of these presents, the same shall be referred to the arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and amendments. The seat of arbitration shall be Chennai. **The reference shall be to a Sole Arbitrator to be appointed by the Lessor.** The arbitrator shall render the award in English language and in writing. The Parties agree to abide by the decision of the arbitrator, which shall be final and binding." [emphasis supplied]*

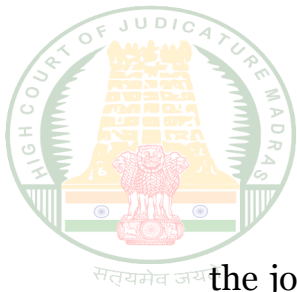
6. The Sole Arbitrator was nominated by appellant in accordance with the dispute resolution clause. The Arbitrator entered into reference and issued a preliminary notice dated 7.2.2019 to the parties. The Arbitrator fixed 27.2.2019 as the date for preliminary hearing.



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7. Without any demur, protest or objection, respondents participated in the arbitration proceedings before the Sole Arbitrator. Admittedly, as submitted by learned counsel, Shri Anirudh Krishnan, in fairness, respondents did not raise any objection to the appointment of the Sole Arbitrator at any stage. They did not raise any protest or objection to the appointment of the Sole Arbitrator in the counter affidavit and they participated in the entire proceedings without even any whisper of any protest or objection. Pleadings were completed. Evidence was also led and witnesses from both sides were also examined and cross-examined. The evidence affidavits and transcripts of cross-examination of witnesses of both parties are annexed to the pleadings herein.

8. As the mandate of the Sole Arbitrator was about to expire, the parties, i.e., appellant and respondents herein, made a joint application dated 19.1.2021 to the Sole Arbitrator affirming that the Arbitrator had entered into reference on 7.2.2019 and further consenting to the extension of the mandate of the Arbitrator under Section 29A of the Act. A copy of



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the joint application dated 19.1.2021, for ease of reference, is scanned and reproduced below:

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BEFORE THE HON'BLE SOLE ARBITRATOR, HON'BLE MR. JUSTICE A. RAMAMOORTHY (Retd. JUDGE, MADRAS HIGH COURT)

M/s. Sugam Vanijiya Holdings Private Limited

... Claimant 177

Vs.

M/s. Prime Store & 5 others

... Respondent

JOINT MEMO FILED UNDER SECTION 29A OF THE ARBITRATION & CONCILIATION ACT, 1996 ON BEHALF OF THE CLAIMANT AND THE RESPONDENT

1. It is stated that the Hon'ble Tribunal entered reference on 07-02-2019 and the preliminary hearing was held on 27-02-2019. It is stated that the statutory period of 12 months expired in the month of February 2020. However, owing to the novel COVID pandemic, the Hon'ble Supreme Court by its order dated 23-03-2020 had extended the period of limitation with effect from 15-03-2020 until further orders. The subsequent order of the Hon'ble SC on this issue is also enclosed herewith.

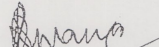
2. The parties herein by consent extend the period by a further period of 6 months and therefore the mandate of the Hon'ble Tribunal by consent of parties is extended up to 30-05-2021 after taking into consideration the period between 07-02-2020 to 15-03-2020.

3. Hence the parties herein in accordance to section 29A(3) of the Arbitration and Conciliation Act, 1996 by way of this present joint memo is mutually consenting to extend the mandate of the Hon'ble Tribunal as stated above.

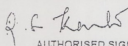
It is therefore prayed that this Hon'ble Tribunal be pleased to extend its mandate as above and pass such other orders as deems fit and thus render justice.

Dated at Chennai on this the 19th day of January 2021


Counsel for Claimant

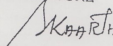

Counsel for Respondents 1 to 6

Claimant For SUGAM VANIJYA HOLDINGS PRIVATE LTD.


AUTHORISED SIGNATORY

For Respondents 1 To 6

For PRIME STORE


Partner



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9. A perusal of the said application, therefore, makes it clear that there was never any objection to the Sole Arbitrator's appointment.

10. The disputes between the parties were finally adjudicated by the Sole Arbitrator and an award dated 22.3.2021 was made. By the said award, the Arbitrator allowed certain claims of appellant and awarded a sum of Rs.11,88,16,397/- along with interest thereon at 24% p.a. and costs of Rs.5,00,000/- in favour of appellant. The claim of Rs.73,55,547/-, which pertains to rentals payable after completion of the fit out period from January, 2019 to April, 2019, was rejected. The Arbitrator proceeded on the basis that the termination by respondents was wrongful and, hence, appellant was entitled to damages in accordance with the contract.

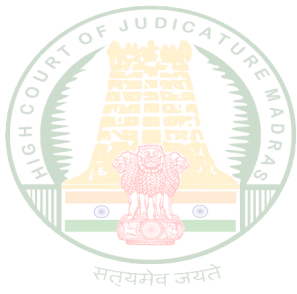
11. Aggrieved by the arbitral award, respondents filed petitions under Section 34 of the Act. For the first time, in these petitions, respondents raised an objection to the appointment of the Sole Arbitrator. According to respondents, the Arbitrator was appointed unilaterally and ought to be disqualified as per Section 12(5) read with Seventh Schedule of the Act.



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Respondents also contended that no express consent was obtained from the respondents for appointing the Sole Arbitrator. According to respondents,

- (i) A unilaterally appointed Arbitrator is *de jure* ineligible to act as an Arbitrator in light of Section 12 read with Schedule VII of the Act.
- (ii) Mere filing of a memo under Section 29A may amount to waiver under Section 4, but not “express waiver” under Section 12(5) of the Act.
- (iii) Participation in the arbitral proceedings shall not bar respondents to challenge the unilateral appointment under Section 34 read with Section 12(5) of the Act.
- (iv) Contravention of the provisions of Section 12 of the Act is ground under Section 34 of the Act to set aside the award.
- (v) Clause 4.3 is of the nature of a Liquidated Damages Clause (LD). In order to allow a claim for LD, proof of loss is a *sine qua non*. Appellant has failed to prove its loss.



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(vi) Burden of proving the loss to justify a claim for LD is on the Claimant.

(vii) By holding that respondents failed to prove the absence of loss, the Award has contravened binding precedents and is hence contrary of the Fundamental Principles of India and liable to be set aside.

(viii) Appellant has failed to mitigate its loss.

(ix) Appellant could have mitigated its losses by letting out the premises after obtaining possession on 12.11.2019. Having failed to do so, appellant is barred from claiming damages.

(x) The Award is hence contrary to binding precedent and therefore violation of Fundamental Principles of India and liable to be set aside under Section 34(2)(b)(iii) of the Act.

(xi) The Award ignores vital evidence and is hence patently illegal and liable to be set aside under Section 34(2A) of the Act.



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12. The learned Single Judge, by the impugned order, set aside the arbitral award, *inter alia*, on the grounds of appointment of the Sole Arbitrator purportedly being foul of Section 12(5) read with Seventh Schedule of the Act. In fact, we find no finding as to which provision is infringed. The learned Single Judge has thereafter proceeded to appoint a new Arbitrator without the consent of the appellant to hear afresh and adjudicate the disputes between the parties. The learned Single Judge has relied upon the judgments of the Supreme Court in ***TRF Ltd v. Energo Engineering Projects Ltd*** (TRF Limited) and ***Perkins Eastman Architects DPC and another v. HSCC (India) Ltd*** (Perkins). The learned Single Judge, having come to the conclusion that the appointment of the Sole Arbitrator was wrongful, has not gone into the merits of the matter, i.e., other grounds raised by respondents.

13. Counsels agreed that if the court holds in favour of appellant, then the impugned order has to be quashed and set aside; and the matter

1 (2017) 8 SCC 377

2 (2020) 20 SCC 760



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remanded to the learned Single Judge to consider the other grounds of the matter, and in particular whether the quantum of damages awarded was correct.

14. Shri P.S.Raman, learned Senior Counsel for appellant submitted as under:

- (a) Without giving any finding as to which provision is infringed, the learned Single Judge has set aside the award on grounds of appointment of the Sole Arbitrator being foul of the Seventh Schedule read with Section 12 of the Act.
- (b) Appellant and respondents had made a joint application dated 19.1.2021, in writing, signed by both the parties, affirming the appointment of the Arbitrator as well as seeking extension of the mandate under Section 29A of the Act. Such express agreement in writing would clearly affirm that there was no objection in the appointment of the Sole Arbitrator.



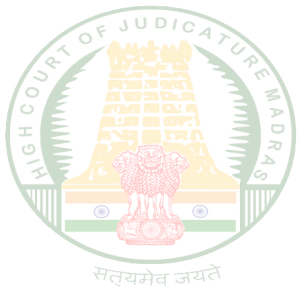
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(c) For the first time, in the petitions filed under Section 34 of the Act, respondents raised an objection to the appointment of the Sole Arbitrator despite having expressly affirmed the appointment, in writing, on 19.1.2021. This objection to the appointment is an afterthought.

(d) The reliance of respondents on the decision in *Perkins* (supra) is misplaced, as the judgment was passed subsequent to the Sole Arbitrator entering reference. Notwithstanding the law as laid down by the Apex Court in *TRF Limited* (supra) and *Perkins* (supra), no objection was raised during the entire arbitral proceedings. On the contrary, respondents participated in the arbitration proceedings and merely because the award was passed against respondents, as an afterthought, respondents have raised the challenge to the appointment of the Sole Arbitrator.



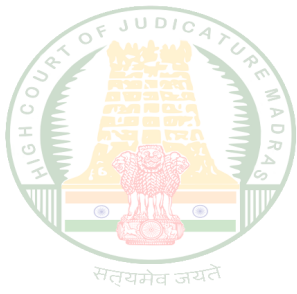
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(e) The alleged violation of Section 12(5) read with Seventh Schedule of the Act has not been substantiated by respondents. The learned Single Judge has not explained as to how the appointment of the Sole Arbitrator violates provisions of the Act. This is notwithstanding the fact that the Sole Arbitrator was a Former Judge of the Madras High Court and appellant never having engaged or consulted or appointed him in any matter prior to the present arbitration.

(f) Section 12(5) of the Act provides “*Notwithstanding any prior 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 the Seventh Schedule shall be ineligible to be appointed as an arbitrator.*” The Seventh Schedule sets out a list of criteria wherein an Arbitrator can be stated to be related to the parties to the dispute or where the said Arbitrator has indirect interest in the



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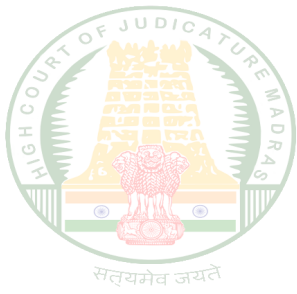


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dispute. There is not even a whisper in the impugned order in relation to the said fact. Admittedly, there is not an inkling as to how the Sole Arbitrator, in any manner, is connected with or related to appellant or has any interest – direct or indirect.

(g) The award could only have been set aside in case the ingredients of Section 34(2) of the Act were met. The respondents were not incapacitated in any manner.

(h) The arbitration agreement between the parties clearly sets out that appellant shall appoint the Sole Arbitrator to adjudicate the disputes between the parties. This was agreed in writing between the parties in the form of an arbitration clause in the lease deed read with the addendum. Respondents never raised any objection to the appointment of the Sole Arbitrator and duly participated in the arbitration proceedings. Therefore, respondents failed to lay down any ingredients, much less the ones mentioned in Section 34(2) of the Act.



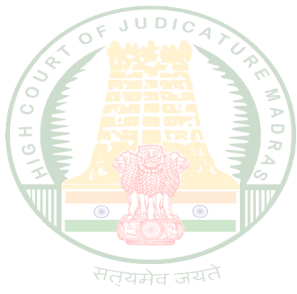
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(i) The judgment of the Apex Court in *TRF Limited* (supra) is not applicable to the facts of the present case. In *TRF Limited* (supra), an objection was raised at Section 11 stage itself, whereas in this case no such objection was raised throughout, until the Section 34 petitions were filed. In fact, respondents expressly even consented to the extension being given under Section 29A of the Act. Moreover, in *TRF Limited* (supra), the Apex Court sets out that parties which are interested persons to the dispute, such as Managing Director or Chief Executive Officer, would be ineligible to act as an arbitrator to adjudicate the dispute and, in the case at hand, neither appellant, nor its officers were appointed as Arbitrator. There is no evidence or proof in relation to the Arbitrator to substantiate any allegation of impartiality.

In fact, Shri Krishnan stated that it is not even their case that the Arbitrator might be biased or impartial.



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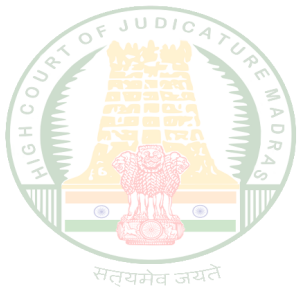


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(j) Similarly, in *Perkins* (supra) also, the objections were raised to the appointment of the Arbitrator. There is nothing to indicate that the decision in *Perkins* (supra) will apply retrospectively to the effect that all arbitration proceedings initiated prior to the *Perkins* judgment have to be called into question and the position has to be changed. That apart, even after the judgment in *Perkins* (supra) was pronounced by the Apex Court, respondents could have raised their objection, which they did not, and, on the contrary, even consented in writing for continuation of the Arbitrator.

(k) The judgment in *Perkins* (supra) was a mere extension of ***Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.*** The clauses are completely different. The ratio in all the cases relied upon was that ineligible persons cannot be appointed an Arbitrator. All the cases were Section 11 cases and, in

3 (2017) 4 SCC 665



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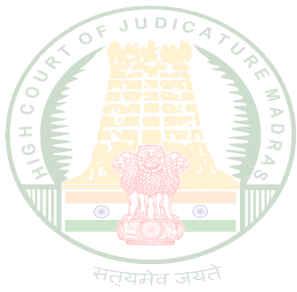


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the case at hand, both are private parties, and it is not a case where a public sector and a private party are involved.

(l) In any event, respondents have waived their right to object and, as provided under Section 4 of the Act, respondents could have stated their objection to the appointment and having not objected and having participated in the arbitral proceedings, respondents are deemed to have waived their rights.

(m) Since the provisions of Sub-section 5 of Section 12 of the Act do not apply to the facts of the case, the proviso thereto that waiver of the applicability of Sub-section 5 of Section 12 of the Act has to be by an express agreement in writing also does not apply. In any event, respondents having signed the application dated 19.1.2021 under Section 29A of the Act, have in writing waived the applicability of this sub-section.



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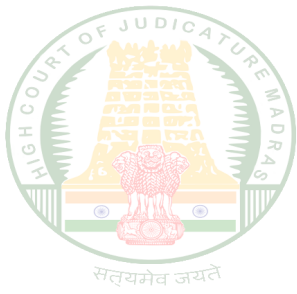
(n)The learned Single Judge has relied on the decision in *Hina Suneet Sharma v. Nissan Renault*⁴. The judgment is distinguishable, inasmuch as the case in *Hina Suneet Sharma* (supra) arose out of financial transaction and as the financial companies appoint the same arbitrator as their panel arbitrator for all matters, it could fall under a disqualification. There an ineligible person was appointed as an arbitrator and parties did not plead waiver as prescribed under Section 4 of the Act.

(o)The learned Single Judge has exceeded the jurisdiction under Section 34 of the Act by appointing a new arbitrator to enter upon a reference and adjudicate the disputes *inter se* the parties and Section 34 of the Act does not provide for appointment of an Arbitrator by the High Court.

(p)In *Bharat Broadband Network Limited v. United Telecoms Limited*⁵, the party that invoked the

4 2023 SCC OnLine Mad 758

5 (2019) 5 SCC 755



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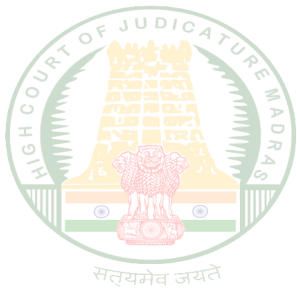
arbitration clause, once it became clear after the declaration of the law by the Supreme Court in *TRF Limited* (supra) that the appointment of the Arbitrator was invalid, immediately filed an application before the Sole Arbitrator bringing the judgments to the Arbitrator's attention and asked him to declare that he has become *de jure* incapable of acting as an Arbitrator. In this case, despite being aware of the law laid down in *TRF Limited* (supra) and *Perkins* (supra), respondents proceeded and participated in the hearing.

(q) Even in ***Quippo Construction Equipment Limited v. Janardan Nirman Pvt Ltd⁶***, it was held that by participating in the arbitral proceedings, respondents must be deemed to have waived all objections.

(r) ***Narayan Prasad Lohia v. Nikunj Kumar Lohia and others⁷*** was a case where two arbitrators were appointed, when Section 10 of the Act provides that

⁶ (2020) 18 SCC 277

⁷ (2002) 3 SCC 572



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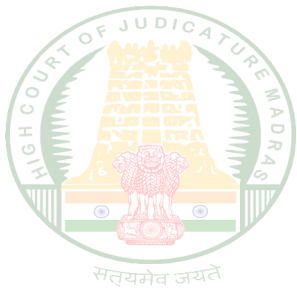


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the number of arbitrators shall not be an even number. Still the Supreme Court did not interfere and held that unless objection is made before the Tribunal itself, there would be a deemed waiver under Section 4 of the Act. The Apex Court held that where parties had appointed two arbitrators to resolve their differences; participated in the arbitral proceedings; and an award was passed, it was not open to the party to challenge the composition of the Arbitral Tribunal. If a party chooses not to object, there would be a deemed waiver under Section 4 of the Act.

(s) Even in ***Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)***⁸ (***CORE***), an objection was raised by the party at Section 11 stage itself. Moreover, in that case, retired railway officers were appointed as Arbitrators. In the said decision, the Apex Court has held that the Act does not *per se* prohibit unilateral appointment of

8 2024 SCC OnLine SC 3219



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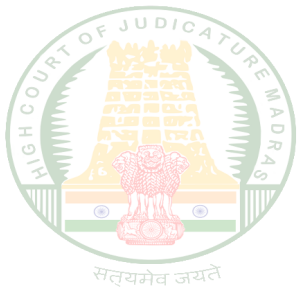
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arbitrators and the eligible arbitrator, not otherwise disqualified under Seventh Schedule of the Act, can be appointed unilaterally and court should refrain from imposing their own opinion countermanding the clear intent of the parties.

15. Shri Anirudh Krishnan submitted as under:

(a) At the outset, there is no allegation admittedly of any bias against the Arbitrator and none of the disqualifications mentioned in the Seventh Schedule of the Act is attracted.

(b) However, in view of the judgment in *Perkins* (supra), appellant could not have unilaterally appointed the Arbitrator and since the clause itself says “*The reference shall be to a Sole Arbitrator to be appointed by the Lessor*”, it is bad and the entire basis of the arbitral proceedings itself is lost. In *Perkins* (supra), the Apex Court has held that a person having interest



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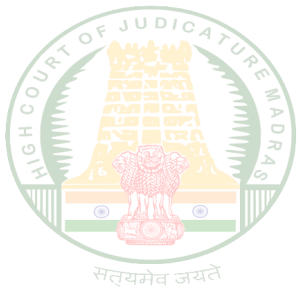


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in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator, but must also not be eligible to appoint anyone else as an arbitrator; and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator and since the arbitration clause gives unilateral appointing power to the lessor, and the lessor is a person having an interest in the dispute or in the outcome or the decision thereof, it cannot appoint any one else as an arbitrator. As the Arbitrator became ineligible by operation of law to act as an Arbitrator, the possibility of bias need not be even looked at.

(c) Under Section 12(5) of the Act, there has to be an express waiver and the waiver has to be in writing. As held by a Division Bench of this Court in ***General Manager, CORE, Allahabad v. JV Engineering Associate Civil Engineering Contractors⁹***, the written

9 2021 SCC OnLine Mad 2892



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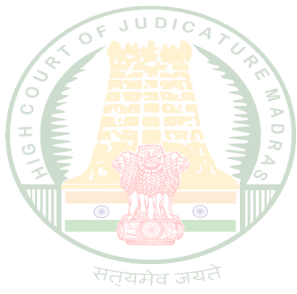


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agreement must happen at a time subsequent to the disputes having arisen between the parties to the arbitration agreement. Such agreement in writing should unequivocally waive the applicability of the relevant sub-section and unless these conditions are strictly complied with, waiver would not take effect and a party to the arbitral agreement cannot be stated to have waived the legal disqualification indicated in the sub-section. The express waiver would arise when the right is specifically brought to the notice of the person, he responds thereto, and such response reveals his awareness of his right; and, finally, there is conscious relinquishment of the known right.

(d)As held in ***Motilal Padampat Sugar Mills Co. Ltd v. state of Uttar Pradesh and others***¹⁰, waiver means abandonment of right and its basic requirement is that it must be an intentional act with knowledge, whether it is express or implied from conduct. There can be no

10 (1979) 2 SCC 409



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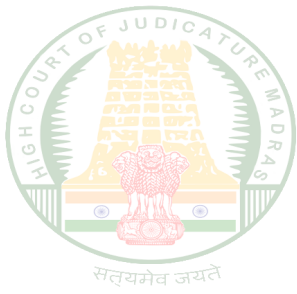
waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abandons.

Counsel did not have an answer when the court raised a point that respondent was a huge multi-crore enterprise and had always got the benefit of legal advice, which they could have obtained.

(e) A learned Single Judge of the Delhi High Court in ***Umaxe Projects Private Limited v. Air Force Naval Housing Board***¹, has held that filing an application under Section 29A of the Act seeking extension of mandate would not amount to express waiver in writing.

In our view, this judgment also is not applicable, inasmuch as the Arbitrator was unilaterally appointed by the respondent therein pursuant to Clause 18.2 of GCC forming part of the Agreement and Clause 22 of the Agreement. Moreover, the

¹¹ 2023 SCC OnLine Del 7684



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wordings of the arbitration clause are not available and, hence, we are unable to authoritatively accept the views expressed in the said judgment.

16. Since the issue involved is very narrow, both counsels agreed that the appeals could be disposed of at the admission stage itself.

17. In our view, the impugned order has to be interfered with. For ease of reference, we reproduce Sections 4 and 12 of the Act, which read as under:

“4. Waiver of right to object.—

A party who knows that—

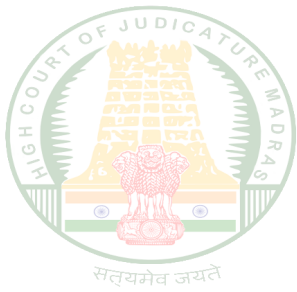
(a) any provision of this Part from which the parties may derogate, or

*(b) **any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.***

...

12. Grounds for challenge.—

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—



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- (a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and
- (b) 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.

Explanation 1.—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.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

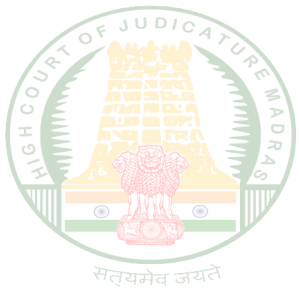
- (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or
- (b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

(5) Notwithstanding any prior 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 the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

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

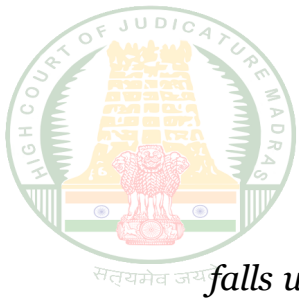
[emphasis supplied]



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18. The dispute resolution clause already extracted earlier provides “..... The reference shall be to a Sole Arbitrator to be appointed by the Lessor”.

19. The admitted fact is respondents participated throughout in the arbitration proceedings and had also made a joint application dated 19.1.2021 in writing, which has been reproduced earlier. The joint memo dated 19.1.2021 makes it very clear that the parties, by consent, extend the period by a further period of six months. Therefore, the mandate of the Tribunal, by consent of parties, was extended up to 30.5.2021. There is no template in the Act as to how the waiver should be worded. From the manner in which the joint memo dated 19.1.2021 is worded, it is quite clear that the parties did not want to raise any objection. In our view, this would be an express waiver of the provisions of Section 12(5) of the Act. In any case, Section 12(5) of the Act would not be applicable, inasmuch as it says “*notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute*

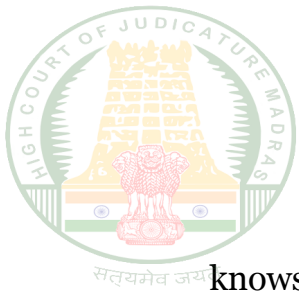


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falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an Arbitrator". This means that even if the parties have entered into an arbitration agreement, but subsequently the arbitrator who is being appointed has any relationship with the parties or counsel or the subject matter of the dispute under any of the categories specified in the Seventh Schedule, the person will be ineligible to be appointed as the arbitrator.

20. The admitted position is the Sole Arbitrator did not have any relationship with the parties or counsel or the subject matter and did not fall under any of the categories specified in the Seventh Schedule to become ineligible to be appointed as an arbitrator. Therefore, the proviso also will not be applicable, because the question of waiver will apply only when Section 12(5) of the Act is applicable. If Section 12(5) of the Act is not applicable at all, the question of waiving the applicability by an express agreement in writing also would not arise.

21. Furthermore, Section 4 of the Act provides that when a party



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knows that any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance, such party shall be deemed to have waived his right to so object. Respondents were free to object to the Arbitrator appointment clause. They did not. The arbitration is a matter of agreement between the parties. Respondents could have objected at any stage before or during the arbitral proceedings, when the law has been laid down by *TRF Limited* (supra) and *Perkins* (supra). But did not. It is a matter which is derogable. It is derogable because respondents were free not to so object. When the appellant issued notice of reference, respondents ought to have objected. They chose not to object. Respondents not only failed to object, but also actively participated and even consented for extending the time limit under Section 29A of the Act by joint memo dated 19.1.2021. Therefore, there will be a deemed waiver under Section 4 of the Act.

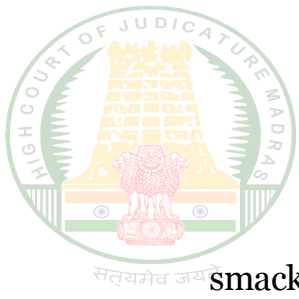
22. When the arbitration proceedings commenced in January – March, 2019 and subsequent thereto *Perkins* (supra) judgment was



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delivered by the Apex Court in November, 2019, still respondents never took any objection at such point of time or even thereafter. As noted earlier, subsequent thereto, in January, 2021, respondents filed the joint memo before the learned Arbitrator extending the term of the Arbitrator. If there was any apprehension or objection to such appointment of the Sole Arbitrator, respondents would certainly not have made the joint application, since the extension under Section 29A of the Act can be obtained by either party.

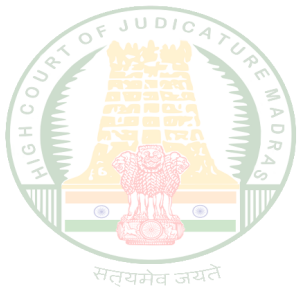
23. In *Perkins* (supra), *TRF Limited* (supra) and *CORE* (supra), the party had objected to the appointment of the arbitrator during the arbitral proceedings. All the judgments relied upon by respondents are on the basis that there is a possibility of a bias or impartiality on the part of the arbitrator. When it is respondents' case, admittedly, that they are not even alleging impartiality or bias, the question of applicability of any of the judgments referred to above would not even arise. When there is no bias or impartiality alleged, the provisions of Sections 12 or 18 of the Act of equal treatment, etc., do not come into play. In fact, the conduct of respondents



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smacks of dishonesty and if such conduct is encouraged by courts by interfering in such factual circumstances, it would only amount to encouraging dishonest parties protracting the litigations and using the court as a tool to achieve their dishonest objectives. The conduct of respondents actually amounts to abuse of process of court.

24. Admittedly, respondents duly participated in the arbitration proceedings without any dispute in relation to the appointment of the Sole Arbitrator and further affirmed the appointment as well. They sought extension of his mandate in writing in a joint application on 19.1.2021. It was only after receiving the arbitration award containing adverse findings, respondents in the petitions under Section 34 of the Act, for the first time, raised a dispute/objection with respect to the appointment of the Sole Arbitrator. It is amply clear that the conduct of the respondents is *mala fide* and nothing but an abuse of process of court. In these circumstances, this is a fit case where respondents should be saddled with substantial costs, as otherwise it will only encourage dishonest parties to raise all kinds of objections once they have lost the arbitration proceedings.



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25. That apart, in the impugned order, the learned Single Judge, with due respects, has proceeded on the assumption that the Arbitrator was disqualified under the Seventh Schedule. The learned Single Judge has not even discussed as to how the arbitrator would get disqualified by virtue of the judgment in *Perkins* (supra).

26. There is no finding in the impugned order as to which provision of Section 12(5) of the Act has been infringed. The judgment in *TRF Limited* (supra) is not applicable to the facts of the present case. The appellant or its officers were not named as arbitrators, whereas in *TRF Limited* (supra), an employee of one of the parties was named as the arbitrator.

27. Further, the settled position of law is that the scope of Section 34 of the Act is limited. The learned Single Judge has not appreciated the fact that the award could be set aside only in case the ingredients of Section 34(2) of the Act were met. Respondents, in the present case, were in no

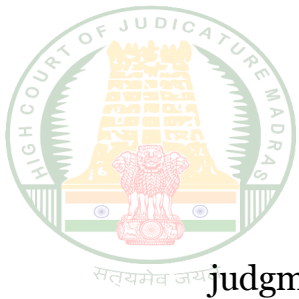


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manner incapacitated. Moreover, the arbitration clause expressly provides that appellant shall appoint the Sole Arbitrator to adjudicate the dispute between the parties. Respondents never raised any objection to the appointment of the Arbitrator and duly participated in the proceedings. Respondents, in our view, have failed to lay down any of the ingredients, much less the ones mentioned in Section 34(2) of the Act.

28. As the law stood at the time of initiation of the arbitration proceedings, there was no bar on the learned Arbitrator having been appointed in the present case to adjudicate the disputes between the parties. If, according to respondents, *Perkins* (supra) came later, respondents were duty bound to raise an objection, as was done in the case of *Bharat Broadband Network Limited* (supra). Moreover, the learned Single Judge, by appointing a new arbitrator, has exceeded the jurisdiction under Section 34 of the Act.

29. The basis of any arbitration is the freedom of the parties to agree to submit their disputes to an individual or to a panel of individuals whose



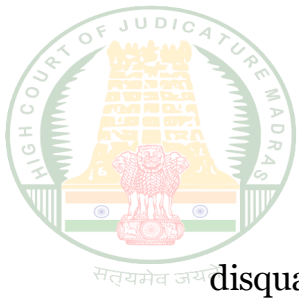
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judgment they are prepared to trust and obey. Party autonomy has been described in various judgments as a brooding and guiding spirit [***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.***¹²] and backbone [***Centrotrade Minerals and Metals Inc v. Hindustan Copper Ltd***¹³]. The principle of minimum judicial interference supplements the autonomy of parties by prohibiting courts from interfering in arbitral proceedings unless mandated by law [Section 5 of the Act]. This principle respects the autonomy of the parties to mutually chart the course of the arbitral proceedings. Sections 3, 11, 14, 15, 20, 21, etc. of the Act recognise the autonomy of parties to determine the arbitral proceedings.

30. As held in *CORE* (supra), the proviso to Section 12(5) of the Act allow parties to waive the applicability of that provision after the dispute has arisen and thereby secures the real and genuine party autonomy by allowing parties to waive the applicability of Section 12(5) of the Act. It is also held that only when it is established that an Arbitrator falls under any of the categories mentioned in the Seventh Schedule, they are automatically

¹² (2016) 4 SCC 126

¹³ (2017) 2 SCC 228



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disqualified without any investigation into whether or not there is any real likelihood of bias. The Court held that since the ineligibility envisaged under Section 12(5) of the Act goes to the root of the appointment, an application may be filed under Section 14(2) of the Act to decide on the termination of the arbitrator's mandate.

31. In *CORE* (supra), it was further held that the Arbitrator will not be automatically disqualified in situations where the relationship of an arbitrator with parties does not fall under the categories mentioned under the Seventh Schedule of the Act. Yet, either of the parties may have justifiable doubts about the independence or impartiality of the arbitrator. The Apex Court has held the party challenging the appointment of an Arbitrator does not need to demonstrate that the Arbitrator lacks independence or impartiality and it only needs to show that there are possible doubts as to an Arbitrator's independence or impartiality. But, in the case at hand, the admitted position is the arbitrator does not fall into any of the disqualifications described in the Seventh Schedule and never did respondents, until the petitions under Section 34 were filed, raise any



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possible doubt as to the arbitrator's independence or impartiality. In fact, Shri Krishnan stated that they do not doubt the arbitrator's independence or impartiality.

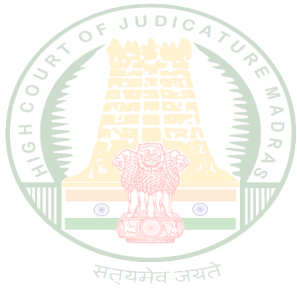
32. In these circumstances, the appeals are allowed and the impugned order dated 20.4.2023 is quashed and set aside. The matter is remanded to the learned Single Judge to decide on the other grounds raised in the petitions filed under Section 34 of the Act. Respondents shall pay a sum of Rs.10,00,000/- as costs to appellant, which amount shall be paid within four weeks, failing which the petitions filed under Section 34 of the Act, which are revived by this order, will stand dismissed without reference to the court. Consequently, all the interim applications stand closed.

(K.R.SHRIRAM, C.J.)

(SENTHILKUMAR RAMAMOORTHY,J.)

26.11.2024

Index : Yes
NC : Yes
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THE HON'BLE CHIEF JUSTICE
AND
SENTHILKUMAR RAMAMOORTHY,J.

(sasi)

Common Judgment
in O.S.A. (CAD) Nos.62 and 63 of 2023

26.11.2024