IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.02.2023

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

Arb.O.P (Com.Div.) No.159 of 2022

1.Hina Suneet Sharma
2.Suneet Sharma

... petitioners

Vs.

M/s.Nissan Renault Financial Services India Private Limited,
Having its registered office at
VBC Solitaire, 5th Floor,
No.47 and 49, Bazullah Road,
T.Nagar, Chennai 600 017.

... Respondent

Arbitration Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the arbitral award dated 30.08.2021 passed by the sole Arbitrator in its entirety and to direct the respondent to pay the costs of the present proceedings.

For petitioners : Mr.Adith Narayan Vijayaraghavan
For Respondent : Mr.Suhrthi Parthasarathy

ORDER

This Arbitration Original Petition was filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter called as "the Act") to set aside the ex-parte arbitral award dated 30.08.2021 passed by the learned sole Arbitrator.

2. The petitioners borrowed a sum of Rs.4,77,014/- by virtue of the Loan-cum-Hypothecation Agreement dated 27.11.2019. The petitioners has admitted the fact about the disbursement of the said loan to purchase a car. As per the terms and conditions of the aforesaid agreement, the petitioners have to pay installments at a sum of Rs.9,900/- per month. The petitioners had made uninterrupted payment of installments from 05.01.2020 till November 2020. Under these circumstances, due to the non-payment of the outstanding amount, the loan of the petitioners was foreclosed and thereafter the respondent unilaterally appointed a sole Arbitrator on 05.02.2021 by referring the clauses in the Loan-cum-Hypothecation Agreement dated 27.11.2019. The Arbitrator proceeded to conduct the arbitration proceedings and he

had passed an award dated 30.08.2021 and the same is under challenge before this Court.

3. The main grounds of challenge that are made by the petitioners are that the respondent appointed the learned Arbitrator unilaterally through his letter dated 05.02.2021. Further, the learned counsel for the petitioners would contend that the learned Arbitrator has not send any notice to the petitioners and also the respondent has not served any claim statement to counter it. Under these circumstances, without any further communication, the learned Arbitrator passed an ex-parte award dated 30.08.2021.

4. The learned counsel for the petitioners would submit that as per the law laid down by the Hon'ble Apex Court in the case of ***Perkins Eastman Architects DPC Vs. HSCC (India) Ltd.,*** reported in ***2019 SCC OnLine SC 1517,*** in the event of any unilateral appointment of Arbitrator without the consent of the other party, the same would be non-est in law. Therefore, he contends that the present appointment is non-est

in law. In terms of the proviso of Section 12(5) of the Act, in the event of unilateral appointment, the appointed Arbitrator can proceed with, when the other party waives the applicability of this Section by way of an express agreement in writing. In the present case, no such express agreement has been made between the parties. Therefore, he would contend that in the absence of any such express agreement, the unilateral appointment of the Arbitrator is null and void and consequently any award passed by the said Arbitrator, is liable to be set aside.

5. The learned counsel for the petitioners would also contend that since the unilateral appointment is contrary to proviso to sub-section (5) of Section 12 of the Act, the same would fall under Explanation (2) of Section 34(2)(b) of the Act, and it is in contravention with the fundamental policy of Indian law as held by the Hon'ble Apex Court. Further, he would contend that the award is also liable to be set aside, since the learned Arbitrator has not given any opportunity to the petitioners to file a counter and contest the matter. Hence, he prayed to set aside the award.

6. On the other hand, the learned counsel for the respondent strongly refuted the contentions of the petitioners, stating that if there is any unilateral appointment, the remedy available to the petitioners is to immediately challenge the same under Section 13 of the Act before the same Arbitral Tribunal. However, in the present case, the petitioners have not resorted to this remedy. Hence, they are not entitled to challenge the award at this stage.

7. Further, he would contend that a notice dated 05.02.2021 has been sent to the petitioners with regard to the appointment of Arbitrator. Therefore, the petitioners are well aware of the fact about the appointment of Arbitrator. Hence, now they cannot come before this Court and raise the issue of unilateral appointment. Hence, he would contend that there is no merit in this original petition and same is liable to be dismissed.

8. I have given due consideration to the submissions made by the learned counsel appearing for the petitioners as well as respondent and perused the entire materials placed on record.

9. Upon hearing the learned counsel on both sides and perusing the documents, it appears that in the present case in the terms of the provision of Clause 20 of the Loan-cum-Hypothecation Agreement dated 30.08.2021, the respondent has option for the appointment of sole Arbitrator at their discretion. In terms of Clause 20 of the said agreement, the authorised representative of the respondent had nominated the sole Arbitrator.

10. In terms of Schedule VII of the Act, if the Arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party or if the Arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration shall be ineligible to be appointed as Arbitrator.

11. When a person is ineligible to be appointed as Arbitrator, in the same way, he is also ineligible to nominate any Arbitrator. This is what the Hon'ble Apex Court has held in the ***Perkins*** case.

12. In the present case, the person appointed as the Arbitrator is neither the employee, consultant, advisor or have any other past or present business relationship or manager, director or part of the management of the respondent. If any of the above persons appointed as Arbitrator, those persons are ineligible to act as an arbitrator in terms of Section 12(5) of the Act. In the same way, the above persons are also not eligible to nominate any person as Arbitrator to act on behalf of them or the concern.

13. In the present case, the respondent appointed the arbitrator unilaterally without consent of the petitioners. Section 12(5) of the Act states as follows:

> ***"12. Ground for challenge**.-*
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> *(1).....*
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> *(2).....*
>
> *(3).....*
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> *(4).....*
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> *(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."

A mere perusal of the above makes it clear that the persons mentioned in Schedule VII of the Act would be ineligible to be appointed as Arbitrator, the persons mentioned in Schedule VII is also ineligible to nominate any persons as arbitrator. Further there is no express agreement between the parties for providing consent in writing for the unilateral appointment of the arbitrator. Hence, the unilateral appointment of the arbitrator by the respondent is in violation of provisions of Section 12(5) of the Act.

14. At this juncture, it would be appropriate to extract the relevant portion of the judgment rendered by the Hon'ble Supreme Court in the ***Perkins*** case at paragraph Nos.16, 17, 18 and 21, which read as follows:

*"**16**. However, the point that has been urged, relying upon the decision of this Court in Walter Bau AG3 and TRF Limited4 , requires consideration. In the present case Clause 24 empowers the Chairman and Managing Director of the respondent to make the appointment of a sole*

arbitrator and said Clause also stipulates that no person other than a person appointed by such Chairman and Managing Director of the respondent would act as an arbitrator. In TRF Limited4 , a Bench of three Judges of this Court, was called upon to consider whether the appointment of an arbitrator made by the Managing Director of the respondent therein was a valid one and whether at that stage an application moved under Section 11(6) of the Act could be entertained by the Court. The relevant Clause, namely, Clause 33 which provided for resolution of disputes in that case was under:

> *"33. Resolution of dispute/arbitration*
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> *(a) In case any disagreement or dispute arises between the buyer and the seller under or in connection with the PO, both shall make every effort to resolve it amicably by direct informal negotiation.*
>
> *(b) If, even after 30 days from the commencement of such informal negotiation, seller and the buyer have not been able to resolve the dispute amicably, either party may require that the dispute be referred for resolution to the formal mechanism of arbitration.*
>
> *(c) All disputes which cannot be settled by mutual negotiation shall be referred to and determined by arbitration as per the Arbitration and Conciliation Act, 1996 as amended.*
>
> *(d) Unless otherwise provided, any dispute or difference between the parties in*

connection with this agreement shall be referred to sole arbitration of the Managing Director of buyer or his nominee. Venue of arbitration shall be Delhi, and the arbitration shall be conducted in English language.

(e) The award of the Tribunal shall be final and binding on both, buyer and seller."

***17**. In TRF Limited4 , the Agreement was entered into before the provisions of the Amending Act (Act No.3 of 2016) came into force. It was submitted by the appellant that by virtue of the provisions of the Amending Act and insertion of the Fifth and Seventh Schedules in the Act, the Managing Director of the respondent would be a person having direct interest in the dispute and as such could not act as an arbitrator. The extension of the submission was that a person who himself was disqualified and disentitled could also not nominate any other person to act Arbitration Application No.32 of 2019 Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd. 18 as an arbitrator. The submission countered by the respondent therein was as under: -*

"7.1. The submission to the effect that since the Managing Director of the respondent has become ineligible to act as an arbitrator subsequent to the amendment in the Act, he could also not have nominated any other person as arbitrator is absolutely unsustainable, for the Fifth and the Seventh Schedules fundamentally guide

in determining whether circumstances exist which give rise to justifiable doubts as to the independence and impartiality of the arbitrator. To elaborate, if any person whose relationship with the parties or the counsel or the subject-matter of dispute falls under any of the categories specified in the Seventh Schedule, he is ineligible to be appointed as an arbitrator but not otherwise.

18. *The issue was discussed and decided by this Court as under:-*

50. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any

such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the "named sole arbitrator" and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. In this regard, our attention has been drawn to a two-Judge Bench decision in State of Orissa v. Commr. of Land Records & Settlement7 . In the said case, the question arose, can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held: (SCC p. 173, para 25)

"25. We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by

him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in Roop Chand v. State of Punjab8 . In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, delegated its appellate powers vested in it under Section 21(4) to an "officer", an order passed by such an officer was an order passed by the State Government itself and "not an order passed by any officer under this Act" within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer in his own right and not as a delegate of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate." (emphasis in original)

51. Be it noted in the said case, reference was made to Behari Kunj Sahkari Awas Samiti v. State of U.P.9 , which followed the decision in Roop Chand v. State of

Punjab8 . It is seemly to note here that the said principle has been followed in Indore Vikas Pradhikaran10 .

52. Mr Sundaram has strongly relied on Pratapchand Nopaji11. In the said case, the three-Judge Bench applied the maxim "qui facit per alium facit per se". We may profitably reproduce the passage: (SCC p. 214, para 9)

> *"9. ... The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim: "qui facit per alium facit per se" (what one does through another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the "pucca adatia", or, as the High Court had held, he is clothed with the powers of an ordinary commission agent only."*

53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to the learned counsel for the appellant, ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.

54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing

Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."

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21. *But, in our view that has to be the logical deduction from TRF Limited4 . Paragraph 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator" The ineligibility referred to*

therein, was as a result of operation of law, in that a person having an interest 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. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the Arbitration Application No.32 of 2019 Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd. 24 course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited."

Therefore, the unilateral appointment of Arbitrator is non-est in law.

15. Now the question that arise for consideration is if the petitioners are participated in the arbitral proceedings or after having the knowledge of the appointment of the sole Arbitrator failed to challenge the said appointment in terms of Section 13 of the Act, would the same deprive the rights of the petitioners to challenge the said appointment of the Arbitrator in terms of the provisions of Section 34 of the Act for the violations of provisions of Section 12(5) of the Act?

16. In my considered view, the answer is no. The petitioners can certainly entitled to challenge under Section 34 of the Act, if there is any violation of the provisions of the Act. Even though, the petitioners have not challenged the unilateral appointment of the sole Arbitrator under Section 13 of the Act, it would not take away the rights of the petitioners to challenge under Section 34 of the Act. Even if there is any participation by the petitioners in the arbitral proceedings, the petitioners still have the right to challenge about the violations of the provisions of

Section 12(5) of the Act under Section 34 of the Act. Any violation of provisions of the Act, is amount to against the public policy of India. The Hon'ble Supreme Court has also held at paragraph No.27 in the case of "***Associate Builders vs. Delhi Development Authorities"*** reported in ***2015 3 SCC 49***, which reads as follows:

> ***"Fundamental Policy of Indian Law***
>
> *27. Coming to each of the heads contained in the Saw Pipes judgement, we will first deal with the head "fundamental policy of Indian Law". It has already been seen from the Renusagar judgement that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgement of a superior court being disregarded would be equally violative of the fundamental policy of Indian law."*

A perusal of the above judgment makes it clear that if any award passed in violation of the provisions of the Act, the same would be against the public policy of India.

17. In the present case, apart from appointing the Arbitrator unilaterally by the respondent, the Arbitrator had also failed to send any

notice about the hearing to the petitioners and the respondent had also failed to furnish the claim statement to the petitioners. Therefore, the petitioners did not have any opportunity to file the counter and contest the matter. Even if the petitioners have filed the counter and considered, the present award is liable to be set aside for the violations of the provisions of Section 12(5) of the Act.

18. Hence the present case is liable to be set aside on the ground of unilateral appointment of arbitrator. Further in the present case, it appears that the award has been passed without giving any opportunity to the petitioners and therefore, the award is suffered with the violations of Principles of Natural Justice also.

19. For all the reasons assigned above, this Court is of the view that the present award is not sustainable under law and the same is liable to be set aside as it is against the public policy of India and it violates the principles of natural justice.

20. Accordingly, the Award dated 30.08.2021 is set aside. In the result, this Arbitration Original Petition is allowed.

15.02.2023

Speaking/Non-speaking order
Index : Yes / No
Neutral Citation : Yes / No
nsa

KRISHNAN RAMASAMY.J.,

nsa

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